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in association with

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Coláiste na Tríonóide, Baile Átha Cliath
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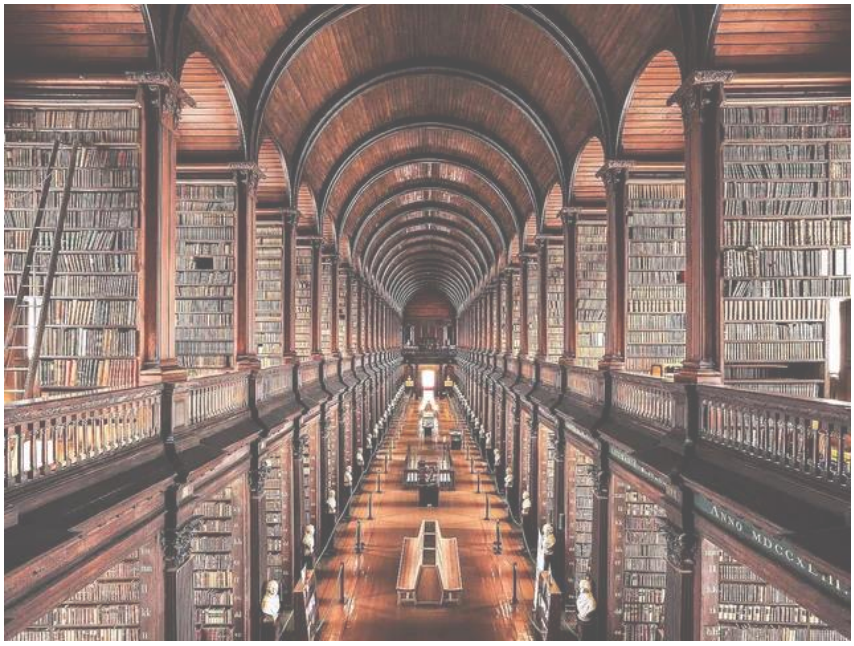
Transnational Commercial and Leasing Law Project

Project Launch Symposium on -

Past, Present, and Future of International Leasing of Personal Property



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Past, Present, and Future of International Leasing of Personal Property

First Symposium of Transnational Commercial and Leasing Law Project

Introduction

In the abstract to his paper on the economics of leasing, Thomas Merrill laments that 'leasing may be the most important legal institution that has received virtually no systematic scholarly attention'.[1] Leasing is too often treated, in academia as well as in national and treaty law, as a form of secured transaction.

This symposium – the launch event for the *Transnational Commercial and Leasing Law*, undertaken in association with Trinity College Dublin (the '**Project'**) – is the ideal opportunity and forum to emphasise and start a deeper exploration of the importance and distinguishing features of leasing in its own right. 2025 marks half a century since Tony Ryan founded Guinness Peat Aviation in the Shannon Free Zone, and 50 years on his legacy thrives in the vibrant aviation leasing community based in Dublin.

This foundational outline provides a framework for that emphasis and exploration. It is divided into four parts:

A. The nature, history, and economic impact of leasing.
B. Liability for damages caused by leased property.
C. Conflict of laws in international leasing transactions.
D. The impact of insolvency laws on leasing transactions.

Annexed to this foundational outline is a prefatory set of basic defined terms and concepts, which we recommend readers review with care (*see* **Annex – Basic Terms and Concepts**). These terms and concepts will be assumed and used throughout this foundational outline.

Save in parts of the historical section, we are excluding leases of real property,[2] which, while in places overlapping with personal property leasing, have many different objectives and features.

We will from time-to-time use and refer to the following hypothetical transaction (the '**Assumed Facts**'):

1. A bank ('**Bank**') loans to a single-purpose ('**SPV**') lessor ('**Lessor'**) incorporated in State 1.
2. Lessor leases an aircraft ('**Aircraft'**) to a lessee ('**Lessee**') incorporated in State 2, under a written lease agreement ('**Lease**').
3. Lessor makes a security assignment of Lease to Bank and further grants a mortgage to Bank over the Aircraft.
4. Following an accident involving the Aircraft, causing substantial passenger and third-party liability, Lessee becomes insolvent, with proceedings in State 2.
5. Lessor then also becomes insolvent, with proceedings in State 1.

