

# **BRITISH VIRGIN ISLANDS**

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## INTRODUCTION

The British Virgin Islands (BVI) is a British overseas territory and is recognised across the globe as the premier jurisdiction for the registration of asset holding companies. The BVI corporate legislation is generally regarded as non-prescriptive, in that companies are able to devise the corporate structure and procedures applicable to their business, subject to certain limited statutory requirements. The corporate structure and procedures applicable to a BVI company are set out in the company's constitutional documents (i.e. its memorandum *and* articles of association) which govern the relationship between the company, its members and its directors. The flexibilities inherent in such a system make BVI companies extremely attractive as part of asset holding structures. The BVI has an independent legal and judicial system based on English common law and the UK Privy Council is the final court of appeal. The attractiveness of the BVI, as a jurisdiction for asset holding structures, is further enhanced by the ability to register aircraft, as well as aircraft mortgages and aircraft engine mortgages.

## PART 1

### LIENS

1

#### What is a lien under British Virgin Islands law?

Generally, a lien constitutes the unassignable right of one person to detain the property of another until its claim for payment has been satisfied. A leading text on English law provides that:

“In its primary or legal sense ‘lien’ means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied.”<sup>1</sup>

The party with the benefit of a lien is called the lienholder (or lienee); the party on whose property the lien is imposed is the lienor. Thus, for example, if Party A repairs Party B's aircraft, in circumstances where Party A acquires a lien over the aircraft for unpaid repair costs, Party A will be the *lienholder* and Party B the *lienor*.

Liens should be distinguished from other security interests over property under BVI law. Liens are different from:

- *mortgages*,<sup>2</sup> since liens do not generally arise from contract, are typically unassignable and depend on continued possession of the property<sup>3</sup>;
- *charges*,<sup>4</sup> since liens do not arise from equity and are lost on loss of possession of the property.<sup>5</sup>
- *floating charges*,<sup>6</sup> since liens attach to specific items of property and take effect without the need for crystallisation.

The distinction between liens and other security interests can be subtle at times. In the case of aircraft however, the distinction between liens and other security interests is usually clear.

Liens can be *legal*,<sup>7</sup> *equitable*,<sup>8</sup> *contractual* (including pledges)<sup>9</sup> and *judicial*.<sup>10</sup>

Legal liens can be subdivided into statutory and common law liens.<sup>11</sup> Also, liens can be divided into *general* and *particular* liens as well as into *possessory* and *non-possessory* liens.<sup>12</sup>

## 2 AIRCRAFT LIENS

### **What aircraft liens exist under British Virgin Islands law? What are their essential characteristics?**

This chapter deals with civil aircraft. For the purpose of this chapter “aircraft” comprises all types of aeroplanes, whether jet or propeller and whether land or sea planes; also, all types of helicopters.<sup>13</sup> It is believed that only the following aircraft liens exist under BVI law<sup>14</sup>:

- Seller’s lien;
- Salvage lien;
- Possessory lien;
- Contractual lien.

Certain maritime liens that apply to vessels under BVI law do not apply to aircraft (see below **8**). The BVI courts are likely to interpret the prerequisites for aircraft liens strictly since:

- liens are mainly the product of historical anomaly and custom;
- liens generally take precedence over other security interests without the need for registration;
- many rights to detain aircraft have already been legislatively provided for.<sup>15</sup>

The that BVI courts are unlikely to extend the situations in which aircraft liens will be held to arise.

As well as aircraft liens, there are various statutory rights of detention exercisable over aircraft (see below **17** onwards).

## **REGISTRATION OF AIRCRAFT LIENS**

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**Can aircraft liens be registered in the British Virgin Islands Register of Civil Aircraft? Or in any other public register? What is the effect of registration?**

### **Aircraft Register**

No provision is made for the registration of aircraft liens in the BVI Register of Civil Aircraft nor, more particularly, in the BVI Register of Aircraft Mortgages or the BVI Register of Aircraft Engine Mortgages.

### **Register of Aircraft Mortgages and Register of Aircraft Engine Mortgages**

The framework for registration of security over aircraft and separately, aircraft engines was established under the Mortgaging of Aircraft and Aircraft Act 2011 (the Act), and the Mortgaging of Aircraft and Aircraft Regulations 2012 (the Regulations). The Act makes provision for the appointment of a Registrar, who is responsible for the general administration, control and management of the register of aircraft mortgages and the register of aircraft engine mortgages (together the Mortgage Register). Neither the Act nor the Regulations place any limitations on a person or company who may be a mortgagee. A mortgage may cover any store of spare parts (including engines) for the aircraft; however, a mortgage created as a floating charge is not registrable. A mortgage of an aircraft or an aircraft engine entered in the Mortgage Register shall have priority over any other unregistered mortgage or charge on that aircraft or aircraft engine. As between registered mortgages, priority is established based on the order of registration, with previously registered mortgages taking priority over subsequently registered mortgages. A notice of intention to make an application to enter a contemplated mortgage of an aircraft or an aircraft engine in the Register may also be entered in the Mortgage Register as a priority notice. An application to enter a priority notice in the Mortgage Register shall be made to the Registrar by or on behalf of the prospective mortgagee in the form set out in Form 2 of Sch.1, and shall be accompanied by the prescribed fees. Where a priority notice has been entered in the Mortgage Register and the contemplated mortgage referred to therein is entered in the Mortgage Register within 14 days thereafter, that mortgage shall be deemed to have priority from the time when the priority notice was registered.

### **Bills of Sale Register**

There is no Bills of Sale Register in BVI.

### **Companies Register**

All charges, unless expressly excluded, created by a company formed and registered in the BVI are registrable with the Registrar of Corporate

Affairs.<sup>16</sup> Where the chargor is a BVI company, the chargor must enter details of the mortgage or charge over the aircraft and/or the engine (as assets of the BVI company) in its private register of charges maintained at the company's registered office in the BVI, pursuant to the BVI Business Companies Act 2004 (the BCA) s.162. The chargor or chargee may also register the charge under the BCA s.163 with the Registrar of Corporate Affairs by entering the details of the mortgage or charge in a register of charges and filing the register with the Registrar of Corporate Affairs. The public registration of the charge under s.163 may be desirable in order to protect the priority of such charge in the BVI, subject to any priority afforded to pre-existing registered charges.

Under the BCA s.160(1), a charge is defined as:

“any form of security interest, over property, wherever situated, other than an interest arising by operation of law.”

Thus, aircraft liens, which by definition qualify as a charge under s.160(1), must be registered in the chargor's private register of charges under s.162 and are registrable on the public Register of Registered Charges under s.163. Please note, however, that unlike the position in English law, which requires registration of a charge to preserve its validity, registration of a charge under s.163 only ensures priority of the charge over (1) any subsequently registered charges; and (2) any unregistered charges. Registration does not, in itself, afford priority over any interest that cannot be registered pursuant to such s.163.

The absence of a legal requirement to register aircraft liens in a public register means they can often occur without interested parties in the aircraft (such as the owner or any mortgagee) being aware of them. In particular, they can be an unpleasant surprise to secured parties, since liens will generally take precedence over their security (see below 9).

#### **4 SELLER'S LIEN**

##### **What is a seller's lien? When will it arise in the case of an aircraft?**

Aircraft are frequently bought and sold. Aircraft are considered “goods” under the Sale of Goods Act (Cap.298) which is similar to the English Sale of Goods Act 1979. Pursuant to the Sale of Goods Act, an unpaid seller may have a lien over the aircraft to the extent that the buyer fails to pay the purchase price. An “unpaid seller” will arise when:

- the whole of the purchase price has not been paid or tendered; or
- a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.<sup>17</sup>

In the case of aircraft sales, in the BVI bills of sale may be used since they have no stamp duty implications or alternatively the aircraft may be sold and transferred by physical delivery (with an acknowledgment of transfer).

