

Aviation Finance & Leasing

Contributing editor
Mark Bisset



2018

GETTING THE
DEAL THROUGH

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Aviation Finance & Leasing 2018

Contributing editor
Mark Bisset
Clyde & Co LLP

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CONTENTS

Global overview	7	Indonesia	88
Mark Bisset Clyde & Co LLP		Nurdin Adiwibowo and Putra Ariyavira Ali Budiardjo, Nugroho, Reksodiputro	
Aircraft operating leases - New York law or English law?	11	Israel	93
Thomas A Zimmer and Neil Poland Vedder Price		Charles B Gottlieb and Assi Talmor* Gottlieb, Gera, Engel & Co Advocates	
Australia	14	Italy	99
Matthew Bode and Kate Craig Colin Biggers & Paisley		Laura Pierallini and Francesco Grassetti Studio Pierallini	
Austria	19	Japan	105
Martin Geiger Benn-Ibler Rechtsanwälte GmbH		Katsu Sengoku and Kentaro Miyagi Nishimura & Asahi	
Belgium	24	Kenya	111
Dimitri de Bournonville and Cyril-Igor Grigorieff Kennedys		Suzanne Muthaura, Christopher Kiragu and Kenneth Kimachia MMAN Advocates	
Bermuda	28	Lithuania	117
Jeremy Leese MJM Limited		Gintautas Šulija Šulija Partners Law Firm Vilnius	
Brazil	34	Malta	125
Renata Iezzi Basch & Rameh		Tonio Grech Dingli & Dingli Law Firm	
British Virgin Islands	41	Mexico	131
Audrey M Robertson Conyers Dill & Pearman		Javier Alegre and Carlos Campillo Alegre, Calderón y Márquez Abogados	
Cayman Islands	45	Netherlands	136
Matthew Stocker Conyers Dill & Pearman		Jeroen Timmermans and Laetitia Kunst-den Teuling Stek	
England & Wales	50	Panama	142
Mark Bisset Clyde & Co LLP		Maria de Lourdes Marengo Patton, Moreno & Asvat	
France	57	Portugal	147
Edward Campbell Stephenson Harwood AARPI		Luís Soares de Sousa* Cuatrecasas	
Germany	64	Russia	154
Ulrich Stepler and Katja Helen Brecke Arnecke Sibeth Dabelstein		Victoria Bortkevicha and Anna Nikulina Clifford Chance CIS Limited	
Greece	71	Slovenia	160
Stelios Stylianou and Mara Stylianou Stylianou & Stylianou Law Office		Andrej Kirm and Sana Koudila Kirm Perpar Law Firm Ltd	
Hong Kong	77	South Africa	166
Tejaswi Nimmagadda and Nai Kwok King & Wood Mallesons		Sean Craig Lederman ENSafrica	
India	82	Sweden	171
Ashwin Ramanathan, Akansha Aggarwal and Rishiraj Baruah AZB & Partners		Fredrik Wilkens, Emma Stuart-Beck and Henrik Schön Advokatfirman Vinge	

Switzerland	177	United States	191
Frédéric Meyer, Raphaël Baeriswyl and Antoine Labaume Meyer Avocats		Thomas A Zimmer Vedder Price	
United Arab Emirates	183		
Shyamal Jeewoolall and Saïda Mehenni Holman Fenwick Willan Middle East LLP			

Preface

Aviation Finance & Leasing 2018

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Aviation Finance & Leasing*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on British Virgin Islands, Greece, Hong Kong and Slovenia.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Mark Bisset of Clyde & Co LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
May 2018

Cayman Islands

Matthew Stocker

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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 Cayman Islands is not a signatory (or a party by extension from the UK) to the Rome Convention, the Geneva Convention or the Chicago Convention. It is now a party to the Convention on International Interests in Mobile Equipment and the associated Protocol to the Convention on International Interests in Mobile Equipment on matters specific to aircraft equipment (collectively, the Cape Town Convention).

In relation to the Chicago Convention, however, certain provisions of that Convention with which the United Kingdom is obliged to ensure that its overseas territories (including Cayman) comply are reflected in the Air Navigation (Overseas Territories) Order 2013 and Overseas Territories Aviation Requirements, applicable in Cayman.

The Cape Town Convention came into force in the Cayman Islands on 1 November 2015 following ratification of the Cape Town Convention by the United Kingdom and its extension to the Cayman Islands at its request. Upon such ratification and extension of the Cape Town Convention by the United Kingdom, the Cayman Islands Cape Town Convention Law 2009 was repealed. The aim of that legislation had been to mimic the principles and framework for the registration, recognition and enforcement of international interests contained in the Cape Town Convention in the absence of the Convention actually being in force in the Cayman Islands.