Disclaimer: the authors have used AI tools in all graphs, charts, and tables included in this paper (unless otherwise noted), in order to enable ***concise*** and ***comparative*** treatment of complex concepts and items in the limited time provided by the symposium. While the authors have skimmed the output from these AI tools, readers should note that neither a close review, nor efforts to enhance accuracy or refine imprecise or inconsistent terminology, have been undertaken by the authors. Output of these tools should be read as directional in nature only.

More generally, this is a foundational outline and, as such, it is the intention of the authors that the work presented here will be built upon, starting with a series of articles following the Project's inaugural symposium in January 2025. Save in parts of the historical section, footnotes are light. To assist in future academic development, we have set out below lists of topics for further research and study (*see* red-framed boxes). We hope these will lead to additional work, research, and writing, and to future symposia for the presentation and development of work in support of the Project.

[1] Thomas W Merrill, 'The Economics of Leasing' (2020) 12 *Journal of Legal Analysis*, 221, 221.
[2] Though ships and aircraft are analogised to real property in certain jurisdictions and contexts, including for purposes of establishing 'nationality' under international law.

Annex – Basic Terms and Concepts

Terms

Lease: an agreement under which exclusive possession and use of tangible property ('**Property**') is granted from one party ('**Lessor**') to another ('**Lessee**') for a specified period of time ('**Term**') in exchange for compensation ('**Rent**').

Finance Lease: a type of Lease in which the Lessee is expected to obtain ownership of the Property at the end of the Term, sometimes following exercise of a purchase option and payment of a nominal sum.

Operating Lease: a type of Lease in which the Lessor is expected to retain ownership of the Property at the end of the Term.

Dry Lease: a term used most often in the aviation context, a Dry Lease is a type of Operating Lease in which the Lessor provides only the Property to the Lessee, without any additional services such as crew, maintenance, or insurance. In the maritime context, a Dry Lease is often referred to as a **Bareboat Charter** or **Demise Charter** and it is akin to the 'net lease' or 'triple net' lease in United States commercial real estate, whereby the tenant assumes responsibility for ownership-related expenses. The three 'nets' of a 'triple net' lease are the most common branches of such expenditure – insurance, maintenance, and property tax.

Wet Lease: in contrast to the Dry Lease, the Lessor provides the Property to the Lessee as well as additional services such as crew, maintenance, and insurance, and a Wet Lease is therefore called in the aviation context an 'ACMI Lease'. In the maritime context, a Wet Lease is often referred to as a **Time Charter**.

Leveraged Lease: describes the method of financing used by the Lessor, in which the Lessor borrows funds to finance the acquisition of the Property and grants to the lender(s) a security interest in the Property and in the Lease.

Tax-driven Lease: a type of Lease which is structured to comply with tax laws in a jurisdiction where a party expects to obtain tax benefits that impact that party's economic assumptions when pricing the Lease.

Table 1. Comparative Frame – Maritime Lease and Aircraft Lease Terms

	Lease	**Finance Lease**	**Operating Lease**	**Dry Lease**	**Wet Lease**	**Leveraged Lease**	**Tax-driven Lease**
Maritime Leasing	A contractual arrangement where a shipowner leases a vessel to another party.	Long-term financing structure often used for vessel acquisition, ending with ownership transfer.	Short-term lease where the shipowner retains ownership and maintenance responsibilities.	Bareboat charter with no crew, provisions, or insurance provided by the owner.	Lease inclusive of crew, fuel, and operational management provided by the owner.	Structured using third-party financing with the vessel and lease as collateral.	Focused on leveraging tax benefits through depreciation and jurisdiction-specific incentives.
Aviation Leasing	A contractual agreement where an aircraft owner leases the asset to an airline or operator.	Long-term financing structure often used for aircraft acquisition, ending with ownership transfer.	Short-term lease where the lessor retains ownership and maintenance responsibilities.	Lease of an aircraft without crew, maintenance, or insurance (bare aircraft lease).	Lease inclusive of crew, maintenance, insurance, and operational management.	Structured using third-party financing with the vessel and lease as collateral.	Focused on leveraging tax benefits through depreciation and jurisdiction-specific incentives.

