



# Aviation Finance & Leasing

in 25 jurisdictions worldwide

# 2014

Contributing editor: Mark Bisset



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**Aviation Finance & Leasing 2014**

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**Mark Bisset**  
**Clyde & Co LLP**

*Getting the Deal Through* is delighted to publish the first edition of *Aviation Finance & Leasing 2014*, a new volume in our series of annual reports, which provide international analysis in key areas of law and policy.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 25 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are always referring to the latest print edition or to the online version at [www.GettingTheDealThrough.com](http://www.GettingTheDealThrough.com).

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**Getting the Deal Through**

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# United States

**Thomas A Zimmer**

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## Overview

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

The US is a party to the following major conventions affecting aviation finance and leasing:

- the 1944 Convention on International Civil Aviation, effective April 1947;
- the 1948 Convention on the International Recognition of Rights in Aircraft (Geneva Convention), effective 17 September 1953;
- the 2001 Convention on International Interests in Mobile Equipment (Convention) and the 2001 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Protocol), effective 1 March 2006 (collectively, the Cape Town Convention); and
- the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The US is not a party to the 1933 Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft.

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

The legal framework applicable to the regulation of aviation finance and leasing transactions in the US is both the law of the state applicable to such transaction and, to the extent they pre-empt state law, US federal laws, regulations and treaties applicable to such transactions. In the US, the Federal Aviation Administration (FAA), to the exclusion of the states, regulates the registration of civil aircraft, airworthiness, safety and maintenance issues involving civil aviation, the issuance of operating certificates and licences for civil aviation and the recording of agreements and instruments conveying interests in aircraft registered with the FAA and certain aircraft engines, components and parts.

Many of the responses in this chapter concern issues involving conveyancing agreements or instruments (aircraft conveyancing agreements) for civil aircraft and their airframes and engines (aircraft items) that provide for one of the following:

- the transfer of title to an aircraft item (an aircraft transfer agreement);
- the lease of an aircraft item (aircraft lease); or
- the grant of a security interest in an aircraft item (an aircraft security agreement).

As used herein, the term ‘grantor’ means the seller, transferor or grantor under an aircraft transfer agreement, the lessee under an aircraft lease or the grantor under an aircraft security agreement. The term ‘grantee’ means the buyer, transferee or grantee under an aircraft transfer agreement, the lessor under an aircraft lease or the grantee under an aircraft security agreement.

The State of New York law is commonly chosen by the parties as the governing law for aircraft conveyancing agreements involving commercial aircraft. Unless otherwise noted, the responses in this chapter will assume that the parties to a relevant aircraft conveyancing agreement have chosen New York law, and that the relevant aircraft item is a civil aircraft registered with the FAA.

The principal domestic legislation applicable to aviation finance and leasing in the US are:

- the Uniform Commercial Code (UCC) as adopted by the relevant states, particularly article 2 (governing sales of personal property), article 2A (governing leases of personal property) and article 9 (governing security interests in personal property). All 50 states have adopted a version of article 9, and all states other than Louisiana have adopted a version of article 2 and article 2A, although there are some variations from state to state;
- Title 49 of the US Code (Transportation Code) and Title 49 of the Code of Federal Regulations (CFRs). The Transportation Code pre-empts state law, including the UCC, as to certain matters relevant to aviation finance and leasing transaction; and
- Title 11 of the United States Code (Bankruptcy Code).

The Cape Town Convention and the Geneva Convention and other aviation treaties to which the US is a party preempt the Transportation Code and state law as to certain matters relevant to aviation finance and leasing transactions.

- 3** 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?

### General rule

Generally, aircraft transfer agreements are governed by article 2 of the UCC, aircraft leases are governed by article 2A of the UCC and aircraft security agreements are governed by article 9 of the UCC, in effect in the applicable state, except as preempted in respect to certain matters by the Transportation Code, the Cape Town Convention and the Geneva Convention. With certain exceptions, the parties to a contract that is subject to the UCC are free to choose, subject to preemption, the governing law for their contractual relationship so long as the transaction bears a reasonable relationship to the chosen jurisdiction and subject to any preemption. However, there are variations in choice of law rules from state to state. Therefore, it is important to examine the state law chosen to govern a transaction.

The New York UCC allows the parties to a contract subject to the UCC to choose the governing law without regard to whether a reasonable relationship exists to the State of New York. New York has another statute that allows the parties to a non-consumer contract involving over US\$250,000 to choose New York law to govern

their contractual relationship. Most aircraft finance and leasing transactions would fall within this statute.

#### **Preemption of state choice-of-law rule as to 'validity'**

If a particular state's law governs an aircraft conveyancing agreement, that law will apply to both the 'validity' of the agreement and the contractual rights and obligations of the parties thereunder, except to the extent preempted by US federal law or treaties adopted by the US. State law is preempted as to the validity of an aircraft conveyancing agreement in respect to certain aircraft items, depending upon various factors. For this purpose, it is useful to differentiate among aircraft and aircraft engines as follows:

