

Malta



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1 General and Contractual

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

Traditionally, the most preferred model was commercial lending, secured by a mortgage over the aircraft. Other forms of financing include leasing structures, capital markets, securitisations and export credit agency financing. In Malta, the most common forms of aircraft financing are leasing structures and commercial lending.

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

In a secured loan structure, ownership is vested in the borrower (airline or aircraft leasing company). Accordingly, risks and rewards incidental to ownership are vested in the borrower. Furthermore, the loan would normally cover a part (not all) of the purchase price for the aircraft and therefore the airline would need to finance part of the acquisition price from its own funds (or through other means).

In a finance leasing, the ownership of the aircraft remains vested in the lessor; however, all risks and rewards incidental to ownership are transferred to the lessee. The entire purchase price is typically financed by the finance lessor, in which the price is recovered (all or substantially all) through rental payments. The lessee would have the option or obligation to acquire the aircraft at the end of the term. The lessor would retain legal title and typically register an international interest in relation to the lease in the International Registry (the “**IR**”) established by the Cape Town Convention (the “**CTC**”).

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

The lease of an aircraft is regulated by the Civil Code, Chapter 16 of the laws of Malta (the “**Civil Code**”) which gives priority to the terms of the lease agreement. Accordingly, aircraft leases will primarily be regulated by the relevant lease agreement, in conjunction with international usages of trade, where applicable. The Civil Code fails to distinguish between a finance lease and an operating lease albeit finance leases are distinguished from operating leasing arrangements in the Finance Leasing Rules, Subsidiary Legislation 123.88 (the “**Finance Leasing Rules**”).

According to such rules, a finance lease constitutes ‘the lease of an asset...involving the payment by the lessee to the lessor over a number of years of the full, or nearly the full cost of the asset together with a return on the finance provided by the lessor and such other remuneration as may be reasonable in the circumstances of the case’.

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

Transport in Malta (“**TM**”) is currently working on amendments to the legal framework regulating aviation with the aim of making Malta an attractive jurisdiction for aircraft leasing. The proposal includes the introduction of cell companies for the aviation sector and facilitation measures relating to the importation of aircraft.

1.5 Is it possible according to the laws in your jurisdiction to enter into non-binding or partially binding pre-contractual agreements (e.g. ‘letters of intent’) which will NOT take effect as fully enforceable agreements?

It is possible to enter into letters of intent, memoranda of understanding or similar pre-contractual agreements.

1.6 Is there a doctrine of ‘good faith’ in your jurisdiction which applies to all pre-contractual agreement, financing and leasing transaction documents, and the conduct of parties connected to them?

All contracts must be carried out in good faith.

2 Taxation and Related Matters

2.1 Which government authority in your jurisdiction has primary responsibility for the accounting for and regulation of revenue control and taxes?

The Office of the Commissioner for Revenue (“**OCR**”).

2.2 What are typically the taxes in your jurisdiction which may arise in relation to a sale, a lease or a financing of an aircraft or an engine?

No withholding tax is payable on lease payments when the lessor is not tax-resident in Malta. The tax legislation is very favourable

to aircraft operators who are not tax-resident in Malta. Income derived by them from the ownership, leasing or operation of aircraft used in international aviation business is not taxed in Malta if such income is not received in Malta. This is the case even if the aircraft is registered in, or operated from, Malta.

2.3 Is the provision of a current tax-residency certificate by a payee sufficient for a lessee or a borrower potentially subject to withholding taxes in your jurisdiction on rental or interest payments to avail itself of treaty access and the mitigation of tax liability?

Yes, a tax-residency certificate issued by the appropriate foreign governmental authority would typically suffice for this purpose.

2.4 Has the advent of BEPS (the Base Erosion and Profit Shifting initiative of the OECD) had any effect as regards structures in aviation finance and leasing or their interpretation?

The main effect which the advent of BEPS has had on aviation finance and leasing structures is the added emphasis on substance.

2.5 What are the typical thresholds in your jurisdiction for which a permanent establishment may be triggered under the terms of any relevant double-tax treaty or similar?

