

Legal 500

Country Comparative Guides 2024

United States

Aviation Finance & Leasing

Contributor

The Milbank logo, consisting of the word "Milbank" in a red serif font, is enclosed within a white rectangular box.

Milbank

Freyda Mechlowicz

Partner | fmechlowicz@milbank.com

Zachary Cronin

Special Counsel | zcronin@milbank.com

Steve Goff

Associate | sgoff@milbank.com

This country-specific Q&A provides an overview of aviation finance & leasing laws and regulations applicable in United States.

For a full list of jurisdictional Q&As visit legal500.com/guides

A decorative graphic in the bottom right corner of the page, featuring a series of concentric circular lines and radial lines that form a grid-like pattern, resembling a stylized compass or a technical drawing.

United States: Aviation Finance & Leasing

1. What international aviation conventions has your jurisdiction signed and/or ratified?

The US is a signatory and has ratified the following relevant aviation conventions and protocols thereto:

- Convention for the Unification of Certain Rules relating to International Carriage by Air, Warsaw Convention (1929); Protocol to Amend the Warsaw Convention of 1929, The Hague Protocol (1955); Montreal Protocol No. 4 (1975); and Convention for the Unification of certain Rules for International Carriage by Air, Montreal Convention (1999)
- Convention on International Civil Aviation, Chicago Convention (1944) and International Air Services Transit Agreement (1944)
- Convention on the International Recognition of Rights in Aircraft, Geneva Convention (1948)
- Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo Convention (1963)
- Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague Convention (1970)
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal Convention (1971) and Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal Supplementary Protocol (1988)
- Convention on International Interests in Mobile Equipment, Cape Town Convention (2001) and Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment, Cape Town Aircraft Protocol (2001)

2. If your jurisdiction has signed and ratified the Cape Town Convention: a. Which qualifying declarations (opt-in and opt-out) has your jurisdiction made under the Cape Town Convention? b. Does the Cape Town Convention

take priority over conflicting national law?

a. Which qualifying declarations (opt-in and opt-out) has your jurisdiction made under the Cape Town Convention:

The United States has made the following declarations under the Cape Town Convention and Aircraft Protocol thereto

- Article 39(1)(a) – (b) of the Cape Town Convention (*Rights having priority without registration*) – Regarding priority of non-consensual rights or interests having priority under United States law, and rights of certain governmental entities and organizations
- Article 54(2) of the Cape Town Convention (*Declarations regarding remedies*) – Permitting certain remedies to be exercised without leave of the court. Article XIX of the Aircraft Protocol (*Designated entry points*) – Designating the FAA as entry point
- Article XXX(1) of the Aircraft Protocol (*Declarations relating to certain provisions*) – Electing to apply Articles VIII, XII and XIII of the Protocol

b. Does the Cape Town Convention take priority over conflicting national law?

To the extent conflicts exist with state laws, the Cape Town Convention as implemented by its implementing act preempt those laws. Treaties that are either self-executing or that have been the subject of implementing legislation, as well as any other validly enacted federal laws, preempt state law wholly or in part. The Cape Town Convention Implementation Act was passed by the U.S. Congress, subject to the specified declarations, and signed into law in 2004. However, it should be noted that this will only apply where international interests are validly created under the Cape Town Convention. If the Cape Town Convention does not apply to a transaction, the validity of a security interest that is not an international interest under the Cape Town Convention will continue to be determined in accordance with other applicable U.S. law including, if applicable, the Geneva Convention, the Transportation Code, and applicable state law.

3. Will a court uphold the choice of a foreign governing law in respect of the following contracts and if so, please also state any conditions or formality requirements to this recognition a. Lease and b. Security document (for example, mortgage)?

A court's determination regarding the parties' selection of choice of law governing a lease or security agreement would be made in accordance with applicable state law. Where state law applies, our answers will address the treatment under New York law and application of law by New York courts unless otherwise stated. Under New York law, the parties to a lease or security agreement may elect for such lease or security agreement to be governed by the law of a foreign jurisdiction, including when one party is a domestic entity or the agreement involves an asset situated in the United States. New York courts routinely uphold such foreign law as the governing law when the chosen jurisdiction has a substantial relationship to the parties or their performance, and will generally uphold the submission to a foreign jurisdiction, subject to certain exceptions as further discussed below and in cases of preemption.

