

Aviation Finance & Leasing

Contributing editor
Mark Bisset



2017

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Aviation Finance & Leasing 2017

Contributing editor
Mark Bisset
Clyde & Co LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

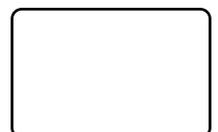


Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2017
No photocopying without a CLA licence.
First published 2014
Fourth edition
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. The information provided was verified between May and June 2017. Be advised that this is a developing area.

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



CONTENTS

Global overview	5	Japan	87
Mark Bisset Clyde & Co LLP		Katsu Sengoku and Kentaro Miyagi Nishimura & Asahi	
Aircraft operating leases – New York law or English law?	9	Kenya	93
Thomas A Zimmer and Neil Poland Vedder Price		Suzanne Muthaura, Christopher Kiragu and Kenneth Kimachia MMAN Advocates	
Australia	12	Lithuania	99
Matthew Bode and Kate Craig Colin Biggers & Paisley		Gintautas Šulija Šulija Partners Law Firm Vilnius	
Austria	17	Malta	106
Martin Geiger Benn-Ibler Rechtsanwälte GmbH		Malcolm Falzon and Steven Decesare Camilleri Preziosi	
Belgium	22	Mexico	114
Dimitri de Bournonville and Cyril-Igor Grigorieff Kennedys		Javier Alegre and Carlos Campillo Alegre, Calderón y Márquez Abogados	
Bermuda	26	New Zealand	119
Jeremy Leese MJM Limited		Frank Porter and Rishalat Khan Buddle Findlay Lawyers	
Brazil	31	Panama	124
Renata Iezzi Basch & Rameh		Maria de Lourdes Marengo Patton, Moreno & Asvat	
Cayman Islands	38	Philippines	129
Matthew Stocker Conyers Dill & Pearman		Imelda A Manguiat, Carina C Laforteza, Bhong Paulo A Macasaet, Aldous Benjamin C Camiso and Maricar G Ramos SyCip Salazar Hernandez & Gatmaitan	
Dominican Republic	43	Portugal	135
Maria Esther Fernandez A de Pou Russin Vecchi & Heredia Bonetti		Luís Soares de Sousa Cuatrecasas	
England & Wales	49	Russia	142
Mark Bisset Clyde & Co LLP		Victoria Bortkevicha and Anna Nikulina Clifford Chance CIS Limited	
France	56	South Africa	148
Edward Campbell Stephenson Harwood AARPI		Sean Craig Lederman ENSafrica	
Germany	63	Sweden	153
Ulrich Stepler and Katja Helen Brecke Arnecke Sibeth		Fredrik Wilkens, Emma Stuart-Beck and Henrik Schön Advokatfirman Vinge	
India	70	Switzerland	159
Ashwin Ramanathan, Akansha Aggarwal and Maitreye Parashar AZB & Partners		Frédéric Meyer, Raphaël Baeriswyl and Antoine Labaume Meyer Avocats	
Israel	76	United Arab Emirates	165
Charles B Gottlieb and Assi Talmor Gottlieb, Gera, Engel & Co Advocates		Shyamal Jeewoolall Holman Fenwick Willan Middle East LLP	
Italy	81	United States	172
Laura Pierallini and Francesco Grassetto Studio Pierallini		Thomas A Zimmer and Laura J Bond Vedder Price	

United Arab Emirates

Shyamal Jeewoolall

Holman Fenwick Willan Middle East LLP

Overview

1 Conventions

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

The UAE has ratified the following conventions:

- the Convention on International Civil Aviation (1944) (the Chicago Convention);
- the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention);
- the Convention for the Unification of Certain Rules for International Carriage by Air (1999) (the Montreal Convention); and
- the Convention on International Interests in Mobile Equipment and its Protocol on Matters specific to Aircraft Equipment (2001) (the Cape Town Convention and its Protocol).

2 Domestic legislation

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

The main domestic provisions applicable to aviation finance and leasing are found in the Civil Aviation Law of the UAE (Federal Law No. 20 of 1991). The Civil Aviation Regulations of the UAE set out the general provisions applicable to the registration of civil aircraft.

The Aviation Authority Law of the United Arab Emirates (Federal Law No. 4 of 1996, as amended by Federal Law No. 20 of 2001) establishes the General Civil Aviation Authority (GCAA) as the competent authority for the control and regulation of civil aviation in the UAE. Law No. 19 of 2010 defines the powers of the Dubai Civil Aviation Authority together with the conditions of its cooperation with the GCAA.

3 Governing law

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?

There are no express restrictions to the choice of applicable law in contracts to the transfer of interests in or creation of security over aircraft. As a general principle, the GCAA and the courts of the UAE would recognise the choice of a foreign law by the parties subject to the following:

- such choice is clearly expressed by the parties in the relevant document; and
- such choice does not contravene public policy or Sharia principles.

