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# Aviation: Finance & Leasing 2022

Ireland: Law & Practice

Matt Hedigan, Killian McSharry, Caitlín Friel,  
Padhraic Mulpeter and Eimear Burbridge  
Walkers

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## Law and Practice

**Contributed by:**

*Matt Hedigan, Killian McSharry, Caitlín Friel, Padhraic Mulpeter  
and Eimear Burbridge*

**Walkers see p.29**



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## 1. AIRCRAFT AND ENGINE PURCHASE AND SALE

### 1.1 Sales Agreements

#### 1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

##### VAT

Whether there will be any VAT payable on the sale of an aircraft is determined by its physical location at the point of sale. If the aircraft is physically located in Ireland at the time, the place of supply for Irish VAT purposes will be Ireland. As a result, the seller will be liable for any Irish VAT chargeable on the supply, at 23%. However, if the aircraft will be used outside the EU or by a transport undertaking operating for reward chiefly on international routes, Irish VAT will apply at 0%. The seller will be obliged to be registered for VAT in Ireland, regardless of whether the 0% or 23% rate applies.

##### Stamp Duty

Irish stamp duty legislation provides an exemption in respect of the lease, transfer and sale of an aircraft, regardless of where the aircraft is located at the time of sale.

##### Customs Duties

No customs duty will be charged on the transfer of title of the aircraft where the aircraft is on the ground in Ireland and in free circulation in the EU.

Customs duties will only apply on the importation of an aircraft into Ireland from outside the EU or on the release of an aircraft in Ireland in circumstances where the aircraft is coming off a duty-suspended procedure such as transit or inward processing.

#### 1.1.2 Enforceability Against Domestic Parties

As a matter of Irish law, translation, certification, notarisation or legalisation is not required to enforce a sale agreement against an Irish party.

### 1.2 Transfer of Ownership

#### 1.2.1 Transferring Title

Transfer of title is legally effected upon delivery of the bill of sale, which will usually include engines installed on the airframe and installed parts on its face, but does not set out the entire commercial agreement between the parties, usually set out in the aircraft sale and purchase agreement.

If an aircraft registered in Ireland has a new owner, a change of ownership form should be filled in and lodged with the Irish Aviation Authority (IAA); a new Registration Certificate will be issued to the new owner upon filing the form. The aircraft may not be flown until the IAA issues the new Registration Certificate in the new entity's name and the certificate is on board the aircraft.

The sale of the ownership interest in an entity that owns an aircraft or engine is effectively recognised as the sale of that aircraft or engine itself, to the extent that the entity to whom the ownership interest is being transferred holds title to the aircraft or engine.

#### 1.2.2 Sales Governed by English or New York Law

There is no formal legal requirement under Irish law that a bill of sale needs to be governed by Irish law. See **2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments**.

Generally, the transaction documents used in aircraft sale transactions (including bills of sale) are well-established forms and do not present a difficulty from an Irish legal perspective.

#### 1.2.3 Enforceability Against Domestic Parties

As a matter of Irish law, translation, certification, notarisation or legalisation is not required for the enforceability of a bill of sale against an Irish party.

#### 1.2.4 Registration, Filing and/or Consent From Government Entities

A bill of sale cannot be registered with the IAA or any Irish government entity. No government applications or consents are prerequisites to the execution and delivery of a bill of sale in relation to an aircraft or engine registered in Ireland. See also **1.2.2 Sales Governed by English or New York Law**.

#### 1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale VAT

VAT payable on the sale of an aircraft will depend on the physical location of the aircraft at the point of sale. If the aircraft is physically located in Ireland at the time of sale, the place of supply for Irish VAT purposes will be Ireland. As a result, the seller will be liable for any Irish VAT chargeable on the supply, at 23%. However, if the aircraft will be used outside the EU or by a transport undertaking operating for reward chiefly on international routes, Irish VAT will apply at 0%. The seller will be obliged to be registered for VAT in Ireland, regardless of whether the 0% or 23% rate applies.

#### Stamp Duty

Irish stamp duty legislation provides an exemption in respect of the transfer and sale of an aircraft, regardless of where the aircraft is located at the time of sale.

Historically, the Irish Revenue Commissioners (Irish Revenue) had extended by concession the stamp duty exemption in respect of the lease, transfer or sale of an aircraft also to apply to the sale or transfer of shares in an aircraft-owning entity (AOE). The current position regarding the transfer of shares in an AOE is that this concessionary treatment does not apply, and stamp duty on the sale of shares in an Irish AOE is payable at a rate of 1% (subject to any available reliefs). The duty applies to the market value of

the shares or the consideration paid, whichever is higher. Irish stamp duty does not apply to the transfer of shares where the consideration payable or market value (whichever is higher) for such shares is EUR1,000 or less.

#### Customs Duties

No customs duty will be charged on the transfer of title of an aircraft where the aircraft is on the ground in Ireland and in free circulation in the EU.

Customs duties will only apply on the importation of an aircraft into Ireland from outside the EU or on the release of an aircraft in Ireland in circumstances where the aircraft is coming off a duty-suspended procedure such as transit or inward processing.

## 2. AIRCRAFT AND ENGINE LEASING

### 2.1 Overview

#### 2.1.1 Non-permissible Leases

Subject to the general legal principles of contract law, there are no types of operating/wet/finance leases or leases concerning only engines or parts that are not permissible or recognised in Ireland, as far as is known.

#### 2.1.2 Application of Foreign Laws

A lease involving either a domestic party or an asset situated in Ireland can be governed by a foreign law – see **2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments**.

#### 2.1.3 Restrictions Concerning Payments in US Dollars

No material restrictions are imposed on domestic lessees making rent payments to foreign lessors in US dollars.

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## 2.1.4 Exchange Controls

Since 1 January 1993, there have been no foreign exchange controls in Ireland. With the removal of exchange controls, the Financial Transfers Act, 1992 has given the Minister for Finance reserve powers to introduce restrictions on financial transfers between the state and other countries in the form of regulations and prohibition orders.

## 2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

No taxes/duties are payable for executing a lease physically in Ireland or as a consequence of an original or copy of a lease being brought into Ireland, either physically or electronically.

## 2.1.6 Licensing/Qualification of Lessors

A lessor does not have to be licensed or otherwise qualified to do business with a domestic lessee.

## 2.2 Lease Terms

### 2.2.1 Mandatory Terms for Leases Governed by English or New York Law

English or New York law-governed lease agreements (and ancillary documents thereto) generally follow well-established forms and do not present a difficulty from an Irish legal perspective.

### 2.2.2 Tax and Withholding Gross-Up Provisions

Generally permissible from an Irish-law perspective, any such provisions would need to be reviewed on a case-by-case basis, the enforceability of which will depend on the governing law of the lease.

### 2.2.3 Parts Installed or Replaced After a Lease's Execution

The leasing of spare engines and other parts (including any such parts as may become attached to the aircraft in the future) may be

made a part of the aircraft lease. Spare parts may also be the subject of a separate lease. No special formalities are required.

## 2.2.4 Risk of Title Annexation

This is a matter for the governing law of the lease. Under Irish law, legal and practical risks can arise when engines become attached to other aircraft in accordance with pooling agreements or if they become subject to encumbrances. Accordingly, the lease will usually provide for such eventualities and may provide for a separate recognition of rights agreement to be entered into in favour of the lessor/owner/security trustee.

## 2.2.5 Recognition of the Concepts of Trust/Trustee

The concept of a trust and the role of an owner trustee under a lease are recognised in Ireland.

## 2.3 Lease Registration

### 2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The purpose of registration is solely to establish the aircraft's nationality, thereby determining which jurisdiction's regulations will apply to the aircraft and the person who will be responsible for the airworthiness and maintenance of the aircraft. The registration of an aircraft does not establish title to the aircraft and does not constitute actual notice or constructive notice of ownership.

### 2.3.2 Registration if the Owner Is Different From the Operator

An aircraft can be registered domestically in the name of the aircraft operator if the operator is not also the owner, or in the name of the owner if the owner is not also the operator.

### 2.3.3 Aircraft/Engine-Specific Registers

There is no specific register for leases concerning aircraft or engines. However, if the lease is

registrable under the Convention on International Interests in Mobile Equipment and the related Protocol on Matters specific to Aircraft Equipment (together, the “Cape Town Convention”), it can be registered on the International Registry (IR) as an international interest.

#### 2.3.4 Registration of Leases With the Domestic Aircraft Registry

A lease (and a lessor’s interest therein) cannot be registered or filed in the domestic aircraft registry, and leases are not subject to consent from any government entity.

#### 2.3.5 Requirements for a Lease to Be Valid and Registrable

As a matter of Irish law, translation, certification, notarisation or legalisation is not required for the enforceability of a bill of sale against an Irish party.

#### 2.3.6 Taxes/Duties Payable for Registering a Lease

This is not applicable in Ireland.