- 'FAA aircraft' means a US civil airframe that is registered with the FAA;
- 'CTC airframe' means an airframe that:
  - qualifies as an 'aircraft object' under the Cape Town Convention; and
  - is either registered in a country that has adopted the Cape Town Convention (a CTC country) or is the subject of an aircraft conveyancing agreement under which the grantor is situated in a CTC country. To qualify as an aircraft object under the Cape Town Convention, an aircraft must either: (i) have an airframe that, when appropriate engines are installed, is type certified to transport at least eight persons including crew or goods in excess of 2,750 kilograms; or (ii) be a helicopter that is type certified to transport at least five persons including crew or goods in excess of 450 kilograms;
- 'FAA/CTC airframe' means an FAA aircraft that has a CTC airframe;
- 'FAA engine' means:
  - a specifically identified aircraft engine having at least 500 rated takeoff horsepower or its equivalent; or
  - an aircraft engine maintained for installation or use in an aircraft by a US-certified air carrier;
- 'CTC engine' means an aircraft engine that (a) qualifies as an 'aircraft object' under the Cape Town Convention and (b) is the subject of an Aircraft Conveyancing Agreement under which the grantor is situated in a CTC country. To qualify as an aircraft engine, the Cape Town Convention requires that an aircraft engine be powered by either: (i) jet propulsion technology, having at least 1,750 pounds of thrust or its equivalent; or (ii) turbine or piston technology, having at least 550 rated take-off shaft horsepower or its equivalent;
- 'FAA/CTC engine' means an FAA engine that qualifies as a CTC engine; and
- 'Geneva Convention aircraft' means a civil aircraft that is registered with a country that has adopted the Geneva Convention.

#### **FAA aircraft and FAA engines**

The Transportation Code provides that the 'validity' of a conveyance, lease or instrument that may be recorded in respect to an FAA aircraft or FAA engine is subject to the laws of the state at which the conveyance, lease or instrument is delivered, regardless of the place at which the subject of the conveyance or other instrument is located or delivered. If the conveyance lease, lease or instrument specifies the place at which delivery is intended, it is presumed that the conveyance, lease or instrument was delivered at the specified place. The applicable governing law in respect to the validity of an aircraft conveyancing agreement for an FAA aircraft or an aircraft lease or aircraft security agreement in respect to an FAA engine is the law of the state where the aircraft conveyancing agreement is delivered.

The Transportation Code does not address the applicable governing law with respect to the contractual rights and duties of the parties to an aircraft conveyancing agreement, which is left to state law, as preempted by the Cape Town Convention. In the case of FAA/CTC airframes and FAA/CTC engines, the Cape Town Convention allows the parties to an aircraft conveyancing agreement to agree on

the law to govern their contractual rights and duties whether or not a reasonable relationship exists to that jurisdiction (thus preempting any such requirement under state law). However, it does not address the choice of law as to its validity which, pursuant to the Transportation Code, would be determined pursuant to the law where the agreement was delivered.

For FAA aircraft and FAA engines that are not subject to the Cape Town Convention, the choice of law as to the contractual rights and duties of the parties under an aircraft conveyancing agreement would be determined under the general rule first described above.

#### **CTC airframes and CTC engines not registered in the US**

As noted above, the Cape Town Convention allows the parties to an aircraft conveyancing agreement for a CTC aircraft or CTC engine to choose the law that governs their contractual rights and obligations. However, it is silent on the choice of law applicable to the validity of the transfer of an interest in or the creation of a security interest in a CTC airframe or CTC engine.

For a CTC airframe that is registered in a country that has adopted the Geneva Convention (a Geneva Convention country) other than the US, the US would recognise and enforce a conveyance under an aircraft conveyancing agreement affecting the CTC airframe if the aircraft conveyancing agreement:

- was 'constituted' in accordance with the law of the country where the CTC airframe is registered (the country of registry); and
- was regularly recorded in a public record in the country of registry.

This would require an examination of the laws of the country of registry to determine:

- whether those laws would recognise the aircraft conveyancing agreement as a valid conveyancing agreement; and
- whether the aircraft conveyancing agreement is regularly recorded in a public record.

The Geneva Convention is silent on the choice of law governing the contractual rights and obligations of the parties. Therefore, the choice of law governing the contractual rights and obligations of the parties would be determined without reference to the Geneva Convention under the general rule first described above.

For a CTC airframe that is not registered in the US or any other Geneva Convention Country, or for a CTC engine that is not also an FAA engine, the law chosen by the parties should govern their contractual rights and obligations under an aircraft conveyancing agreement pursuant to the Cape Town Convention. However, the law governing the validity of the transfer of interest or the grant of a security interest would be determined under the general rule first described above.

#### **Geneva Convention aircraft without CTC airframes**

For a civil aircraft that is registered in a Geneva Convention country other than the US but does not have a CTC airframe, as is the case for such an aircraft with a CTC airframe, the US would recognise and enforce a conveyance under an aircraft conveyancing agreement affecting such aircraft if the aircraft conveyancing agreement was constituted in accordance with the law of the country of registry, and was regularly recorded in a public record in the country of registry. However, the choice of law governing the contractual rights and obligations of the parties would be determined by the general rule first described above.

#### **Non-Geneva Convention aircraft with non-CTC airframes and non-FAA and non-CTC engines**

For a civil aircraft that is not registered with the FAA or another Geneva Convention country, and that does not have a CTC airframe, and aircraft engines that are not FAA engines or CTC engines, the

choice of law as to both validity and the contractual rights and duties of the parties under an aircraft conveyancing agreement would be determined under the general rule first described above.