Although Maltese tax legislation contains references to the term ‘permanent establishment’, the term is not defined by Maltese legislation. Indeed, in terms of Maltese domestic tax law, a non-resident is, in principle, subject to Maltese tax on income arising in Malta, irrespective of the existence or otherwise of a permanent establishment in Malta (subject to any double tax treaty provisions that would apply if in conflict with Maltese tax law).

If the Maltese Inland Revenue is required to interpret such a term, reference would typically be made to the definition contained in the OECD Model Convention.

2.6 Is the authority at question 2.1 likely to establish a ‘look-through’ right or similar as regards a lender or a lessor which is a special-purpose vehicle involved for the purpose of tax treaty access?

This is not likely to be established by the OCR.

2.7 Will the import of an aircraft into your jurisdiction and/or the sale or leasing of the aircraft give rise to any VAT, sales or use taxes or any customs import or excise duties?

Leasing of an aircraft is chargeable to VAT, but only on the deemed use of the aircraft within the European airspace. For this purpose, the VAT Department has issued a formula that establishes the percentage of such use taking into account the features of the particular aircraft. Through this scheme, the lessor may claim back the original VAT incurred upon acquisition of the aircraft. No VAT is charged in respect of the supply of aircraft destined to be used by airline operators for reward chiefly for international transport of passengers or goods.

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

No stamp duty applies on the transfer of aircrafts, airframes, engines and other aircraft-related assets. No other documentary taxes apply.

3 Registration and Deregistration

3.1 Which government authority in your jurisdiction has primary responsibility for the regulation of aviation and the registration of aircraft? Is it an owner registry or an operator registry? If the aircraft register is an operator register, is it possible to record the details of an owner or lessor and any financier with an aircraft mortgage?

The Civil Aviation Directorate within the TM (“CAD”) is responsible for the regulation of aviation and registration of aircraft in the National Aircraft Register (the “NR”), kept by the Director General (the “DG”).

The NR is an operator registry. It is possible to record ownership rights, lessor and lessee rights, and details of any mortgages and international interests registered in the IR and the debtor thereof.

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

Registration of aircraft: (a) renders information public; (b) renders the acts effective against third parties; (c) creates priority; (d) where expressly conditional on registration, creates legal effects between the parties to certain transactions; and (e) has all other effects under the ARA.

The certificate of registration signed by the DG is *prima facie* evidence of its contents and issuance.

3.3 Can foreign-owned aircraft be registered on your national aircraft register and are there limits or restrictions on the age of aircraft that may be registered or operated?

Foreign-owned aircraft may be registered in the NR. There are no restrictions or limitations as to the age of aircraft that may be registered in the NR.

3.4 Can aircraft leases be registered? If so, in what circumstances? Must the lease be in a particular form if it is to be valid and enforceable (for example, must it be in a particular language or be notarised, legalised or apostilled)?

The operator of an aircraft under a lease or other temporary title may register the aircraft. It is not necessary for this to be notarised, legalised or apostilled for it to be valid and enforceable.

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

The deregistration process is typically initiated by the registrant, through the submission of a written application to the DG.

It is possible to register an irrevocable de-registration and export request authorisation (“**IDERA**”) and/or irrevocable de-registration power of attorney (“**DPOA**”). If an IDERA is registered, it is only the authorised party under the IDERA, or its certified designee, who is entitled to deregister the relevant aircraft.

If a request for de-registration is made by an authorised person or his delegate, pursuant to an IDERA or DPOA which has been registered in the NR or in the IR, CAD must act upon such request unless the holder of the IDERA or DPOA, as applicable, ranks in priority after any mortgage or any international interest registered in the NR or IR, in which case consents to cancellation would be required.

4 Security

4.1 Is it possible to create a mortgage over an aircraft or engine in your jurisdiction? If so, what are the types of aircraft mortgage and engine mortgage available and what formalities are required in order to perfect it?

It is possible to register a mortgage over an aircraft (or a share therein) in the NR.

In terms of Maltese law, for the purposes of the registration of the mortgage, an aircraft is deemed to include not simply the airframe but also the engines, any equipment, appurtenances and machinery as well as data and manuals insofar as they belong to the same owner. Hence it is not possible to register a Maltese mortgage over the engines alone.