#### 2.3.7 Registration of Aircraft in Alternative Countries

There are no particular alternative countries in which aircraft habitually based in Ireland are typically registered.

#### 2.3.8 Requirements for Documents Concerning Registration

To register an aircraft, a registration form, as found on the IAA website, must be filed, along with supporting evidence as set out in the form. As part of the supporting evidence, an Export Certificate of Airworthiness or EASA Form 52 or an original Certificate of Airworthiness and a valid ARC must be submitted.

## 2.4 Lessor’s Liabilities

### 2.4.1 Tax Requirements for a Foreign Lessor

A foreign lessor is not required to pay any income, capital gains or other taxes upon leasing an aircraft or engine to a domestic lessee if the foreign lessor and domestic lessee are unconnected third parties. Irish legislation does contain secondary liability provisions that may need to be considered in certain group situations.

### 2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor cannot be deemed to be resident, domiciled or subject to any taxes as a result of it being a party to or its enforcement of the lease, provided that it is not otherwise resident in Ireland or does not have a permanent establishment or other taxable presence in Ireland, or, if the lessor is so established in Ireland, that it does not act through a branch or agency in Ireland, or other taxable presence in Ireland, in respect of its acts.

### 2.4.3 Engine Maintenance and Operations

Aircraft or engine maintenance and operations are governed by the contractual provisions of the lease agreement, responsibility for which typically resides with the lessee.

See **2.4.4 Damage or Loss Caused by an Asset** and **2.4.6 Priority of Third Parties’ Rights**.

### 2.4.4 Damage or Loss Caused by an Asset

Under Irish law, the lessor/owner is primarily liable for loss and damage caused by an aircraft to third persons and property, although liability can be passed on to the lessee. As per Section 21(1) of the Air Navigation and Transport Act, 1936, the lessor/owner would be liable as if they were at fault for any material damage or loss caused to any persons or property by an aircraft while in flight, taking off or landing.

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The lessor and lessee are independently responsible for their own negligence in relation to the aircraft, both through their acts and through their omissions. Liability for this can be restricted or excluded via contract, but such terms will be subject to reasonableness. It is not possible to restrict or exclude liability for death or personal injury due to negligence.

#### 2.4.5 Attachment by Creditors

The lessee may have allowed certain liens to accrue against an aircraft (eg, a possessory lien arising from a third party having worked on the aircraft to improve its condition). See **2.4.6 Priority of Third Parties' Rights**.

#### 2.4.6 Priority of Third Parties' Rights

Under the Irish Air Navigation and Transport Acts, certain third parties are granted a right to detain and, in some cases, to sell an aircraft (or cause it to be forfeited) in certain circumstances, whether or not the aircraft is registered in Ireland. These include, eg, airport charges, air navigation charges, customs duties and unpaid tax.

#### Other Liens

Other common liens include those that arise in the context of storage, repair, maintenance or other services to aircraft, tax liens and judgment liens. The lessee, usually in breach of the terms of the lease, may have allowed certain liens to accrue against the aircraft, eg, a possessory lien arising from a third party having worked on the aircraft to improve its condition. A lien for the salvage of an aircraft may also arise.

Since liens cannot be registered at the Irish Companies Registration Office (CRO), and since there is no Irish aircraft mortgage register, liens may often arise without the lessor's knowledge.

#### Laws Governing Detention, Restricted Use and Sale of an Aircraft

Pursuant to the Irish Aviation Authority (Nationality and Registration of Aircraft) Order 2015 and the Air Navigation and Transport Acts, 1936–2005 (as amended), the IAA and Dublin Airport Authority can detain or restrict the use of an aircraft and, if necessary, sell it in certain circumstances, eg, where the aircraft is not in compliance with safety standards, where airport charges have not been paid or if the IAA considers it necessary to secure compliance with statutes and statutory instruments.

Customs officers may detain an aircraft in respect of imported uncleared cargo remaining on board after a stipulated period until certain expenses for the safeguarding and removal of the goods have been paid. In the case of an item liable to forfeiture, any aircraft carrying it may also be liable to forfeiture, and the owner and commander of the aircraft may also be liable for a penalty. The Air Navigation and Transport Act, 1988 makes provision for enforcing the detention of that aircraft by authorised persons. A party who ignores such a detention order will be guilty of a summary offence.

Revenue may seize and sell the aircraft for unpaid taxes owed by the owner.

Pursuant to Section 5 of the Criminal Assets Bureau Act, 1996 (as amended), the Criminal Assets Bureau may confiscate assets identified or suspected as deriving directly or indirectly from criminal conduct.

Pursuant to Section 4 of the Proceeds of Crime Act, 1996 (as amended), the Irish High Court may (on application) make a disposal order in respect of property that constitutes directly or indirectly the proceeds of crime.

In an emergency, the IAA can give directions as to the use or possession of an aircraft.

## **2.5 Insurance and Reinsurance**

### **2.5.1 Requirement to Engage Domestic Insurance Companies**

It is not mandatory for all or part of the insurances to be placed with domestic insurance companies.

### **2.5.2 Mandatory Insurance Coverage Requirements**

The EU regulation setting out minimum levels of insurance requires that insurance cover exists for every flight, in compliance with the regulations.

### **2.5.3 Placement of Insurances Outside of Jurisdiction**

Professional underwriters' insurance can be placed outside of Ireland with up to 100% coverage.

### **2.5.4 Enforceability of "Cut-Through" Clauses**

The general view is that "cut-through" clauses (under which a reinsurer undertakes a direct relationship of indemnity with the original insured under a reinsured policy) are not thought to be effective under Irish law on account of the doctrine of privity and under insolvency law.

### **2.5.5 Assignment of Insurance/Reinsurance**

Assignments of insurances/reinsurances are permitted.

## **2.6 Lease Enforcement**

### **2.6.1 Restrictions on Lessors' Abilities**

The Irish courts recognise self-help remedies and typically recognise and enforce contractual arrangements between parties.

In addition to the self-help remedy under Irish law, the owner will have the remedies available to it under the Cape Town Convention, including taking possession of the aircraft without a court order and deregistering and exporting an aircraft by exercising its rights under an irrevocable deregistration and export request authorisation (IDERA).

However, it should be noted that, in most cases, the aircraft will not be located in Ireland, and the lease is likely to be governed by English or New York law. The effectiveness of these actions will, therefore, be determined by general principles of enforceability under the governing law of the lease and in the jurisdiction in which the aircraft is located.

### **2.6.2 Lessor Taking Possession of the Aircraft**

The termination of a lease should entitle the lessor to seek repossession of the aircraft as a matter of contract without a court order. It is important that the lessor strictly complies with such a procedure, as described in the lease, to take valid possession of the aircraft. If the lessee resists repossession, the lessor can apply to the court for an order of delivery and possession of the aircraft.

### **2.6.3 Specific Courts for Aviation Disputes**

The Irish Commercial Court is the forum for the determination of substantial commercial disputes in Ireland, and it has jurisdiction in respect of a claim or counterclaim relating to any business document, contract and dispute where the claim involved is greater than EUR1 million.

The Irish Commercial Court has previously accepted jurisdiction of substantive causes of action in disputes relating to registrations originating entirely outside Ireland under the provisions of the Cape Town Convention. This was given effect in Ireland pursuant to the International Interests in Mobile Equipment (Cape Town

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Convention) Act, 2005, as in PNC Equipment Finance LLC v Aviareto Limited and Link Aviation LCC (unreported, High Court 17 December 2012) and, more recently, Unicredit Global Leasing Export gmbh v Business Aviation Ltd and another (2019) IEHC 139.

## 2.6.4 Summary Judgment or Other Relief

If the lessor wishes to sue the lessee for the debt, this may be done by way of summary summons. Possession cannot be effected by way of summary judgment.

An injunction may be sought from the courts, and in an extreme emergency, eg, the aircraft may be taken outside the jurisdiction without notice to the other party to the proceedings.

The purpose of the injunction is to require a party to perform (mandatory) or refrain from doing (prohibitory) some act. Injunctive relief is equitable in nature and is a remedy rather than a cause of action. Injunctions are generally sought to protect a person's rights where those rights have been breached, or an imminent breach of those rights can be identified.

If the court grants an interim injunction, it will be served on the other party along with the summons, the notice of motion and any affidavits submitted. The notice of motion will fix a date for the hearing of an interlocutory injunction at which both sides will be heard. If the court declines to grant an interim injunction, it could grant leave to the applicant to serve notice on the other party of its intention to apply for an interlocutory injunction, and the court may allow a shorter notice of that application than is usual.

The court must be satisfied with a number of elements prior to granting an injunction:

- there must be a bona fide/genuine question to be determined;

- damages must not be an adequate remedy; and
- the balance of convenience must lie in favour of granting the injunction.

