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UPDATE

Turbulent times for aircraft financing – a practical guide to repossession and deregistration of aircraft from Cayman

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The ongoing viral pandemic COVID-19 has drastically impacted the global aviation industry, leaving both borrowers and lenders concerned with the potential effect on their loan facilities. Liquidity issues, travel restrictions and pressure on asset-values amid financial market volatility, may trigger breach of financial and operational covenants, and material adverse change provisions in loan documentation, likely to constitute an event of default.

In our experience, while relationship-driven lenders generally seem willing (under the circumstances) to explore creative solutions to such defaults, others have resorted to enforcing their security package following an event of default, including the aircraft mortgage.

This article focusses on the enforcement of aircraft mortgages through the remedy of repossession where the aircraft is registered in the Cayman Islands with the Civil Aviation Authority of the Cayman Islands (CAACI).

It is not uncommon to have a foreign law (for example English law or New York law) governed aircraft mortgage over a Cayman registered aircraft, and Cayman Islands law would, generally speaking, recognise the validity of such a security interest from a Cayman Islands law perspective (assuming it creates a valid security interest as a matter of that foreign law). Whether the aircraft mortgage is foreign or Cayman Islands law governed, it will usually provide the lender with an express power of sale.

In our experience, the most common method by which a mortgagee seeks to enforce an aircraft mortgage is to exercise the self-help remedy of repossession, usually with the end goal of selling the aircraft to recover outstanding amounts owed to the lender.

Taking physical possession of an aircraft is permitted under Cayman Islands law. CAACI's permission is not required to pursue such remedy of repossession in an enforcement scenario and CAACI has solid procedures in place to recognise aircraft mortgages that have been registered with CAACI, together with any ancillary documents, such as an irrevocable deregistration and export request authorisation (IDERA) and deregistration power of attorney (DPOA) (each of which can also be registered with CAACI).

The Convention on International Interests in Mobile Equipment and the Protocol on Matters Specific to Aircraft Finance (the **Cape Town Convention**) has been extended to the Cayman Islands. In exercising enforcement rights, a lender can exercise standard default remedies under security agreements to take possession or control of the aircraft and (among other things) to sell and procure the deregistration, export and physical transfer of the aircraft from the territory in which it is located. These remedies are available under the Cape Town Convention (and under Cayman Islands law) without a court order.

Where a mortgagee-in-possession wishes to sell and deregister the aircraft from the aircraft register maintained with CAACI, the following steps apply:

1. **Formal notification letter:** The mortgagee must provide a formal letter to CAACI:

- (a) indicating that under the relevant section of the aircraft mortgage, the aircraft has been repossessed by the mortgagee, providing the date of repossession and making reference to, and attaching, any relevant legal documentation to support the claim (this could be court documents (if applicable), any IDERA, DPOA or shareholder letter of consent to deregister the aircraft);
- (b) stating that the mortgagee will be acting under the DPOA/IDERA and intends to deregister the aircraft from the Cayman Islands (giving an estimated time frame, which has to be within 28 days of the formal notification letter to preserve the validity of the aircraft registration under the Air Navigation (Overseas Territories) Order (as amended) during the deregistration process). The jurisdiction where the aircraft will be re-registered should also be noted;
- (c) confirming that the aircraft mortgage can now be removed from CAACI's register of aircraft mortgages or stating that the aircraft mortgage will be removed at a later date (noting the timeframe for removal of such aircraft mortgage);
- (d) confirming the status of the current technical regulatory oversight of the aircraft, i.e. whether the aircraft is still in the possession of the mortgagor's aircraft management company and whether this company will be responsible for technical oversight until deregistration of the aircraft from CAACI. If this is not the case, then the mortgagee will need to confirm if the aircraft has been assigned to a new aircraft management company (this is especially important if an Export Certificate is required (see below)); and
- (e) giving the mortgagee's legal counsel the authority to give the final deregistration instruction to CAACI.

This letter should be on the formal letterhead of the mortgagee and submitted to CAACI along with a document which (i) authenticates the signature of the person signing on behalf of the mortgagee; and (ii) confirming that the person signing is an authorized person of the mortgagee to conduct such matters. The letter can also be notarized to assist with the authentication, to the extent this is feasible.

2. **Export Certificate:** Enquiry should be made if an Export Certificate is required for the new state of aircraft registration.
3. **Aircraft account paid in full:** The current balance of the aircraft account is required to be paid in full prior to the deregistration of the aircraft. If an Export Certificate is required, a pro-forma invoice can be provided upon request to expedite the deregistration process. CAACI's accounts team can be contacted for a current statement of account and a quote or pro-forma invoice for the export, if required.
4. **Certificate of registration:** A certified true copy of the current certificate of registration of the aircraft is to be returned to CAACI, duly executed at the back of the certificate (in light of the pandemic, CAACI is not currently requiring the original certificate to be returned). The mortgagee (through the DPOA) will need to complete the reverse of the original certificate of registration stating that the aircraft has been repossessed and indicating the new state of registration. The certificate of registration should be accompanied by a legal document of the mortgagee which indicates that the person signing is an authorized signatory (this could be, for example, a power of attorney or an official authorised signatory list of the mortgagee). The aircraft will not be deregistered until final instructions are given by the mortgagee or its legal counsel.
5. **Final instruction:** The mortgagee or its legal counsel will need to give the final instruction to CAACI to deregister the aircraft. Such deregistration notice should be given at least a day before the actual deregistration date.

The aircraft deregistration process can be carried out relatively quickly, and the CAACI team have continued to be flexible, commercial and cooperative, especially during the prevailing global crisis where normal procedures and practices may not be practicable.

Mourant are offshore experts in aviation. If you have any questions or would like assistance or advice on the CAACI aircraft repossession and deregistration process, please feel free to reach out to Danielle Roman or Tracey Forbes of Mourant Ozannes for Cayman Islands and BVI legal matters.

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