Concepts

Using common law concepts (as a base to be built upon by future comparative work), a lease of goods is a '**species of bailment**' where the Lessor by agreement grants a right to possession or control of an object to the Lessee in return for rental or other payment.[3] A lease is therefore a contract for hire, reflecting its basis in Roman law.

Property interests held by the Lessor and the Lessee are set out in the following table, which does not consider derivative transactions or sub-interests (such as sub-leasing):

Table 2. Property Interests of Lessor and Lessee

Property Interests	Lessor	Lessee
Ownership	Retains ownership of the property throughout the lease term	No ownership; holds only a leasehold interest
Possession	No possession during the lease term unless repossession is permitted following default	Holds possession of the equipment for the duration of the leasing under the lease
Usage Rights	No usage rights; however retains the right to enforce terms of usage	Granted usage rights as permitted under the lease agreement
Reversionary Rights	Reclaims the property upon lease expiry or termination	No reversionary rights; must return equipment at end of leasing under the lease

See Table 4: Comparative Frame – Lessor and Lessee Property Interest based in respective Legal Systems

See Table 6: Similarities and Differences – Finance Lease, Hire Purchase, Conditional Sale, Mortgage

The '**Quiet Enjoyment**' of Property is a key right of the Lessee and is consistent with the Lessee's right of exclusive possession and use. Quiet Enjoyment is the Lessor's commitment not to disturb the Lessee's possession or use of the Property during the Term, and in the case of a Leveraged Lease the Quiet Enjoyment commitment typically will be provided by the lender(s). The Lease may contain limits on Quiet Enjoyment, chief among them being that it ceases to apply after default, termination, or expiry of the Term.

Residual Value of the Property refers to its intrinsic value at a future date, typically at the end of the Term. Residual Value is one of the risks and rewards of ownership, and is usually considered to be held by the Lessor under an Operating Lease and by the Lessee under a Finance Lease. However, it should be noted that a Finance Lessor has Residual Value exposure during the Term should the Lessee prove unable to perform under the Lease.

Redeployment of Property occurs either (1) at expiry of an Operating Lease or (2) during the Term, following a default under, and termination of, an Operating Lease or Finance Lease. At expiry or termination of the Term, the Lessor will re-lease or sell the Property. In scenario (1), this is the plan and expectation of the Lessor given that the Term is designed to be less than the economic useful life of the Property. In scenario (2), the redeployment occurs earlier than expected by the Lessor under an Operating Lease and is likely to result in a less beneficial financial outcome than anticipated; in the case of a Finance Lease, recovery and redeployment of the Property will determine the Lessor's recovery of its unamortised financial exposure and determine its Loss Given Default.

Loss Given Default, in a Finance Lease, Loss Given Default ('**LGD**') refers to the proportion of the unamortised financial exposure that the Lessor loses if the Lessee defaults on its Lease obligations. It is a critical metric used in credit risk assessment and is typically expressed as a percentage of the Lessor's total exposure at the time of default under the formula: **LGD** = 1 – ((Recovery from Residual Value + Lease Enforcement) / Total Exposure of Lessor).

[3] Ewan McKendrick, *Goode and McKendrick on Commercial Law* (6th edn, LexisNexis 2020) 835succinctly puts it as follows: 'In the eyes of English law a lease of goods is a hire contract, by whatever name it is called. Its essential characteristic is that goods are bailed by one party, A, to another party, B, for B's use and enjoyment in exchange for rent'.

PART A

Nature, History, and Economic Impact of Leasing

1. Basic and Related Concepts

I. Nature of a Lease

As noted in the annex above, leasing of goods is a species of bailment. Importantly, however, bailment is much broader in scope and does not require a contract: examples include gratuitous bailment (safekeeping) or unilateral assumption (finding). Leases, by contrast, can only come into existence as a result of a deliberate grant of rights by one person to another, resulting in an enforceable contract.