Under New York law, the factors effecting the validity of a governing law clause include, but are not limited to, (i) the sophistication of the parties, (ii) whether enforcement would offend principles of fundamental fairness or are contrary to public policy, and (iii) whether the governing law clause was reasonably communicated to the non-drafting party. New York courts may disregard the parties' choice of governing law when application of the law would be contrary to a fundamental policy of a jurisdiction that has a materially greater interest than the selected jurisdiction or if there is no reasonable basis for the parties' choice, such as when neither party nor the transaction has a substantial relationship to the selected jurisdiction.

4. Please confirm whether it is (i) customary and (ii) necessary to also take a local law mortgage and if so, why?

N/A

5. Are foreign judgments recognized and enforceable by courts of your jurisdiction and if so, please also state any conditions or formality requirements to this recognition (for example, do

you require a local court order confirming such recognition)?

Courts in the United States will in most cases recognize and enforce a final judgment of a foreign court or an arbitral award, even if it is not governed by treaty. Recognition and enforcement procedures are governed by state law. Some factors which might lead a New York court to not enforce a foreign money judgment include that (i) the foreign court procedures are incompatible with notice or other due process considerations, (ii) the foreign court was not impartial, or (iii) the cause of action resulting in the judgment is contrary to public policy.

After a foreign judgment has been recognized, it is called a "domesticated judgment." Most U.S. states require the person or entity seeking the enforcement of a foreign judgment to commence a new action in the appropriate U.S. court to obtain jurisdiction over the defendant or subject property, including New York. The judgment holder must then prove that the foreign judgment is valid and authentic, which usually requires a certified copy of the judgment by the court that issued it. After a judgment has been domesticated, the judgment holder may begin collection. There are many collection procedures available to judgment holders, all of which depend on independent state laws.

Most states have adopted a form of the Uniform Foreign Money Judgments Recognition Act, including New York, which provides the framework for courts to recognize a foreign judgment granting or denying the recovery of money only if it is final, conclusive, and enforceable where originally rendered. The U.S. is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which provides common legislative standards for the recognition of arbitration agreements and the recognition and enforcement of foreign arbitral awards.

6. Is your aircraft registry an owner-register (registering ownership interests) or an operator-register (registering interests as operator)? Please also state any conditions, procedural steps or formality requirements for such registration and explain how this is evidenced (for example, the issuance of a Certificate of Registration)

In the U.S., aircraft are registered in the Federal Aviation Administration (FAA) Aircraft Registry, which is an owner-register. To be eligible for registration, an aircraft must not be registered under the laws of any foreign country

and must be owned by a citizen of the United States (as defined in 14 CFR 47.9), with some exceptions. An aircraft may be registered only by and in the legal name of its owner. The owner/applicant must submit an Aircraft Registration Application (AC Form 8050-1), accompanied by evidence of ownership, evidence that prior foreign registration has ended (and, if applicable, that recorded interests ranking in priority have been discharged or the holders of the interests consented to the deregistration) and a registration fee.

Upon receipt of a completed registration application that meets its requirements, the FAA issues a Certificate of Registration, AC Form 8050-03.

A Certificate of Registration must be renewed every three years.

7. Is there a security document register in your jurisdiction where a mortgagee's interests will be recorded? If so, please also state any conditions, procedural steps or formality requirements for such registration and explain how this is evidenced (for example, the issuance of a certificate or official stamp on the security document)

Security interests in U.S.-registered aircraft may be registered in the FAA registry, as may security interests in (i) a specifically identified aircraft engine having at least 550 rated take-off horsepower or its equivalent, (ii) a specifically identified aircraft propeller capable of absorbing at least 750 rated take-off shaft horsepower and (iii) an aircraft engine, propeller, or appliance maintained for installation or use in an aircraft, aircraft engine, or propeller, by or for an FAA-certified air carrier.