Under the Protocol to the Cape Town Convention, the parties to a contract may choose the governing law of their contractual rights and obligations under such contract.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

The title to an aircraft may be transferred by two or more parties entering into a legal instrument that meets the following criteria:

- is in a form satisfactory to the GCAA;
- describes the relevant aircraft in sufficient detail;
- expresses the intention of the parties to sell and purchase the aircraft; and
- is executed by the seller and the purchaser in ink.

A bill of sale or any other instrument that fulfils these conditions would be effective in transferring title to an aircraft.

5 Transfer document requirements

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

Pursuant to Appendix 1 of Chapter 1 of Part V of the Civil Aviation Regulations, a request to the GCAA for the registration of the transfer of title to an aircraft must be accompanied by a certified true copy of the document that establishes the owner's property title. The transfer document must comply with the conditions set out in question 4. If the transfer document is executed pursuant to a power of attorney, an original notarised power of attorney should be provided to the GCAA. In case the power of attorney is not available, the GCAA may accept any other original documentary evidence of authorisation (its equivalent) giving full powers to submit the related GCAA application and all required documentation associated to such party granting authorities. The GCAA has a discretionary power to require from the applicant any additional information or complementary supporting documents in order to determine whether the aircraft's ownership may properly be registered in the UAE.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

Section 1 of Chapter 1 of Part V of the Civil Aviation Regulations sets out the conditions under which an aircraft may be registered with and maintained in the registry of the GCAA. In order to be eligible for registration with the GCAA, an aircraft must be owned by or leased to the following:

- a UAE national;
- a corporate body having its principal place of business in the UAE or wholly owned by a UAE national; or
- a UAE government department.

Accordingly, an aircraft may be registered in the name of an operator in the aircraft registry of the GCAA if this operator constitutes a qualified person (eg, a national UAE airline or an airline wholly owned by a UAE national or having its principal place of business in the UAE).

We are not aware of any well-used 83-bis arrangements between the UAE and other states.

There is no specific engine register in the UAE

7 Registrability of ownership of aircraft and lease interests

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?

An ownership or lease interest in, or lease agreement over, aircraft can be registered with the aircraft registry of the GCAA and there are no particular limitations under UAE laws as to the owner other than that the aircraft shall be owned or leased as specified in question 6. Pursuant to article 29 of the Civil Aviation Law, other than in the event of a destruction, loss or permanent withdrawal of operation of the aircraft, the deregistration of an aircraft from the registry of the GCAA shall be effected if the owner of such aircraft ceases to be a UAE national or transfers its ownership to a national of another state.

In respect of the registration of lease interests, an aircraft that originally bears a foreign registration can be registered with the aircraft registry of the UAE as long as the operator falls within the scope of the above requirements during the term of the lease agreement in accordance with the Civil Aviation Regulations.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

The aircraft registration process requires the submission of the following documents as provided under Appendix 1 of Chapter 1 of Part V of the Civil Aviation Regulations:

- a GCAA aircraft registration form duly executed by the aircraft owner or its representative together with a notarised original power of attorney or other document evidence of authority;
- in the event of an individual, a certified true copy of the owner's passport and UAE residency certificate (if applicable);
- in the event of a legal entity, a certified true copy of the owner's certificate of incorporation (or equivalent), the list of directors or incumbency certificate (or equivalent) and the managerial title that states that the relevant signatory is the legal representative of the owner or its duly authorised representative; and
- a certified true copy of the underlying contracts or other legal documents in respect of the aircraft registration such as the transfer of title document or the lease agreement over the aircraft and the appropriate certified copies of the documentary evidence of the identity and signing authority in respect of each submitted legal document.

In addition to the above-listed primary documents, the GCAA shall be provided with the following documents with respect to the operation of the aircraft:

- an application for a radio licence to be issued by the UAE's Federal Ministry of Communications' Department of Telecommunications in accordance with article 4 of the Civil Aviation Law;
- a certificate of airworthiness issued by the relevant department of the GCAA;
- an aircraft non-registration certificate in relation to any new aircraft or, otherwise, a deregistration certificate from the previous aircraft's state registry, clear of liens (unless the beneficiary of the registered liens provides a consent letter); and
- a certified true copy of the aircraft's valid insurance certificate.

With respect to specific form requirements, all powers of attorney filed with the GCAA shall have been previously notarised and issued for a fixed expiry date. If the power of attorney is silent in respect of the expiry date and has been granted earlier than three years prior to the date of its submission to the GCAA, the issuer of the power of attorney may be required by the GCAA to confirm in writing that the power of attorney is still valid as of the date of submission. In addition, the practice is that all original signatures are provided in ink.