II. Rights and Interests Under a Lease

The table below sets out the basic rights and interests of the Lessor and Lessee:

Table 3. Basic Rights and Interests of the Lessor and Lessee

	Lessor	**Lessee**
Rights	Receive lease payments	Use property as permitted under the lease
	Reclaim property following termination or lease expiry	To the extent not waived, remedies for defective property
	Indemnified for costs arising from use	Quiet enjoyment of property without interference, subject to any agreed limitations
Interests	Ownership of property throughout the lease term	Exclusive possession and use of property during the lease term
	Possession of property following termination or lease expiry	Freedom from interference

The Lessor is often the owner but need not be. The separation of ownership and use of Property is the base concept in most definitions of a Lease.

III. Property Interest Under a Lease

Table 4. Comparative Frame – Lessor and Lessee Property Interest based in respective Legal Systems

Legal System	**Lessee Property Interest**	**Lessor Property Interest**
Common Law (New York)	Holds possessory rights during the lease term; limited rights for transfer or sublease	Retains ownership; title remains with the lessor
Common Law (England)	Possessory rights with potential ability to assign or sublease, subject to agreement	Retains ownership; lessee gains possession but no title
Civil Law (France)	Possessory rights granted but strictly regulated; cannot claim ownership	Ownership retained; lessee holds a right of use under strict conditions
Civil Law (Germany)	Gains usufruct rights, allowing use without ownership claims	Ownership retained; lessee gains usufruct rights but not ownership
Chinese Law	Limited to possessory rights; may sublease if the contract allows	Ownership retained; lessee has limited rights of possession and use
Islamic Law[4]	Holds the right to use under the terms of the hire; no ownership claim	Ownership retained; lease is structured as a hire agreement under Sharia law

Legal systems vary, and legislation may impact the extent to which a Lessee under an Operating Lease holds a proprietary interest, which 'is good against the world, including the Lessor and the Lessor's trustee in bankruptcy

[4] For purposes of this document, Islamic law will, for convenience if too simply, connote the law in Muslim majority countries. There are a range of such laws, and material differences among them. We summarise only highest-level principles, and disregard efforts within these systems to adapt and apply common and civil law principles.

or liquidator'.[5] The affirmative position is more uniform for a Finance Lease, reflected in the views of the Sirs William Blackstone and William Jones.[6] The interest of the bailor (in the case of the Lease, the Lessor), by contrast, is a reversionary interest within the frame of ownership.

IV. Key Features of Leases

Under a Finance Lease, the Lessee retains the long-term economic interest in the Property. In other words, as the International Accounting Standards Board puts it, a Finance Lease is 'a lease that transfers substantially all the risks and rewards incidental to ownership'.[7] The Lessor's retention of title is nominal in nature and title to the Property will pass at the end of the Term upon payment by the Lessee of a final amount, which may be nominal.

An Operating Lease, by contrast, is shorter and represents only a part of the economic life of the Property. Moreover, under an Operating Lease, the Lessee has neither the obligation nor (usually) even the option to purchase the Property at the end of the Term. As a result, the economic risk and reward in the asset remain with the lessor during the Term and beyond. A Lessor will therefore need to enter into multiple leases throughout the useful life of the asset, relying on the Residual Value of the Property to cover its investment and provide a return.

Tax-driven Leases aim to attract funds from equity investors who are able to enjoy tax benefits available to the Lessor in its home jurisdiction to obtain an attractive return on their investment and, typically, pass a portion of those benefits on to the Lessee in the form of reduced rent. For example, in certain jurisdictions, the Lessor as the owner of the Property will be able to utilise a tax allowance or deduction for depreciation of the asset. The tax depreciation may amount to the full acquisition cost of the Property, whereas in the case of a Leveraged Lease the equity investors have only contributed 10-20% of the acquisition cost of the Property. Furthermore, it is possible for tax depreciation to be 'accelerated' (as in Japan or, in some circumstances, the US).