A mortgage has no effect regarding the aircraft or share, or against any person, other than the mortgagor, unless it has been registered.

4.2 Can spare parts, including future parts, be subject to the aircraft mortgage or engine mortgage (as the case may be)? If not, are there any other forms of security that can be taken over spare parts?

Any spare parts and/or engines attached to an aircraft which do not pertain to the owner of the airframe will not be subject to any mortgage registered in the NR. However, an international interest in an aircraft object (the airframe or engine) may be registered in the IR.

Other forms of security of general application, such as general hypothecs, pledges or security by title transfers, are also available. However, given the nature of such security interests, these may not be suitable or feasible for spare parts.

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

Mortgages registered over an aircraft are recorded in the NR.

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

International interests over an aircraft object may be registered in the IR, which shall be recognised and enforceable under the laws of Malta irrespective of whether it is recorded in the NR or not. Various interests which can be registered in the IR include: (i) an interest granted by the chargor under a security agreement; (ii) an interest vested in a conditional seller under a title reservation agreement; and (iii) an interest vested in a lessor under a leasing agreement.

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

Mortgages registered in the NR rank after international interests registered in the IR, unless such mortgages were registered in the NR prior to the ‘effective date’ (as defined in the ARA) of the CTC.

Certain creditors, including aircraft manufacturers and repairers, which are placed with the authority and care of an aircraft for a particular purpose (such as the execution of works), benefit from a possessory lien. This lien entitles the creditor to retain possession of the aircraft until the creditor is paid.

The ARA also caters for the creation of special privileges, both by operation of law and following registration, in relation to certain debts. The special privileges arising by operation of law are (a) judicial costs incurred in respect of the sale of an aircraft pursuant to the enforcement of a mortgage or other executive title, (b) fees due to the DG, (c) wages due to crew, (d) debts due to the holder of a possessory lien, or expenses incurred, in each case for the repair, preservation of the aircraft to the extent of the service performed on and value added to, the aircraft, and (e) wages and expenses for salvage in respect of the aircraft (“**Non-Registrable Privileges**”).

The ARA also provides for the possibility of registering certain claims in relation to (a) taxes, duties and, or, levies due to the Government of Malta, and (b) wages and expenses for assistance or recovery, in each case in respect of the aircraft, in the IR (“**Registrable Privileges**”).

Any debt secured by a mortgage registered in the NR or a charge in the IR (or secured by a foreign mortgage recognised under the ARA) ranks after debts secured by possessory liens and Non-Registrable Privileges, and in preference to other hypothecary and privileged claims. Registrable Privileges, once registered, rank after Non-Registrable Privileges and after all debts secured by mortgages and charges in the IR registered prior to the date of the registration of the relevant Registrable Privileges, and thereafter shall rank in accordance with article 44(3) of the ARA, in each case subject to article 44(5) of the ARA.

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

Security may be granted over an aircraft and, or, engine lease by means of the registration of an international interest in the IR.

5 Enforcement and Repossession

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

The mortgagee and mortgagor may at any time agree in writing as to what constitutes a default and thus gives rise to certain remedies in terms of the enforcement of a registered mortgage. However, in the absence of an express agreement, the ARA provides its own interpretation as to the qualification of a default.

Reference is made to question 3.5 above, in relation to the de-registration and repossession of an aircraft.

In each case, a mortgagee has the power to terminate the relevant agreement and take possession or control of the aircraft, or to apply to the court to authorise or direct either of these acts.

A mortgagee may also apply for the issuance of a warrant of arrest by the court.

5.2 What is the procedure for repossession of the aircraft?

Reference is made to questions 3.5 and 5.1 above. In addition, a creditor may demand and obtain the issuance of a warrant of arrest by means of an application in the form prescribed by law. The right to request issuance of an arrest warrant is, however, subject to certain limitations as to the value of the claim and the nature of the services provided by the said aircraft, unless the claim is made by the holder of a mortgage or an international interest which has been registered in accordance with the applicable provisions of the ARA.

