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After much anticipation, the Bermuda International Interests In Mobile Equipment (Cape Town Convention) Act 2016 came into operation in Bermuda on 1 January 2018. Essentially this legislation extends the Convention on International Interests in Mobile Equipment and its corresponding Protocol and Declarations (together the “Cape Town Convention”) to Bermuda.

What does it mean for Bermuda?
Bermuda is already a leading aviation financing jurisdiction with numerous Bermuda companies used to finance and register aircraft. Bermuda is also the jurisdiction of choice for aviation asset backed securitisations. This is due to its sophisticated infrastructure, strong legislative structure and a respected civil aviation authority (with just over 830 aircraft on the Bermuda Aircraft Register). Being a party to the Cape Town Convention will further strengthen this position.

With the majority of aircraft on the Bermuda Aircraft Register being registered in the commercial category, the ability to secure financing at lower costs and potentially with the “Cape Town Discount” will facilitate the purchase of new aircraft by a number of airlines operating in the jurisdictions where Bermuda already has an “Article 83 bis” treaty in place (currently the Russian Federation, the Republic of Uzbekistan and the Republic of Azerbaijan).

As an overseas territory of the United Kingdom, Bermuda courts would have followed the law set out in the Blue Sky case. This case provided that even if the parties had contractually agreed that the governing law of a mortgage is English law, if the jurisdiction where the aircraft was physically situated at the time the mortgage affixed, did not recognise such a mortgage under its conflict of laws principles, the mortgage would not be valid (the “lex situs rule”). Bermuda has followed the UK’s lead and included in its domestic legislation a provision making it clear that where an international interest has been validly created and registered under the Cape Town Convention, it shall have effect in Bermuda regardless of the lex situs rule.

Practical Consequences of Extension

Security Filings
Under the Cape Town Convention, an electronic International Registry has been created, which is open twenty-four hours a day, seven days a week. Creditors with an “international interest” in an aircraft object can register their interest on the International Registry provided that the debtor is located in and/or the aircraft is registered in a “Contracting State”.

A “Contracting State” is a jurisdiction which has ratified the Cape Town Convention. It should be noted that as an overseas territory, Bermuda is not a Contracting State but rather a “territorial unit” of a Contracting State, namely the United Kingdom.

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1 Blue Sky One Ltd. & Ors -v- Mahan Air and Anor [2009][EWHC] 3314 (Comm)
To constitute an “international interest” the agreement creating the interest must:

(i) be in writing;

(ii) relate to an object of which the debtor has power to dispose;

(iii) enable the object to be identified for the purpose of the Convention; and

(iv) if a security agreement, enable the secured obligations to be determined.

The debtor is situated in a Contracting State when it:

1. is incorporated or formed in a Contracting State; or

2. has its registered office or statutory seat in a Contracting State; or

3. has its centre of administration in a Contracting State.

Where the debtor is a Bermuda company, such international interests can now be registered against the Bermuda company on the International Registry.

**Benefits of Registration**

International interests registered on the International Registry take priority over subsequently registered interests and also have priority over non-registered interests over the same assets. It is possible to vary such priority by registering subordination agreements on the International Registry.

In addition to ease of registration, the International Registry also provides greater transparency as potential creditors can easily search the Register to identify prior security interests already granted.

Although most of the security documents in relation to an aircraft financing will constitute an “international interest”, which can be registered on the International Registry, it is expected that most parties will elect a dual registration procedure and register on both the International Registry and the local Bermuda Register of Aircraft Mortgages. This will be beneficial in circumstances where:

- the aircraft may need to be repossessed in a non-Contracting State that does not recognise the Cape Town Convention;

- the debtor does not consent to registration on the International Register (no consent is needed to register on the Bermuda domestic register); or

- it turns out the security did not actually constitute an “international interest” or should not have been registered under the Cape Town Convention.

Practically speaking until such time as there is case law supporting the application of the Cape Town Convention, most creditors will adopt the more cautious route of dual registrations.

**Irrevocable Deregistration and Export Authorisations Filings**

Another benefit of the extension of Cape Town to Bermuda is that creditors can now file irrevocable deregistration and export authorisations (“IDERAs”) with the Bermuda Civil Aviation Authority, with the result that the BCAA will only accept deregistration instructions from the party named in the IDERA as the “authorised party”. Previously the registrant of the aircraft could have granted a deregistration power of attorney. However, as a matter of English common law, such POA could have been revoked and since it granted a power only as opposed to creating an enforceable obligation, it could not have been
enforced against the BCAA. However, the IDERA has the force of law and is therefore a much more useful document to the creditor.

Although the IDERA refers to export, it should be noted that practically none of the commercial aircraft registered on the Bermuda Register are actually physically present in Bermuda, but are located in those jurisdictions which have the Article 83 bis treaties with Bermuda. As such, export from such jurisdictions should be addressed with a separate export power of attorney recognised by the relevant foreign jurisdiction.

It should also be noted that an IDERA must be in connection with a right or interest created on or after the date the legislation became effective in Bermuda, i.e. 1 January 2018. It is not appropriate to file IDERAs in respect of International Interests created before such date. As long as such prior interests were registered in Bermuda either with the Registrar of Companies or on the Bermuda Register of Aircraft Mortgages, they would continue to enjoy the priority they had thereunder.

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