The Cayman Islands is, by Order-in-Council from the United Kingdom, a party to the New York Convention.

2 Domestic legislation

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

The principal domestic legislation is as follows:

- the Air Navigation (Overseas Territories) Order, 2013 as amended;
- the Mortgaging of Aircraft Regulations, 2015 (these regulations have superseded the former 1979 regulations, inter alia, to take account of the introduction of the Cape Town Convention into Cayman Islands law as referenced in question 1); and
- the International Interests in Mobile Equipment (Cape Town Convention) Law 2015.

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?

Save for public policy considerations, there are no restrictions under Cayman Islands law on the parties' freedom to choose the governing law of such arrangements.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

While there are no specific Cayman formalities, title is invariably transferred by way of bill of sale.

5 Transfer document requirements

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

Save for general enforceability considerations, there are no specific formalities. Note that a document executed in, brought in original form to, or produced before the courts of the Cayman Islands may be subject to Cayman Islands stamp duty.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The aircraft registry is the Civil Aviation Authority of the Cayman Islands (CAACI). Registration may be effected by a qualifying owner or charterer by demise of an aircraft (see question 7). In general terms, this is a 'private use' register although the CAACI will look at applications that do not fit such criteria on a case-by-case basis.

The CAACI has an 83-bis arrangement in place with Saudi Arabia.

There is no specific engine register. International interests that fall within the provisions of the Cape Town Convention may be registered against the airframe or separate engines at the International Registry maintained pursuant to the Cape Town Convention.

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?

The following persons are qualified to hold a legal or beneficial interest by way of ownership or by charter by demise in an aircraft registered in Cayman (or a share therein):

- the Crown in right of Her Majesty's government in the United Kingdom or in right of the government of the Cayman Islands;
- United Kingdom nationals;
- Commonwealth citizens;
- nationals of any European Economic Area (EEA) state;
- bodies incorporated in any part of the Commonwealth that have their registered office or principal place of business in any part of the Commonwealth; or
- undertakings formed in accordance with the law of an EEA state and that have their registered office, central administration or principal place of business within the EEA.

There is no ability to register interests in an aircraft on the Cayman Companies Register or any other register in the Cayman Islands, save that a mortgage over an aircraft registered on the Cayman Islands Aircraft Register may be registered in the Aircraft Mortgage Register maintained by the CAACI. Additionally, where a Cayman Islands company creates a mortgage or charge over any of its assets (including an aircraft), the details of such security shall be recorded in its register of mortgages and charges.

The CAACI has a discretion to cancel a registration on a change of ownership, or if an unqualified person otherwise becomes entitled to a legal or beneficial interest by way of ownership of the aircraft or of a share therein, in which latter case the registration will become void and the Certificate of Registration must be returned to the CAACI.

There is no ability separate from that relating to the airframe to register interests in engines on the Cayman Aircraft Register or Aircraft Mortgage Register.

As noted above, however, pursuant to the Cape Town Convention, relevant parties are now able to register applicable interests against applicable airframes or engines or both at the International Registry.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

The registration process may be initiated by completing and submitting all of the relevant application forms, and returning them to the CAACI for the approval of the Director General of Civil Aviation. The CAACI has established an online facility for doing so. The application forms must be accompanied by, inter alia, the company's certificate of incorporation or comparable document, a list of authorised company signatories and a general description of the company's activities and main base of aircraft operations. Where applicable, a statement must also be included that states the aircraft will only be operated within the definition of 'private category'. Private category is defined as being 'any purpose other than public transport or aerial work' and, therefore, an aircraft registered in the private category may not be used for the purposes of 'hire and reward'.

Persons wishing to register an aircraft must first prove eligibility to hold a legal or beneficial interest by way of ownership or charter by demise in an aircraft registered in Cayman (or a share therein) as described above.

Subject to receipt of an acceptable 'due diligence' report, an airworthiness survey will then be scheduled. Thereafter, subject to the surveyor making a recommendation for the issue of a Certificate of Airworthiness and receipt of an Export Certificate of Airworthiness or similar document, the deregistration process may be initiated.

Once accepted for registration, a registration mark prefixed with 'VP-C' will be assigned or the applicant may request a specific registration mark, which (if available) will be allocated.