5.3 Will local courts recognise a choice of foreign law in an aircraft mortgage? Are there any mandatory local rules that apply, despite a choice of foreign law?

A mortgage registered in the NR must be submitted on a statutory form, which is regulated by Maltese law. The mortgage can secure a foreign law finance or security document. Furthermore, where the security interest has been registered as an international interest in the IR, it will be recognised and enforceable in Malta. The choice of law is not restricted, subject to compliance with EC Regulation 593/2008/EC of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) of 17 June 2008.

5.4 Will local courts recognise and enforce a foreign court judgment in favour of a mortgagee or lessor? Are any interim relief measures available?

A judgment awarded by a competent court outside Malta would be recognised as a valid judgment and enforceable in the Courts of Malta, subject to the provisions of the following:

in the case of judgments falling within the scope of the Brussels I (Recast) Regulation (EU) No. 1215/2012 (the “**European Judgments Regulation**”), the recognition and enforcement would be subject to the provisions contained in the European Judgments Regulation.

in the case of judgments falling within the scope of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters signed in Lugano on 30 October 2007 between the European Community, the Kingdom of Denmark, the Republic of Iceland, the Kingdom of Norway and the Swiss Federation (“**Lugano Convention**”), the recognition and enforcement of judgments delivered in Member States of the Lugano Convention, other than judgments which fall within the European Judgments Regulation, would be subject to the provisions contained in the Lugano Convention.

in the case of judgments falling within the scope of the Convention on Choice of Court Agreements, concluded on 30 June 2005 under the auspices of the Hague Conference on Private International Law (the “**Hague Convention**”), the recognition and enforcement in a contracting state of judgments delivered by a court of another contracting state designated in an exclusive choice of court agreement which is regulated by the Hague Convention would be subject to the provisions contained in the said Hague Convention; and

in the case of judgments not falling within the scope of the European Judgments Regulation, the Lugano Convention or the Hague Convention, Maltese Courts would recognise and enforce such judgments, subject to the applicable law of Malta imposing judgment registration or confirmation in Malta, unless: (i) the

judgment sought to be enforced may be set aside on any of the grounds for re-trial as contemplated in Maltese law on organisation and civil procedure; (ii) in the case of a judgment by default, the parties were not contumacious according to foreign law; or (iii) the judgment contains any disposition contrary to public policy or to the internal public law of Malta.

As explained above, it is possible to request the issuance of a warrant of arrest. In addition, in terms of the First Schedule of the ARA (which implements the provisions of the Convention), where a creditor can adduce evidence of default by the debtor, the creditor may obtain ‘speedy relief’ from the court by virtue of a court order. This relief may take various forms including the preservation of the aircraft object and its value, the possession, control or custody of the aircraft and the sale and application of proceeds therefrom.

5.5 Are powers of attorney from a local airline in favour of a lessor or mortgagee likely to be effective to allow the lessor or mortgagee to deregister the aircraft? Can such powers be irrevocable, be governed by a foreign law and/or do they need to be in any particular form for local recognition?

The ARA expressly contemplates the registration of irrevocable de-registration powers of attorney and IDERAs. The IDERA must be submitted to the CAD in the statutory form, whilst the irrevocable de-registration power of attorney need not be in a specific form or governed by Maltese law, however it should state that it is irrevocable and granted by way of security.

Requests made by an authorised person or his certified designee in writing, pursuant to an irrevocable de-registration authorisation or power of attorney which has been registered, must be acted upon in all cases by CAD, unless the holder of the irrevocable deregistration authorisation which has been registered ranks in priority after any mortgage or any international interest registered in the NR or in the IR, respectively, in which case the consent of all holders of registered mortgages or international interests is required.

5.6 If recovery of the aircraft is contested by the lessee and a court judgment is obtained in favour of the lessor, how long is it likely to take to gain possession of the aircraft?

As explained above, the lessor is not required to obtain a judgment to take possession or control of the aircraft, notwithstanding the opposition of the lessee. If the lessee does not comply with the provisions of the lease agreement and the lessor’s instructions, the lessor may apply to court to authorise or order such acts. In such case, the court is required to render its full support to the lessor as expeditiously as possible.