The above process can be completed online through the GCAA's website after the registration of the applicant, except that the documents required as originals shall be communicated separately to the GCAA. Upon completion of the registration process and the issuance of the aircraft's certificate of registration, the GCAA shall be provided

with a CD-ROM enclosing all the documentation in accordance with Appendix 1 of Part V of the Civil Aviation Regulations.

An aircraft initial registration fee, which ranges from 30,000 UAE dirhams to 400,000 UAE dirhams, depending on the maximum take-off weight of the aircraft, shall be paid to the GCAA. Specific provisions apply to freighters. In addition to the initial registration fee, an annual fee is payable in relation to the airworthiness certificate's issuance and renewal. Other miscellaneous fees in connection with the registered aircraft's certificates and documents issued by the GCAA for the operation of the aircraft are applicable. In the UAE, the official office opening hours of the Abu Dhabi office, Dubai office and Sheikh Zayed Centre Office of Abu Dhabi are 8am to 1pm from Sunday to Thursday. Accordingly, the GCAA is closed and not available for any registration formalities on Fridays.

9 Title and third parties

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

Federal Law No. 10 of 1992 on evidence in Civil and Commercial Transactions, as amended by Federal Law No. 36 of 2006 provides for the legal force of documents issued by government entities and sets out that an informal document has no probative force as to its date with regard to third parties unless, inter alia, it has acquired an established date from the day of its registration with a register maintained for this purpose. On this basis and as a general matter, the courts of the UAE would recognise a certificate of registration issued by the GCAA as valid and appropriate evidence of an ownership interest, a lease interest or a security interest such as resulting from a mortgage over an aircraft registered with the GCAA.

However, information registered with the GCAA but not recorded on the certificate of registration of the aircraft is not publicly available and is not disclosed by the GCAA to third parties other than to interested parties for inspection purposes. Accordingly, we take the view that any information noted on the aircraft register would not constitute a notification to third parties by the GCAA or the courts of the UAE.

10 Registration of lease interests

Summarise the process to register a lease interest.

The GCAA does not hold any specific registry in respect of leases for registration purposes. However, the lease of an aircraft can be registered under the provisions of section 1 of Chapter 1 of Part V of the Civil Aviation Regulations in respect of an aircraft notably leased to or by a UAE national, or a corporate body having its principal place of business in the UAE or wholly owned by a UAE national. The identity of the lessee as a UAE-qualified person and an owner, as lessor, are recordable with the aircraft registry of the GCAA.

In order to permit such lease registration, the applicant must file with the GCAA a duly executed registration form and certified true copies of the documentary evidence of the existence of both the owner, as lessor, and the lessee in addition to satisfactory evidence of the signing authority of each party (including, as applicable, notarised powers of attorney). Certified copies of the lease documentation and any additional information or document in connection thereto shall also be submitted to the GCAA as it deems necessary.

There is no prescribed form in respect of leases for the purpose of the GCAA's registration other than that the leases that are relevant are those that provide for a transfer of possession of the leased asset. Contractual freedom would prevail in commercial matters as long as the parties have clearly expressed the terms and conditions of the lease. For legal certainty, the parties to a registered lease should determine clearly the main elements of the lease arrangements such as the identification of the leased aircraft, the financial requirements and the duration as well as liability provisions in respect of the operation of the aircraft and the right of the lessee to quiet enjoyment.

No registration fees apply specifically to aircraft lease registrations except in respect of the GCAA's fees applicable to International Registry's registration for the purpose of the allocation of an authorising entry point (AEP) code as detailed in question 14.

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

Section 1 of Chapter 1 of Part V of the Civil Aviation Regulations provides that the certificate of registration of the aircraft shall reflect the details listed below. The following details in respect of the parties and the aircraft shall be completed in the registration application form:

- the name of the owner(s) of the aircraft, and more generally, the name of any person or legal entity that holds a legal or beneficial interest by way of ownership of a UAE-registered aircraft or a share therein;
- the name of the parties to the aircraft lease agreement in the event that a lease is registered;
- the aircraft's name of manufacturer and manufacturer's designation;
- the aircraft's nationality, registration mark and serial number; and
- the date of issuance of the certificate of registration.

If a lease agreement is registered, the certificate of registration will only reflect the name of the operator. The name of the owner is registered in the files of the GCAA but may also be reflected on the certificate of registration upon request. Regarding the registration of security interests, a secured creditor as mortgagee may also specifically request that its security interest is reflected in the certificate of registration. Finally, there is no specific engine registry held by the GCAA.

12 Deregistration and export**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?**

An aircraft may be deregistered by its owner or a secured creditor by giving notice to the GCAA. The GCAA will not permit the deregistration of an aircraft without the consent of its owner or the secured creditor in the presence of registered security interests recorded in its files. In accordance with Appendix 1 (Table 3) of Chapter 1 of Part V of the Civil Aviation Regulations, an aircraft owner would not be allowed to deregister an aircraft without the written consent of a secured creditor in respect of registered security interests. More specifically, such consent shall only be satisfied if a certified true copy of a notarised no objection letter or consent letter is issued by the relevant secured creditor.