### **Nature of seller's lien**

Where the *property* in the aircraft *has passed* to the buyer, an unpaid seller will have a lien on the aircraft (or a right to retain it) for the price while the seller is still in *possession* of it.<sup>18</sup> If the buyer is insolvent, an unpaid seller has a right to stop the aircraft in transit, after it has parted with possession.<sup>19</sup> Where an unpaid seller exercises such a lien (or stoppage in transit) and then resells the aircraft, the new purchaser will acquire good title as against the former buyer.<sup>20</sup> Further, the seller's lien (or stoppage in transit) will not be affected by any sale or other disposition of the aircraft by the buyer, unless the seller assents to it.<sup>21</sup> Apart from the lien, the seller may maintain an action against the buyer for the price of the aircraft where, under the sale contract, the property in the aircraft has passed to the buyer but the buyer wrongfully neglects (or refuses) to pay for the aircraft according to the contract.<sup>22</sup> Also, where the buyer wrongfully neglects or refuses to accept and pay for the aircraft, the seller can maintain an action for damages against the buyer for non-acceptance.<sup>23</sup>

Where the *property* in the aircraft *has not passed* to the buyer, the unpaid seller (in addition to its other remedies) has a right to withhold delivery.<sup>24</sup> This right is similar to, and co-extensive with, the lien (or stoppage in transit) referred to above.

### **Loss of lien**

An unpaid seller in possession of an aircraft may retain possession of it until payment (or tender) of the purchase price where the aircraft:

- has been sold without any stipulation as to credit; or
- has been sold on credit but the credit term has expired; or
- where the buyer becomes insolvent.<sup>25</sup>

The lien (or right of retention) may be exercised even though the seller is in possession of the aircraft as the agent, bailee or custodian of the aircraft for the buyer.<sup>26</sup> The lien (or right of retention) will be lost when the:

- seller delivers the aircraft to a carrier (or other bailee or custodian) for transmission to the buyer, without reserving a right of disposal; or
- buyer (or its agent) lawfully obtains possession of the aircraft; or
- seller waives the lien (or right of retention).<sup>27</sup>

### **Aircraft financing techniques**

There appears to be no BVI case law on a seller exercising a seller's lien in respect of an aircraft. Often, in the case of commercial aircraft, a special purpose company on behalf of a syndicate of banks will purchase an aircraft which has been preselected by the airline from the manufacturer. The purchase price is usually paid outright by the banks and the *property* in (and *possession* of) the aircraft transferred to the special purpose company established by them at the same time as the manufacturer is paid. Given that the manufacturer will retain the property in, and possession of, the aircraft until payment in full, the problem of an unpaid manufacturer (as seller) will not generally arise. It may also be noted that the sale contract with the manufacturer may have a foreign governing law, in which case the Sale of Goods Act would not generally apply.

Having purchased the aircraft from the manufacturer, the special purpose company (or the banks) may lease it to the airline pursuant to a *finance lease*, in which case property in the aircraft remains with the special purpose company until the airline has made all the relevant lease payments. At the end of the lease term, the property in the aircraft is then usually transferred to the airline pursuant to a separate (usually nominal) purchase option. Thus, the *property* in the aircraft normally only transfers on payment of all the lease rentals.<sup>28</sup> In the absence of payment of the lease rentals, the finance lease normally provides for a wide range of remedies, including repossession of the aircraft. However, these remedies are those of a lessor and not of an unpaid seller. Thus, the Sale of Goods Act will not apply.

In respect of *hire purchase*, *conditional sale* and *credit sale* agreements, possession of the aircraft will pass to the buyer immediately (with the *property in the goods* passing on the payment of the last hire-purchase instalment, the fulfilment of the relevant conditions or the making of the last loan payment). Thus, there should be no seller's lien since the buyer has lawfully obtained *possession* of the aircraft from the outset. On the enforcement of unpaid seller's liens, see **13**.

## **5 SALVAGE LIEN**

### **What is a salvage lien? When will it arise in the case of aircraft?**

The salvage lien in maritime law has a long ancestry. It is based on the principle that it is for the common good that assistance be rendered to vessels in distress and, as an inducement to this end, a person providing voluntary assistance should recover its costs prior to other parties with an interest in the vessel. It is uncertain whether an aircraft salvage lien can be asserted in the BVI and whether the maritime salvage liens established by the Merchant Shipping Act 2001 of the BVI would be extended to apply to aircraft.

There appear to be no cases where an aircraft salvage lien has been

asserted before the BVI courts and the occasions where salvage services are provided to aircraft are very rare. Further, given their construction, modern commercial aircraft that crash are generally unsalvageable or not worth salvaging.

## **POSSESSORY LIEN**

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### **What is a possessory lien? When will it arise in the case of aircraft?**

A possessory lien is a common law legal lien.<sup>29</sup> If a person has in its lawful and continuous possession an aircraft on which it has bestowed labour, enhancing the aircraft's value, that person will have a lien on the aircraft to the extent that it remain unpaid for its labour. By reference to case law, there are a number of prerequisites for such a lien to exist, namely:

- (a) There must be possession by the lienholder, which possession has been lawfully acquired. Thus, if possession of the aircraft has been obtained by misrepresentation, by mistake, via the wrongful act of a third party, or for another purpose, then it will not be lawful.<sup>30</sup> For example, if an aircraft is repaired when it was only intended to be inspected, no lien should arise.
- (b) Possession must be continuous. This will depend on the particular circumstances of the case. For example, if an aircraft repairer lets an aircraft out of its possession to continue operations, it is doubtful whether the repairer could reassert the lien should the aircraft come into its possession again.<sup>31</sup>
- (c) The labour bestowed on the aircraft must improve it in some way.<sup>32</sup> Merely maintaining the aircraft is not enough.<sup>33</sup> The distinction between improvement and maintenance may be a question of degree based on the facts and some workshop visits, or may involve an element of both. Repairing an aircraft or refurbishing it by way of an upgrade would seem sufficient.<sup>34</sup> However, acts such as refuelling an aircraft,<sup>35</sup> undertaking A–D checks, cleaning it,<sup>36</sup> warehousing it or supplying food and other necessities to it pre-flight would not be enough.<sup>37</sup>
- (d) The labour must be authorised by the owner, whether expressly or by implication.<sup>38</sup> Authorisation would cover cases where the owner ordered the labour and also where the person ordering it had the authorisation of the owner (whether in the form of express, implied or ostensible authority).<sup>39</sup> This would include the situation where the person ordering the work was under a duty to the owner to keep the aircraft in good condition and repair.<sup>40</sup>
- (e) A possessory lien may arise even if expressly prohibited by the owner, if its creation was a reasonable incident of its use and the lienholder is unaware of the prohibition.<sup>41</sup> It may be noted that the

- owner's authorisation (or prohibition) of a party from creating a lien for repairs etc, will normally arise by way of contract (see 7).
- (f) The labour must be completed and the debt due.<sup>42</sup>

An aircraft possessory lien is a particular lien relating to the specific aircraft (or parts) in question, since there is no general lien for repairs at common law. Thus, the aircraft cannot be retained for all debts due to the repairer, but only for the cost of unpaid repairs to the specific aircraft in question. The lien will give a creditor a right to retain the aircraft until payment, but not, generally, to sell it without judicial intervention. It seems that a possessory lien will survive a change of ownership.<sup>43</sup>

While an aircraft is subject to a possessory lien, it seems the lienholder cannot claim expenses incurred in keeping it (such as warehousing it, preventing its deterioration etc).<sup>44</sup> However, the case law on this matter is old and it is believed likely that a BVI court today would adopt a more practical approach and allow a lienholder to recover its reasonable expenses in the circumstances.

On the enforcement of possessory liens, see 13.

## 7 CONTRACTUAL LIEN

### **What is a contractual lien? When will it arise in the case of aircraft?**

Regardless of whether a possessory lien exists at common law, parties may create a lien by contract. Thus, the owner of an aircraft may pledge it to a creditor as security for a debt. Or a lien may arise as a result of a person expending labour on an aircraft which improves its value in some way in accordance with a contractual agreement (such as frequently occurs in respect of aircraft repairs). A contractual salvage lien may also arise. These forms of contractual lien are now considered.

To establish a lien by contract, the contract must be certain and, to the extent that the contractual lien covers the same ground as the possessory lien (for repairs etc), it will discharge or supersede the former.<sup>45</sup> A contractual lien can be more extensive than a possessory lien. For example, it could provide for the sale of the aircraft in the event of non-payment or for the lien to continue in the absence of possession.<sup>46</sup> The nature and extent of this lien will be governed by the terms of the contract. However, it is likely that the BVI courts will strictly construe the terms of a contractual lien where there are competing interests in the aircraft (such as mortgages), given the anomalous nature of liens, and that they are not registrable.