#### Title transfer

##### 4 How is title in an aircraft transferred?

Transfer of title to an aircraft in the US is governed by applicable state law. Pursuant to article 2 of the UCC, which has been adopted in all states other than Louisiana (subject to certain exceptions), title to goods passes from the seller to the buyer in any manner and on any conditions agreed on by the parties. However, title to goods cannot pass under a contract of sale prior to the time the goods are identified to the contract; that is, the goods must be existing and identifiable at the time title is transferred. Further, any reservation of title by the seller in goods delivered to the buyer is limited in effect to a reservation of a security interest. Typically in the US, aircraft transfer agreements provide that the transfer of title to the aircraft is evidenced by the delivery of a bill of sale from seller to the buyer. However, under article 2 of the UCC, once the aircraft is physically delivered by the seller, title transfers whether or not a bill of sale or other written conveyance document is delivered.

As described in question 3, the applicable law governing the validity of an instrument for the sale and transfer of an FAA aircraft is the law of the state where the instrument is delivered. Under the Transportation Code, in order to be valid against third parties without notice, an instrument for the transfer of title to an FAA aircraft must be filed for recording with the FAA. Under the Cape Town Convention, in order to have priority over subsequently registered interests or unregistered interests, an interest in respect to a CTC airframe transferred pursuant to a 'contract of sale' must be registered with the International Registry established pursuant to the Cape Town Convention (an aircraft transfer agreement for a CTC airframe is a contract of sale). The practice for the transfer of FAA aircraft is to provide for the delivery of a bill of sale that is in a form suitable under applicable state law contemporaneously with the physical delivery of the FAA aircraft, at which time a bill of sale in the FAA's prescribed form is filed for recording with the FAA Registry. If the transfer involves an FAA/CTC airframe with FAA/CTC engines, the transferred interests are registered with the International Registry.

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

The formalities required for an aircraft transfer agreement are determined by applicable state law (see question 4). As between a seller and buyer, while the applicable statute of frauds may require a written contract for the transaction, a written transfer document is not necessary, and title could transfer by physical delivery alone. However, in the case of an FAA aircraft, a conveyancing instrument must be filed for recording with the FAA Registry in order for the transfer to be effective against third parties without notice. Further, in the case of FAA/CTA aircraft, in order to have priority against subsequently registered interests and unregistered interests, the interest transferred must be registered with the International Registry.

The formalities for recording an instrument affecting title to, or any interest in, an FAA aircraft are set out in Part 49 of the Federal Aviation Regulations, 14 CFR Part 49. Typically, a separate warranty bill of sale under state law is issued, with an AC Form 8050-2 filed with the FAA. The formal requirements for filing a conveyance instrument for an FAA aircraft with the FAA are:

- the instrument must be in a form acceptable to the FAA, which has provided AC Form 8050-2 as an acceptable conveyancing form;

- the instrument must describe the aircraft by make and model, manufacturer's serial number and FAA registration number, or other identifying detail;
- the instrument must be an original document, or a duplicate original document, or if neither is available, a true copy of an original document. The signatures on the instrument must be ink originals. No notarisation or other authentication of the signatures is required unless requested by applicable state law. Most states, including New York, do not require authentication;
- the instrument must be accompanied by a filing fee of US\$5;
- if the seller is not shown as owner on the FAA records, the instrument must be accompanied by bills of sale or similar documents showing the chain of title; and
- if the conveyance is made by a person or entity doing business under a trade name, or by an agent, corporation, partnership co-owner or unincorporated association, there are additional formal requirements to evidence the authority of the signer.

#### Registration of aircraft ownership and lease interests

##### 6 Identify and describe the aircraft registry.

The FAA maintains a registry for civil aircraft in Oklahoma City, Oklahoma (the FAA Registry). The FAA Registry is an owner registry, and FAA aircraft may only be registered in the name of the owner, which must be

- a US citizen;
- a US resident alien;
- a US corporation that does not qualify as a US citizen but only if the aircraft is based in and primarily used in the US; or
- the US government or a state or territory or possession of the US.

To qualify as a US citizen, the owner must be:

- an individual citizen of the US;
- a partnership each of whose partners is an individual citizen of the US; or
- a US corporation or association of which the president and at least two thirds of the board of directors and other managing officers are US citizens, which is under the actual control of US citizens, and in which at least 75 per cent of the voting interest is owned or controlled by US citizens.

The FAA has also permitted other ownership structures, including limited liability companies (which are treated as associations) and owner trusts, provided that the ownership entity qualifies as a US citizen or US resident alien. In the case of owner trusts, the trustee must qualify as a US citizen or US resident alien and either:

- beneficiaries who qualify as US citizens must hold at least 75 per cent of the power and authority to influence, direct or remove the trustee; or
- the trustee must have the power and authority in respect of the ownership and operation of the aircraft to take actions which in its discretion are necessary to protect the interests of the US, without interference from the beneficiaries, in which case the beneficiaries need not qualify as US citizens (a 'non-citizen trust').

In connection with the registration of an FAA aircraft in the name of an owner trustee, the trust agreement and each document affecting a relationship under the trust agreement (such as an operating agreement with the beneficiary) must be submitted along with the application for registration of the aircraft.

There is no separate engine registry in the US.



- 7** 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 interest in an FAA aircraft can and must be registered with the FAA. The interest of a lessee under a 'true lease' cannot be registered with the FAA. However, if the lease does not qualify as a true lease and, instead, is treated as a conditional sale agreement or a security interest, the lessee could be characterized as the 'owner'.

See question 6 as to ownership restrictions for FAA aircraft.

The owners', operators' and lessees' interest in aircraft engines cannot be registered with the FAA.

- 8** Summarise the process to register an ownership interest.