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

In terms of article 15 of the First Schedule to the ARA, the lessor may – to the extent that the lessee has at any time so agreed and in accordance with the terms agreed and provided that it has obtained the prior consent in writing of the holder of any registered interest ranking in priority to that of the lessor – (i) procure the de-registration of the aircraft, and (ii) procure the export and physical transfer of the aircraft object from the territory in which it is situated.

The CAD must honour such request, unless it is not able to do so due to any applicable safety laws and regulations, provided that: (i) the request is properly submitted by the authorised party under a recorded IDERA; and (ii) the authorised party certifies, if required, that all registered interests ranking in priority to that of the creditor, in whose favour the authorisation has been issued, have been discharged or that the holders of such interests have consented to the de-registration and export.

5.8 Are exchange controls prevailing in your jurisdiction as regards payments in foreign currency? Will any consents be required for the remittance of the sale proceeds abroad?

Exchange control limitations have been abolished in Malta and Maltese persons may enter into foreign currency transactions without limitation. The only requirement in this regard is that statistical data relating to certain foreign currency transactions is submitted by Maltese credit institutions on the appropriate forms to the Central Bank of Malta in terms of the External Transactions Act, Chapter 233 of the laws of Malta. Failure to so notify will not impinge on the ability of the non-Maltese counterparty to claim payment and will have no impact on the validity of the underlying transaction.

5.9 If the lease is governed by English law and a judgment is obtained by the lessor in the English courts, can that judgment be automatically enforced in your jurisdiction or will the case have to be re-examined on its merits?

Reference is made to question 5.4.

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

There are no more aircraft-specific security interests.

6 Conventions

6.1 Has your jurisdiction ratified any of the following: (a) The Chicago Convention of 1944 on International Civil Aviation (the Chicago Convention); (b) The 1948 Convention on the International Recognition of Rights in Aircraft (the Geneva Convention); (c) The 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (the 1933 Rome Convention); and (d) The Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Cape Town Convention) and the Protocol on the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment?

The Chicago Convention and the Cape Town Convention, together with the Protocol, have both been ratified, whilst the Geneva Convention and the 1933 Rome Convention have not been ratified at present date.

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

Simultaneously with ratification of CTC, a new act regulating aircraft registration and security related to aircraft was published.

Its ratification has accordingly not caused any conflicts or issues with local laws. Certain amendments were also made to the Civil Code in order to reflect the principles underpinning the CTC.

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

The ARA differentiates between non-consensual rights and interests and priority non-consensual rights or interests. The Non-Registrable Privileges in question 4.5 qualify as priority non-consensual rights or interests. A priority non-consensual right or interest, to the extent that it has priority over an aircraft object equivalent to that of the holder of a registered international interest, prior to the 'effective date' (as defined in question 4.5 above), retains priority and this is irrespective of whether there are insolvency proceedings or not.

The Registrable Privileges in question 4.5 qualify as registrable non-consensual rights or interests. These must be registered as if the right or interest were an international interest and only thereafter will it be regulated in an equivalent manner.

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

Malta has adopted Alternative A.

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

An IDERA must be filed by the operator or owner in the statutory form and recorded by CAD. The IDERA is to be signed and two (2) originals must be submitted.

7 Liability for Damage and Environmental

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

Strict liability for environmental damage is established under the Prevention and Remedying of Environmental Damage Regulations, Subsidiary Legislation 549.97 (“**SL 549.97**”), however, its application is restricted to environmental damage (excluding air damage) arising from those activities set out in Schedule III thereto, and these activities do not include the operation of an aircraft.

7.2 Does the EU Emissions Trading System (EU ETS), or any similar scheme, apply to aircraft and aircraft operators in your jurisdiction? Will charges levied according to the EU ETS, or its equivalent, give rise to any *in rem* rights in relevant aircraft which are part of the fleet of the operator concerned and, if so, will such rights rank in priority ahead of any mortgage interests properly registered in the relevant aircraft and/or engine?