### **Pledge**

The word "pledge" is often used to refer to the particular case where, by agreement, property is handed over by the owner to a creditor as security for a debt, as opposed to where property is handed over to a third party

for other purposes (e.g. for repair<sup>47</sup>). The pledge of an aircraft under BVI law is rare, since it requires the actual (or constructive) delivery of the property to the creditor. In the case of aircraft, however, the owner invariably wants to continue using it.<sup>48</sup> Further, banks do not want to take possession of an aircraft—since they will then generally bear responsibility for its preservation and upkeep.<sup>49</sup> As a result, the common form of security granted over an aircraft, for a debt is a mortgage. In any case, the mortgage generally conveys a greater security right to the creditor, in that the general property in the aircraft will pass to the creditor subject to an equity of redemption (as opposed to a pledge where the general property in the aircraft remains with the pledgor).

### **Repairs and other improvements**

In modern times, most aircraft (and their parts) are repaired or refurbished in accordance with the terms of a contract with the repairer or refurbisher.<sup>50</sup> The contract will generally specify in detail the work to be undertaken and the payment terms, also the action which can be taken by the repairer/refurbisher in the event of a default in payment.<sup>51</sup> This will usually include a right to default interest, as well as to retain possession of the aircraft until payment is made.

### **Salvage**

The owner of an aircraft may contract with a third party for its salvage. For the enforcement of contractual liens, see **13**.

## **OTHER TYPES OF AIRCRAFT LIEN**

**8**

### **Are there any other types of aircraft lien? Or similar rights that do not give rise to a lien?**

In maritime law, there are a number of liens and other rights which have developed as a matter of history or custom. However, they are generally inappropriate in the case of aircraft and it is thought that the BVI courts would be reluctant to recognise their having any application to aircraft by way of analogy.

### **Wages of master and crew**

Under BVI law, a maritime lien can arise for the payment of wages of the master and crew, as well as for the master's disbursements. It is believed that no such lien will apply to aircraft.<sup>52</sup>

### **Bottomry and respondentia**

Under maritime law, *bottomry* is the mortgaging (hypothecation) of vessels (including cargo and/or freight) by the master as security for the payment of repair costs and other necessities away from the home port.

*Respondentia* is the mortgaging of cargo in the same circumstances. These maritime liens are obsolete in the case of vessels and there is no reason why they should apply to aircraft.

### **Damage done by an aircraft**

A maritime lien may arise as a result of damage done by a vessel. However, there seems to be no good reason or authority why an aircraft lien should arise when one waterborne aircraft (such as a seaplane) collides with another or with other objects in the water, including vessels.

### **Towage and pilotage**

Under BVI common law, the towage or pilotage of a vessel does not give rise to a maritime lien and this should also apply to vessels, refer to *Westup v Great Yarmouth Carrying Co.*<sup>53</sup>

### **Equitable lien**

To mitigate the rigour of the common law, the English courts have sometimes recognised the existence of an equitable lien, and this would be persuasive authority in the BVI. However, it is doubted such a lien would apply in respect of aircraft since, in the case of:

- an *unpaid sellers lien*, the Sale of Goods Act should exclusively govern the matter;
- a *contractual lien*, the contractual terms should exclusively govern the matter.

As to other possible equitable liens (e.g. an equitable lien arising for voluntary improvements to an aircraft) it may be noted that, as a general rule under BVI law, a person who spends money on property for the benefit of the owner, in the absence of a contractual agreement acquires no lien from simply having made the expenditure.<sup>54</sup> Further, the BVI courts will likely be reluctant to extend the types of lien which will take precedence over other security interests in aircraft (see 2).

## **9 PRIORITY OF AIRCRAFT LIENS**

### **What is the priority of aircraft liens under British Virgin Islands law?**

Section 2 above identifies the aircraft liens believed to exist under BVI law. As to their priority (i.e. their order of precedence to the aircraft and to any proceeds from its sale) the position can only be stated tentatively, since:

- there is little case law or other authority to provide guidance on the matter;

- there are a number of possible permutations and much will depend on the facts and situation, and the time when the respective liens arise.

However, it is believed that the priority of aircraft liens and detention rights will be as follows:

- (1) *Statutory detention rights* (see 31).
- (2) *Contractual lien*. This will supersede the terms of an aircraft lien that might otherwise arise under common or maritime law (i.e. the possessory or salvage lien). Instead, the lienholder's rights will be determined by the terms of the contract (see 7). However, it remains to be seen the extent to which a BVI court will give precedence to a contractual lien where it is expressed to be more extensive than under common or maritime law, for example, where an aircraft repair or maintenance contract provides for a fleet lien (i.e. to cover all debts owed to the repairer) or that the lienholder's rights continue even in the absence of possession. Since liens are somewhat anomalous rights, there may be public policy reasons for the BVI courts not to permit parties by way of private arrangements from gaining priority over other creditors who have little, or no, chance to determine what those arrangements are.
- (3) *Salvage Lien*. Authority for this is the case of *The Gustaf*,<sup>55</sup> where a ship was salvaged and then taken for repairs. It was held that the salvage lien took precedence over the possessory lien.
- (4) *Possessory Lien*. A conflict between a possessory lien (or pledge) and then a subsequent salvage lien would not appear to be possible, for the former lien would lapse on the loss of possession (see 6(a) and 7).
- (5) *Registered Mortgages*, in order of registration.<sup>56</sup>
- (6) *Unregistered Mortgages*.<sup>57</sup>

It is difficult to envisage both a *seller's lien* and a *possessory lien* existing over an aircraft since, in the case where the aircraft is sold and then repaired, the seller will not normally have an unpaid seller's lien, possession having lawfully passed to the buyer or its agent.<sup>58</sup>

For foreign aircraft liens, see 16.

## RIGHTS OF OWNER OR LESSOR V LIENHOLDER

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### What are the rights of the owner or a lessor of an aircraft against a lienholder?

The owner of an aircraft (which may have a legal or an equitable interest under BVI law) generally has the greatest "right" to the aircraft as against third parties. However, this right is not wholly unqualified.

### **Salvage Lien**

If the aircraft has incurred such a lien, the lienholder (the salvor) has a right to claim its salvage expenses against the owner. The salvor can bring an action in personam against the owner, or an action in rem against the aircraft (see below 13). The salvor's right is not dependent on possession of the aircraft.

### **Possessory or contractual lien**

The owner may be subject to this lien, even though it may have expressly prohibited its creation by the operator of the aircraft, unless the lienholder was aware of this prohibition (see above 6(d) and 7).<sup>59</sup>

### **Seller's lien**

The owner (as the purchaser of the aircraft) will be subject to a *seller's lien* to the extent that it failed to pay the aircraft's purchase price, and the seller still retains possession of the aircraft (see 4).

In the case where the owner is not the lessor of the aircraft (for example in the case of a sub-lease), the lessor will generally be bound by the above mentioned liens, even though the owner (or lessee) may have warranted it had not, or would not, create them.<sup>60</sup>

## **11 RIGHTS OF MORTGAGEE V LIENHOLDER**

### **What are the rights of the mortgagee of an aircraft against a lienholder?**

Aircraft mortgages can be registered in the BVI Register of Aircraft and Mortgages. They take priority from their date of registration. However, no provision is made for the registration of aircraft liens. Further, the relevant statutory instrument that provides for the registration of aircraft mortgages, the Mortgaging of Aircraft and Aircraft Engines Regulations 2012, expressly provides that nothing in these regulations shall be construed as giving a registered mortgage *priority* over:

- (a) any possessory lien in respect of work done on the aircraft (whether before or after the creation or registration of the mortgage) on the express or implied authority of any persons lawfully entitled to possession of the aircraft; or
- (b) any right to detain the aircraft under any statutory provisions (see below 17 onwards).<sup>61</sup>

Item (a) above refers to "persons lawfully entitled to possession of the aircraft". These words would include persons such as lessees (and other persons using the aircraft pursuant to credit agreements) who incur repairer's liens. In the case of (b), the wording should also cover a seller's lien under the Sale of Goods Act (see 4).

Since aircraft liens cannot be registered in the BVI Register of Aircraft and Mortgages, they can be an unpleasant shock to an aircraft mortgagee who may have to pay off the lien, in the case where the aircraft user (such as an airline) is in liquidation, in order to repossess the aircraft.