To be eligible for recording, an instrument granting a security interest in the foregoing equipment must (i) include the names of the parties to the agreement, (ii) contain words granting a security interest in the collateral, (iii) describe the relevant aircraft by either make and model, manufacturer's serial number and registration mark, or other detail facilitating identification, (iv) be an original, a duplicate original or (if neither is available) a true copy of an original document, and (v) be accompanied by a recording fee.

As evidence of recordation, the FAA issues to secured parties a Conveyance Recordation Notice (Form AC 8058-41), which describes the collateral, lists the parties and date of the security agreement, and shows the FAA recording number and date of recordation.

The FAA also recognizes the International Registry under the Cape Town Convention for the filing of security interests in certain airframes, engines and helicopters. The U.S. has designated an authorizing entry point (AEP) under the Cape Town Convention. To register an interest in eligible US-registered aircraft or aircraft engines with the International Registry, the interested party must file, together with the previously noted documentation representing the transaction, a completed FAA Entry Point Filing Form International Registry (AC Form 8050-135). After reviewing only for completeness, the FAA will provide a unique authorization code and return the authorized form to the filing party for use in entering the related interest(s) into the International Registry Database through the International Registry web page.

8. What is the effect of registration of: a. Ownership interest (for example, proof of title to third parties of ownership) b. Lease (for example, perfects the status of the Lessor under the Lease) c. Security document (for example, secures priority over later registered security). If there are any interests that could rank prior to the security document please state these

a. Ownership interest In the case of an aircraft registered in the FAA Registry, evidence of title must be filed for recording with the FAA Registry. Furthermore, upon a transfer of such title, a conveyance instrument should be filed for recording with the FAA Registry. Recordation of title provides notice to third parties of the recorded interest. However, a certificate of registration of an aircraft issued by the FAA is not conclusive evidence of ownership of aircraft in a proceeding with respect to ownership. Furthermore, the recording of a conveyance is not determinative that the instrument does, in fact, effect transfer of title to, or an interest in, the aircraft. The validity of a conveyance is governed by the law of the jurisdiction in which the conveyance instrument was delivered.

b. Lease Title 49 of the U.S. Code (the Transportation Code) stipulates that the FAA Registry is the recordation system in which leases of U.S.-registered aircraft should be recorded. A lease involving an FAA registered aircraft or an aircraft engine that is eligible to be, and is, recorded with the FAA does not need to be recorded in any other location to be valid against third parties, except registration contemplated by the Geneva Convention or the Cape Town Convention, if applicable. However, the validity of any instrument eligible for recording in the FAA Registry is governed by the State, Territory or possession of the U.S. in which the instrument was delivered.

Moreover, the U.S. Bankruptcy Code may affect the status and enforceability of lessor's interest.

c. Security document (for example, secures priority over later registered security). If there are any interests that could rank prior to the security document please state these

Title 49 of the U.S. Code (the Transportation Code) stipulates that the FAA Registry is the recordation system in which security interests in U.S.-registered aircraft should be recorded. A security interest in an FAA registered aircraft or an aircraft engine that is eligible to be, and is, recorded with the FAA does not need to be recorded in any other location to be valid against third parties, except registration contemplated by the Geneva Convention or the Cape Town Convention, if applicable. However, the validity of any instrument eligible for recording in the FAA Registry is governed by the State, Territory or possession of the U.S. in which the instrument was delivered. Moreover, the U.S. Bankruptcy Code may affect the status and enforceability of a secured party's lien. A perfected security interest allows a secured party to gain priority over third-party interests in the aircraft, with priority given for earlier recorded security interests with some exceptions, including, but not limited to, purchase money security interests.

9. What types of lease are recognized in your jurisdiction?

N/A

10. What formalities are required to perfect Lessor's rights under a lease in your jurisdiction (for example, translation, notarization, apostille, legalization etc.)?

N/A

11. Are the ownership rights relating to engines recognized as separate and distinct from the ownership of the rest of the aircraft in your jurisdiction? Please highlight any separate registration, filing or additional formalities that are required to be completed to perfect Lessor's interest in the engines

In the U.S., ownership rights relating to engines are recognized as separate and distinct from the registered airframe. First, under the Uniform Commercial Code

(UCC), title to an engine installed on an airframe does not automatically annex to the owner of the airframe, provided the identity of the engine is not lost. Second, under the Cape Town Convention, the principle of accession for aircraft engines is expressly rejected.