In order to register an FAA aircraft in the name of the owner with the FAA, the following must be filed with the FAA Registry in Oklahoma City, Oklahoma:

- An aircraft registration using AC Form 8050-1. In the case of a corporate owner, the application must be signed by an officer or by an authorised person who presents a certified copy of an authorisation from any officer or manager. In the case of a partnership, the application must be signed by a general partner with the names of all general partners listed. In the case of a limited liability company, the application must include a statement of Support of Registration demonstrating the US citizenship status of the limited liability company.
- Evidence of the ownership of the aircraft by the applicant, which can take various forms:
  - If the aircraft has not previously been registered in the US or any other country, the applicant must submit a bill of sale using Form 8050-2 signed by the seller or an equivalent conveyancing instrument or other evidence of ownership authorised by the Federal Aviation Regulations.
  - If the aircraft was last previously registered with the FAA and was purchased from the last registered owner, the applicant must submit a bill of sale using AC Form 8050-2, signed by the seller, or an equivalent conveyance instrument or other evidence of ownership authorised by the Federal Aviation Regulations.
  - If the aircraft was last previously registered with the FAA but was not purchased from the last registered owner, the applicant must produce evidence of ownership, such as the chain of title from the last registered owner with the FAA, satisfactory to the FAA.
- If the aircraft was registered in a foreign country, the applicant must submit evidence that the foreign registration has ended (normally evidenced by notice from the foreign registry to the FAA); a bill of sale using Form 8050-2 signed by the foreign seller or other evidence satisfactory to the FAA that the applicant owns the aircraft; and (i) if the foreign country has not ratified the Geneva Convention or the Cape Town Convention, evidence that the foreign registration has ended or is invalid; (ii) if the foreign country has ratified the Geneva Convention but not the Cape Town Convention, evidence that the foreign registration has ended or is invalid, and that each recorded interest in the aircraft has been discharged or that each holder of such an interest has consented to the transfer; or (iii) if the foreign country has ratified the Cape Town Convention, evidence that the foreign registration has ended or is invalid and that all recorded interests ranking in priority have been discharged or the holders of such interests have consented to the deregistration and export of the aircraft.

- Certification as to the US citizenship or US residency status of the owner, along with any required evidence to establish that status.
- The fee for a Certificate of Registration of an aircraft – US\$5.

Pursuant to the UCC, title to an engine installed on an aircraft would not automatically vest in the owner of the aircraft upon installation on the aircraft as long as the identity of the engine is not lost.

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

The Transportation Code provides that the issuance of a Certificate of Registration by the FAA is not evidence of ownership of an FAA aircraft in a proceeding in which ownership is an issue. The effectiveness or validity of title to an FAA aircraft is determined by applicable state law.

The Transportation Code provides for the establishment of the FAA Registry for the recording of:

- conveyances that affect an interest in US civil aircraft;
- leases and instruments executed for security purposes, including conditional sales contracts, assignments and amendments, that affect an interest in:
  - an engine having at least 550 rated take-off power or its equivalent;
  - an aircraft propeller capable of absorbing at least 550 rated take-off shaft horsepower;
  - an aircraft engine, propeller or appliance maintained for use in an aircraft, engine or propeller by an FAA-certified air carrier; and
  - spare parts maintained by an FAA-certified air carrier; and
- releases, cancellations, discharges and satisfactions related to any such conveyance, lease or instrument that is recorded with the FAA.

All types of aircraft conveyancing agreements in respect to FAA aircraft, and aircraft leases and aircraft security agreements (but not aircraft transfer agreements) in respect to FAA engines, may be filed with the FAA. The Transportation Code provides that any conveyance, lease or instrument executed for security purposes that may be recorded with the FAA, affecting an FAA aircraft or FAA engine, must be filed for recording with the FAA in order to be valid against third parties without notice.

Under the Cape Town Convention, in order to have priority against subsequently registered interests of unregistered interests, it is necessary to register an interest in a CTC airframe or CTC engine with the International Registry.

- 10** Summarise the process to register a lease interest.

There is no registration of the interest of a lessee under a lease of an FAA aircraft or an FAA engine. However, a lease involving an FAA aircraft or FAA engine can be filed for recording with the FAA Registry, and must be filed for recording with the FAA in order to be valid against third parties without notice. The international interest in a CTC aircraft or CTC engine must be registered with the International Registry in order to have priority over subsequently registered interests or unregistered interests.

In order to file a lease of an FAA aircraft or FAA engine for recording with the FAA, a signed copy of the lease must be submitted to the FAA. Under established procedures, the FAA will allow certain economic terms of the lease to be set forth in a schedule and to redact such schedule from the lease filed with the FAA. There is no prescribed form of lease, but the lease should constitute a true lease under applicable state law. The same signing procedures for the filing of a transfer document for an aircraft described in question 5 must be met for a lease. The filing fee is US\$5.

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

Certificates of Registration for FAA aircraft are issued by the FAA. A Certificate of Registration, in the form of AC Form 8050-03, identifies an FAA aircraft by registration mark (commencing with the letter N), the manufacturer's serial number, the manufacturer and manufacturer's designation of the aircraft by model number, the name and address of the party to whom the Certificate of Registration is issued (the person who appears to be the owner based on the evidence of ownership submitted to the FAA), the date of issuance and the expiration date. A Certificate of Registration issued from or after 1 October 2020 expires three years after the last day of the month in which it is issued, unless it is renewed during the six months preceding its expiration date. The Certificate of Registration does not list the owner, operator or any holder of any interest in the FAA aircraft and expressly states that it is not a certificate of title. There is no separate engine certificate of registration.