The lessor, like any applicant for injunctive relief, will be required to provide an undertaking and/or security for damages to the court against a wrongful claim.

## 2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

For disputes within the EU, a choice-of-law clause is recognised pursuant to Regulation (EC) 593/2008 (the Rome I Regulation).

For non-EU disputes, the courts will generally recognise and respect choice-of-law clauses under common-law rules.

Limited exceptions to the above general position arise where the courts may refuse to recognise choice-of-law clauses for public policy reasons or where there are mandatory Irish-law considerations, eg, with respect to consumer-law matters.

For disputes within the EU, choice-of-jurisdiction clauses are recognised under the Brussels I Regulations as transposed into Irish law under the Civil and Commercial Judgments Regulations 2002 and, for disputes in proceedings commenced on or after 10 January 2015, Regulation (EU) 1215/2012 (the Recast Brussels I Regulation) as transposed into Irish law by the Civil and Commercial Judgments Regulations 2015.

Where the dispute involves parties domiciled in countries that are not signatories to the Recast Brussels I Regulation, its predecessor or the Lugano Convention, the common-law rules of "most appropriate forum" apply.

Limited exceptions to this general position arise where the courts may refuse to recognise choice-of-jurisdiction clauses where there are mandatory Irish-law considerations, eg, with respect to consumer-law matters or for public policy reasons.

### 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

The means of enforcing a foreign court judgment depend mainly on the country or state that has handed down the judgment and the nature of the judgment or order.

#### Judgments of EU Member States

The process of enforcing judgments of EU member states is governed by one of the following:

- Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; or
- Regulation (EC) 805/2004 on creating a European Enforcement Order for uncontested claims.

Depending on the applicable rules, an application must be made to the Master of the High Court. Once the foreign judgment is recognised, it is considered by the Irish court as if it had been delivered by a court in Ireland, and the usual methods of enforcement can be used.

#### Other Foreign Judgments

The Hague Choice of Court Convention can be relied upon for enforcement of a judgment in Ireland from a Hague contracting state, provided that the judgment relates to an agreement which contained an exclusive choice of court clause which falls within the Hague Convention.

For foreign judgments that fall outside the aforementioned rules, the lessor/mortgagor must issue fresh proceedings in Ireland to enforce the judgment. However, the plaintiff will be able

to obtain summary judgment in a new action in Ireland on the grounds that the defendant has no defence to the claim if the relevant judgment satisfies the following conditions that it is:

- for a debt for a definite sum of money;
- final and conclusive; and
- given by a court of competent jurisdiction.

#### Refusal to Recognise and Enforce a Foreign Judgment

The Irish courts retain discretion to refuse to recognise and enforce a foreign judgment in the following circumstances:

- it is impeachable on the grounds of jurisdiction, fraud, public policy or natural or constitutional justice, or the judgment has been obtained or is alleged to have been obtained by the commission of a fraud, trick or deliberately misleading circumstances;
- the procedures and rules of the court giving the judgment have not been observed;
- it is inconsistent with a judgment of the courts of Ireland in relation to the same matter;
- it is contrary to public policy or the natural or constitutional justice of Ireland;
- the Irish courts have no jurisdiction over the matter;
- the jurisdiction of the court giving such a judgment has not been exercised in circumstances that an Irish court (as a matter of Irish law) will recognise as justifying enforcement of the judgment; and
- enforcement proceedings are not instituted in Ireland within six years of the date of the judgment.

The enforcement of foreign arbitral awards in Ireland is governed by the Arbitration Act, 2010.

#### 2.6.7 Judgments in Foreign Currencies

A lessor under an aircraft lease can obtain a judgment in a foreign currency.

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## 2.6.8 Limitations on Lessors' Actions Following Termination

There are common-law limitations on lessors' actions following termination. For example, a contractual provision conferring or imposing a remedy or an obligation following default may not be enforceable if it was construed by an Irish court as being a penalty, particularly if it involved enforcing an additional pecuniary remedy (such as default or overdue interest) referable to that default. Recovery may be limited by laws requiring mitigation of loss suffered.

## 2.6.9 Lessor's Requirement to Pay Taxes/Fees

On the occurrence of an event of default by the lessee under the lease, the lessor will generally retake possession of the aircraft in accordance with the express terms of the lease. If damages are additionally claimed by the lessor, a summons may also be served.

See **2.4.6 Priority of Third Parties Rights.**

## 2.6.10 Mandatory Notice Periods

The procedure for the termination of a lease will be determined by the terms agreed between the parties to that lease.

## 2.6.11 Lessees' Entitlement to Claim Immunity

Whether the lessee is entitled to claim any immunity from suit, execution, attachment or other legal process will depend on its actual identity. If the lessee is a sovereign body or other government organ (whether autonomous or quasi-autonomous), it may be able to claim sovereign immunity.

## 2.6.12 Enforcement of Foreign Arbitral Decisions

The UNCITRAL Model Law on International Commercial Arbitration, the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva

Convention on the Execution of Foreign Arbitral Awards of 1927 (the "Geneva Protocol/Convention"), the New York Convention and the Washington Convention have force of law in Ireland by virtue of the Arbitration Act, 2010. Assuming the arbitration award of an arbitrator comes within the scope of the aforementioned, subject to the 2010 Act and the terms of the aforementioned, an Irish court would recognise and enforce an arbitral decision without any retrial or examination of the merits of such award, subject to certain exceptions.

## 2.6.13 Other Relevant Issues

There are no issues.

## 2.7 Lease Assignment/Novation

### 2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Ireland recognises the concepts of contractual assignment and novation.

### 2.7.2 Assignment/Novation of Leases Under Foreign Laws

Assuming a lessor transferring its rights under an aircraft lease is assigning or novating its rights under that lease to a new lessor pursuant to a New York or English law-governed assignment and assumption agreement or novation agreement (or deed), either agreement (or deed) will be held valid by a domestic court, assuming the assignment and assumption agreement or novation agreements constitute in all respects legal, valid and binding obligations of each party thereto enforceable under all the laws of New York and England. See **2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments.**

Lessee consent is not required under domestic law, but it may be required as a matter of contract.

Generally, the transaction documents used in aircraft finance are well-established and do not present a difficulty from an Irish legal perspective.

There are no mandatory terms that Irish law requires to be included in that agreement/deed.

### 2.7.3 Enforceability of Lease Assignments/Novations

The absence of translation, certification, notarisation or legalisation will not affect the enforceability of the contract under Irish law.

### 2.7.4 Filing/Registration of Lease Assignments/Novations

This is not applicable in Ireland.

### 2.7.5 Taxes/Duties Payable on Assignment/Novation

No taxes/duties are payable in respect of such an assignment and assumption/novation agreement or as a consequence of an original or copy of it being brought into Ireland, either physically or electronically.

### 2.7.6 Recognition of Transfer of Ownership Interests

See **1.2.4 Registration, Filing and/or Consent from Government Entities**.

## 2.8 Aircraft Deregistration and Export

### 2.8.1 Deregistering Aircraft in This Jurisdiction

The registered owner can apply for the deregistration of the aircraft. Where an IDERA has been lodged with the IAA, the “authorised party” specified can procure the deregistration of the aircraft.

To deregister (and export) an aircraft, the following are required:

a formal request in writing, including the complete description of the aircraft, registration marks, make, model and serial number. This letter must be signed by the following:

- if the registered owner is an individual, the individual signs the request;
- if the registered owner is more than one individual, all individuals must sign (or send separate letters);
- if the registered owner is a company, the letter must be signed by a current director of the company or the current company secretary (as per the current CRO print-out);
- proof that the aircraft’s nameplate/fireproof plate has been removed;
- proof that the registration marks have been removed from the aircraft;
- proof that the aircraft’s Irish Mode S code has been negated (if applicable);
- proof that the aircraft’s Irish emergency locator transmitter (ELT) code has been negated (if applicable);
- if the aircraft is on an Irish Air Operator Certificate (AOC), it must be removed from the AOC prior to deregistration;
- all fees outstanding must be paid in full for the aircraft; and
- if the aircraft has an IDERA lodged against it, the IDERA must first be removed.

A new system has been implemented by the IAA since April 2022 for the registration of mortgages, charges and liens over certain categories of aircraft that are not covered by the Cape Town Convention and registered on the IAA’s register of aircraft. Arising out of the new system, a lender, in a default scenario, can instruct the IAA to proceed to deregister the aircraft upon presentation by the lender of proof of default to the IAA.

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## 2.8.2 Lessee's/Operator's Consent

An aircraft owner, mortgagee or lessor can apply for the deregistration of the aircraft without the lessee's or operator's consent.

## 2.8.3 Required Documentation

See **2.8.1 Deregistering Aircraft in this Jurisdiction**.