There is no separate register for engines in the United States. However, leases of engines and security interests in engines can be recorded with the FAA Register in the case of a specifically identified aircraft engine having at least 550 rated takeoff horsepower or its equivalent and aircraft engines maintained for installation or use in an aircraft by or for a certificated air carrier.

12. What form does security over aircraft generally take in your jurisdiction?

In the U.S., typically, security over an aircraft takes the form of a mortgage or other agreement under which a security interest is granted pursuant to Article 9 of the UCC as adopted in the relevant state. The owner of an aircraft will grant a security interest in the aircraft and related proceeds to a secured party in a security agreement, which "attaches" a security interest to collateral, such as an aircraft, for purposes of the UCC.

13. Are there any particular terms or characteristics that such a security document must take (for instance, a cap on the secured liabilities)?

A security agreement governed by New York law granting a security interest in an aircraft should include the following in order for the security interest to be enforceable against the debtor and third parties:

1. value has been given for the security interests;
2. the debtor has rights in the collateral or the power to transfer the rights in the collateral to a secured party; and
3. the security agreement, which provides a description of the collateral, has been authenticated (i.e. signed) by the debtor.

14. Are there any perfection requirements for such security document? If so, please state any conditions, procedural steps, formality requirements or documentation (for example, corporates, list of directors etc.) required to effect this

First, with respect to a New York law security agreement

granting a security interest in a U.S.-registered aircraft, the relevant security agreement must be recorded with the FAA Registry as further described in question 6 above. Second, the international interests created thereunder must be registered with the International Registry. Finally, while the foregoing steps are sufficient to perfect a security interest in a U.S.-registered aircraft, a UCC-1 financing statement would customarily also be filed with the office of the secretary of state where the debtor is "located" under UCC Section 9-307 identifying the collateral. The UCC filing must be renewed with a UCC-3 continuation statement during the six-month period prior to the fifth anniversary of its initial filing or subsequent renewal.

With respect to a security agreement granting a security interest in an aircraft that is not registered with the FAA, if there is an international interest created thereunder in accordance with the Cape Town Convention, then the international interests must be registered with the International Registry. If not, but the aircraft is registered in a jurisdiction that is party to the Geneva Convention, then applicable steps to perfect the security interest in such jurisdiction of registration should be taken in accordance with the Geneva Convention. In either case, a UCC-1 financing statement would also customarily be filed with the office of the secretary of state where the debtor is "located" under UCC Section 9-307 identifying the collateral.

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

Not applicable.

16. Are cut-through clauses under the insurance and reinsurance documentation legally effective in your jurisdiction?

Cut-through clauses have been generally enforceable in the United States through recent case law. While most states recognize the validity of cut-through clauses, such case law suggests that cut-through clauses should be specifically tailored in order to be effective and there is a wide variance in legal effectiveness from state to state. The Second Circuit Court of Appeals in *Jurupa Valley Spectrum, LLC v. National Indem. Co.*, 555 F.3d 87 (2d Cir. 2009) explicitly recognized the enforceability of cut-through clauses in New York, stating that "New York law recognizes an exception if the reinsurance agreement contains a so-called 'cut through' provision granting policyholders a direct right of action against reinsurers, which is apparent on its face." However, there is a

variance in legal effectiveness from state to state.

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

The U.S. Department of Transportation imposes minimum coverage requirements on U.S and foreign direct air carriers (including commuter air carriers). 14 CFR § 205.5 dictates that these operators must maintain third-party aircraft accident liability coverage for bodily injury or death with minimum limits of \$300,000 for any one person in any one occurrence. Additionally, subject to certain exceptions for aircraft with lower capacity, coverage for a total of \$20,000,000 per involved aircraft for each occurrence must be maintained.