Subject to the aircraft being duly registered with the GCAA and no attachment order being issued by a competent court of the UAE, it should be possible for an owner, a secured creditor such as a mortgagee or any other interested party to request the export of the aircraft on the basis of a deregistration power of attorney. The aircraft would be exported under an export certificate of airworthiness issued by the GCAA subject to any objection from the new state of registration to which the aircraft is being exported.

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

A typical deregistration power of attorney in respect of an aircraft would be recognised by the GCAA subject to its notarisation. In the event that such power of attorney is executed outside of the UAE, this document would have to be legalised. The enforcement of a deregistration power of attorney would be recognised for its duration. The duration of a deregistration power of attorney usually mirrors the duration of the underlying supporting contract or other legal document registered with the GCAA. UAE law does not require the interested party or a representative of the interested party to be physically in the territory of the UAE in order to enforce the deregistration power of attorney.

Under UAE law, it should be noted that any power of attorney can be revoked unless it has been specifically and contractually agreed otherwise between the parties. As such, it is advisable that an irrevocable deregistration power of attorney be granted to the interested party and, more particularly, an irrevocable deregistration and export request authorisation (IDERA) under the conditions set out in the Cape Town Convention and its Protocol, should be granted.

14 Cape Town Convention and IDERA**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.**

Any interested party such as a mortgagee may request the deregistration of the aircraft from the GCAA by submitting an application form by way of the enforcement of an IDERA in accordance with the Cape Town Convention and its Protocol. The conditions for such deregistration by way of the enforcement of an IDERA are set out under Appendix 1 (Table 4) of Chapter 1 of Part V of the Civil Aviation Regulations. The following documents should be provided by the applicant:

- an original executed IDERA;
- a copy of a priority search certificate issued by the International Registry;
- the GCAA application form(s);
- an original power of attorney or other original documentary evidence of the authorised party's representation or its certified designee under the International Registry;
- evidence of the managerial title of the authorised party and a certified true copy of the documentary evidence of its existence;
- an original of the certificate of registration with the reverse side signed by the owner;
- the original aircraft certificates in respect of the operation of the aircraft issued by the GCAA and Telecommunications Regulatory Authority of the UAE (as applicable);
- evidence that Mode S Code (assigned by the GCAA) and emergency local transmitter code have been cancelled (if applicable);
- evidence that the registration mark and identification plates have been removed from the aircraft;
- an original of the certified designee's confirmation letter and the original confirmation letter from the authorised party; and
- a CD-ROM enclosing all of the documentation submitted to the GCAA.

The templates of the request letter for the deregistration of an aircraft by way of the enforcement of an IDERA, the IDERA itself and the certified designee confirmation letter in relation to the IDERA can be found under Appendices 2 to 4 of Chapter 1 of Part V of the Civil Aviation Regulations. The IDERA does not need to be countersigned by the GCAA but the certified designee confirmation letter shall be countersigned, acknowledged and lodged by the GCAA.

In addition to these documentary requirements, article XIX of the Protocol to the Cape Town Convention provides that a contracting state may choose to designate an entry point for the transmission of information to the International Registry. Pursuant to the Regulations and Procedures for the International Registry, and effective as of 24 November 2011, the GCAA has been designated as the entry point for the UAE. An entry point can be designated either as an AEP or a direct entry point (DEP). Unlike a DEP, the GCAA, as an AEP, does not make itself the registration with the International Registry but provides an AEP registration code to the applicant, which uses it in order to effect itself the registrations with the International Registry. The applicant shall be registered with the International Registry prior to serving the request to the GCAA. The website of the GCAA provides all relevant information in respect of the request for the issuance of an AEP registration code: the signed documentation and drafts in relation to prospective interests shall be supplied to the GCAA and fees shall be paid in the amount of 4,074 UAE dirhams. The process usually takes around seven working days.

Security**15 Security document (mortgage) form and content****What is the typical form of a security document over the aircraft and what must it contain?**

Other than in respect of the generic provisions of the UAE Federal Law (Law No. 18 of 1993) in relation to the Law of Commercial Transactions (the Commercial Code) concerning mortgages over moveable assets, there is no significant or specific aviation law in the UAE in respect of aircraft security documents such as aircraft mortgages and, therefore, no typical form for such security document would apply. The Commercial Code's provisions applicable to commercial mortgages over moveable

assets require the transfer of possession of the moveable asset to the mortgagee, whether fully or partially under a joint possession between the mortgagor and the mortgagee. In this context, the affixing of nameplates setting out clearly that the aircraft is mortgaged in favour of a mortgagee would address this requirement up to a certain extent.