Upon receiving notification from the existing state of registry that the aircraft has been removed from that register, a Cayman Certificate of Registration, Certificate of Airworthiness and all required documentation will be issued.

9 Title and third parties

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

While registration and the issue of a Certificate of Registration indicates that the CAACI considers the relevant applicant to be qualified for registration, and may therefore be considered prima facie evidence of ownership or the holding of an applicable charter by demise interest in the aircraft, registration is not proof of legal ownership and the Certificate of Registration will state on its face that such certificate is not proof of legal ownership.

10 Registration of lease interests

Summarise the process to register a lease interest.

See question 7, in the context of charterers by demise. In general terms, the CAACI will not concern itself with the specifics of the lease itself.

11 Certificate of registration

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

The Certificate of Registration is issued by the CAACI. It sets out the following information: registration mark, aircraft type and serial number, name of registered owner (and whether such registered 'owner' holds a charter by demise interest) and the nationality of the registered owner.

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?

Where the aircraft is subject to a mortgage registered on the Cayman Aircraft Mortgage Register, the aircraft will not be deregistered without the consent of all parties registered as mortgagees.

Although not a legal requirement, as a matter of practice, where there is a charter by demise over the aircraft, the CAACI will agree, if requested, not to deregister the aircraft without the consent of the registered owner. The CAACI will, if requested, provide the lessor or owner of the aircraft with a 'comfort letter' whereby the CAACI acknowledges the ownership and leasing structure of the aircraft and confirms that it will not remove the aircraft from the Aircraft Register without receiving written authorisation from the lessor or owner. The CAACI will place a notation on the Aircraft Register of the undertaking so provided and of the ownership or leasing structure.

Additionally, see below in relation to deregistration powers of attorney (question 13) and irrevocable deregistration and export request authorisation (IDERAs) (question 14).

13 Powers of attorney

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

Under Cayman Islands law, a deregistration power of attorney when granted to secure an obligation owed, typically, to the finance parties will be irrevocable until that obligation is discharged and will survive the insolvency of the grantor. The power of attorney may be granted to more than one attorney-in-fact on a joint or several basis, or both.

Further, under Cayman Islands law, a power of attorney governed by Cayman Islands law is required to be executed as a deed.

A deregistration power of attorney need not, however, be governed by Cayman Islands law. It will frequently have the same governing law as the other transaction documents, for example, English law or New York law. It is possible to submit the deregistration power of attorney to the CAACI and obtain an acknowledgement from the CAACI with respect to it.

With regard to the deregistration process itself, there is no specific form of deregistration request and deregistration will, therefore, typically consist principally of the return to the CAACI of the original of the Certificate of Registration endorsed at section (iii) on the back and signed by the owner of the aircraft or an officer of the company (or by the relevant attorney-in-fact). The aircraft typically cannot be deregistered until the CAACI receives the original of such signed certificate.

In addition, the other principal requirements for deregistration of the aircraft are:

- that any balance on the account for the aircraft is paid in full; and
- where a Certificate of Airworthiness for Export is required, the relevant party will need to make a request to the CAACI for such certificate and make arrangements for one of the CAACI surveyors or its agents to inspect the aircraft.

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.

The Air Navigation (Overseas Territories) Order provides for the Cape Town Convention IDERA regime to be recognised and take effect in the Cayman Islands.

Accordingly, relevant filings of IDERA or consents to deregister may be filed with (and acknowledged by) the CAACI in accordance with the Cape Town Convention. The CAACI requires that IDERA documentation so filed must be notarised and, additionally, each filing carries a fee of US\$304.88 at current rates.

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?

There is no statutory format with which the mortgage must comply. The mortgage itself need not be governed by Cayman Islands law. The original mortgage deed need not be provided to the CAACI (and, indeed, it is advisable that the original mortgage not be brought to the Cayman Islands in order to avoid the possibility of triggering a liability to Cayman Islands stamp duty (see question 16)).

Where the relevant mortgage is to be registered as an international interest at the International Registry under the Cape Town Convention, then such mortgage must be in such form as to constitute an international interest under the Cape Town Convention.

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 documentary formalities under Cayman Islands law, save that where the original mortgage is brought to the Cayman Islands, applicable Cayman Islands stamp duty may be payable (which may be up to US\$610 at current rates).

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.

With respect to a mortgage over an aircraft registered on the Cayman Aircraft Register, it is possible to register such mortgage on the Cayman Aircraft Mortgage Register. Such registration will go to priority (subject, where applicable, to the rules of priority under the Cape Town Convention) but not validity.