18. Can a mortgagee (or equivalent security interest holder) or lessor following an event of default under a mortgage (or equivalent security document) or lease, respectively, take possession of the aircraft without judicial intervention in your jurisdiction? Please also state any conditions, procedural steps, formality requirements or documentation (for example, original, legalized, translated Lease/Mortgage, corporates etc.) required to effect this

Yes, upon the occurrence of an event of default under a mortgage or lease, a mortgagee or lessor, respectively, may take possession of an aircraft without judicial intervention. Article 9-609 of the Uniform Commercial Code allows for a secured party to repossess collateral after a default, provided that such repossession proceeds without breach of the peace. Similarly, Article 2A-501 of the Uniform Commercial Code allows for the lessor, following a default under a lease agreement, to exercise self-help. However, should the mortgagor or the lessee resist any effort by the mortgagee or the lessor, respectively, to repossess the aircraft, such resistance will be deemed a breach of peace and thus repossession will not be allowed. In such circumstances, judicial intervention will be required to proceed with the repossession.

Further, a mortgagor's or lessee's bankruptcy proceedings would restrict a mortgagee's or a lessor's ability to take possession of an aircraft. However, if Section 1110 of the U.S. bankruptcy code or Alternative A under the Cape Town Convention applies, then the applicable creditor would be permitted to foreclose on the

aircraft if the debtor does not cure all defaults and agree to perform under the relevant agreement with the creditor within 60 days (or in the case of Alternative A, a different period selected by the relevant jurisdiction). Section 1110 of the U.S. bankruptcy code would only apply in an insolvency proceeding commenced under Chapter 11 of the U.S. bankruptcy code where, at the time the transaction was entered into, the debtor possessed an air carrier operating certificate issued pursuant to Chapter 447 of title 49 of the U.S. Code for aircraft capable of carrying 10 or more individuals or 6000 pounds or more of cargo. Although generally untested in the United States, the Cape Town Convention provides that Alternative A would apply in respect of a debtor where the debtor's primary insolvency jurisdiction has adopted Alternative A. In each case, certain other factors would also need to be met in order for the relevant creditor to benefit from the requirement, such as certain requirements regarding the equipment, the transaction agreements and, in the case of Alternative A, that registrations of the relevant international interests had been made on the International Registry.

19. How can a mortgagee (or equivalent security interest holder), lessor under a lease or designee/beneficiary of an IDERA deregister the aircraft? Please also state any conditions, procedural steps, formality requirements or documentation (for example, original, legalized, translated Lease/Mortgage/IDERA etc.) required to effect this

If an IDERA was provided to the mortgagee and was properly recorded with the FAA, the authorized holder of the IDERA must submit the following documents and evidence to be filed with the FAA:

1. the relevant IDERA;
2. a written request for deregistration which includes a description of the aircraft such as the make, model, serial number and the US registration number and identifies the country to which the relevant aircraft is to be exported;
3. evidence satisfactory to the FAA that any liens and leases created before February 28, 2006 have been discharged or the holders of such liens have consented to the deregistration; and
4. written certification that any interest ranking higher in priority than that of the party requesting deregistration has been extinguished or that the holders of such interest have consented to the deregistration.

Deregistration requests with the FAA must comply with the signing requirements outlined in Part 47.13 of the Federal Aviation Regulations.

20. Can the government or the lessee lawfully prevent the repossession or deregistration and if so, in what circumstances

The government generally should not be able to prevent repossession or deregistration, except that in the case of a bankruptcy proceeding of the person who granted a security interest or the lessee, as applicable, the security interest holder or lessor will be stayed from exercising remedies like repossessing or deregistering the aircraft. In some cases this stay will be limited to 60 days as further described in question 15.

In addition, if a mortgagee or the lessor will not be able to complete the repossession without breaching the peace, the mortgagee or the lessor seeking possession must pursue judicial intervention as further described below.

21. If judicial intervention is required, please describe the process? Please also state any procedural steps, length of time to complete and advise as to documentation required

Judicial intervention is generally not required for repossession. However, if the lessee or mortgagor were to resist a lessor's or mortgagee's efforts such that a repossession would involve breaching the peace, such lessor must pursue judicial intervention in order to repossess the aircraft in the form of either (1) a court order to repossess the aircraft or (2) a foreclosure action relating to the aircraft, pursuant to the law of the state where the aircraft is located.