As mentioned above, the Civil Aviation Law allows for the registration of a mortgage over a UAE-registered aircraft and the GCAA, in practice, permits the registration of mortgages governed by foreign law and reflects the name of the mortgagee on the certificate of registration on request. This registration may be considered as sufficient to record and protect the interests of the mortgagee and to prevent the mortgagor from deregistering the aircraft or effecting any change of ownership to the aircraft without the prior consent of the mortgagee. In this context, it is advisable that the mortgage or any other relevant security interest is recorded with the International Registry, to the extent registrable.

16 Security documentary requirements and costs

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

There are no specific requirements applicable to security documents concerning aircraft. Generic requirements set out in the Commercial Code apply to commercial mortgages. The Commercial Code provides for the general principles and conditions that apply to mortgages over moveable assets with a transfer of possession. As part of the conditions set out, the commercial mortgage shall contain the amount of the secured debt and shall be notarised before a notary of the UAE. The GCAA does not require a notarised Arabic translation of foreign law security documents but it would be advisable to arrange for foreign law mortgages under English law or New York law (or both) to be translated into Arabic and notarised by a notary of the UAE in order to avoid any potential challenge of the validity of such documents.

17 Security registration requirements

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 mortgage interest.

The GCAA does not provide for a specific registry for the registration or security documents. In the event of a mortgage being granted over a registered aircraft, the GCAA will register the identification details of the mortgagee in its records. A request shall be made in this regard and accompanied with a certified copy of the mortgage document and any other supporting documents evidencing the existence and powers of the mortgagee.

It is not a condition to the validity or the enforceability of a mortgage that it is filed or recorded by the GCAA under UAE law. As mentioned above, the information recorded by the GCAA other than reflected on the certificate of registration of the aircraft is not available to third parties other than interested parties. In the event that the mortgage is noted on the certificate of registration, this information will be available to third parties but does not create, on this sole basis, any specific rights or priority and it is advisable therefore that this mortgage is recorded with the International Registry as an international interest to the extent possible. No registration fees specifically apply to a mortgage registration except in respect of the GCAA's fees applicable to International Registry's registration for the purpose of the allocation of an AEP code as detailed in question 14.

18 Registration of security

How is registration of a security interest certified?

The Civil Aviation Law provides for the registration of a mortgage over UAE-registered aircraft and the GCAA, in practice, permits the registration of mortgages governed by foreign law under its registry and the notation of the name of the mortgagee on the certificate of registration issued by it to the extent requested by the mortgagee. The registration of the mortgage under the certificate of registration would not specify the rank of the mortgage but would constitute a protection of the mortgagee against the owner's attempt to sell or deregister the aircraft without obtaining the mortgagee's prior written consent.

The Commercial Code does not contain any specific provisions in respect of the rank and priority of security interest created by the commercial mortgage but the rights of the secured creditors would be governed by the provisions applicable to the international interests of the Cape Town Convention provisions except that the effect of such provisions may be affected in the event of insolvency proceedings and non-consensual rights may have priority over international interests under the laws of the UAE.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

The information registered with the GCAA other than recorded on the certificate of registration of the aircraft is not available to third parties other than interested parties. Regarding the information and documents recorded with the GCAA but not strictly reflected in the aircraft certificate, it is doubtful whether such recorded information and documents would be recognised as enforceable with regard to third parties. However, on the basis of the aforementioned provisions of Federal Law No. 10 of 1992, as amended by Federal Law No. 36 of 2006, the courts of the UAE would recognise a certificate of registration issued by the GCAA as admissible evidence of a security interest such as a mortgage interest.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Security over aircraft is typically structured using a security trustee or agent holding the security over the aircraft on behalf of financiers. Most aircraft are owned by special-purpose companies (SPC) in the relevant aircraft structure. The SPC is typically a private limited company incorporated in countries with favourable tax regimes such as the Cayman Islands or Ireland. Under the Civil Aviation Regulations, the GCAA would give effect to the registration of a security (typically a mortgage) and register it in the name of the security trustee or agent against the SPC as owner. Aside from the mortgage, which has been discussed above, a security assignment of the owner's rights under the lease and its rights under the hull and war insurances in respect of the operation of the aircraft would be granted in favour of the financiers and a pledge over the owner's bank account to which the lease rentals are paid would be put in place. Under the Civil Aviation Regulations, international interests as set out under the Cape Town Convention and its Protocol, would be recognised in respect of a mortgage interest as an enforceable item of collateral in the UAE, as the state of registration.