The procedure to effect registration of a mortgage is simple and straightforward, requiring an application by the mortgagee. The mortgagee must provide the CAACI with a short registration form summarising the principal points of the mortgage (ie, date, aircraft description, mortgagor contact details and confirmation of sum secured). An original of the registration form (although, in certain circumstances the CAACI may proceed on the basis of a PDF), signed by either the mortgagee or his or her agent or legal counsel, must be submitted to the CAACI together with a copy of the mortgage certified by the applicant to be a true and correct copy. The mortgage registration fee should also be submitted upon registration, which fee is calculated on an ad valorem basis depending on the sum secured, up to a maximum amount (at current rates) of approximately US\$6,000.

Where the mortgage or other relevant security interest constitutes an international interest under the Cape Town Convention, then such international interest may also be registered at the International Registry pursuant to the Cape Town Convention.

18 Registration of security

How is registration of a security interest certified?

The CAACI will issue a notification of registration, which is generally available on the date of registration. The notification states the date and time of registration, whether it is the first or a subsequently registered mortgage with respect to the relevant aircraft, the principal details of the mortgage and acknowledges receipt of the relevant registration fee.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

A registered mortgage is given statutory priority over subsequently registered mortgages and unregistered mortgages. The priority of the registered mortgage will not be affected by the bankruptcy of the mortgagor, and the security interest will rank in preference to any right, claim or interest of other creditors. It should be noted, however, that possessory liens for work done on the aircraft (whether before or after the mortgage was created), or over persons lawfully entitled to possession of the aircraft, or with a right to detain the aircraft, will have priority over a registered mortgage. In addition, a previously registered mortgage or a mortgage created prior to 9 October 1979 would have priority over a subsequently registered mortgage.

Registration of the mortgage cannot take effect until the aircraft is registered, but the mortgagee may secure its interest prior to registration of the aircraft by submitting a priority notice to the CAACI. Lodging of a priority notice will prevent any other security interests over the aircraft being registered in advance of registration of the mortgage that is the subject of the priority notice.

The priority notice is a simple form, along the same lines as the mortgage registration form, and must be accompanied by the applicable nominal priority registration fee.

All registered mortgagees must provide their consent to removal of the aircraft in question from the Aircraft Register before such removal can take place, and a registered mortgage will continue to exist despite removal of the aircraft from the Aircraft Register. Moreover, by law, the Cayman Islands government is required to indemnify a mortgagee for loss suffered owing to an error or omission in the Mortgage Register or any inaccuracy in any entry that is made.

Although registration of a mortgage does not constitute evidence of its validity, it does constitute express notice of all facts appearing on the Mortgage Register.

Additionally, under the Mortgaging of Aircraft Regulations, the effects of registration of international interests at the International Registry is now recognised from the date of coming into effect of the Cape Town Convention in the Cayman Islands. The priority of pre-existing aircraft mortgages on the Cayman Aircraft Mortgage Register is preserved although from such date mortgages registered on the Cayman Aircraft Mortgage Register and as international interests at the International Registry will have their priority determined in accordance with the priority rules set out in the Convention, subject, in all cases, to the priority of certain non-consensual rights or interests that will in any event take priority under Cayman law and under the Cape Town Convention as applicable to the Cayman Islands (eg, Cayman government liens for unpaid taxes or charges and repairers' liens).

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?

A typical security package for a financing involving the Cayman Islands will consist of an aircraft mortgage, a security assignment of the borrowing party's contractual rights (eg, under the relevant lease arrangements, the lease rentals or insurances) and a deregistration power of attorney or IDERA. It is often the case that the lenders will take security over the shares of the (often Cayman) owner or borrower. These documents will usually not be governed by Cayman law but by, for example, English or New York law, save that a share mortgage over the shares of a Cayman company is often governed by local law.

The secured party is often a security trustee or collateral agent for the financing parties from time to time.

21 Security over spare engines

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

A mortgage to be registered on the Cayman Aircraft Mortgage Register may cover any store of spare parts (including engines) for the aircraft, but may not include a mortgage created as a floating charge or a mortgage of spare parts on their own. Parts that in the future may become attached to the aircraft can be part of a registered mortgage provided

Update and trends

The Cayman Islands has long been a hub of the securitisation industry. In keeping with this, in recent times there has been a growing trend among aircraft operating lessors eager to access the capital markets to securitise portfolios of aircraft in asset-backed securitisation (ABS) transactions using Cayman Islands-incorporated special purpose vehicles (often Irish tax resident) (the Issuer). The notes issued by the Issuer in these transactions are typically then listed – often such listings have been made on the Irish Stock Exchange, but more recently we have seen a significant increase in ABS listings on the Cayman Islands Stock Exchange, with its favourable disclosure requirements and listing fee structure.

they are sufficiently identifiable when acquired by the mortgagor and value is given. See also the comments above with respect to the registration of international interests over engines under the Cape Town Convention.