22. How is legal title transferred under the laws of your jurisdiction? Please also state any conditions, procedural steps, formality requirements or documentation (for example, corporates etc.) required to effect this

Applicable state laws generally provide that legal title to an aircraft can be transferred via an instrument of transfer or physical delivery alone, although typically a written transfer document would be executed, such as a bill of sale.

For a U.S. registered aircraft, a conveyancing instrument must be filed for recording with the FAA Registry, which

must include adequate description of the equipment, the names of seller and purchaser, date of transfer, and sufficient wording to convey ownership or title. The FAA Aircraft Bill of Sale (AC Form 8050-2) provides a template to effect such transfers. It is important that seller names match past FAA aircraft registration records, if applicable, and that the purchaser's name is identical to that of the entity that will register the aircraft with the FAA. When the seller of an aircraft is not shown as the owner of the aircraft in FAA records, the FAA will also require copies of previous bills of sale, or similar documents showing consecutive transfer and each intervening owner.

In transferring title of a foreign registered aircraft that is to be registered in the United States, bill of sale documentation must appropriately reflect the seller's status as a "foreign seller" and foreign aircraft registration number. Additional documentation for FAA registration is necessary where the foreign non-registration or deregistration confirmation does not list the seller of the aircraft on its registration documentation.

23. Are there any restrictions on the sale of an aircraft following enforcement (for example, the requirement to obtain a court order or conduct a public auction or other action in order to sell the aircraft upon enforcement)

Sale of aircraft following enforcement will generally be subject to applicable state law. Under the New York UCC, a secured party's rights arise after a default. The first step by the secured party, regardless of the intended disposition of the aircraft, is to foreclose. Under the New York UCC, there are four kinds of remedies that may be exercised by a secured party: (i) strict foreclosure, (ii) judicial foreclosure, (iii) foreclosure by private sale and (iv) foreclosure by public sale.

The procedural requirements for strict foreclosure are complex. First, the secured party must receive the debtor's consent to partial satisfaction. For full satisfaction, however, consent may be assumed if the debtor does not respond to a secured party's proposal for full satisfaction within 20 days after such proposal is sent. Second, under Section 9-621 of the UCC, certain other parties with interest in the aircraft must be sent notices of the proposal for full or partial satisfaction by the secured party. The secured party may not proceed with the strict foreclosure should any such party object to the proposal.

Under Section 9-609 of the UCC, the relevant secured party may initiate a foreclosure action in state court to

obtain a judicial decree of foreclosure against the debtor and all subordinate lienholders. Once the secured party has obtained a judicial decree for a foreclosure sale, the judge, sheriff or a court appointed official will advertise and conduct the sale. Except for the secured party, all bids are required to be in cash.

Notice of a private sale must be sent to the debtor and any "secondary obligor" with the information specified in Section 9-613(a) of the UCC. Secondary obligors include parties such as guarantors whose obligation is secondary or who has a right of recourse against the debtor that is secured by the aircraft. The UCC provides a safe harbor from the requirement to notify secondary obligors if, not later than 20 days or earlier than 30 days before the notification date, the secured party requests "in a commercially reasonable manner" a search of UCC financing statements and sends notices to only the parties specified in such search reports.

A public sale under Section 9-610 of the UCC requires that the public have a "meaningful opportunity for competitive bidding" before a price may be determined. This requirement may be met by providing reasonable notice of the time and place of such public sale in a national publication and in aviation publications to provide an opportunity for interested parties to submit bids or participate in the auction.

Under Section 9-607 of the UCC, a secured party must "proceed in a commercially reasonable manner" in its exercise of enforcement rights. Such secured party may deduct from any collections "reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses". Should the secured party receive any surplus, such surplus must be paid to the debtor.

In the case of a U.S. registered aircraft, in order to provide evidence of ownership during the FAA registration process following a foreclosure action, specific documentation of the transaction must be maintained. As in a typical transfer, an accurate and complete FAA Aircraft Bill of Sale, AC Form 8050-2, or equivalent bill of sale, and delivery must be completed. In addition, where a transfer has been made in accordance with a court order, lien settlement, or enforcement order, a certified copy of that court order, certificate of repossession, or appropriate documentation must be obtained and submitted to the FAA by the purchasing party as evidence of ownership during the FAA registration process.