Under a simple finance lease structure, the SPC would lease the aircraft to the operator under a finance lease. The operator would operate the UAE-registered aircraft and pay the lease rentals to the SPC under the finance lease and, in broad terms, that rent would be equal to the principal and interest the SPC must pay to the financiers in respect of the financing documentation. When considering the registration of the lease and the financing documentation with the GCAA, the interested parties should provide originals or certified copies of the relevant transaction documents that reflect the transaction's structure. The term of the finance lease and the loan would coincide and therefore, upon the expiry of the lease term, if the airline has paid all amounts due from it under the finance lease, the SPC will have repaid the loan in full and at that point, the financiers would request from the GCAA the release of the mortgage and any other security documents registered with the GCAA's file such as an IDERA. Typically, under this finance lease structure, the operator would be entitled to purchase the aircraft for a nominal sum and amendments would be made with the GCAA in order to reflect the transfer of ownership of the aircraft and its deregistration if the UAE's registration cannot be maintained under the conditions set out by the Civil Aviation Law.

No specific regulations have been developed under the UAE to govern lease financings and it should be noted, as a general matter, that financial institutions are generally restricted from owning assets and carrying out commercial activities. Sharia-compliant structures, such as Ijaara leases and Murabaha financing structures, can take over as an alternative to the traditional lease financing structures.

21 Security over spare engines

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

A security over spare engines or spare parts can take the form of a pledge. The pledge is a form of security under Law No. 5 of 1985 relating to the Law of Civil Transactions (the Civil Code). The completion of a pledge requires, as for a commercial mortgage, that the possession of the pledged asset is physically transferred to the pledgee or its agent. Accordingly, this type of security is not applicable to moveable assets such as installed engines or parts that shall continue to be used by the borrower or a third party such as the aircraft's operator, notwithstanding the completion of the security. It is therefore doubtful that a specific security can be created over installed engines and parts under UAE law.

Enforcement measures

22 Repossession following lease termination

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

UAE law has made a declaration under article 54(2) of the Cape Town Convention at the time of its accession and, as a result, any remedies under the Cape Town Convention that do not require a court judgment are not recognised by the UAE. Accordingly, self-help remedies are not available and a court order must be obtained. Under the proceedings applicable in the UAE, the claimant that requires the repossession of an aircraft may file a court application for an attachment. Under such attachment procedure, the aircraft needs to be clearly identified. If the attachment procedure is initiated prior to the substantive proceedings for the recovery of the debt, it is mandatory that, within eight days of the granting of the attachment order, such substantive proceedings are initiated by the claimant. It is possible for the claimant to request that the attachment order is granted *ex parte* by the relevant court of the UAE. Following the obtainment of a judgment from the court, a public auction would be ordered and supervised by the court to sell the asset. The court has the power to order new public auctions if it considers that the offer of the higher bidder is not sufficient. The auction is published in UAE newspapers. All documents brought to the court shall be in Arabic and the following documents are required:

- original agreements (such as the lease agreement) applicable to the case;
- evidence of non-payment of the debt;
- evidence of any other default than with respect of the debt payment;
- evidence of title and certificate of registration in respect of the aircraft; and
- evidence of the authority of the owner's solicitor before the court.

The proceedings applicable in the UAE entail the payment of court fees, which depend on the value of the claim and have a maximum cap (except in cases filed before the Abu Dhabi court). According to Law No. 21 of 2015 regarding the new fees of the Dubai Court in Dubai, before the court of first instance and civil actions, the court fee represents 6 per cent of the claim, provided that the amount is not less than 500 UAE dirhams, and is subject to the following caps on the basis of tranche values of the claims:

- 20,000 UAE dirhams if the claim value is less than 500,000 UAE dirhams;
- 30,000 UAE dirhams if the claim value is between 500,000 UAE dirhams and 1 million UAE dirhams; and
- 40,000 UAE dirhams if the claim value is more than 1 million UAE dirhams.

If provisional orders, such as an attachment order, are sought, a further fee of 50 per cent of the initial filing fee is payable subject to a cap of 10,000 UAE dirhams. The length of the procedures depends, as in any other jurisdiction, on the nature and the complexity of the matter and, in the event of a case that does not raise any exceptional controversial matters, a proceeding before the courts of first instance usually takes around six months.

Within the UAE, the authority of the Dubai International Financial Centre (DIFC) court to perform functions of arbitration assistance is provided for by the DIFC Law No. 1 of 2008 and the Dubai Law No. 16 of 2011, and the arbitration sentences of the DIFC court are recognised by

the courts of the UAE without examination of the merits of the decision, subject to certain conditions (eg, the arbitral sentence does not contravene public order considerations).

Outside of the UAE, arbitration sentences should be recognised and enforceable in the UAE as it is a party to the New York Convention but only to the extent that such arbitral sentences have been rendered by a contracting state to the New York Convention. Other regional or bilateral treaties such as with certain countries of the Gulf Cooperation Council (GCC) may also facilitate the recognition of foreign judgments and arbitral sentences.