## 2.8.4 Duration of Deregistration Process

Assuming the tasks in **2.8.1 Deregistering Aircraft in this Jurisdiction** have been completed to the satisfaction of the IAA, deregistration can be completed by the IAA in a matter of days. If the co-operation of the lessee is not forthcoming, this will result in the deregistration of the aircraft being delayed until such point as the lessor has possession and has completed the required deregistration tasks. Where an IDERA is invoked by an "authorised party" with respect to the deregistration and export of an aircraft, the IAA may not make the deregistration conditional on actions within the control of the lessee, such as returning the original certificate of registration or airworthiness, or changing the aircraft's transponder codes, etc, as this would frustrate the provisions of the Cape Town Convention.

## 2.8.5 Aviation Authority's Assurances

Interactions with the IAA usually occur prior to the deregistration of the aircraft, and documentation can be pre-positioned with the IAA to the fullest extent possible. See **2.8.1 Deregistering Aircraft in this Jurisdiction**.

## 2.8.6 Costs, Fees and Taxes Relating to Deregistration

Where an Export Certificate of Airworthiness is required, the applicant should submit the prescribed fee, which is governed by Irish legislation (IAA (Fees) Order, 2015) and calculated by reference to the weight of the aircraft. The rates charged can be found under the registration

fees section of the IAA website at [www.iaa.ie/commercial-aviation/registration-fees-1](http://www.iaa.ie/commercial-aviation/registration-fees-1).

## 2.8.7 Deregistration Power of Attorney

The IAA will not record a deregistration power of attorney (DPOA). The filing and recording of an IDERA has largely replaced transaction-specific DPOA where the aircraft is registered in Ireland. A DPOA does not need to be translated, certified, notarised, legalised or lodged in advance.

## 2.8.8 Documents Required to Enforce Deregistration Power of Attorney

See **2.8.7 Deregistration Power of Attorney**.

## 2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A DPOA does not have to be governed by the laws of Ireland.

## 2.8.10 Revocation of a Deregistration Power of Attorney

If the DPOA is expressed to be irrevocable and granted to secure an obligation, the grantor should not in practice be able to revoke it until the secured obligations have been discharged.

## 2.8.11 Owner's/Lessor's Consent

See **2.8.1 Deregistering Aircraft in this Jurisdiction**, noting that lessee consent is not required.

Where the owner is not the registered owner of the aircraft or where there is a mortgagee, when negotiating the lease, a requirement should be included that an IDERA should be executed by the entity listed as the registered owner with the IAA. As long as the IDERA is in effect, the "authorised party" can request the IAA to deregister the aircraft pursuant to the provisions of Article 15 of the Consolidated Text. Provision should also be made for the payment of a "security deposit" by the lessee to cover any fees,

costs or expenses associated with a breach of the lease agreement by the lessee.

The aircraft does not need to be located in Ireland at the time of deregistration and/or export. To take an aircraft outside Ireland, an Export Certificate of Airworthiness in respect of Aircraft may be required from the IAA.

#### 2.8.12 Aircraft Export Permits/Licences

See **2.8.1 Deregistering Aircraft in this Jurisdiction** and **2.8.6 Costs, Fees and Taxes Relating to Deregistration**, noting that an export permit/licence is not issued by the IAA.

#### 2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

See **2.8.6 Costs, Fees and Taxes Relating to Deregistration**. The 0% rate of VAT applies to the supply of an aircraft transported directly by or on behalf of the seller to a destination outside the EU and to the supply of an aircraft dispatched or transported directly outside the EU by or on behalf of the purchaser where that purchaser is established outside Ireland.

#### 2.8.14 Practical Issues Related to Deregistration of Aircraft

See **2.8.1 Deregistering Aircraft in this Jurisdiction**.

## 2.9 Insolvency Proceedings

### 2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

The governing piece of legislation in Ireland applicable to corporate restructurings and insolvencies is the Companies Act 2014 (the Companies Act).

### 2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings,

### Reorganisations, Insolvencies and Receivership

The principal procedures set out in the Companies Act are examinership, small companies administrative rescue process (both corporate rescue and restructuring procedures), liquidation (winding-up of companies) and receivership (security enforcement). There are two further restructuring procedures available under the Companies Act: a Part 9 Scheme of Arrangement (identical in all material ways to the UK Part 26 Scheme of Arrangement) and a Part 11 Scheme of Arrangement, which is available to companies that are being or are about to be wound up. All of these have been used on a pre-pack basis to bring about a pre-determined outcome.

#### Examinership

Examinership is a statutory preventive (debtor-in-possession) restructuring tool for the rescue of a company or group of companies. It usually comprises three main components, namely:

- new investment;
- a cross-class cram-down;
- a legal moratorium preventing enforcement action being taken during the period of examinership.

The criteria to enter into examinership are three-fold:

- the company is, or is likely to become insolvent;
- no step has been taken to wind up the company; and
- there is a reasonable prospect of survival of the whole or part of the business of the company as a going concern.

It is necessary to furnish a detailed report prepared by an independent expert on any application for the appointment of an insolvency practitioner. This examiner will set out, amongst other

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things, a statement of opinion by that expert that the company has a reasonable prospect of survival.

## Part 9 Scheme of Arrangement

A scheme of arrangement is provided for under Part 9 of the Irish Companies Act 2014. It is a court-approved arrangement between a company and its shareholders or its creditors, or both. It can be used to effect a solvent reorganisation of a company or group structure as well as to effect insolvent restructurings. A Part 9 scheme is not an insolvency proceeding under the EU Recast Insolvency Regulation. It is open to Irish and non-Irish companies deemed to have a sufficient connection to Ireland.

For a scheme of arrangement to be binding, the following criteria must be met:

- the proposed scheme must be approved by majority in number representing at least 75% in value of the creditors or class of creditors or members (or both, as the case may be) present and voting at the scheme meeting — in other words, a “Special Majority”;
- appropriate notice of the scheme meeting(s) must be given; and
- the High Court must sanction the scheme of arrangement.

## Part 11 Scheme of Arrangement

Where a company is being wound up or about to be wound up, and enters into an arrangement with its creditors, then, subject to the right of appeal of those creditors, it is binding on the company if sanctioned by special resolution and binding on the creditors if approved by three-quarters in number and value of the creditors.

A right to appeal exists for 21 days from the date of completion of the arrangements, allowing creditors to appeal against it and allowing

courts, if it is just to do so, to amend, vary or confirm the arrangement.

In addition to there being no court sanction process, a Part 11 scheme has the additional benefit of having no requirement to allocate the creditors into different classes.

Neither a Part 9 nor a Part 11 Scheme of Arrangement is considered an insolvency proceeding for the purposes of the EU Recast Insolvency Regulation.

## Liquidations

There are three distinct types of statutory liquidations in Ireland:

- members voluntary liquidation (MVL);
- creditors voluntary liquidation (CVL); and
- court liquidations (OL).

The MVL is used for solvent liquidations, whereas the CVL and OL are used for insolvent liquidations.

### MVL

An MVL is commenced by using the Irish company law summary approval process (SAP) and entails the directors executing a declaration of solvency to the effect that the company will be able to pay all its debts within 12 months of the commencement of the liquidation. As part of the SAP process to appoint a liquidator, the directors will prepare a statement of assets and liabilities of the company, which is subject to independent verification by accountants. Once a liquidator is appointed, they have the primary duty of administering and distributing the property of the company.

### CVL

A CVL is commenced by the directors resolving to recommend to the members that, as the company cannot pay its debts as they fall due,

the company should be placed in liquidation. The members then execute a resolution to this effect. On the same day or the next day as the passing of the resolution, a meeting of the creditors of the company must be held, which allows the creditors to nominate an alternative liquidator and to ask questions of the directors as to the reasons for the company's insolvency. To address the logistical difficulties caused by the COVID-19 pandemic, legislation was passed to allow for the holding of virtual creditors meetings.

## OL

Where commenced by a creditor, the first step is usually to deliver a statutory demand (for a liquidated amount in excess of EUR10,000). If this demand is not met within 21 days, a company is deemed unable to pay its debts. A petition may then be presented to the court for the winding-up of the company.

In all three cases, a liquidator is appointed to the company and has the primary duty of administering and distributing the property of the company.

## Receiverships

The mechanics of enforcement of a secured claim will depend upon the nature of the security package.

The relevant security documentation will normally allow the secured creditor as security-holder on the occurrence of an event of default in the underlying loan (or upon demand where the loan is a demand facility) to appoint a receiver to realise the security.

The receiver's primary duty is to take reasonable care to obtain the best price reasonably obtainable for the secured asset at the time of sale.

Receivership is technically not an insolvency process and is not defined as such for the purposes of the EU Recast Insolvency Regulation.

## Small Companies Administrative Rescue Process

The Companies (Rescue Process for Small and Micro Companies) Act 2021 inserts a new Part 10A into the Companies Act 2014 to provide for an administrative rescue process for small and micro companies, called the Small Companies Administrative Rescue Process.