**12** 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?

As the holder of the Certificate of Registration for an FAA aircraft, the owner (not the operator under a lease) is the party who must initiate the deregistration of the FAA aircraft for export, subject to the rights of the holder of the IDERA, or a creditor of the owner that has been granted the authority to deregister and export the aircraft.

The holder of the Certificate of Registration for an FAA aircraft, or for an FAA/CTA airframe authorised under an IDERA if one has filed for recordation with the FAA, must submit to the FAA Registry the following in order to deregister and export the aircraft:

- a written request for cancellation describing the FAA aircraft by make, model, manufacturer's serial number and FAA registration mark and the country to which the FAA aircraft is to be exported;
- evidence satisfactory to the FAA that all senior recorded interests have been discharged or the holders thereof have consented to the cancellation; and
- a written certification that all senior registered interests have been discharged or the holders thereof have consented to the cancellation.

Upon cancellation of registration of an FAA aircraft, the FAA Registry notifies the country to which the aircraft is to be exported of the cancellation.

If an IDERA has been issued for an FAA/CTC aircraft, the operator should not be able to block the deregistration or export by the holder of the IDERA.

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

As ratified by the US, the Cape Town Convention allows for the issuance of an IDERA by an owner of an FAA/CTC airframe in the form prescribed by the Cape Town Convention. IDERAs, rather than deregistration powers of attorney, are the most common and appropriate instrument for an FAA/CTC airframe.

**14** 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.

IDERAs for FAA/CTC airframes must be in the form attached to the Protocol. The IDERA must be signed by the owner that holds the Certificate of Registration. It need not be countersigned by the FAA, but must be filed for recording with the FAA Registry. The IDERA

must be 'linked' to a security instrument that is filed for recording with the FAA Registry. When seeking to deregister and export an FAA/CTC airframe using an IDERA, the holder must submit to the FAA Registry a search certificate from the International Registry and evidence of the discharge of any senior registered interest or the consent of the holders thereof to the cancellation.

The US will recognise the holder of an IDERA in respect to an FAA/CTC airframe as the sole person who may procure the deregistration and export of the aircraft. If an IDERA has been filed with the FAA in respect to an FAA/CTC Airframe, the FAA Registry will only honor a cancellation request from the authorised party under the IDERA or its designee.

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

The typical form of aircraft security agreement over an FAA Aircraft is an English language agreement, normally called a security agreement or mortgage, under state law, creating a security interest in the FAA aircraft under article 9 of the UCC. In order to be valid against the grantor granting the security interest, the following requirements must be satisfied:

- the grantor must have rights in the collateral;
- value must be given; and
- the grantor must sign or otherwise authenticate the security agreement that identifies the aircraft and the obligations that are secured.

In order to constitute an international interest under the Cape Town Convention in respect to an FAA/CTC airframe, the following requirements must be met by the aircraft security agreement:

- it must be in writing;
- it must relate to an aircraft object of which the grantor has a power to dispose;
- it must identify the aircraft; and
- it must enable the secured obligations to be determined.

In order to be effective against third parties, the security interest must be perfected pursuant to the UCC and the Transportation Code. If it constitutes an international interest under the Cape Town Convention in respect to an FAA/CTC airframe, it must be registered at the International Registry.

An aircraft security agreement need not be in any specified form as long as it creates a valid security interest under applicable state law. It need not state a maximum secured amount. The economic terms of the transaction do not need to be recorded in a public record.

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

The documentary formalities will be determined by applicable state law. If the aircraft security agreement is governed by New York law, there are no documentary formalities besides being duly signed by an authorised signatory. The only document expenses would be in connection with the filing or perfection of the security interest.

**17** 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 mortgagee interest.

An aircraft security agreement creating a security interest against an FAA aircraft need not be filed or registered to be valid between the grantor and the grantee. However, in order to be valid against



third parties without notice, an aircraft security agreement for an FAA aircraft must be filed for recording with the FAA. For an FAA/CTC aircraft, an international interest must be registered with the International Registry.

For FAA aircraft, perfection is accomplished by submitting a signed original of the mortgage or security agreement to the FAA Registry, along with evidence of the authorisation of the signing party, and a filing fee of US\$5. As the entry point under the Cape Town Convention for FAA/CTC aircraft, the FAA will issue an authorising code to allow for the registration of the international interest created by the aircraft security agreement with the International Registry.

Perfection requirements will vary from the foregoing if an aircraft security agreement grants a security interest in an aircraft that is not registered with the FAA. For these aircraft, perfection is not accomplished by filing with the FAA Registry. If the aircraft is a CTC aircraft, the registration of an international interest with the International Registry should take priority over subsequently registered interests and unregistered interests, and perfection under the UCC should be preempted. If the Cape Town Convention does not apply, but the aircraft is registered in a Geneva Convention country, if the country of registry has a central filing system and the aircraft security agreement is duly constituted under its laws and duly recorded under its filing system, the effect of such recording and rights under the aircraft security agreement under the laws of the country of registry will be recognised in the US. If neither the Cape Town Convention nor the Geneva Convention applies, then under article 9 of the UCC, perfection would be determined by the law of the jurisdiction where the grantor is located. In the case of foreign grantors, if the grantor is a 'foreign air carrier' under the Transportation Code, it is deemed located at the designated office for its agent for service of process by the US Department of Transportation. If the grantor is not a 'foreign air carrier' and the foreign jurisdiction provides for perfection by filing in a public filing system, perfection according to that system may be sufficient. If the foreign jurisdiction does not provide for perfection by filing in a public filing system, perfection can be accomplished filing a financing statement in the District of Columbia.