24. Would lease rentals be subject to tax (for

example, withholding or income tax)? Please also state if there are any conditions for such tax to be imposed and any steps usually taken to mitigate this

Lease rentals may be subject to federal, state and local taxes depending on the circumstances.

In the first instance, it is necessary to determine whether the rental income is considered from U.S. sources. In the case of leases of tangible personal property such as aircraft, this turns on where the property is used by the lessee (and not where the owner/lessor is based or acting from). Generally, (1) if rent is attributable to domestic flights (i.e., between points within the United States) this is considered "U.S. source" rental income, (2) if rent is attributable to flights entirely between points outside of the United States this is considered "foreign source" income and (3) to the extent rent is attributable to flights to or from a point in the United States and another country (so called "gross transportation income" or "GTI") the GTI is deemed conclusively to be 50% from U.S. sources.

Federal taxation on the rental income then depends on whether the owner-lessor is deemed to be "engaged in a U.S. trade or business" to which the rent is connected. Merely leasing from outside the United States to a U.S. lessee does not constitute conduct of an active business within the United States but other direct nexus with the United States (such as having an office or even leasing agents acting from within the United States) arguably may do so. If the owner lessor is so engaged, and is not entitled to the benefits of an income tax treaty between its residence country and the United States, it will be subject to net income tax at the same rates applicable to a similarly situated U.S. person on the U.S. source rental income. Foreign source rental income generally will not be deemed connected to such a U.S. trade or business. The U.S. source component of GTI may also be subject to net income tax (although the level of U.S. nexus required for treating GTI as connected to a U.S. trade or business is somewhat higher). If a tax treaty is available, rental income would be subject to U.S. income tax net income tax only if the owner-lessor has a permanent establishment in the United States to which the income is attributable under the provisions of the relevant treaty.

If the owner-lessor is not deemed to engage in a U.S. trade or business (or, if a treaty applies, does not have a U.S. permanent establishment), net income tax does not apply. However, U.S. source rental income is potentially subject to a 30% gross basis withholding tax and the U.S. source component of GTI is potentially subject to a 4%

excise tax. If a tax treaty applies, the U.S. source rental income may however be exempt from withholding under a specific article (including, as "Business Profits"). There are also domestic law and treaty exceptions that may exempt an owner-lessor from the 4% excise tax, which exemptions are detailed and fact specific.

In addition, if net income tax applies at the federal level, there can also be state and local net income taxes that apply if the business has a sufficient nexus with that state or locality, although generally states and localities do not impose equivalent withholding or excise taxes.

25. Would a sale of an aircraft in your jurisdiction incur sales tax? Please also provide details of amount or calculation and any steps usually taken to mitigate this

There is no federal sales tax or value-added tax. However, many states and localities potentially would impose sales or use tax to the extent the aircraft sale is deemed under their rules to occur within their jurisdiction, subject in many cases to various exceptions and exemptions.

26. Are there any restrictions on the import or export of aircraft in your jurisdiction and would such importation or exportation incur any liability as to customs or taxes? Please also state if any consents or approvals are required and the procedural steps taken to obtain these, and any procedural steps or formality requirements to mitigate any taxes

Certain aircraft and aircraft parts are subject to U.S. export controls, including the Export Administration Regulations ("EAR") administered by the U.S. Department of Commerce and the International Traffic in Arms Regulations ("ITAR") administered by the U.S. Department of State. The export of items subject to the EAR or the ITAR may require an export license depending on the item, the destination of the item and end-use / end-user of the item. However, exceptions to the license requirements may also exist in certain circumstances.

27. Are there any foreign exchange restrictions on transfers of funds

N/A

28. How successful have foreign creditors and lessors been in enforcing their security and lessor rights over and successfully repossessing aircraft in a timely manner?