23 Enforcement of security

Outline the basic measures to enforce a security interest.

How may the owner lawfully impede the mortgagee's right to enforce?

In respect of the enforcement of a security interest and the repossession of an aircraft following an event of default, self-remedies are not available under UAE law and the procedure is the same as stated above in respect of repossession by an owner. Regarding the list of documents required before the courts, the secured creditor(s) shall provide an original or a certified copy of the security document and the underlying financing documents in addition to the evidence of the non-payment of the debt, the events of default, the evidence of title and the certificate of registration as well as the proof of the authority of the solicitor that represents the secured creditor before the court.

The only limitation to the strict requirement for a court order in the UAE may reside in the procedures for the enforcement of an IDERA as set out under the Civil Aviation Regulations. The Civil Aviation Regulations do not expressly require the intervention of a court and give effect to the protection mechanisms of the secured creditors under the Cape Town Convention and its Protocol. However, it should be noted that it is doubtful whether the GCAA would give effect to an IDERA in the presence of a serious contestation without requiring a court judgment. In the event of a repossession leading to the deregistration of the aircraft, the Civil Aviation Regulations provides that all fees and amounts due and payable to the GCAA shall be cleared prior to such deregistration. The provisions of article X of the Protocol to the Cape Town Convention, which are applicable in the UAE, provide for an expedite enforcement; however, as we are not aware of any significant precedent, it is not possible to give a detailed overview of a repossession scenario and the enforcement of an IDERA in the UAE.

As to insolvency proceedings under the domestic law of the UAE, the main provisions can be found in the Commercial Code, Federal Law No. 2 of 2015 and, more recently, the new Bankruptcy Law (Law No. 9 of 2016), which provide for a new protective composition procedure. We take the view that this procedure does not interfere with the rights of secured creditors to enforce their respective security with the permission of the court.

24 Priority liens and rights

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?

In the UAE, the liens and rights (including international interests under the Cape Town Convention) in favour of secured creditors have first priority as set out under the new Bankruptcy Law over, *inter alia*, costs in respect of any liquidation proceedings, unpaid salaries and wages of the employees of the debtor and amounts due to governmental bodies. UAE law does not provide for specific provisions in respect of the state's or government entities' right of confiscation, nationalisation or requisition of assets in particular circumstances, but the government of the UAE, under its constitutional rights and sovereign prerogatives, could decide to operate the requisition, nationalisation, confiscation or take other expropriation actions by way of a national decree in the event of exceptional circumstances such as in times of war.

A claim could be filed against a government-owned operator by the owner of an aircraft or a secured creditor but, in certain circumstances, a non-objection confirmation from the local competent government authority would need to be obtained.

Update and trends

The UAE has announced the introduction of a VAT from the beginning of January 2018. The government has been advised by the International Monetary Fund to set VAT at 5 per cent. Once introduced, it would make the UAE the first Gulf state to tax at the point of sale. The scope and conditions of the VAT have not yet been confirmed.

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

Generally, there are, at present, no stamp duty or VAT on the purchase of aircraft or withholding tax on lease rentals applicable in the UAE. Furthermore, there is no corporate tax payable in the UAE except from for oil and gas companies and subsidiaries of foreign banks. For all companies, a municipality fee is paid to each Emirate at the time of issuance or renewal of the company's trade licence. This municipality fee corresponds to 10 per cent of the annual amount of the rent of offices and warehouses and 5 per cent of the annual amount paid by a company to accommodate its employees.

Payments under aircraft leases, including rentals, is unlikely to attract any taxes in the UAE. In addition, no fees or charges should be payable in respect of the completion of a lease agreement or security agreement over an aircraft except as stated above in relation to fees payable to the GCAA as part of the International Registry's registration and the obtaining of an AEP code.

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

There are no restrictions on international payments and exchange controls in effect in the UAE that would restrict the free remittance of proceeds abroad resulting from a sale or other operations. There is no consent to be provided in respect of the transfer of such proceeds and there is no central bank within the UAE.

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

As a principle, article 714 of the Civil Code provides for the prohibition of interests and mirrors Sharia principles. However, the application of ordinary interests by the banks have been authorised by the UAE Federal Supreme Court in 1981 and, further, the interests and delayed payments interests have been expressly permitted by the Commercial Code, which prevails over the Civil Code in relation to commercial transactions where, by definition, one of the persons involved in a transaction is a 'trader'. Accordingly, it is commonly accepted that article 714 of the Civil Code does not apply to matters governed by the Commercial Code.

As to any limitations to the amount of interest, the Commercial Code gives effect to the contractual freedom and the parties are free to determine the interest rate payable in respect of a commercial loan or interest rates applicable to default payments. Under article 76 of the Commercial Code, if the agreement of the parties is silent in respect of the calculation of the interest rate, the interest rate shall be fixed in accordance with the rate prevailing in the market at the time of the transaction. In this case, the interest rate shall not exceed 12 per cent, until full settlement is made.