A mortgagee can take various steps to avoid, or mitigate, the effect of aircraft liens, namely:

- A *salvage lien* should not, generally, affect a mortgagee since it will usually require, as part of its security, an assignment of the aircraft's hull insurances, with the insurances being at an agreed value. Thus, on the loss of the aircraft, the mortgagee will generally look to the insurance proceeds to cover the mortgage debt, as opposed to the value of the aircraft (see above 5 and 7).
- In the case of the *possessory* or *contractual liens* the position is more problematic. Although the mortgage may prohibit the owner (and any user) of the aircraft from creating such a lien, it can still arise in practice and take precedence over the mortgagee's interest in the case where the lienholder is unaware of such a prohibition (see above 6(d) and 7).<sup>62</sup> Also, even though the mortgage may impose an obligation on the owner or user to pay off such a lien where created, this will not assist a secured party where the owner or user has no money to do so (e.g. where the airline is in liquidation).

## RIGHTS OF LESSEE V LIENHOLDER

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### What are the rights of the lessee of an aircraft against a lienholder?

As indicated in 3 above, it is not possible to register liens in the BVI Register of Aircraft Mortgages or the Register of Aircraft Engine Mortgages. Further, aircraft liens will take precedence over the right of a lessee (such as an airline). That said, a lessee will usually be aware of the creation of aircraft liens, since it will be using the aircraft. Thus, in respect of a:

- *Salvage Lien*, the lessee will be aware of this. In any case, the loss of the aircraft will likely have the effect of terminating the lease.
- *Possessory Lien* (whether common law or contractual), the lessee will usually have incurred these with the owner's authority, whether express, implied or ostensible (see above 6(d) and 7).
- *Pledge* over the aircraft, the lessee will be subject to this. That said, the pledge of an aircraft would be rare and could only be created by the owner, as the party with title to the aircraft (see above 7). Further, the owner could not generally do this without breaching the terms of the lease which invariably provide for the lessee to have use and quiet enjoyment of the aircraft, providing it makes the rent payments.
- *Seller's lien*, it will normally be a lease term that the owner (as lessor)

warrants that it has created no such lien and that if it arises, the owner will indemnify the lessee.

### **13 ENFORCEMENT OF AIRCRAFT LIENS**

#### **How does an aircraft lienholder enforce its lien under British Virgin Islands law? What British Virgin Islands court will have jurisdiction?**

Generally, an aircraft lienholder will not have to apply to the BVI courts to enforce its lien (and, if necessary, to sell the aircraft) since it will have a statutory right, or one arising by way of contract, to undertake such actions. Exceptions include a seller's lien and a possessory lien where the lienholder has no general right to sell an aircraft without the consent of the court.

#### **Seller's lien**

An unpaid seller with a lien under the Sale of Goods Act does not have to apply to the BVI court for permission to resell the aircraft. Where an unpaid seller has exercised its right of lien (or stoppage in transit) in respect of an aircraft (see 4), it may resell it, in which case the new buyer will acquire good title as against the original buyer.<sup>63</sup>

Usually the aircraft sale contract will specify a right of resale in the event of buyer default. Where the seller resells the aircraft, the original sale contract will be rescinded without prejudice to any claim the unpaid seller may have for damages.<sup>64</sup> The unpaid seller will also have a right of resale if it has given notice to the buyer that it intends to resell the aircraft and the buyer does not pay (or tender) the outstanding purchase price within a reasonable time thereafter.<sup>65</sup>

#### **Salvage lien**

The Eastern Caribbean Supreme Court (more commonly referred to as the "High Court") has admiralty jurisdiction over any aircraft salvage claim. The High Court's jurisdiction applies whether or not the aircraft is registered in the BVI, or wherever the owner is domiciled or resident. An action may be brought in personam against the aircraft's owner or in rem against the aircraft.

#### **Possessory lien**

The creditor must either claim for a definite amount or give the owner particulars from which the amount can be calculated. The owner must tender this without any set-off or deduction. It should be noted that the lienholder has no general right to sell the aircraft and can be liable for wrongful interference with the aircraft, should it attempt to do so. The High Court has jurisdiction over proceedings to sell an aircraft subject to a common law possessory lien (such as for repairs or refurbishment). The

High Court has a discretion to order the sale of the aircraft and also the return of the aircraft by the lienholder to the owner, provided that there is paid into court the sum in respect of which the lien is claimed.

#### *Contractual lien*

In the case of a *pledge* it carries with it an implied right to sell the property pledged in default of payment. Thus, recourse to the BVI courts will not be necessary.<sup>66</sup> In the case of any other contractual lien, the contract will normally contain clauses stipulating:

- in default of payment the lienholder may sell the aircraft, or otherwise dispose of it within a certain period;
- payment of overdue interest at a penalty rate;
- governing law and jurisdiction.

The permission of the BVI court will not usually be required under the contract to resell the aircraft. In any case the High Court has jurisdiction over proceedings for the sale and distribution of the proceeds of any property subject to a lien.<sup>67</sup>

## **RIGHTS IN REM AGAINST AIRCRAFT**

14

### **Is there a right in rem against an aircraft under British Virgin Islands law?**

A right in rem enables a party to bring an action against property as opposed to an action against a person (which is called a right in personam). A right in rem developed under maritime law. Its basic purpose was to enable parties to obtain redress when a vessel was in the jurisdiction of the courts even though its owner was abroad. There is no right in rem against aircraft with the very limited exceptions of:

- salvage;
- towage (waterborne aircraft only);
- pilotage (waterborne aircraft only).

Proceedings in rem, in the case of these exceptions, are expressly provided for in legislation. For the High Court to have jurisdiction in rem in these cases the writ should be served on the aircraft by being physically attached to it. The aircraft must be within the jurisdiction when the writ is served, though it may be outside the jurisdiction when the writ is issued.

## **INTERNATIONAL CONVENTIONS AND LIENS**

15

### **Is the British Virgin Islands party to any international Conventions that relate to aircraft liens? How do these Conventions apply?**

International Conventions will only apply to the BVI if ratified by the

UK and extended to its Overseas Territories (which include the BVI). Those international Conventions in force that relate to aircraft liens are listed below. However, the UK has not ratified them and, as a result, they do not apply as part of English or BVI law. It is worth noting that, as at the time of writing, the Cape Town Convention on International Interests in Mobile Equipment and the related Protocol on Matters Specific to Aircraft Equipment has not been extended to the BVI.

### **1948 Geneva Convention on Rights in Aircraft**

The UK has signed, but not ratified, the 1948 Geneva Convention on the International Recognition of Rights in Aircraft (the Geneva Convention).<sup>68</sup> As a result, its terms do not apply as part of English or BVI law.

The Geneva Convention requires a contracting State to recognise certain “rights” in aircraft where they:

- have been constituted in accordance with the law of the contracting State in which the aircraft was registered as to nationality at the time of their constitution; and
- are regularly recorded in a public record of the contracting State where the aircraft is registered.<sup>69</sup>

Such “rights” include conditional sale and credit agreements, mortgages (legal and equitable), fleet mortgages, leases with a term of more than six months, aircraft trust agreements and pledges.<sup>70</sup> The Convention also provides that, in priority to these “rights”, contracting States must recognise claims in respect of:

- compensation for the salvage of the aircraft; and
- extraordinary expenses indispensable for the preservation of the aircraft

providing these acts gave rise to a charge against the aircraft under the law of the Contracting State where the salvage (or preservation) operations terminated.<sup>71</sup>

Since the UK has not ratified this Convention, neither it nor the BVI would be obliged to recognise, or give priority to, these foreign acts of salvage and preservation.

### **1933 Rome Convention on Precautionary Arrest**

The UK has not ratified the 1933 Convention on the Precautionary Arrest of Aircraft (the Rome Convention).<sup>72</sup> This Convention precludes the arrest of aircraft in various circumstances, where it would seriously disrupt commercial traffic or interfere with state services. It applies to the precautionary arrest of aircraft by judicial or administrative agencies at the behest of the owner of the aircraft, a creditor or a person with a right

in rem.<sup>73</sup> This would include a mortgagee or a lienholder. Arrest is prevented where sufficient security is provided.<sup>74</sup>

In the case of the detention of aircraft for non-payment of Eurocontrol charges pursuant to a multilateral agreement, see 20.

## RECOGNITION AND PRIORITY OF FOREIGN AIRCRAFT LIENS

16

### **Would a British Virgin Islands court recognise foreign aircraft liens? What priority would it give them?**

At the outset, it should be noted that this area of law is complex and that much will depend on the specific fact situation arising, and also whether the basic nature of the claim is founded in tort (e.g. wrongful interference with goods) or contract. In any case, a BVI court (as the *lex fori*) will make a distinction between the *validity* of a foreign aircraft lien and its *priority*.