It is customary to also file a precautionary financing statement under article 9 of the UCC for the security interest granted by the grantor, even in respect to FAA aircraft.

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**18** How is registration of a security interest certified?

After an aircraft security agreement against an FAA aircraft is recorded with the FAA Registry, the FAA sends a Conveyance Recordation Notice, AC Form 8050-41, to the grantee, identifying the recorded conveyance document by its date, the parties, the FAA recording number and the date of recordation and describing the FAA aircraft. The Conveyance Recordation Notice does not state the rank or priority of the security interest created by the recorded conveyance document. Registered interests appear in a searchable database maintained by the FAA.

Upon the registration of an international interest in an FAA/CTC aircraft with the International Registry, the registered interest will appear on the International Registry's searchable database.

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**19** What is the effect of registration as to third parties?

Pursuant to the Transportation Code, in order to be valid against third parties without actual notice, a security agreement against an FAA aircraft must be filed for recording with the FAA. The validity and priority of the security interest in an FAA aircraft created by an aircraft security agreement is determined by applicable state law, and in particular article 9 of the UCC. Under article 9 of the UCC, subject to certain exceptions, the general rule is that the priority of a security interest in personal property is determined by the order of filing of a financing statement or security agreement in

the appropriate location, subject to certain exceptions (see question 24).

The Cape Town Convention preempts the Transportation Code and state law as to CTC airframes and CTC engines. Under the Cape Town Convention, a registered interest in a CTC airframe or CTC engine has priority over a subsequent registered interest or an unregistered interest, subject to certain exceptions (see question 24).

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**20** How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

Security over aircraft in the US is created by the grant of a security interest against the aircraft pursuant to article 9 of the UCC as adopted in the applicable state. The document by which the security interest is granted is typically called a security agreement or mortgage. A security interest may be granted to a trustee or agent on behalf of a group of beneficiaries; however, in such a case, the secured party would be the trustee or agent, not the beneficiaries.

If a security interest is granted to a lender to secure the loan from the lender and the lender transfers the loan to a new lender, the security agreement under which the security interest was granted would have to be transferred to the new lender. As between the grantor of the security interest, the original lender that was granted the security interest and the new lender, no filing or registration in respect to the assignment would be necessary in order for the assignment to be effective, although notice of the assignment would have to be given to the grantor. However, in order for the assignment to have priority over third parties, the assignment would need to be perfected.

Under the Transportation Code, in order to be effective against third parties without notice, an assignment of a security interest in respect to an FAA aircraft or FAA engine would need to be filed for recordation with the FAA Registry. Under the Cape Town Convention, in order to be effective against third parties (whether or not they have notice), the assignment of associated rights in respect to the international interest would have to be registered with the International Registry.

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

The form of security over spare engines in the US is the same as that for aircraft – a security interest granted pursuant to article 9 of the UCC, with the typical document being a security agreement or mortgage (see question 20). In the case of engines that are installed on an airframe, a single aircraft security agreement covering the airframe and its installed engines is most commonly used. In the case of spare engines that are not installed, an aircraft security agreement covering that engine or other uninstalled engines may be used.

Engines are typically treated separately from the airframe and, therefore, an aircraft security agreement covering both an airframe and its installed engines should separately identify the engines by manufacturer, model and serial number. An engine need not be installed on the airframe in order to be covered by an aircraft security agreement that appropriately identifies the engine. Subject to the terms of the aircraft security agreement, the engine should remain encumbered by the aircraft security agreement if it is removed from the airframe.

While an engine encumbered by an aircraft security agreement that is installed on another airframe should not cease to be encumbered under the UCC, this could depend upon applicable law where the engine is located when it is installed on the other airframe.

**Enforcement measures**

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

Subject to any limitations under the aircraft lease, upon termination of the aircraft lease following the expiration of its term or an event of default by the lessee, the lessor may exercise self-help measures to repossess an aircraft without judicial intervention if it can do so without breach of the peace. If the lessee physically opposes the lessor's repossession efforts, the lessor cannot forcibly take the aircraft and would likely have to seek assistance from a court through a judicial proceeding. The typical procedure for repossessing an aircraft in the US will be to pursue an action in state or federal court where the aircraft is situated under state law procedures. In the same proceeding, the lessor could seek to recover damages under the aircraft lease. In such court proceeding, the lessee could seek to resist the repossession of the aircraft by lessor or countersue the lessor; actions that could interfere or delay the lessor's attempts to repossess.

If a bankruptcy proceeding is commenced by or against a US lessee, an automatic stay under the Bankruptcy Code would bar any efforts by the lessor to repossess the aircraft absent an order from the bankruptcy court except in respect to an aircraft lease involving certain aircraft that are subject to section 1110 of the Bankruptcy Code. Section 1110 provides that, in respect to aircraft, aircraft engines and certain other items subject to a security interest granted by, leased to or conditionally sold to, a grantor that is an FAA-certified air carrier for aircraft capable of carrying 10 or more individuals or 6,000 pounds or more of cargo, the automatic stay is lifted unless the bankruptcy trustee cures all defaults and agrees to assume all obligations under the security agreement, lease or conditional sale contract within 60 days after the commencement of the bankruptcy proceeding.