## 2.9.3 Co-ordination, Recognition or Relief in Connection With Overseas Proceedings

As Ireland is a member state of the EU, Irish insolvency proceedings are capable of automatic recognition throughout other EU member states (with the exception of Denmark), provided the requirements in the EU Recast Insolvency Regulation are satisfied. As such, the opening of insolvency proceedings in Ireland affords a debtor entity extensive recognition throughout the EU.

Ireland is not currently a signatory to the UNCITRAL Model Law on Insolvency. As such, the recognition of Irish insolvency proceedings in non-EU jurisdictions will be determined by local recognition laws. While each case will be dependent upon its individual circumstances and local laws, Irish insolvency proceedings have been recognised in the US under Chapter 15 of the US Bankruptcy Code.

## Examinership

Examinership is a specified procedure under the EU Recast Insolvency Regulation. Accordingly, the appointment of an examiner and any proposals under an examinership scheme of arrangement confirmed by the Irish court are, subject to certain limited exceptions, automatically recognised and enforceable throughout the EU. This is subject to the condition that a company applica-

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tion for examinership can satisfy the Irish court that its Centre Of Main Interests (COMI) within the meaning of the EU Recast Insolvency Regulation is in Ireland. It is also now increasingly common in cross-border cases to get recognition of the order sanctioning the examinership recognised in the US under Chapter 15 of the US Bankruptcy Code.

## Schemes of Arrangement

By contrast with examinership, a company is only required to demonstrate a sufficient connection to Ireland to avail itself of a Part 9 Scheme of Arrangement. It has recently been confirmed by the Irish courts that an order sanctioning a Part 9 Scheme is a court order for the purposes of the Recast Brussels I Regulation and will be automatically recognised throughout the EU.

## Liquidations

Liquidations (both OL and CVL) are specified insolvency proceedings under the EU Recast Insolvency Regulation.

## Recognition of Foreign Insolvency Proceedings and Co-ordination

As the EU Recast Insolvency Regulation has effect in Ireland, insolvency proceedings commenced in other EU member states will be automatically recognised in Ireland. In respect of non-EU countries, the insolvency office-holder will be required to apply to the Irish High Court for such recognition under general principles of comity. Ireland is not currently a signatory to the UNCITRAL Model Law on Insolvency.

There is no formal process set down as regards the co-ordination of foreign proceedings in Ireland. However, Irish courts have shown a willingness to approve such protocols on a case-by-case basis. The EU Recast Insolvency Regulation provides, at Articles 41–43, regulations in respect of co-operation across the EU member states.

Foreign creditors are entitled to claim in an Irish insolvency process in the same manner as Irish creditors.

## 2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

The liquidation of an Irish-incorporated lessee would not void or terminate the IDERA and usually lead to an event of default under the relevant lease agreement, pursuant to which the lessor/mortgagee could enforce its rights.

An Irish law-governed power of attorney may, in limited circumstances, be revoked by the winding-up of the donor company. However, under Section 20 of the Powers of Attorney Act, 1996, a power of attorney will not be revoked by the winding-up or dissolution of the donor (except with the consent of the donee) if it is expressed to be irrevocable and given to secure either a proprietary interest of the donee or the performance of an obligation owed to the donee, as long as the donee has that interest or the obligation remains undischarged.

## 2.9.5 Other Effects of a Lessee's Insolvency

The following transactions by a company that subsequently becomes insolvent are capable of being set aside.

## Unfair Preference

Section 604 of the Companies Act, 2014 (the Act) seeks to prevent companies from granting a preference to one creditor over another. A preference arises when a company enters into a transaction that puts a creditor in a better position than that creditor would have been in if the transaction had not taken place. Preferences that took place within six months before the company's liquidation can be set aside. This time limit is extended to two years where the disposal was in favour of a connected party. A connected party is any person who, at the time of the transaction, was:

- a director or shadow director of the company;
- a director's spouse, parent, sibling or child;
- a related company (this is very widely defined); or
- any trustee of, or surety or guarantor for, the debt due to any person referred to above.

### Improper Transfer

If a disposition by a company has the effect of perpetrating a fraud on the company, its creditors or members, the High Court can order the return of the property to the liquidator, examiner or receiver on any terms or conditions it deems fit (Section 608 of the Act).

### Examinership

The effect of the appointment of an examiner is that the rights of the creditors, including secured creditors, are frozen for the period of the examinership, which is up to 70 days, extendable to 150 days, and also subject to the possibility of a further extension where the court requires further time to consider the examiner's final report, which is usually only relevant where the examinership is complex. During this period, the lessor would not be able to recover the aircraft without the consent of the examiner.

### Disclaimer of Onerous Contracts by the Liquidator

Regarding whether the aircraft can be deemed part of the lessee's property in a liquidation of the lessee, the general position in Ireland is that a liquidator of a company cannot obtain better title to an asset than that of the company prior to liquidation. Thus, if the aircraft is held as a lease, the liquidator will not be able to treat the aircraft as being owned by the lessee company.

Section 615 of the Act confers power on a liquidator, with leave of the court, at any time within 12 months of the commencement of the liquidation, to disclaim any property of the company being wound up which consists of, among other

things, unprofitable contracts or any property that is unsellable or not readily saleable because it binds the possessor to the performance of any onerous act or the payment of money.

### Repudiation of Certain Contracts by the Company in Examinership

Under Section 537 of the Act, where proposals for a compromise or scheme of arrangement are to be formulated in relation to a company, the company may, subject to the approval of the relevant court, affirm or repudiate any contract under which some element of performance other than payment remains to be rendered both by the company and by the other contracting party or parties. While the Irish courts have not specifically held that an aircraft lease would constitute a contract under which some element of performance other than payment remains to be rendered by the company and the other contracting party or parties, the Irish courts have held that an occupational lease of real property does constitute such a contract and made repudiation orders in respect of leases.

Any person who suffers loss or damage as a result of such a repudiation order stands as an unsecured creditor for the amount of that loss or damage. Where the relevant court approves the affirmation or repudiation of a contract under this section, in giving such approval, it may make any such orders as it deems fit for the purposes of giving full effect to its approval, including orders as to notice to, or declaring the rights of, any party affected by that affirmation or repudiation.

### Priority of Claims

Whether the liquidator could impose the rights of any other creditors in priority to the lessor, to the extent that the lessor is due any outstanding payments under the lease, the lessor will rank as an unsecured creditor in the liquidation. Irish insolvency law operates a waterfall of payments, with certain classes of preferential creditors

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ranking ahead of the unsecured creditor class. The likelihood of the unsecured creditor classes receiving full payment or a substantial payment in respect of the outstanding amount due and owing to each unsecured creditor varies on a case-by-case basis and is dependent upon the assets in the company and the liquidator's ability to realise those assets.

### **2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent**

See **2.9.5 Other Effects of a Lessee's Insolvency**.

### **2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings**

See **2.9.5 Other Effects of a Lessee's Insolvency re examinership**.

There is a moratorium on the commencement or continuation of legal proceedings against a company in liquidation without first obtaining the consent of the Irish High Court to such proceedings.

### **2.9.8 Liquidation of Domestic Lessees Examinership**

See **2.9.5 Other Effects of a Lessee's Insolvency** in respect of examinership. If the proposals are not confirmed by the court, it can then make such order as it deems fit, which is most likely to be an order for the winding-up of the company.

## **Liquidation**

There are three types of winding-up.

### *Members' voluntary winding-up*

For a members' voluntary winding-up, the company must be solvent (so it is not strictly an insolvency procedure). The members of the company must resolve by 75% majority to have the company wound up. The directors of the company

must make a statutory declaration that they have made a full investigation into the affairs of the company and, having done so, are of the opinion that the company can pay its debts in full within 12 months from the commencement of the winding-up. Failure to do so may leave the directors open to personal liability in respect of the debts owed.

### *Creditors' voluntary winding-up*

Where a company is insolvent, the directors may convene a meeting of the members with a view to the members passing a resolution to wind up the company and appoint a liquidator. A meeting must also be convened of all creditors of the company to inform the creditors of the winding-up resolution passed by the shareholders. Once appointed, the liquidator realises all of the company's assets and distributes the proceeds to the creditors.

### *Compulsory winding-up*

The High Court has the power to order the winding-up of a company and appoint a liquidator. A creditor who is not paid monies due to it may present a petition to the High Court that the company is insolvent and unable to pay its debts as they fall due. The insolvency procedure in a compulsory winding-up differs in that the appointment of a liquidator arises not from meetings of members and creditors but by order of the High Court. It is the obligation of the liquidator to take control of all the company's assets, to realise the assets so as to discharge the company's liability and pay the company's creditors.