The table below sets out some of the main features of Operating, Finance, and Tax-driven Leases:

Table 5. Comparative Frame - Main Features of Operating, Finance, and Tax-Driven Leases

Feature	Operating Lease	Finance Lease	Tax-Driven Lease
Ownership	Lessor retains ownership	Lessee effectively obtains ownership risks and benefits, though legal title may remain with the lessor	Ownership is structured to maximise tax benefits
Lease Term	Short to medium term, typically less than the useful life of the asset	Long term, often covers the majority of the asset's useful life	Varies based on tax benefits sought; often designed around tax rules
Lessee's Accounting Treatment	Under IFRS 16, most operating leases are capitalised on the lessee's balance sheet as a right-of-use asset and lease liability	Capitalised on the lessee's balance sheet as an asset and liability	Designed to exploit tax treatment, often following unique structures which may affect accounting treatment
Lessor's Accounting Treatment	Lessor recognises lease income over the course of the lease term and retains ownership of the leased asset and therefore reports it on its balance sheet	Lessor derecognises the leased asset, recognises a lease receivable (which amortises over the lease term) and records interest income	
Residual Value Risk	Lessor assumes residual value risk	Lessee assumes residual value risk	Residual value risk allocation depends on tax structuring
Primary Purpose	Primarily for temporary use of the asset	Primarily for long-term use or acquisition of the asset	Structured to achieve tax benefits for one or both parties
Tax Implications	Lease payments may be fully deductible as operating expenses	Lease payments split into interest and principal components for tax purposes	Often designed to take advantage of depreciation or other tax benefits
Balance Sheet Impact	Recorded as right of use asset and as lease liability on the lessee's balance sheet	Recorded as both an asset and a liability on the lessee's balance sheet	Depends on the tax-driven structure; may be off-balance-sheet or capitalised

[5] Bridge, Gullifer, Low & McMeel 265. On the available remedies in proprietary restitution claims, *see* Hugh Beale (ed.), *Chitty on Contracts* (35th edn, Sweet & Maxwell 2023) Chapter 33.
[6] Blackstone, B1 Comm II 454; Jones, W., *An Essay on the Law of Bailments* (1781) 80-85.
[7] IFRS 16, Appendix A. This definition retains the definition from IAS 17, which it has replaced.

V. Form and Substance: Finance Leasing, Conditional Sales, and Hire Purchase

Above an Operating Lease is contrasted with a Finance Lease, which itself has close parallels, with differing terminology, often based on the source legal system. The following table compares, under English law, some of the key elements of three similar contractual forms: Finance Lease, conditional sale, and hire-purchase, with reference to a standard asset finance structure, the loan and mortgage:

Table 6. Similarities and Differences – Finance Lease, Hire Purchase, Conditional Sale, Mortgage