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?

Subject to enforceability considerations under the governing law, the *lex situs* and any other relevant laws (other than Cayman Islands law), the Cayman courts will typically recognise and enforce contractual arrangements such as lease termination provisions created under foreign laws. The Cayman courts would also generally recognise self-help remedies by which the counterparties may take possession of the aircraft.

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?

Similarly, the Cayman courts would typically recognise self-help remedies in the context of an enforcement of security interests over the aircraft (and often over the shares of the aircraft owning vehicle), for example, by dealing directly with the CAACI pursuant to a deregistration power of attorney or IDERA to effect a deregistration. Cayman Islands law will generally also respect the secured parties' security interests in the event of the insolvency of the relevant obligor.

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?

See question 19. For aircraft present in, or that are brought to, the Cayman Islands itself, the relevant fees prescribed pursuant to the Airports Authority Law of the Cayman Islands shall be paid with respect to such aircraft. Under such Law, the Cayman Islands Airports Authority has a lien on every aircraft for the recovery of airport dues, fees and other charges imposed. Such Authority may enter, take control of and arrest and sell by public auction or private arrangement in compliance with applicable rules and regulations to that effect any aircraft over which it has a lien. The Authority shall not be a bailee for reward and has no liability for loss or damage occasioned thereby and thereto unless such loss or damage is owing to the wilful neglect or default of the Authority.

Generally, issues of compensation for detention, requisitioning, etc are typically also dealt with contractually in the transaction or insurance documentation.

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?

The Cayman Islands currently has no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax.

Additionally, Cayman Islands exempted companies (as well as exempted limited partnerships, exempted limited liability companies and exempted trusts) are entitled to obtain an undertaking as to tax concessions from the Governor-in-Council of the Cayman Islands exempting such entity from the effects of any changes to the Cayman Islands tax regime for a period of (in the case of an exempted company) 20 years from the date of such undertaking.

26 Exchange control

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

There is no exchange control legislation under Cayman Islands law, and accordingly there are no exchange control regulations imposed under Cayman Islands law.

27 Default interest

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

Arrangements that provide for a penal rate of interest may be unenforceable under English common law principles, which are of persuasive, if not binding, authority before the courts of the Cayman Islands.

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?

Aircraft registered on the Cayman Aircraft Register are almost invariably located and operated outside of the Cayman Islands.

Were an aircraft to be imported into the Cayman Islands, it would be subject to Cayman Islands import duty.

Insurance and reinsurance

29 Captive insurance

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

The Cayman Islands is the second largest jurisdiction for captive insurance after Bermuda, with over 700 captive insurance companies regulated by the Cayman Islands Monetary Authority. Cayman Islands insurance legislation has been updated recently, *inter alia*, to contemplate the use of portfolio insurance companies.

In relation to aircraft insurance, save where the relevant aircraft is 'ordinarily based' in the Cayman Islands, Cayman insurance legislation does not apply and it is typically the case that insurance is placed in the principal aviation insurance centres of London and New York.

30 Cut-through clauses

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

There are no Cayman statutory provisions in relation to such clauses. The position under Cayman law will reflect English common law principles (which are of persuasive, if not binding, effect before the courts of the Cayman Islands).

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?

Subject to usual enforceability qualifications, such arrangements are effective under Cayman law and are common in aircraft finance transactions.

32 Liability

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

With respect to an owner, section 76(4) of the UK Civil Aviation Act, 1982 is extended to the Cayman Islands to the effect that loss or damage caused by an aircraft in flight or by a person in, or an article, animal or person falling from, such an aircraft, is transferred to the person to whom the owner has demised, let or hired out the aircraft if the demise, let or hire is for a period of more than 14 days and no crew member is employed by the owner.

In general terms, a lessor or financier would not otherwise be liable solely by operation of Cayman Islands law.

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?

Save as noted in question 32, the owner of the aircraft would be subject to strict liability by virtue of section 40(2) of the UK Civil Aviation Act, 1949, extended to the Cayman Islands.

34 Third-party liability insurance

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

There are no specific Cayman law requirements.



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