### **2.9.9 Ipso Facto Defaults**

In an examinership, a creditor cannot withhold performance of, terminate, accelerate or in any other way modify an executory contract between a creditor and the company solely by reason of the making of an application by petition to appoint an examiner, the appointment of an interim examiner or an examiner to the com-

pany or the appointment of an examiner to a related company. An executory contract is one between a company and one or more creditors under which the parties still have obligations to perform at the commencement of the protection period.

### 2.9.10 Impact of Domestic Lessees' Winding-Up

See **2.9.5 Other Effects of a Lessee's Insolvency**.

The winding-up of the lessee or another insolvency event would usually constitute an event of default under the lease agreement, which would entitle the lessor to enforce its rights with regard to the return of the aircraft, dealing with the security deposit, maintenance reserves, etc. Where an examiner is appointed to the company, the lessor would not be able to repossess the aircraft without the consent of the examiner.

In a liquidation, the aircraft may not be attached by unsecured creditors of the lessee. The lessee only has a right to possession of the aircraft pursuant to the lease agreement, and its rights are subject to the proprietary and security interests of the lessor and its secured creditors.

As noted in **2.9.5 Other Effects of a Lessee's Insolvency**, if any outstanding lease rental payments were due to the lessor when the lessee was being wound up, the lessor would claim as an unsecured creditor of the lessee and would rank behind the preferential creditors of an insolvent lessee.

## 2.10 Cape Town Convention and Others

### 2.10.1 Conventions in Force

The Cape Town Convention is in force in Ireland. The International Interests in Mobile Equipment (Cape Town Convention) Act, 2005 is the domestic legislation that enacted the Cape Town Con-

vention. Authorised entry point (AEP) codes are not necessary.

### 2.10.2 Declarations Made Concerning Conventions

In accordance with Article 39 of the Cape Town Convention, Ireland has declared that:

- when, under a law of the state, a non-consensual right or interest (other than a right or interest to which Article 40 of the Cape Town Convention applies) has priority over an interest in an object equivalent to that of the holder of a registered international interest, that right or interest has priority over a registered international interest, whether in or outside insolvency proceedings; and
- if the state or any state entity, or any intergovernmental organisation of which the state or any such entity is a member, or any private provider has provided a public service, nothing in the Cape Town Convention affects the right of the state, entity, organisation or provider to arrest or detain, in accordance with the laws of the state, an object for the payment of amounts owed to the state or any such entity, organisation or provider for those services in respect of that object or another object.

In accordance with sub-article 2 of Article 54 of the Cape Town Convention, it is declared that a creditor who wishes to exercise a remedy that is available to the creditor under a provision of the Cape Town Convention is not required to make an application to the High Court of Ireland for leave to exercise that remedy unless the provision expressly requires the creditor to make such an application.

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### 2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

In accordance with Article XXX of the Aircraft Protocol, it is declared that Articles VIII, XII and XIII, and sub-article 3 of Article X of that protocol apply to and in respect of Ireland.

The practical steps for submitting an IDERA are as follows:

- the IDERA must be in the form specified in the Cape Town Act and must be signed by the aircraft's registered owner in wet ink. Two signed copies of the IDERA must be submitted, one of which is retained by the IAA, while the other is returned to the registered owner;
- application to lodge the IDERA may be made by the registered owner, by submitting the fully completed and signed form in duplicate to the IAA; and
- the IAA will process the applications as required by law.

It is hoped that IDERAs that meet all the requirements, including using the correct format, will be returned to the registered owner duly annotated within ten working days.

### 2.10.4 Enforcement of Conventions

Since the International Registry's establishment in Ireland, the Irish courts have had exclusive jurisdiction to deal with certain disputes under the Cape Town Convention, in particular those seeking an amendment to or deletion of entries on the IR where the registrant refuses to do so. The Irish courts have shown a willingness, in appropriate circumstances, to make orders directed to the IR to delete invalid or improper registrations. See **2.6.2 Lessor Taking Possession of the Aircraft**.

### 2.10.5 Other Conventions

Ireland is a signatory to the Geneva Convention but has not yet ratified it. It is not a signatory to the Rome Convention.

## 3. AIRCRAFT DEBT FINANCE

### 3.1 Structuring

#### 3.1.1 Restrictions on Lending and Borrowing

As far as is known, there are no restrictions on foreign lenders financing an aircraft locally or on borrowers using the loan proceeds.

#### 3.1.2 Effect of Exchange Controls or Government Consents

See **2.1.4 Exchange Controls**.

#### 3.1.3 Granting of Security to Foreign Lenders

No restrictions on granting security to foreign lenders exist.

#### 3.1.4 Downstream, Upstream and Cross-Stream Guarantees

These are permissible under Irish law, provided the company granting those guarantees is permitted under its constitution.

It is important to note that the directors of Irish companies have a fiduciary duty to act in the best interests of the company and, in doing so, must have regard for the interests of the shareholders collectively.

Section 82(2) of the Act sets out the prohibition on an Irish company providing financial assistance for the acquisition of its own shares. Noting that the term "acquisition" in relation to shares is defined as meaning "by subscription, purchase, exchange or otherwise", the acquisition of shares frequently occurs within Irish aircraft acquisition and financing structures. The

prohibition on financial assistance applies irrespective of whether the financial assistance is given directly or indirectly, with typical examples including the making of guarantees and the provision of security by a target company.

While a number of exceptions to the prohibition exist, including principal purpose, lawful incurrence of liability by a company and lending in the ordinary course of business, each transaction structure should be considered on a case-by-case basis. The principal exception to the prohibition is the SAP, or “whitewash” procedure, contained in Chapter 7 of part 4 of the Act. Activities that may otherwise amount to prohibited financial assistance, such as upstream guarantees, may be whitewashed or permitted if the procedure as set out in the Act is adhered to.

### 3.1.5 Lenders’ Share in Security Over Domestic SPVs

It is advisable for a lender to take share security over the domestic special-purpose vehicle that owns the financed aircraft.

A share pledge by way of equitable charge and/or mortgage is the most typical type of pledge and is granted by the deposit of the share certificates and signed undated stock transfer forms with the lender. The charging document will contain provisions that any such deposit is made by way of security and the terms on which that security may be enforced.

### 3.1.6 Negative Pledges

Negative pledge provisions are typically included in share security documents in Ireland; a negative pledge cannot be specifically registered or noted with the Companies Registration Office (CRO).

### 3.1.7 Intercreditor Arrangements

No material restrictions or requirements imposed on intercreditor agreements exist under Irish law.

Intercreditor agreements are typically governed by English or New York law.

### 3.1.8 Syndicated Loans

Agency is a recognised concept under Irish law.

### 3.1.9 Debt Subordination

Subject to general qualifications regarding enforceability, any method of subordination permitted by the transaction documents governed by English or New York law would be permissible and recognised under Irish law.

In the event of the insolvency of the borrower company, leading to examinership or company voluntary arrangements, the debt owed to subordinated lenders may be written down, particularly if it is unsecured.

### 3.1.10 Transfer/Assignment of Debts Under Foreign Laws

Subject to general qualifications as to enforceability, the courts of Ireland would recognise as effective a New York or English law-governed assignment that is effective under that law.

See **2.6.5 Domestic Courts’ Approach to Foreign Laws and Judgments.**

### 3.1.11 Usury/Interest Limitation Laws

Similar to all other EU member states, Ireland was required to implement the interest limitation rule (ILR) contained in the EU’s Anti-Tax Avoidance Directive (ATAD). Subject to certain exemptions/exclusions, these rules apply to companies within the charge to corporation tax in Ireland in respect of accounting periods commencing on or after 1 January 2022. The ILR is a fixed ratio rule that seeks to link a taxpayer’s allowable net interest deductions (exceeding borrowing costs, ie, deductible interest expense/borrowing costs in excess of taxable interest/interest equivalent revenues) directly to its level of earnings by lim-

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iting the net deduction to 30% of tax-adjusted EBITDA.

While 30% is the default rate, a taxpayer may, in certain circumstances, deduct an amount in excess of 30% of tax-adjusted EBITDA under the “group ratio” rule.

All of the exemptions/exclusions from the ILR as contemplated under the ATAD have been included in the ILR with the exception of the exclusion for “financial undertakings”.

Irish based lessor groups with any group or third-party debt should assess how these rules may impact their structures. The Irish tax legislation also provides that interest payable on a loan or other security in excess of a reasonable commercial return will generally be treated as a distribution and will accordingly be non-deductible.

## 3.2 Security

### 3.2.1 Typical Forms of Security and Recourse

Aviation finance transactions are typically governed by English or New York law. If the AOE is an Irish-registered company, the typical forms of Irish law-governed security that the AOE or its parent would be a party to include a charge over the shares in the AOE, an aircraft mortgage, an assignment of the lease and a charge over the accounts into which rent receivables, maintenance reserve and security deposits are paid, assuming the accounts are in Ireland.