Feature	Finance Lease	Hire Purchase	Conditional Sale Agreement	Loan/Mortgage
Purpose	Primarily used for financing long-term use of an asset	Used for purchasing property over time while using them	Used for acquiring ownership while deferring payments	Used for financing the outright purchase of assets, with the asset as collateral
Ownership	Legal ownership remains with the lessor, but the lessee assumes the risks and rewards of ownership	Ownership transfers to the hirer after the final payment is made, with the risks and rewards of ownership typically passed to the hirer during the term	Ownership transfers to the buyer once all conditions are met (e.g., final payment), with the risks and rewards of ownership passing to the buyer at the start of the agreement	Ownership transfers to the borrower immediately upon purchase of the asset, which may occur at disbursement of the loan; the loan may also be used to refinance asset already owned by borrower
Usage Rights	Granted upon signing the lease agreement	Granted upon signing the agreement while installment payments are made	Granted upon signing the agreement and fulfilling initial conditions	Inherent in borrower's ownership rights; may be subject to conditions set by lender
Payment Structure	Payments are often periodic and may not always be fixed; accounted for by the lessor as a combination of receivable amortisation (principal) and interest income	Installments typically include both principal and interest components	Installments typically include both principal and interest components	Payments typically include both principal and interest components
Quiet Enjoyment	Lessee is entitled to use the asset without interference from the lessor, provided the lease terms are adhered to	Hirer is entitled to use the asset without interference from the lessor, as long as installment payments are made	Buyer is entitled to uninterrupted use of the asset, subject to compliance with the agreement's conditions	Borrower has the right to use the asset without interference from the lender, provided loan terms are adhered to
Rights under English Law	Lessee has the right to use the asset per the lease agreement but does not acquire buyer protections under sale of goods legislation	Hirer has usage rights but is not deemed a buyer in possession; therefore, the Sale of Goods Act 1979 provisions do not apply	Buyer is deemed a buyer in possession, gaining protections under the Sale of Goods Act 1979	Borrower has the right to use the asset under the terms of the loan agreement but does not gain protections under the Sale of Goods Act 1979, as the transaction is classified as financing rather than a sale
End-of-Term Options	Lessee may have the option to purchase or renew the lease. There is no obligation for the lessee to make a final payment unless stipulated in the lease terms	Ownership automatically transfers after the final payment, which the hirer is obligated to make under the agreement	Ownership transfers automatically after conditions (e.g., final payment) are satisfied, which the buyer is obligated to make	Borrower must repay loan in full and retains ownership of the asset
Accounting Treatment	Capitalised on the lessee's balance sheet as an asset and liability	Capitalised as an asset and liability on the hirer's balance sheet	Recorded as a purchase in the buyer's books, with the asset capitalised and a liability recorded for the unpaid balance	Loan is recorded as a liability on the borrower's balance sheet
Risk of Loss	Typically borne by the lessee during the lease term	Typically borne by the hirer during the term of the agreement	Typically borne by the buyer upon signing the agreement and fulfilling initial conditions	Borrower retains risk of loss
Remedies upon Default	Lessor may repossess the asset, demand accelerated payments, or enforce contract terms through legal action	Lessor may repossess the asset, retaining installments paid, and may also claim damages for breach of contract	Seller may repossess the asset or demand full payment of remaining balance, depending on contract terms	Lender may foreclose on collateral or pursue legal action for repayment of outstanding loan balance

VI. Comparative law

Distinctions between common law and civil law principles, and across other systems familiar from other areas of legal study, are present in the leasing context. For example, where civil law jurisdictions rely more heavily on codified rules, in common law jurisdictions, precedents and case law often dictate leasing principles. The table below sets out certain distinctions in leasing across different legal systems:

Table 7. Comparative Frame – Distinctions in leasing across different Legal Systems

See next page.