28 Customs, import and export**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?**

The UAE is a member of the GCC and a unified customs tariff applies throughout the GCC. A 5 per cent entry duty is payable on imports, and once paid, goods can be shipped anywhere within the GCC without incurring further customs charges. This entry duty is charged on the cost, insurance and freight value of the goods at the port of entry. However, aircraft are exempt from customs taxes applicable throughout the GCC by virtue of the GCC's Common External Tariff Schedule, which sets out those items that are not subject to customs duties.

There are no export restrictions and no export duties or tariffs in the UAE.

Insurance and reinsurance**29 Captive insurance****Summarise any captive insurance regime in your jurisdiction as applicable to aviation.**

Pursuant to article 24(1) of the UAE Insurance Law (Federal Law No. 6 of 2007), insurance operations in the UAE may be carried out by any of the following entities that are licensed and registered with the Insurance Authority:

- a public stock company established in the UAE;
- a branch of a foreign insurance company subject to article 55; or
- an insurance agent.

Additionally, as provided under article 4 of Insurance Authority Resolution No. 42 of 2009, it is mandatory that insurance companies incorporated in the UAE have at least 75 per cent of their capital owned by UAE or GCC nationals or by juristic entities wholly owned by them.

Pursuant to article 26 of the UAE Insurance Law, property in existence inside the UAE or liabilities resulting thereof shall not be insured with insurance companies outside the UAE but an insurer may reinsure the property inside and outside of the UAE. There is no stated percentage that must be retained within the UAE in the case of reinsurance outside of the UAE.

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

Insurance and reinsurance policies are generally based on the London market wordings and cut-through clauses are relatively common.

Under the Civil Code, it is not possible for an insured or a third party to claim directly against a reinsurer. However, in certain specific circumstances, a UAE court may decide to allow a claimant to join the reinsurer to a claim issued against the insurer, including in circumstances where an insurance policy includes a cut-through clause.

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

Under UAE law, there are no specific restrictions to assignments of insurance or reinsurance and these would be legally effective in respect of UAE insurer or reinsurers. However, reinsurance agreements must be disclosed by insurers that are subject to reporting obligations.

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

Under the provisions of section 1 of the Civil Code (Hire in General), a lease (hire) confers to the lessee the right of use of the leased asset as from the date agreed in the contract and for a specific period in consideration of an ascertained rent. Article 763 of the Civil Code provides that the possession is therefore transferred to the lessee, which confers liability on the lessee.

However, it is further stated that the lessor is responsible for maintaining the full and quiet enjoyment of the leased asset by the lessee and that the lessee may cancel the lease and cease to be liable under the lease if its right of enjoyment is infringed, including in respect of any default from the lessor from repairing any defect in the leased asset. These provisions do not appear, prima facie, to be in line with the standard liability and risk allocation clauses customary in aircraft lease agreements regarding the liability of owners, lessees and financiers.

33 Strict liability

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

The Civil Code gives an important place to the determination of the obligations of the parties under contractual arrangements that are listed in the first place under article 174, which provides for the sources of one's personal obligations other than by way of statutory laws or legal events. On this basis, the courts of the UAE may give effect to the typical contractual arrangements agreed between a lessor and a lessee under an aircraft lease agreement in the event of a conflict with the general provisions of the Civil Code.

34 Third-party liability insurance

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

Pursuant to article 7(6) of the Civil Aviation Law, the aircraft's crew, passengers and third parties must be insured against ground injury as per the applicable rules. The level of third-party liability coverage is set out in the Safety Decision 14-2016, published by the UAE General Civil Aviation Authority on 4 December 2016. It is expressed under 10 categories in special drawing rights (SDRs) and pegged to the maximum take-off mass (MTOM) of the aircraft in question.

In relation to the level of insurance for passengers, baggage and cargo, the following limits apply:

- in respect of passengers, the minimum insurance coverage is 250,000 SDRs per passenger unless the aircraft in question is a non-commercial aircraft with an MTOM of 2,700kg or less, in which case the minimum insurance coverage is 100,000 SDRs per passenger;
- in respect of baggage, the minimum insurance coverage is 1,131 SDRs per passenger; and
- in respect of cargo, the minimum insurance coverage is 19 SDRs per kilogram.

holman fenwick willan 

Shyamal Jeewoolall

shyamal.jeewoolall@hfw.com

Level 8, Building 6
Emaar Square
Sheikh Zayed Road
PO Box 53934
Dubai
United Arab Emirates

Tel: +971 56 808 4027
Fax: +971 4 425 7941
www.hfw.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation

Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans

Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Aviation Finance &
Leasing
ISSN 2055-7256



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law