### 3.2.2 Types of Security Not Available

As far as is known, there are no restrictions on types of security under Irish law, although it should be noted that the registration and perfection requirements may differ – see **3.2.16 Form and Perfection of Security over Bank Accounts**.

Any restrictions would arise under the governing law of the security documents (typically English or New York law) or the law of the jurisdiction in which that collateral is located.

### 3.2.3 Trust/Trustee Concepts

The concept of trust and the role of a security trustee are recognised.

### 3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

A borrower can assign its rights to the aircraft or under an aircraft lease (including in relation to insurances) to a security trustee, pursuant to a security assignment or a mortgage.

### 3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

The common-law position is that the burden of a contract cannot be assigned without the consent of the other party to the contract, in which event that consent will give rise to a novation.

### 3.2.6 Choice of Foreign Law

A security assignment or guarantee can be governed by English or New York law and is not required to be governed by Irish law to be enforceable, provided that the law of the jurisdiction governing the security assignment or guarantee recognises a valid security assignment. See **2.6.5 Domestic Courts’ Approach to Foreign Laws and Judgments**.

### 3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

No statutory requirements relating to the terms of a security assignment exist under Irish law. On aircraft finance transactions, the security assignment is typically governed by New York or English law. A common form of security assignment provided by an Irish-incorporated company would contain the following:

- parties’ clause;

- recitals;
- full particulars of the assigned property;
- a covenant to pay;
- charging provisions;
- covenants, normally in respect of:
  - (a) carrying on the business in a proper and efficient manner;
  - (b) observing all pertinent regulations;
  - (c) insurance; and
  - (d) rent;
- further assurances;
- a power of attorney to enable the assignee to perfect its interest;
- enforcement of security – circumstances in which the assignee can obtain possession and assignee’s rights in possession. Provision will be made for the appointment of a receiver;
- notice provisions; and
- governing law and jurisdiction clause.

Under Irish law (and typically under the governing law of the security assignment), the assignor should provide notice of the security assignment to the other party to the underlying contract being assigned by way of security. An acknowledgement of such a notice should be requested from the counterparty, although this is not a perfection requirement.

If the assignor is a company, a Form C1 containing particulars of the security assignment executed on behalf of the assignor and assignee should be filed in the CRO within 21 days of the date of its creation.

Failure to register within 21 days of the creation of the security assignment by a company renders it void against the liquidator and any creditor of the company.

### 3.2.8 Domestic Law Security Instruments

No additional domestic law security instruments are needed. With respect to IR filings, where

the security assignment creates a registrable assignment of associated rights under the Cape Town Convention, such an assignment may be recorded on the IR established under the Cape Town Convention.

No additional domestic law security instruments or filings are required to make Cape Town filings.

Registration of a Form C1 with the CRO, as mentioned in **3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments**, costs EUR40.

### 3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

An English or New York law-governed security assignment or a domestic law security instrument granted by an Irish-registered company can be registered domestically, as per the procedure outlined in **3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments**.

### 3.2.10 Transfer of Security Interests Over Aircraft/Engines

It is possible to transfer security interests over an aircraft by way of assignment of contractual rights or novation. In the event of a transfer of security interests, there are a number of considerations that are not specific to Irish law, such as whether consent from the security provider is required, the existence of covenants to pay the debt in favour of the transferor, and cross-collateralisation of the debt.

In the assignment of security interests previously registered with the CRO, a Form C17 must be filed noting the change of charge-holder. If the security interest is novated, a new security interest is deemed to be created and, as such, novation may require registration, depending on the type of interest.

*Contributed by: Matt Hedigan, Killian McSharry, Caitlin Friel, Padhraic Mulpeter and Eimear Burbridge, Walkers*

A transfer of security interest can be registered with and, therefore, recognised by the IR.

### 3.2.11 Effect of Changes in the Identity of Secured Parties

If the identity of the secured parties under a security assignment changes after its execution, the security interests are not jeopardised, provided the security assignment is in favour of a security trustee, and the security assignment (or related finance documents) contemplates that the secured parties may change from time to time.

### 3.2.12 “Parallel Debt” Structures

These are not typically used in Ireland.

### 3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment would not be deemed to be resident, domiciled or subject to any taxes as a result of its being a party to or its enforcement of such a security assignment, provided that the secured party is not otherwise resident in Ireland and does not have a permanent establishment or other taxable presence in Ireland, or, if the secured party is so established in Ireland, provided it does not act through a branch or agency in Ireland or other taxable presence in Ireland in respect of its acts.

### 3.2.14 Perfection of Domestic Law Mortgages

As per **3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments**, if the mortgagor is an Irish-incorporated company, a Form C1 containing particulars of the mortgage executed on behalf of both mortgagor and mortgagee should be filed in the CRO.

Assuming that the mortgage satisfies the requirements for classification as an “international interest” pursuant to the Cape Town Convention, IR filings can be made in respect of such mortgage.

### 3.2.15 Differences Between Security Over Aircraft and Spare Engines

There is no difference in the forms of security or perfection taken over an aircraft or spare engines.

### 3.2.16 Form and Perfection of Security Over Bank Accounts

Charges are typically taken over Irish rent accounts, maintenance reserves accounts, or accounts into which supplemental rent, security deposits, insurance and sales proceeds are paid. To perfect the charge, the account bank must be notified of the charge. An acknowledgement of the notice would typically be obtained from the account bank, but this is not necessary for its perfection.

The Act exempts charges over cash, funds in a bank account or securities from CRO registration.

## 3.3 Liens

### 3.3.1 Third-Party Liens

See **2.4.5 Attachment by Creditors** and **2.4.6 Priority of Third Parties’ Rights**.

### 3.3.2 Timeframe to Discharge a Lien or Mortgage

A security interest created by a company is released or discharged upon the execution and dating of the relevant deed of release or release agreement, and the release or discharge becomes effective at this point. The discharge is effected with the CRO by submitting a Form C6 to the CRO, verifying the satisfaction of the secured debt. The filing of a Form C6 in respect of such a release or discharge will appear on Irish company searches within a number of weeks of filing the Form C6 (this is an administrative matter for the CRO). There is no time limit on when a Form C6 should be filed in respect of a release

or discharge of a mortgage, and it does not have an impact on the effectiveness of the release.

### 3.3.3 Register of Mortgages and Charges

The creation of a mortgage or charge over an aircraft by an Irish AOE must be registered in the CRO in accordance with Section 409 of the Act, as noted in **3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments**. Since April 2022 the IAA has implemented a new system for the notification of mortgages, charges and liens over certain categories of aircraft registered on the IAA's register of aircraft. It should be noted that the new registration regime implemented by the IAA does not have any bearing on the perfection of the security created under the relevant security document.

### 3.3.4 Statutory Rights of Detention or Non-consensual Preferential Liens

See **2.4.5 Attachment by Creditors** and **2.4.6 Priority of Third Parties' Rights**.

### 3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser of an aircraft could search the IR and CRO to verify that an aircraft is free of encumbrances.

## 3.4 Enforcement

### 3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

Enforcement will depend on the terms of each such instrument.

### 3.4.2 Security Trustees' Enforcement of Their Rights

Subject to certain qualifications regarding recognition of the governing law of the security assignment by the Irish courts and assuming all other necessary factors to bring proceedings against the lessee are in place (eg, cause of action, etc), an acknowledgement and notice of assignment

would assist the security trustee in pursuing any action or claim against the lessee that may arise pursuant to a security assignment.

### 3.4.3 Application of Foreign Laws

See **2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments**.

### 3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

See **2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments**.

### 3.4.5 Secured Parties' Right to Take Possession of Aircraft

Enforcement will be determined by the provisions of the relevant security agreement.

### 3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

Domestic Irish courts are competent to decide enforcement actions. See **2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards**.

### 3.4.7 Summary Judgments or Other Relief

See **2.6.4 Summary Judgment or Other Relief**.

### 3.4.8 Judgments in Foreign Currencies

A secured party under a security agreement/aircraft mortgage can obtain a judgment in a foreign currency.

### 3.4.9 Taxes/Fees Payable

A secured party is not required to pay taxes or fees in connection with the enforcement of a security agreement/aircraft mortgage.

### 3.4.10 Other Relevant Issues

There are none at present.

*Contributed by: Matt Hedigan, Killian McSharry, Caitlín Friel, Padhraic Mulpeter and Eimear Burbridge, Walkers*

## 4. OTHER ISSUES OF NOTE

### 4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are none at present.

### 4.2 Current Legislative Proposals

#### EU Anti-Tax Avoidance Directive

Similarly to all EU member states, Ireland is required to implement a number of corporation tax measures as a result of the EU ATAD – the EU’s response to the OECD’s base erosion and profit-shifting (BEPS) project of corporation tax reform. Of the measures proposed in the ATAD, the “interest limitation rule” (BEPS Action Item 4) and the “hybrid mismatch rules” (BEPS Action Item 2) deduct interest in certain circumstances.