- 23** Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

Similar to the rights of a lessor under an aircraft lease described in question 22, upon a default under an aircraft security agreement covering an aircraft, pursuant to article 9 of the UCC, the grantee may exercise self-help measures to repossess the aircraft or render the aircraft unusable by the grantor without judicial intervention if it may do so without breach of the peace. If the grantor physically resists the grantor's repossession efforts, the grantor will likely not be able to proceed without breaching the peace, in which case the grantor would need to seek a court order in order to repossess the aircraft. The typical procedure for repossessing an aircraft in the US is to pursue an action under state law procedures in state or federal court where the aircraft is situated. In the same proceeding, the lessor could seek a deficiency claim against the grantor if the value of the aircraft is less than the amount secured and other damages. In such a court proceeding, the lessee could seek to resist the repossession of the aircraft by lessor or countersue the lessor; actions that could interfere or delay the lessor's attempts to repossess.

If the grantee under an aircraft security agreement is able to repossess the aircraft, either through the exercise of self-help or pursuant to a court order, under the UCC, the grantee would be able to dispose of the aircraft either through a public or private sale in accordance with the UCC and the aircraft security agreement, with the net proceeds from the sale, after payment of expenses, being applied against the secured debt, with any surplus proceeds going to the grantor.

Similar to an aircraft lease agreement, if a bankruptcy proceeding is commenced by or against a US grantor of an aircraft agreement, the automatic stay under the Bankruptcy Code would bar any efforts by the grantee to repossess or dispose of the aircraft absent

an order from the bankruptcy court except in respect to an aircraft security agreement involving certain aircraft that are subject to section 1110 of the Bankruptcy Code (see question 22).

- 24** 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?

The following liens or rights could have priority over a security interest created under an aircraft security agreement:

- US federal tax liens, which are filed with the relevant state and cannot be filed with the FAA Registry or registered with the International Registry;
- possessory mechanics and warehouse liens to the extent provided under applicable state law;
- non-possessory mechanics liens to the extent provided under applicable state law, although these may be subordinate to any perfected security interest and may need to be filed for recordation with the FAA Registry;
- purchase money security interests, which may be filed up to 20 days after the grantor receives possession and will take priority over any intervening security interests; and
- buyers purchasing goods in the ordinary course from persons in the business of selling that type of goods.

The US Customs Service may seize an aircraft for transporting drugs (except for airlines involved in common carriage).

The US government has the power to require all or any part of the US airline transportation system to be turned over for government use during times of war. The US government would be obligated to provide compensation for any such taking under the US Constitution.

**Taxes and payment restrictions**

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

Aviation finance and leasing transactions in the US give rise to a significant number of tax issues, and before entering into such a transaction the parties should thoroughly examine the US and foreign tax consequences and factor them into the structuring and pricing of the transaction. The following is a brief discussion of a few selected tax issues that are commonly addressed in the case of foreign corporation selling, financing or leasing an aircraft to a US resident.

**Sales and use taxes**

Upon the sale of an aircraft when physically located in a state, or the lease of an aircraft that will be based or used in a state, generally the state will require that the seller or lessor collect from the buyer or lessee and remit to the state's tax authorities a sales tax on the gross sale proceeds or use tax on the gross rentals under a lease when based or operated in such state. State sales taxes are typically around 8.5 per cent of gross sales proceeds. There are often exemptions available, including in many states an exemption for sales or leases of aircraft to air carriers for use in foreign or interstate commerce. Delivering an aircraft when it is located either over international airspace or in another state or jurisdiction that does not impose a sales tax or has an exemption can be an effective way to eliminate sales taxes, but not use taxes. The seller or lessor should require that the buyer or lessee deliver a tax exemption certificate to evidence the availability of any tax exemption. There are no federal sales or use taxes, although there are both federal and state income taxes that could be imposed in respect to income or gain from sale proceeds or rentals.

**Federal withholding tax on aircraft lease rentals**

Without an exemption or reduction under an international tax treaty or federal tax laws, gross rentals payable by a US lessee to a foreign lessor that is not engaged in the leasing business in the US are generally subject to US federal withholding tax at the rate of 30 per cent, to the extent that the rentals are attributable to periods of time when the aircraft is located or operated within the US. The US is a party to numerous treaties with other countries that either exempt or reduce the withholding tax on gross rentals.

**Federal corporation income tax on aircraft lease rentals**

A foreign corporate lessor that is engaged in the leasing business through a permanent establishment in the US is subject to US federal income tax at the graduated rate applicable to US domestic corporations. However, all or part of the lessor's leasing income may be exempt from US federal income taxation under an international treaty or a 'reciprocal exemption' under the US federal income tax statute.

A foreign corporate lessor that is engaged in the leasing business in the US that does not have a permanent establishment in the US will be subject to a US federal gross transportation income tax at the rate of 4 per cent on one-half of its rental income for the period when the aircraft is operated between a place within the US and a place outside the US. However, all or part of the lessor's leasing income may be exempt from US federal income taxation under an international treaty or a 'reciprocal exemption' under the US federal income tax statute.

**State income tax on aircraft lease rentals**

A foreign corporate lessor that carries on the business of leasing at a place of business within a state will be subject to income taxation by the state. A foreign corporate lessor that does not have a place of business within a state may nonetheless be subject to income taxation by the state if aircraft leased by the lessor are based or operated within the state.

**Property taxes**

Certain states and local taxing authorities impose a property tax on the owner of tangible property located within a state during all or a portion of a tax year. Such taxes are usually based on the value of the property.

**Federal withholding tax on interest payments**

Absent an exemption or reduction under an international tax treaty, interest payments by a US resident to a foreign lender that is not effectively connected to a US business of the lender are generally subject to US federal withholding tax at the rate of 30 per cent. If the interest payments are effectively connected to a US business of the lender, the lender would be subject to US federal income tax at the graduated rate applicable to US domestic corporations. The US is a party to numerous treaties with other countries that either exempt or reduce the withholding tax on gross rentals.