Many creditors and lessors have successfully and quickly repossessed aircraft in the United States. The success and speed of an aircraft repossession and enforcement of lessor rights depends on a variety of factors, including the aircraft's condition, location, operator, manager and the then existing market conditions of the aviation industry. For example, a repossession and subsequent remarketing may be significantly delayed should major maintenance on an engine or airframe be required, hindering the exercise of lessor rights. Similarly, an uncooperative aircraft operator can result in a remarketing delay should the lessor need to retrieve or update maintenance records and/or logbooks. Up-to-date records are critical to any aircraft transfer as incomplete documentation can reduce the value of an aircraft significantly. Finally, if the remarketing prospects for a repossessed aircraft are limited, repossession may be less attractive.

29. What government led reforms affecting creditor and lessor rights are currently underway in the aviation sector in your jurisdiction?

N/A

30. Please describe any interesting legal development in your jurisdiction (for instance, decided court cases or arbitral awards) which affect creditor and lessor rights?

N/A

31. Please discuss any relevant governmental regulations implemented in your country to help alleviate the financial and other difficulties faced by airlines in your jurisdiction caused by CoVid 19 and whether that will impact rights of lessors (who lease aircraft to the airlines) and lenders (who finance such aircraft which are mortgaged in favour of the lenders)? Are such governmental regulations expected to be in place until the difficulties faced by airlines caused by the CoVid 19 subside or are they more long term?

Consolidated Appropriations Act, 2021

The Consolidated Appropriations Act, 2021 (H.R. 133, Public Law 116-220) ("CAA"), signed into law by the U.S. President on December 27, 2020, included \$15 billion in funds to be awarded to air passenger carriers and \$2 billion to U.S. airports to be used for the continuation of payment of employee wages, salaries, and benefits. This relief was in addition to the financial assistance provided under the CARES Act, which was designed to alleviate the financial difficulties faced by airlines in the short-term. However, unlike the CARES Act, under the CAA, cargo carriers were not allocated funding. Relief amounts under the CAA were based on amounts distributed pursuant to the CARES Act, with certain adjustments available for airlines that did not take full advantage of CARES Act funding.

Entities receiving aid under the CAA were required to provide several assurances: the aid recipient would (i) refrain from involuntary furloughs or pay cuts through at least March 31, 2021; (ii) not buy back its own securities or stock or pay out dividends or capital distributions through at least March 31, 2022; and (iii) limit salaries, salary increases, and severance packages for higher paid officers and employees through at least March 31, 2021.

American Rescue Plan Act of 2021

The American Rescue Plan Act of 2021 (H.R. 1319, Public Law 117-2) (the "Rescue Plan Act"), signed into law by the U.S. President on March 11, 2021, provided further funding to U.S. air carriers and contractors which received financial assistance under the CAA. Under the Rescue Plan Act, eligible air carriers were provided with \$14 billion in financial assistance, while eligible contractors are provided with \$1 billion. Individual air carriers would receive amounts proportionate to the amounts they received under the CAA; aviation contractors would receive the same amount received under the CAA. The funds are to be used exclusively for the continuation of employee wages, salaries, and benefits.

Eligible air carriers were those that (i) provide air transportation as of March 31, 2021, and had certified to the U.S. Treasury Department that they would refrain from furloughs or pay cuts until September 30, 2021, or until funds were exhausted; (ii) refrain from purchasing certain equity securities, paying dividends or making capital distributions until September 30, 2022; (iii) agree to certain restrictions on executive compensation during the two-year period beginning April 1, 2021; and (iv) had not implemented furloughs or pay rate or benefits decreases between March 31, 2021 and the date when it makes the required certification to the U.S. Treasury Department. Aviation contractors must comply with

similar restrictions to obtain relief under the Act.

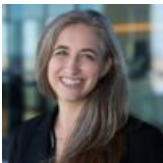
According to publications from the U.S. Department of the Treasury, under the Payroll Support Program (PSP) authorized by the CARES Act, the Consolidated

Appropriations Act of 2021, and the American Rescue Plan Act of 2021, the Treasury Department awarded \$59 billion in financial assistance to the United States domestic aviation industry for the continued payment of employee wages, salaries, and benefits.

Contributors

Freyda Mechlowicz
Partner

fmechlowicz@milbank.com



Zachary Cronin
Special Counsel

zcronin@milbank.com



Steve Goff
Associate

sgoff@milbank.com