#### *Recognition of foreign aircraft liens*

The BVI court will recognise a foreign aircraft lien provided that it is valid under its appropriate governing law.<sup>75</sup> It is believed that the BVI court will first determine whether the lien is, in nature:

- *substantive or procedural*; and
- *contractual or proprietary* (i.e. whether it also creates an interest in the aircraft).

In both cases, it is submitted that the law the BVI court will apply to determine these matters will be the *lex causae* of the claim. Thus, if the *lex causae* recognises the claim as *procedural*, the BVI court will not recognise it, since the *lex fori* determines procedural matters.<sup>76</sup> Where the *lex causae* holds that the foreign aircraft lien is purely *contractual* in nature (or the matter in dispute relates to the contractual aspects of the foreign aircraft lien only) the governing law will be the proper law of the contract. This will be the law chosen by the parties and, in the absence of a choice, the law of the country with which the contract is most closely connected.<sup>77</sup>

Where the aircraft creates or conveys a *proprietary right* it is less certain what conflict of laws rule the BVI court will apply. The *lex situs* has been proposed as the conflict of laws rule to govern the proprietary aspects of foreign rights.<sup>78</sup> However, in the case of aircraft, it has been suggested that this rule is rarely of assistance, and that the *proper law of the transfer* (decided in the same way as the proper law of the contract) would be both more in accordance with the implicit wishes of the parties and more likely to uphold the principle of validation.<sup>79</sup>

### **Priority of foreign aircraft liens**

For the priority of domestic aircraft liens, see 9. In the case of foreign maritime liens and claims before a BVI court all questions on their priority will be determined by BVI law, as the law of the forum deciding the matter (the “lex fori”), since the question of priority is a procedural rather than a substantive matter under BVI law.<sup>80</sup> This should also apply to aircraft liens. Thus, for example, if a BVI court has to decide whether a US repair lien on an aircraft takes priority over a BVI mortgage, it will decide the order of priority by reference to BVI law.<sup>81</sup>

## **PART 2**

### **17 RIGHTS OF DETENTION AND SALE**

#### **What rights of detention and sale may be exercised against aircraft in the British Virgin Islands?**

In this Part, reference is made to *detention rights* rather than to *statutory liens*, since the legislative rights of detention considered in this Part do not in general use the word “lien”. Further, unlike a lien in its primary sense (see 1), these detention rights are not generally based on possession, nor do they seek to prevent other parties with an interest in the aircraft from having access to it. Detention rights may also accord a right to *sell* the property in question.

Under BVI legislation persons are granted a right to *detain* and, in some cases, to *sell* (or cause to be forfeited) aircraft in a variety of circumstances. These include circumstances relating to the following:

- customs +;
- public health;
- crimes +;
- war or national emergency.

The legislative right to cause an aircraft to be *forfeited* is marked with a cross (+); it occurs in the case of the contravention of certain provisions of Customs law and in connection with certain crimes such as drug trafficking.

### **18 AIRPORT CHARGES**

#### **Under British Virgin Islands law, can an aircraft be detained and sold for unpaid airport charges? In what circumstances?**

In brief, BVI law does not currently make provision for aircraft to be *detained*, or *sold*, for the non-payment of airport charges.

### **BVI airports and airport charges**

All airports in the BVI are owned and operated by the BVI Airports Authority (the Airports Authority). In the BVI, airport charges are payable for the use of various airport facilities. They include those in respect of the landing of aircraft and aircraft parking. BVI airport charges, as well as rights to detain and sell aircraft in the event of non-payment, may arise from a *contractual agreement* between the airport user and the Airports Authority. The contract may be express or implied.<sup>82</sup> Legislation expressly provides for the levying of airport charges.<sup>83</sup>

### **Register of airport charges**

There is no BVI public register of airport charges. However, the charges are set out in Air Navigation (Aerodrome Charges) Regulations 2007 and Statutory Rates, Fees and Charges (Amendment Schedule) Order 2007.

### **AIR NAVIGATION CHARGES**

19

**Under British Virgin Islands law, can an aircraft be detained and sold for the non- payment of air navigation charges? In what circumstances?**

There are no air navigation charges imposed under BVI law.

### **INTERNATIONAL AIR NAVIGATION CHARGES, INCLUDING EUROCONTROL**

20

**Under British Virgin Islands law, can an aircraft be sold for the non-payment of international air navigation charges, such as Eurocontrol charges? In what circumstances?**

Under BVI law no provision is made to enable any entity to collect in the BVI international air navigation charges.

### **LICENSING CONTRAVENTIONS**

21

**Under British Virgin Islands law, can an aircraft be detained and sold for contraventions of British Virgin Islands licensing requirements? In what circumstances?**

In brief, under BVI law, aircraft can be *detained* for the contravention of BVI licensing requirements. Air Navigation (Overseas Territories) Order 2013 (the Order) Pt 9 provides that an aircraft shall not fly on any flight for the purpose of commercial air transport otherwise than under and in accordance with the terms of an air operator's certificate. Article 8 of the Order permits an aircraft to be detained where it is to be flown in contravention of such article or any other article of the Order.

## 22 AIR NAVIGATION CONTRAVENTIONS

### **Under British Virgin Islands law, can an aircraft be detained and sold for contraventions of Air Navigation regulations? In what circumstances?**

The Order gives certain powers to the Governor of the BVI (whose functions are exercised by the Director of the Department of Civil Aviation). Thus, if it appears to the Department of Civil Aviation (or an authorised person)<sup>84</sup> that an aircraft is intended, or likely, to be flown in circumstances that provisions of the Order dealing with the matters listed below would be contravened in relation to that flight, the Department of Civil Aviation (or an authorised person) may take such steps as are necessary to *detain* the aircraft:

- Registration of aircraft, nationality and registration marks, air operator's certificates, certificates of airworthiness, composition and licensing of flight crew, protection of flight crew from cosmic radiation, flight crew being drunk, public transport aircraft loading and suspended loads, flight recording systems and the preservation of records, the carriage of weapons, war munitions and dangerous goods restrictions with respect to carriage for valuable consideration in aircraft registered outside the BVI, restrictions on aerial photography, aerial survey and aerial work in aircraft registered outside the BVI or flights over any foreign country.
- Where the flight would contravene any other provisions of the Order (or regulations made thereunder) or be a danger to any person or property whether or not in the aircraft.
- While the aircraft is in a condition unfit for flight.

## 23 CUSTOMS CONTRAVENTIONS

### **Under British Virgin Islands law, can an aircraft be detained and sold for contraventions of Customs requirements? In what circumstances?**

In brief, under BVI law, aircraft can be *detained*, and in some cases *forfeited*, for breaches of BVI customs law.

#### **Customs airports**

BVI legislation provides that an aircraft entering the BVI from abroad or departing the BVI for abroad must land at, or depart from, a prescribed airport unless it is prevented by an unavoidable cause.<sup>85</sup>

#### **Forfeiture of aircraft**

Where anything becomes liable to forfeiture under BVI customs law, any aircraft used for the carriage, handling, deposit or concealment of the thing liable to forfeiture shall also be liable to forfeiture. Forfeiture of an

aircraft may also occur if it is (or has been) adapted to be used for or is used for the purpose of smuggling or concealing goods.

**NOISE AND EMISSIONS CONTRAVENTIONS** 24

**Under British Virgin Islands law, can an aircraft be detained and sold for contraventions of noise and emissions requirements? In what circumstances?**

Under the Air Navigation (Overseas Territories) Environmental Standards Order 2004 an aircraft may be detained pursuant to art.19 of that Order.

**PATENT INFRINGEMENTS** 25

**Under British Virgin Islands law, can an aircraft be detained and sold for patent infringements? In what circumstances?**

Under BVI law, there is no provision allowing for aircraft to be detained or sold for patent infringements.

**PUBLIC HEALTH REQUIREMENTS** 26

**Under British Virgin Islands law, can an aircraft be detained and sold for breaches of public health requirements? In what circumstances?**

Under the Quarantine Act 2014, the Minister responsible for health may make regulations for the detention of aircraft for the protection of public health. As at the time of writing, the relevant regulations have not been adopted.