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

The US does not have restrictions on international payments or foreign exchange controls other than certain bank reporting requirements, and certain restrictions on dealing with barred or listed countries, persons or entities.

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

Pursuant to state usury laws, there are limits on interest payments that may be charged on borrowed money. In New York, the maximum amount of interest that may be charged is 16 per cent, although

certain exemptions may apply. Usury limits may not restrict the amount of interest that may be paid following a default on a loan or lease payment if they are not determined to be payments for borrowed money.

**28** 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 export of commercial aircraft from the US, and sale or transfer of a US-origin aircraft outside the US, is subject to US export laws. Most commercial aircraft are considered US origin aircraft. Generally, the export of a US aircraft does not require a special licence, although certain transfers are prohibited including transfers:

- to certain embargoed countries;
- of aircraft incorporating certain military or technologically advanced components; and
- to certain persons or entities or barred lists, or those located in certain countries.

If an aircraft is being permanently exported from the US, there is certain required paperwork in connection with the export.

**Insurance and reinsurance**

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

There are no captive insurance regimes applicable to commercial aircraft and insurance coverage in the US. Aviation insurance is normally placed through aviation commercial markets.

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

A cut-through clause (or endorsement) in an underlying primary insurance policy allows the insured to seek payment directly from the reinsurer in the case of the insolvency or similar events affecting the primary insurer policy. The enforceability of cut-through clauses is determined by the governing law for the primary insurance policy and the governing law for the reinsurance policy. For the primary insurance policy, the main issue is whether, under the state law applicable to the primary insurer, the proceeds from reinsurance can be paid to the insured, rather than to the primary insurer or a conservator or administrator of the insolvent insurer. While the results vary from state to state, many states, including New York and California, permit cut-through endorsements. Among the issues affecting the enforceability of a cut-through endorsement against the reinsurer is whether there needs to be privity between the reinsurer and the insured. Generally, such privity should not be required in the US. However, the safest approach is to include a cut-through endorsement in the reinsurance policy and have the insured named as an additional insured and loss payee under the reinsurance policy, so that the insured has a direct claim against the reinsurer.

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

With the exception of California and Louisiana, assignments of insurance policies (including reinsurance policies), other than health-care-insurance, are excluded from coverage under article 9 of the UCC. There is no uniformity from state to state regarding the process to obtain priority in an assignment of aviation insurance or reinsurance over competing assignments. As a consequence, assignments of insurance and reinsurance policies are not customary for aviation finance and leasing transactions in the US. The normal approach is

**Update and trends**

Among the most significant recent legal issues affecting aircraft finance and leasing transactions in the US are requirements for the periodic renewal of the registration of all FAA registered aircraft and the issuance by the FAA of a policy clarification for aircraft registered with the FAA in the name of owner trustees under trusts with non-US citizen beneficiaries, commonly called non-citizen trusts.

Under the requirements for the renewal of registrations, Certificates of Registration for aircraft registered with the FAA expire three years after issuance and must be renewed prior to expiration and a triennial basis thereafter. The failure to renew a Certificate of Registration by the expiration date will cause the registration to be cancelled.

Under the FAA's policy clarification for non-citizen trusts, among other things, the US owner trustee under a non-citizen trust must be able to provide to the FAA within a matter of days after a request from the FAA detailed information concerning the aircraft and its operations. In addition, the owner must submit with an application for registration of an aircraft with the FAA the trust agreement and all documents affecting the trust relationship, including any operating agreements. The FAA published a template of a trust agreement for a non-citizen trust containing provisions that the FAA expects to be included in the trust agreement.

for the financier or lessor to be named as an additional insured and loss payee under the insurance and reinsurance policies, and include cut-through endorsements in the policies, rather than assignments.

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

If an accident or incident involving an FAA aircraft causes death, injury or damage to third parties, it is not clear under what circumstances an owner, lessor or secured party without any operational control or authority over the aircraft would be liable to such third parties. Pursuant to the Transportation Code, a lessor, owner or secured party of an FAA aircraft can be liable for personal injury, death, or property loss or damage 'on land or water' caused by a civil aircraft, engine or propeller only if it was in the actual control of the lessor, owner or secured party. In *Vreeland v Ferrer*, 28 So 3d 906 (2010), the Florida Supreme Court construed section 44112 narrowly to only exclude liability for loss or damage to people or property 'on the ground' and, therefore, looked to applicable state law as to whether liability should be imposed on a passive owner. While the decision in the *Vreeland* case has been severely criticised, a few other states have reached similar results.

If the *Vreeland* decision is followed, then the liability of an owner, lessor or financier could depend upon the applicable law in

the jurisdiction where a lawsuit is filed. There is no uniform standard under state laws for imposing liability for aircraft accidents upon an owner, lessor or secured party that does not have operation control over the aircraft. Some states impose strict liability upon an owner. Other states might impose liability if an owner, lessor or secured party is found to be negligent either on its own or vicariously through its selection of an operator. Although there is very little authority actually holding an owner, lessor or financier liable for aircraft accidents or incidents, the standard practice is to obtain broad indemnification from the operator covering all operational risks, and to require broad liability insurance covering those rights.

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

This is a matter of state law, possibly where the accident occurs or where the defendant is located, or where the legal proceeding is held.

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

There are no minimum amounts of third-party liability insurance that are required for commercial aircraft.



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