Yes, in terms of the European Union Greenhouse Gas Emissions Trading System for Aviation Regulations, Subsidiary Legislation

423.51 (the “**SL 423.51**”), the EU ETS applies to aircraft operators performing certain aviation activities (set out in Schedule 1 to the regulations) which result in emissions of greenhouse gases specified in respect of those activities, and who have a valid operating licence; or for whom Malta, being the Member State with the greatest estimated attributed aviation emissions from aviation activities as listed in Schedule 1 performed in the base year by those aircraft operators, has been designated as the administering Member State either in Regulation (EC) No 748/2009, or by means of any measure taken by the European Commission pursuant to Directive 2003/87/EC or by the ‘competent authority’ in terms of SL 423.51.

No, charges levied according to the EU ETS will not give rise to any *in rem* rights in the relevant aircraft.

7.3 What liabilities (actual or potential) could an owner, lessor or financier of an aircraft incur in your jurisdiction because of a failure to comply with local environmental law and/or regulations on the part of an operator of aircraft leased or financed by it?

Under SL 549.97, it is the operator who is responsible for failure to comply with local environmental law. However, the term ‘operator’ is broadly defined encompassing all persons, whether natural or legal, private or public, who operate or control the occupational activity or, to whom decisive economic power over the technical functioning of the occupational activity has been delegated.

8 Insolvency and Searches

8.1 Are there any public registers in your jurisdiction where a search can be carried out to determine whether an order or resolution for any bankruptcy, bankruptcy protection or similar insolvency proceedings has been registered in relation to an operator or lessee?

In relation to corporate entities registered with the Malta Business Registry (the “**MBR**”), an insolvency register is maintained.

8.2 In the event that an operator or lessee were to become insolvent either on a balance sheet basis (assets less than liabilities) or is unable to pay debts as fall due, would an operator or lessee be required to file for insolvency protection?

Maltese insolvency law does not cater for the possibility of filing for insolvency protection, albeit certain protections are afforded to a Maltese company filing for insolvency, such as the company recovery procedure.

Article 329B of the Companies Act, Chapter 386 of the laws of Malta (“**Companies Act**”) regulates how a company can apply and be placed under company recovery. This procedure allows an insolvent company to benefit from a restructuring option instead of being wound up and dissolved. However, in terms of the ARA, the provisions of article 329B do not apply to a company whose main object or function is to own, hold, operate, charter, manage or lease any aircraft or aircraft engine.

8.3 Do the available forms of insolvency protection in your jurisdiction involve the appointment of either an officer of the court or a specifically court appointed official to take control of the operator or lessee (an ‘Insolvency Official’) while in insolvency protection?

Please refer to question 8.2.

The Companies Act does allow for the appointment of a provisional administrator at any time after the presentation of a winding up application. The provisional administrator is responsible for the administration of the estate of the company subject to the winding up order.

Furthermore, a specific insolvency regime is contemplated in article 27A of the ARA for a company whose centre of main interests is in Malta or is registered in Malta and the sole asset of which is an aircraft or aircraft engines and other related assets (“**Aircraft Companies**”). In particular, the memorandum and articles of association of Aircraft Companies can provide that the right to request any insolvency proceedings in relation to the said company is to be exercised only by holders of a mortgage, an international interest or a security interest, or trustees or agents for such persons, over such assets, singly or collectively, including as a class or classes of creditors, to the exclusion of any other persons for as long as the interest of the persons so indicated remains in force.

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

Reference is made to question 8.3 above.

Malta has adopted Alternative A of the Aircraft Protocol. Accordingly, where Malta is the primary insolvency jurisdiction, the debtor or insolvency administrator must give possession of the aircraft object no later than: (a) expiry of a period of 30 calendar days commencing on the date of the insolvency-related event (‘waiting period’); or (b) the date on which the creditor would be entitled to possession of the aircraft object if the relevant provision of the ARA did not apply. Unless and until the creditor is given the opportunity to take possession: (i) the insolvency administrator or debtor, as applicable, must preserve the aircraft object and maintain it and its value in accordance with the agreement; and (ii) the creditor is entitled to apply for any other forms of interim relief available in terms of applicable law.