**TAX LAW CONTRAVENTIONS** 27

**Under British Virgin Islands law, can an aircraft be detained and sold for contravention of British Virgin Islands tax laws? In what circumstances?**

The BVI currently has no income, corporate, capital gains, inheritance or gift taxes. Accordingly, there are no detention or sale provisions under BVI law for a tax offence.

**CRIMES** 28

**Under British Virgin Islands law, can aircraft be detained and sold in connection with crimes? In particular, offences relating to terrorism and drug trafficking?**

In brief, under BVI law, aircraft can be *detained* and, in some cases, *forfeited* under criminal law. In particular, forfeiture of aircraft may occur in drug trafficking offences.

### **Terrorism**

Under the Aviation Security and Piracy (Overseas Territories) Order 2000 certain sections of the United Kingdom Aviation Security Act of 1982 were extended to the BVI, which include powers to detain aircraft in connection with terrorism or other acts of violence. Under the Anti-Terrorism (Financial and Other Measures) Order 2002, the BVI courts may make forfeiture orders with respect to any property of a person convicted of financing terrorism which is intended to be, or is suspected might be used, for the purposes of terrorism. This would include aircraft.

### **Drug Trafficking**

A court before which a person is convicted of an offence under the Drugs (Prevention of Misuse) Act may order anything shown to the satisfaction of the court, to relate to the offence, to be forfeited and either destroyed or dealt with in such other manner as the court may direct. This could include an aircraft used for drug trafficking purposes or one purchased from the proceeds. See also **23**.

### **Proceeds of Criminal Conduct Act 1997**

Under this Act, the BVI courts may make confiscation, and restraint orders to recover the proceeds of drug trafficking or any other relevant offence. Proceeds will include aircraft.

## **29 WAR OR NATIONAL EMERGENCY**

**Under British Virgin Islands law, can aircraft be detained and sold by reason of war or other national emergency? In what circumstances?**

When a state of war or national emergency exists, the Governor has broad powers to make regulations pursuant to the Emergency Powers (Disasters) Ordinance which includes, inter alia, the power to make regulations which authorise the taking of possession or control of any property.

## **30 OTHER AIRCRAFT DETENTION AND SALE RIGHTS**

**What other rights are there under British Virgin Islands law to detain, and sell, aircraft?**

The main statutory rights to detain aircraft are set out in **18–26**. Detention may also arise as a result of a breach of contract or in the case where the attachment of an aircraft is sought, for example for the non-payment of a debt or on the liquidation or insolvency of the company which owned it.

## PRIORITY OF AIRCRAFT DETENTION RIGHTS

31

**What is the priority of aircraft detention rights? In particular, what is their priority over aircraft liens?**

For the priority of *aircraft liens* (i.e. their order of precedence to the aircraft and to the proceeds of sale of the aircraft) see 9. This section deals with the priority of *detention rights* among themselves, as well as their priority over aircraft liens.

**Competing detention rights**

It is possible that more than one detention right may exist over an aircraft at the same time. It is likely that their priority will be determined according to the time each contravention occurred.

**Detention rights and liens**

In the case of statutory detention rights versus other rights to detain aircraft, a statutory right to detain an aircraft will take priority over a *mortgage*, even though the airport operator was aware of the existence of the mortgage prior to exercising its right to detain.

Further, it seems that statutory detention rights will take priority over aircraft liens, even where the lien arose prior to the detention right. However, the wording of the statute in question is important. In a maritime case, the statutory right of a port authority to detain a vessel for unpaid dock tonnage and harbour dues took priority over a prior lien for unpaid wages.<sup>86</sup>

**ENDNOTES**

<sup>1</sup> Halsbury, Vol.68 para.802.

<sup>2</sup> “A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given” per Lindley MR in *Santley v Wilde* [1899] 2 Ch. 474.

<sup>3</sup> Halsbury, para.813, although it seems a lien could be assigned if there is authority to transfer the subject of the lien (Halsbury, para.820). A non-possessory lien is also possible. A mortgage is assignable and is not dependent on possession of the property in question: indeed, it takes effect by way of assignment and the mortgagor invariably retains possession of the mortgaged property. “Neither a mortgage nor a charge depends on the delivery of possession [to the creditor]” per Millett LJ in *Re Cosslett (Contractors) Ltd* [1997] B.C.C. 724 at 733. See generally, McBain, “Codifying the Law on Consensual Security: Pledges and Liens” (2007) 21 *Australian Commercial Law Quarterly* 24–47.

<sup>4</sup> Halsbury, para.814. A charge (in its primary sense as an equitable right) does not give the creditor any general or specific right in the property nor any right to possession without recourse to a court. The creditor will require the aid of the court to enforce its interest, which is necessarily equitable.

<sup>5</sup> Liens, in their primary sense, arise from law and are based on possession. The distinction between a mortgage and an equitable charge is that “a mortgage involves a transfer of legal or equitable ownership to the creditor, whereas an

equitable charge does not” per Millett LJ in *Re Cosslett (Contractors) Ltd* [1997] B.C.C. 724 at 733.

<sup>6</sup> In *Re Yorkshire Woolcombers’ Assoc Ltd* [1903] 2 Ch. 284 at 295, Romer LJ indicated that a charge was a *floating charge* if:

- (a) it was a charge on a class of assets of a company, present and future;
- (b) that class was one which, in the ordinary course of business of the company, would be changing from time to time; and
- (c) it was contemplated by the charge that, until a future step was taken by or on behalf of the chargees, the company might carry on its business in the ordinary way in relation to those charged assets.

<sup>7</sup> Halsbury, paras 802 and 817–854.

<sup>8</sup> Halsbury, paras 804 and 855–886. An equitable lien arises irrespective of possession of the chattel by the lienholder and it requires the assistance of the court to enforce it. However, it is doubtful whether such a lien will arise in the case of aircraft: see **8**.

<sup>9</sup> A pledge arises from contract. While it is possible to refer to it as a contractual lien, it is commonly referred to as a pledge when property is delivered up to cover a debt. “In the case of a pledge the owner delivers possession to the creditor as security, whereas in the case of a lien the creditor retains possession of goods previously delivered to him for some other purpose” per Millett LJ in *Re Cosslett (Contractors) Ltd* [1997] B.C.C. 724 at 733. See also Halsbury, paras 810 and 815; and LC 164 para.2.6.

<sup>10</sup> It is debatable whether judicial liens actually exist: see *Halsbury* Vol.68 para.803 fn.4.

<sup>11</sup> Halsbury, paras 802 and 806. An example of a *statutory* lien is the seller’s lien: see **4**. *Common law* liens are generally specific to certain trades (e.g. innkeepers and solicitors liens etc) (*Halsbury*, Vol.68 para.802 fn.5).

<sup>12</sup> A *general* lien entitles the lienholder to retain the lienor’s chattel until *all* its claims or accounts against the lienor are satisfied. A *particular* lien entitles the lienholder to retain the lienor’s chattel until its claims or accounts against the lienor in respect of *that* chattel only are satisfied. General and particular liens may exist as either common law or contractual liens. As to *possessory* and *non-possessory* liens, the basis of a lien (in its primary sense) is that the lienholder loses the lien on losing possession. However, non-possessory liens are possible in very limited cases (e.g. a salvage lien where continued possession of the salvaged property is not required).

<sup>13</sup> See Air Navigation (Overseas Territories) Order 2013 Sch.2. Most of the principles in this chapter will also apply, where possible, to other flying objects such as balloons, airships, gliders and microlights. They will also sometimes apply to aircraft engines and parts (e.g. **6** and **7** will apply to engines when off-wing). However, these objects are not dealt with specifically in this chapter.

<sup>14</sup> It is not possible to be definitive since no legislation and, it appears, no case law have analysed aircraft liens in detail.

<sup>15</sup> In particular, the English courts are reluctant to extend general liens: *Rushforth v Hadfield* (1805) 6 East. 519 at 528 per Le Banc J; *George Barker (Transport) Ltd v Eynon* [1974] 1 All E.R. 900 at 907 per Edmund Davies LJ; and *Squamish Terminals Ltd v Price Waterhouse Ltd* (1986) 26 B.C.L.R. 22 at 26.

<sup>16</sup> Pursuant to the BVI Business Companies Act 2004 (as amended) s.163.

<sup>17</sup> Sale of Goods Act (Cap. 178) s.39(1).