#### Hybrid Mismatch Rules

The Irish Finance Act 2019 (effective since 1 January 2020) contained legislation implementing the hybrid mismatch rules. The rules seek to counteract no tax outcomes from payments made on or after 1 January 2020 under cross-border arrangements between “associated enterprises”, which result in deduction without inclusion or double-deduction outcomes.

Irish leasing platforms financed by EU or treaty-resident investors should be unaffected by the hybrid mismatch provisions on the basis that such investors should be taxed on their returns in their home jurisdiction. Similarly, interest payments made to non-tax jurisdictions or tax-exempt entities may also be unaffected by the hybrid mismatch provisions on the basis that the non-inclusion is not a result of hybridity.

Under the ATAD, Ireland was also required to introduce rules to neutralise the effects of reverse-hybrid mismatches by 31 December 2021. The rules would apply to “reverse-hybrid entities”, entities treated as transparent under

the laws of the jurisdiction where they are established but as opaque under the laws of the jurisdiction of their investor(s). A deductible payment made to a reverse-hybrid entity can give rise to a mismatch outcome where that payment is not included in the jurisdiction where the payee is established or in the jurisdiction of any investor in that payee. The rule neutralises such mismatch outcomes by denying a deduction on a payment to a reverse-hybrid entity.

#### Interest-Limitation Rule

As outlined in **3.1.1 Restrictions on Lending and Borrowing**, subject to certain exemptions, the ILRT operates to limit deductible interest expenses in a tax period to up to 30% of EBITDA. Deductible net interest expenses (referred to as exceeding borrowing costs) are restricted to excess borrowing costs over taxable interest revenues and other economically equivalent taxable revenues according to national law.

The rule will be particularly relevant for leveraged leasing companies in Ireland, which have a substantial annual interest expense. However, the rules may not impact on many financing transactions where the net excessive borrowing costs of a company (or interest group) do not exceed the EUR3m annual de minimis amount.

The key question from a leasing perspective is how the ILR applies to a business with the nature of a financing business but whose income has the legal form of operating lease rentals.

Importantly from an aviation finance perspective, the concept of “interest equivalent” includes both:

- the finance element of finance lease payments/income; and
- a portion of operating lease income for certain lessors carrying on a trade of leasing.

Given the complexity of the rules, each structure should be assessed on a case-by-case basis regarding the potential impact of the rules.

The Irish Revenue Commissioners are expected to release guidance on the application of the rules sometime in Q3 2022.

### **Multilateral Instrument**

Ireland was also among the first group of countries to sign the BEPS Multilateral Instrument (MLI) in June 2017, which saw the majority of Ireland's 76 double tax treaties (73 in effect) updated to be BEPS-compliant. The MLI seeks to implement changes to double tax treaties on a multi-lateral basis to counteract treaty misuse that results in base erosion and profit-shifting. The MLI entered into force in Ireland on 1 May 2019. It took effect for Ireland's double tax treaties in respect of withholding tax on 1 January 2020. For all other taxes, the MLI came into effect on 1 November 2019 at the earliest; however, the date on which the MLI modifies Ireland's double tax treaties will depend on when a relevant treaty partner deposits its instrument of ratification with the OECD. Ireland is adopting a principal-purpose test (PPT) as an anti-avoidance measure to prevent treaty abuse. This test will operate to deny the benefit of the treaty if obtaining that benefit was one of the principal purposes of any arrangement or transaction unless it is established that granting that benefit would be in accordance with the object and purpose of the relevant tax-treaty provisions.

As many aircraft financing transactions rely on double-tax treaties to ensure there is no withholding tax on payment flows (eg, lease rentals and loan payments), parties will need to understand the impact of the changes to relevant double tax treaties, given the importance of tax-treaty relief. Structures that incorporate intermediate lessor entities to make use of a particular double tax treaty may be affected by the MLI.

The changes introduced by the MLI could result in more scrutiny where intermediate lessors rely on treaty protection to avoid withholding tax being imposed on lease rentals. The risk of withholding taxes under an aircraft lease is generally allocated to the lessee on the basis that withholding taxes are generally imposed by the jurisdiction of the payor. Under the MLI, a restriction on treaty benefits may also occur due to a lack of substance or commercial rationale for the lessor entity. Irish leasing platforms should not be affected by the provisions of the MLI on the basis that such platforms generally have significant substance and operations in Ireland.

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Irish and Jersey law advice on a broad range of aircraft finance transactions. The group has extensive experience in setting up and advising on leasing platforms and aviation funds, loyalty programme-backed financing, PDP financing, delivery financing, export credit financing, AFIC financing, aircraft securitisations, non-US EETC structures, Islamic aircraft financing, and sale, purchase and leasing transactions for both commercial and private aircraft. The firm has one of the most experienced and accomplished dedicated aviation teams in the market.

## AUTHORS



**Matt Hedigan** is based in Walkers' Ireland office, where he is a partner in the asset finance group, specialising in all aspects of the financing and leasing of aviation assets. Matt advises

private equity investors, operating lessors, financial institutions and airlines on a wide range of tax-efficient leasing and financing structures, including platform establishments, warehouse financings, joint ventures and transportation business acquisitions disposals. In addition, Matt has a strong structured finance background with particular emphasis on cross-border debt capital markets transactions, including aircraft securitisations and loan portfolio financings, acquisitions and restructurings. He regularly advises on Irish and EU financial services and securities law, including the Prospectus Directive, EMIR, AIFMD, MiFID, Market Abuse and the Securitisation Regulation. Matt is a member of the Incorporated Law Society of Ireland and the Dublin Solicitors Bar Association.



**Killian McSharry** is based in Walkers' Ireland office, where he is a partner in the asset finance group. He advises banks, financial institutions, international aircraft operating

lessors, aircraft owners, financial arrangers and private equity groups on asset finance transactions. Killian has advised on the financing and leasing of both fixed-wing and rotary aircraft, including government-supported financings, secured lending, cross-border and operating leases, the purchase and sale of single aircraft and multi-aircraft portfolios, workouts and restructurings, debt finance and security matters, domestic and cross-border tax-driven leasing, pre-delivery financing, and sale and leaseback financing. He has experience on a wide range of cross-border banking and finance transactions, including bilateral and syndicated lending, leveraged and acquisition financings and restructurings. He is a member of the Incorporated Law Society of Ireland and the Dublin Solicitors Bar Association.

*Contributed by: Matt Hedigan, Killian McSharry, Caitlín Friel, Padhraic Mulpeter and Eimear Burbridge, Walkers*



**Caitlín Friel** is an Of Counsel in the Walkers asset finance group. She advises banks, financial institutions, international aircraft operating lessors, aircraft owners, financial arrangers and

private equity groups on asset finance transactions. Caitlín has advised on the financing and leasing of both fixed-wing and rotary aircraft including government-supported financings, secured lending, cross-border and operating leases, the purchase and sales of single aircraft and multi-aircraft portfolios, workouts and restructurings, debt finance and security matters, domestic and cross-border tax-driven leasing, pre-delivery financing, and sale and leaseback financing. She also has experience on a wide range of cross-border banking and finance transactions, including bilateral and syndicated lending, leveraged and acquisition financings and restructurings. Caitlín is a member of the Incorporated Law Society of Ireland.



**Padhraic Mulpeter** is based in the Walkers' Ireland office, where he is a Tax Consultant (partner equivalent) in the tax group. He recently joined Walkers from a leading domestic

law firm where he was a tax partner. Padhraic has over 13 years of experience providing tax advice to businesses operating in the financial services industry, having previously worked in the financial services tax department of a Big 4 accounting firm. He advises clients across a wide range of financial services sectors, including advice on securitisation and structured finance transactions, aviation leasing and financing transactions, and the establishment of investment management platforms. Padhraic has extensive experience advising clients on the tax aspects of aviation and asset financing. He is a member of the Irish Tax Institute and the Chartered Accountants of Ireland.



**Eimear Burbridge** is based in Walkers' Ireland office, where she is an Of Counsel in the tax group. She works with a broad range of national and international clients, advising on

a wide range of tax issues. She specialises in financial services, including investment funds, insurance, structured products and securitisation structures. Eimear also advises companies and investment funds on their Irish tax compliance obligations across a number of tax heads. She is a member of the Incorporated Law Society of Ireland, the Irish Tax Institute and the Dublin Solicitors Bar Association.

*Contributed by: Matt Hedigan, Killian McSharry, Caitlín Friel, Padhraic Mulpeter and Eimear Burbridge,  
Walkers*

## Walkers

The Exchange  
George's Dock  
IFSC  
Dublin 1  
Ireland

Tel: +00 353 1 470 6600  
Fax: +00 353 1 470 6601  
Email: [info@walkersglobal.com](mailto:info@walkersglobal.com)  
Web: [Walkersglobal.com](http://Walkersglobal.com)





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