The insolvency administrator or debtor, as applicable, may retain possession of aircraft object where, during the waiting period, it has cured all defaults (other than a default constituted by the opening of insolvency proceedings) and has agreed to perform all future obligations under the agreement.

8.5 Can the commencement of insolvency proceedings have retrospective effect in relation to any such actions taken before commencement? If so, for what period can there be a look back?

Article 303 of Companies Act provides that any obligation incurred by a company within six months before dissolution of same company is deemed to be a fraudulent preference against its creditors, whether it is of gratuitous or onerous nature, if it constitutes a transaction at an undervalue or if a preference is given, unless the person in whose favour it is made, done or

incurred, proves that it did not know and did not have reason to believe that the company was likely to be dissolved by reason of insolvency.

8.6 Is there, either under law or as a matter of practice in your jurisdiction, a period of time within which the Insolvency Official will either 'adopt' the lease and pay rent and other lease payments as an expense of the insolvency or 'reject' the lease and permit the owner to enforce such rights as it may have under the lease? (a) If the lease is 'adopted', will the Insolvency Official also pay any unpaid lease payments due as at commencement of the insolvency protection? (b) If not or if the lease is 'rejected', would the owner's claim for any outstanding sums rank equally with other ordinary unsecured creditors of the lessee?

Reference is made to question 8.4 above.

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

Reference is made to question 4.5 above regarding special privileges. Registrable Privileges only constitute a privilege and enjoy the preference and status of such right in relation to the aircraft if the claim is created by the owner of the aircraft or a person authorised by him.

The person enjoying a possessory lien also has a preferred claim on the aircraft and has no obligation to release aircraft until 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.

Debts secured by a mortgage registered in the NR or a charge in the IR or secured by a foreign mortgage recognised under the ARA rank in the manner set out in article 44 of the ARA.

Finally, certain creditors are granted rights *in rem* against aircraft in terms of the Code of Organisation and Civil Procedure, Chapter 12 of the laws of Malta.

8.8 If the aircraft is in the possession of a person other than the operator or lessee at the commencement of Insolvency Protection of the operator or lessee, for example, an independent maintenance facility, will such person be entitled, under the laws of your jurisdiction, to assert a lien arising under law or contract over the aircraft in respect of amounts then due and unpaid to such person by the operator or lessee?

Reference is made to questions 4.5 and 8.2 above.

9 Detention and Confiscation

9.1 Other than insolvency laws (see section 8), are there any laws which may have the effect of defeating the owner's right in the aircraft – for example, Government requisition? Do the laws of your jurisdiction provide for any compensation in such circumstances?

Maltese law does not specifically cater for Government requisition of an aircraft or any similar means of defeating an owner's right in the aircraft.

9.2 Are there any rights in relation to third parties to detain or sell the aircraft pursuant to illegal activities, tax or any other laws if the operator or lessee fails to pay when due? If so, can the aircraft be forfeited and sold without the owner being made aware?

Laws of general application cater for several instances where assets may be detained in the context of illegal activities (such as the carriage of weapons). Moreover, aircraft may be detained where deemed unfit to fly or where lacking required insurance cover.

The Airports and Civil Aviation (Security) Act, Chapter 405 of the laws of Malta also lists the various instances when an aircraft can be detained, generally in the context of offences against the safety of aircraft and, or, the protection and policing of airports.



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Camilleri Preziosi is a leading Maltese law firm established in the 1960s having a large international legal practice, advising across all areas of corporate and commercial law. The firm's approach is to understand clients' key business drivers in order to provide an integrated, solution-driven and business-oriented service. Internationally, Camilleri Preziosi commands an outstanding reputation as a leading corporate law firm and is regularly ranked as a top-tier firm in the *Chambers Global*, *Chambers Europe*, *IFLR1000* and *European Legal 500* directories.

Camilleri Preziosi is strongly positioned in the transport industry, including in particular aviation and shipping. With particular reference to the aviation sector (both business and commercial), the firm's clients include local and international banks and financiers, aircraft owners, operators, charter companies, aircraft lessees and lessors, as well as the Malta International Airport. More specifically, the firm advises on aircraft registration, security interests, enforcement and regulatory matters.

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