<sup>18</sup> Sale of Goods Act s.40(1)(a). “Property” is defined (s.2(1)) to mean the general property in goods and not merely a special property (such as a pledge). Thus, it generally refers to *title* to the goods.

<sup>19</sup> Sale of Goods Act s.40(1)(b) and ss.44–46. “Stoppage in transit” means that

the seller may resume possession of the aircraft as long as it is in transit and may retain it until payment or tender of the purchase price (s.44). Goods are deemed to be in transit from when they are delivered to a carrier (or other bailee or custodian) for the purpose of transmission to the buyer, until the buyer (or its agent) takes delivery of them from the carrier (or other bailee or custodian) (s.45(1)).

- <sup>20</sup> Sale of Goods Act s.48(2). *The Bineta* [1967] 1 W.L.R. 121 (resale of vessel).
- <sup>21</sup> Sale of Goods Act s.47(1). See also *Mordaunt Bros v British Oil and Cake Mills Ltd* [1910] 2 K.B. 502 (assent must be given by the seller in such circumstances as to show an intention to renounce his right against the goods sold by the buyer).
- <sup>22</sup> Sale of Goods Act s.49(1).
- <sup>23</sup> Sale of Goods Act s.50(1).
- <sup>24</sup> Sale of Goods Act s.40(2). The “other remedies” referred to would include an action for the price of the aircraft where the sale contract provided for payment on a specific date irrespective of delivery (s.49(2)).
- <sup>25</sup> Sale of Goods Act s.41(1). A seller which has lost its lien will not regain it merely because it obtains possession of the aircraft once more: *Pennington v Reliance Motor Works Ltd* [1923] 1 K.B. 127.
- <sup>26</sup> Sale of Goods Act s.41(2).
- <sup>27</sup> Sale of Goods Act s.43(1). The lien (or right of retention) is not lost by reason only that the seller has obtained a judgment or decree against the buyer for the price of the aircraft (s.43(2)).
- <sup>28</sup> This applies whether the lease is a simple finance lease or a *leveraged lease* (e.g. a finance lease with both debt and equity streams). In the case of an *operating lease* there is no sale, since title to the aircraft remains with the owner throughout the lease term. In the case of a finance lease a separate purchase option is usually provided for, to prevent the finance lease being categorised as something other than a lease (in which case various tax benefits, such as capital allowances, may not be available to the lessor).
- <sup>29</sup> For the usual case where the repairs or improvements etc, are made pursuant to a contract containing a lien, see 7.
- <sup>30</sup> In *Bowmaker Ltd v Wycombe Motors Ltd* [1946] K.B. 505, a car hire-purchase agreement was terminated. However, the former hire purchaser subsequently ordered repairs on the car. It was held that no lien was created since possession by the former hire purchaser had been terminated and, thus, he had no authorisation to order the repairs.
- <sup>31</sup> In *Pennington v Reliance Motor Works Ltd* [1923] 1 K.B. 127, it was held that the possessory lien terminated when the lienholder (a car repairer) gave up possession and that it could not be reclaimed subsequently when possession was regained by him. See also *Hatton v Car Maintenance Co Ltd* [1915] 1 Ch. 621 at 624 per Sargant J: “lien would be lost by virtue of the arrangement under which the owner was to be at liberty to take the car away, and did take the car away, as and when she pleased”. cf. *Albermarle Supply Co Ltd v Hind & Co* [1928] 1 K.B. 307 in which taxis were warehoused by a garage proprietor who allowed them to be taken out for hire.
- <sup>32</sup> *Bevan v Waters* [1828] 3 C. & P. 520 per Best CJ: “by the general law, whenever a party has expended labour and skill in the improvement of a chattel bailed to him, he has a lien upon it”. The addition of more modern avionics or noise abatement equipment would be examples of adding value.
- <sup>33</sup> In *Hatton v Car Maintenance Co* [1915] 1 Ch. 621 a car maintenance agreement provided for the repairs and maintenance of a car (including the supply of petrol, lubricant, tyres, tubes and its washing and cleaning). It was held not to create a lien, per Sargant J at 624: “all that was to be done by the

contractor was for the purpose of maintaining the car in the condition in which it was sent to him”.

- <sup>34</sup> *Green v All Motors Ltd* [1917] 1 K.B. 625 (repair of a car); *Williams v Allsup* [1861] 10 C.B.N.S. 417 (repair of a vessel).
- <sup>35</sup> It may be noted that the supplier of fuel to a vessel, or a repairer, has no maritime lien: *The Heinrich Bjorn* [1885] 10 P.D. 44; (1886) 11 App. Cas. 270. See also the US case *Jones v Bodkin* 44P (2d) 38 (Okla 1935) (purchase of oil or gasoline for an aircraft cannot be considered as a labour or a skill. Nor does it contribute to the improvement of the aircraft).
- <sup>36</sup> *Sanderson v Bell* [1834] 3 L.J. Ex. 66 (mere storage insufficient to create a lien). There is the possibility of a warehouse keeper having a common law general lien. In the case of aircraft, it seems there is no authority in point and a BVI court may be reluctant to find in favour of a new category of general lienholder at common law (see 2). In any event, such a lien is unlikely in practice since the warehousing of aircraft will invariably be in accordance with a contract which will supersede any common law general lien which might otherwise exist.
- <sup>37</sup> *Re, Southern Livestock Producers Ltd* [1963] 3 All E.R. 801 (caring for livestock insufficient to create a lien).
- <sup>38</sup> *Tappenden v Artus* [1964] 2 Q.B. 185 (a van was bailed to X who created a repairer’s lien over it. Held that a valid lien had been created by the bailee. In the case of bailment, the purpose of which was the use of the goods by the bailee, the grant of authority by the owner to a bailee to use the goods was authority to do all things reasonably incidental to their reasonable use unless any particular thing was expressly excluded).
- <sup>39</sup> *Williams v Allsup* [1861] 10 C.B.N.S. 417. A mortgagor of a vessel ordered its repair when it became unseaworthy. Held that a lien arose against the mortgagee, who had not given permission for the repair. The court stated, per Erle CJ, that: “the mortgagee having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of earning wherewithal to pay off the mortgage debt, the relation so created by implication so entitles the mortgagor to do all that may be necessary to keep her in an efficient state for that purpose”.
- <sup>40</sup> *Keene v Thomas* [1905] 1 K.B. 136 (hirer had an obligation to keep and preserve a dog cart from injury); *Green v All Motors Ltd* [1917] 1 K.B. 625 (under a hire-purchase agreement hirer was required to keep car in good repair and working condition. Held that a possessory lien arose since, inter alia, there was an express duty on the hirer to have it so repaired).
- <sup>41</sup> *Albemarle Supply Co v Hind* [1928] 1 K.B. 307 (although a car hire-purchase agreement prohibited the hirer from creating a lien for repairs, one arose when it was repaired. The repairer was held to have a valid lien since he did not know of the prohibition).
- <sup>42</sup> *Wehner v Dene Steam Shipping Co* [1905] 2 K.B. 92 at 101.
- <sup>43</sup> *The Freightline One* [1986] 1 L.L.R. 266 at 272: “so long as the [Port of London Authority] retains possession of the vessel [it] cannot be deprived of its right of detention by a change of ownership in the vessel”.
- <sup>44</sup> See *Somes v British Empire Shipping Co* (1860) 8 H.L. Cas. 338. cf. *The Winson* [1982] A.C. 939; *The Katingaki* [1976] 2 Lloyd’s Rep. 372 at 375–376.
- <sup>45</sup> *Walker v Birch* (1795) 6 Term Rep. 258 per Lord Kenyon CJ: “where there is an express stipulation to the contrary, it puts an end to the general rule of law. Here the parties are bound by their express stipulation which excludes all idea of lien”. See also *Re Leith’s Estate, Chambers v Davidson* (1866) L.R. 1 P.C. 296 at 305 per Lord Westbury: “the express stipulation and agreement of the parties for security exclude lien, and limits their rights by the extent of the

express contract they have made". Also, *Fisher v Smith* (1878) 4 App. Cas. 1; Kennedy 326; Gough 498.

- <sup>46</sup> However, there must be at least initial possession: *George Barker (Transport) Ltd v Eynon* [1974] 1 All E.R. 900 (as with a legal possessory lien, a contractual lien depends on delivery as a condition for its exercise).
- <sup>47</sup> A pledge or pawn is a security created by contract and effected by a bailment of a chattel to the creditor to be kept by him until the debt is discharged. It is incomplete without actual or constructive delivery of the goods to the pledgee. The general property in the goods remains in the pledgor.
- <sup>48</sup> The practical disadvantage, that the borrower loses the use and possession of the object pledged, makes this quite unsuitable for the raising of money on the security of an aircraft in any commercial contract.
- <sup>49</sup> As bailee, the bank would have a general duty to take reasonable care of the aircraft (the precise terms would usually be set out in the pledge agreement).
- <sup>50</sup> There is no general possessory lien for repairs. Thus, the lien can be only a particular lien. Further, an attempt to extend this particular lien by contract to make it a general lien, it seems, would be ineffective as against the property of a stranger to the contract (e.g. an aircraft repairer seeks to argue that it has a general lien for aircraft repairs which is effective against a mortgagee).
- <sup>51</sup> In the case where the owner is not operating the aircraft, the user (often an airline) will generally be the contracting party with the repairer/maintainer. In respect of the owner's authorisation to do this, see 6(d).
- <sup>52</sup> Although the BVI has not ratified, or acceded to, the Geneva Convention (see 15), the Mortgaging of Aircraft and Aircraft Regulations 2012 (dealing with the registration of mortgages) are based on the Convention to some extent. It may be noted that the Convention precludes any lien for wages being accorded priority over registered mortgages (art.1(2)). Further, the Regulations neither mention an aircraft lien for wages being possible under BVI law, nor suggests that it could, in any case, take priority over a registered mortgage (art.14(5)).
- <sup>53</sup> *Westrup v Great Yarmouth Steam Carrying Co* (1889) 43 A.C. D. 241, judgment of Kay J at 244.
- <sup>54</sup> *Falcke v Scottish Imperial Insurance Co Ltd* (1886) 34 Ch. D. 234 at 248 per Bowen LJ; *The Heinrich Bjorn* (1885) 10 P.D. 44; (1886) 11 App. Cas. 270 (supply of necessaries did not create an equitable lien against the vessel). Thus, e.g. where a repairer voluntarily repairs an aircraft without the owner's authorisation, it should not have an equitable lien. However, a court would be likely to seek to find authorisation or some form of implied agreement (and thus a possessory or contractual lien) where it otherwise seemed just to enable the person to retain the aircraft until payment. See also 6(d).
- <sup>55</sup> *The Gustaf* (1862) 167 E.R. 230; *The Russland* [1924] P. 55. The possessory lien was held to take effect only from the date of possession. A salvage lien does not depend on possession, though it only takes effect from the event of the successful performance of the salvage services. See *Josefina Thorden* (1945) 78 Lloyd's Rep. 197. Also, see Halsbury, Vol. 93 para.960; Thomas, p.235; and Jackson, Ch.23. In respect of separate acts of salvage on the same vessel, the later ranks prior to the earlier (Thomas, p.244).
- <sup>56</sup> Mortgaging of Aircraft and Aircraft Engines Regulations 2012 subreg.11(7) provides that nothing in the Regulations shall be construed as giving a registered mortgage priority over a possessory lien (see 11).
- <sup>57</sup> Mortgaging of Aircraft and Aircraft Engines Regulations 2012 subreg.11(1).
- <sup>58</sup> Sale of Goods Act s.43(1). Although the seller may have lost its lien, it would have other remedies available against the buyer for the price.
- <sup>59</sup> Where the owner expressly prohibited the creation of the lien, the lienholder would not be able to rely on its *express* or *implied* authority. Where the

- lienholder knew of the prohibition it would not be able to rely on the operator's *express* or *implied* authority. See also *Halsbury* Vol.68 para. 808.
- <sup>60</sup> e.g. as a term of a lease the aircraft owner usually warrants to a lessor that it has unencumbered title to the aircraft. Despite this, if a seller's lien arises it will take precedence over the lessor's rights if the seller still has possession of the aircraft (see 4) even though the owner may be in breach of the contract to the lessor as a result.
- <sup>61</sup> *Mortgaging of Aircraft and Aircraft Engines Regulations 2012* subreg.11(1).
- <sup>62</sup> Usually, the mortgage and other agreements contain covenants from the owner and/or lessee to the mortgagee to inform the latter of any lien (or potential lien) which may arise and to pay it off forthwith. In the case where the lienholder was aware of the prohibition it is believed that no lien will arise.
- <sup>63</sup> *Sale of Goods Act* s.48(2). The BVI court has jurisdiction over proceedings for the sale and distribution of the proceeds of any property subject to a lien or charge.
- <sup>64</sup> *Sale of Goods Act* s.48(4).
- <sup>65</sup> *Sale of Goods Act* s.48(3).
- <sup>66</sup> *Halsbury*, para.808; *Re Hardwick Ex p. Hubbard* (1886) 17 QBD 690 at 698 per Bowen LJ: "there is at common law an authority to the pledgee to sell the goods on the default of the pledgor to pay the money, either at the time originally appointed, or after notice by the pledgee". See also *Deverges v Sauderman, Clerk & Co* [1901] 1 Ch.70.
- <sup>67</sup> See about fn.66.
- <sup>68</sup> For the text of this Convention, see McBain, "Registration of Aircraft and Mortgages: The International Conventions" *Aircraft Finance: Registration, Security and Enforcement* (London: Sweet & Maxwell) Vol.1 pp.1–30.
- <sup>69</sup> *Geneva Convention* art.1(1).
- <sup>70</sup> *Geneva Convention* art.1(1).
- <sup>71</sup> *Geneva Convention* arts 3 and 4.
- <sup>72</sup> For the text of this convention see McBain.
- <sup>73</sup> *Rome Convention* art.2(1).
- <sup>74</sup> *Rome Convention* art.4.
- <sup>75</sup> The appropriate governing law will also depend on how the cause of action is framed. e.g. an aircraft owner may bring proceedings against a party for wrongful interference with its property (a claim in tort) in defence of which such party asserts a lien arising from contract (or, possibly, at common law or in equity). The governing law in respect of the tort claim will probably depend on the law of the jurisdiction where the aircraft was located when the wrongful interference was alleged to have been committed. See, generally, *Dicey and Morris and Cheshire & North*.
- <sup>76</sup> *Dicey and Morris*, r.19. It is believed that where the *lex causae* categorises the claim as substantive, a BVI court will not generally reject it as procedural simply because it is procedural under English domestic law: 203–204.
- <sup>77</sup> *Dicey and Morris*.
- <sup>78</sup> i.e. the law of the country where the aircraft was situated at the time when the lien was created: *Dicey and Morris*, rr.133 and 230.
- <sup>79</sup> McBain, chapter on the Anglo-American Conflicts of Law Rules to Govern the Conveyance of Aircraft. See also **England and Wales 16** and footnotes.
- <sup>80</sup> *Dicey and Morris*, r.19(5).
- <sup>81</sup> See *Halcyon Isle* [1981] A.C. 221 (whether English mortgagee or US repairman had priority. Held that mortgagee had priority since the *lex fori* (Singaporean law, like English law) did not recognise repairs as giving rise to a maritime lien).
- <sup>82</sup> In most cases, the aircraft operator uses the airport without signing any

contract to pay airport charges. However, if the aircraft operator knows that airport charges are payable in accordance with the airport's conditions of use, it can be argued that an implied contract is made when the operator uses the airport.

<sup>83</sup> Airports Act 2003, Air Navigation (Aerodrome Charges) Regulations 2007 and Statutory Rates, Fees and Charges (Amendment Schedule) Order 2007.

<sup>84</sup> Air Navigation (Overseas Territories) Order 2013 art.8. "Authorised person" in relation to art.8 in general refers to any police constable and any person authorised by the Department of Civil Aviation. The Department of Civil Aviation may also direct the aircraft's operator or commander not to make the flight.

<sup>85</sup> Customs Management and Duties Act 2010 s.23.

<sup>86</sup> *Emilie Millon* [1905] 2 K.B. 817 (master and crew of a vessel had maritime lien for wages pursuant to which they obtained an admiralty judgment in rem and had the vessel sold. However, it was held that a statutory power to detain the vessel for unpaid dock tonnage and harbour dues took priority). See also *The Spermina* (1923) Lloyd's Rep. 17 at 52, 76 and 109; *The Charger* [1966] 1 Lloyd's Rep.670; and Jackson, p.563.