Legal System	Key Features	Rules	Rights of Lessee	Obligations of Lessee	Rights of Lessor	Obligations of Lessor
Common Law (NY & England)	Contractual freedom is emphasised, governed by United States Uniform Commercial Code (UCC) Article 2A for personal property. In England and other common law jurisdictions, personal property leasing relies on contract law, case law precedents, and relevant statutory provisions such as the Sale of Goods Act 1979 and the Hire Purchase Act 1967	In the United States, UCC Article 2A defines the framework for personal property leases, including warranties and default remedies. In England and other common law jurisdictions, general contract law and relevant statutes like the Sale of Goods Act 1979 and Hire Purchase Act 1967 apply	Use of the property per lease terms; claims for defects or non-performance are typically directed at the supplier/manufacturer, as the lessor (financier) disclaims responsibility for goods' quality	Pay rent, maintain property, return at lease end unless otherwise stated	Receive rent; reclaim property upon breach or lease expiration	Provide goods fit for intended use; maintain ownership rights, which obligations may be fulfilled by the vendor if the lessor is purely providing financing., which may be delegated to the vendor or supplier if the lessor only provides financing.
Civil Law (France)	Codified rules; leasing treated distinctly under obligations law in the Civil Code	Civil Code distinguishes between leases and sales contracts	Entitlement to use goods per contract terms; remedies for defective goods or non-performance are generally directed at the supplier, not the financier-lessor	Payment of agreed rent, proper usage, care for leased goods	Enforce compliance with lease terms; repossess property if needed	Deliver usable goods; ensure goods match agreed specifications, which obligations may be fulfilled by the vendor if the lessor is purely providing financing, and these obligations are typically executed by the vendor in cases of financier-only lessors.
Civil Law (Germany)	Highly regulated with detailed provisions for personal property leasing under the Civil Code	Strict compliance with leasing provisions in the German Civil Code (BGB)	Strong protections for using goods as intended; claims for defects or quality issues are typically made against the supplier, not the financier	Return goods in good condition barring normal wear; pay rent as agreed	Collect rent; repossess goods for non-compliance	Supply goods fit for agreed use; honor contract terms, which obligations may be fulfilled by the vendor if the lessor is purely providing financing, but a financier-lessor may rely on the supplier to fulfill delivery and related duties.
Chinese Law	State involvement in regulating personal property leases; statutory codes apply	Rules for personal property leases integrated into commercial and civil codes	Right to use goods per lease agreement; disputes over quality or defects are generally resolved with the supplier rather than the financier	Timely rent payment; proper maintenance and return of goods	Receive agreed compensation and ensure lessee complies with terms	Ensure goods meet contractual terms and are fit for use, which obligations may be fulfilled by the vendor if the lessor is purely providing financing, though a lessor acting as a financier often shifts delivery responsibilities to the vendor
Islamic Law	Leases must align with Sharia, prohibiting interest-based financing models	Islamic principles govern, emphasising fairness and use without exploitation	Right to use goods as agreed in the lease; claims for defects or suitability are usually directed to the supplier, unless the lessor plays a dual role as supplier	Ensure proper use in line with Islamic principles and contract terms	Ownership retained; right to reclaim goods upon lease expiration	Provide goods per agreement without infringing on lessee's rights, which obligations may be fulfilled by the vendor if the lessor is purely providing financing, unless the lessor has explicitly assumed vendor-like responsibilities in addition to financing

VII. International leasing of mobile assets

The movable nature of assets such as aircraft, ships, and railway rolling stock, which regularly cross international and jurisdictional borders, renders the rights and interests of Lessors and lenders unstable and potentially vulnerable. Property interests created in one jurisdiction may prove unenforceable in another. Insolvency, including cross border insolvency, may substantially and adversely impact a Lessor's rights and remedies. The Convention on International Interests in Mobile Equipment of 2001 (the '**Convention**') and its Aircraft Protocol (the '**Protocol'**) (together, the '**Cape Town Convention**')[8] represent 'one of the most ambitious international commercial law instruments ever to have been fashioned in the field of private transactional law',[9] providing for enforceable rights, and an international registry to prioritise competing interests, in a *sui generis* property interest in covered assets. That interest is neither dependent upon, nor derived from, national law; it is created by the Cape Town Convention. This topic is dealt with in greater detail below.

Table 8. Key features and innovations embodied in the Cape Town Convention

	Creation of International Interest in Mobile Equipment	**Priority of International Interest in Mobile Equipment**	**Enforcement of International Interest in Mobile Equipment Outside Bankruptcy**	**Enforcement of International Interest in Mobile Equipment Inside Bankruptcy**	**Dispute Resolution**
Cape Town Convention (Arabic numbers) and Aircraft Protocol (Roman numerals) Articles	Article 7: Sets out formal requirements for constituting an international interest.	Articles 29: and XIV Establishes priority rules for competing interests, centered on registration.	Articles 8 and IX - XIII Sets out remedies available to creditors upon debtor default, including possession and sale. Where declared by a country, includes (a) non-judicial remedies, and (b) prompt advance relief. .	Article 30 and XI Addresses effects of insolvency on international interests, and, where declared by a country a) requires that a creditor's rights are recognised and promptly and predictably enforced, and (b) prevents involuntary restructuring of rights.	Article 42-43 Binding party autonomy-based jurisdiction provisions, *inter alia*.

[8] The other protocols of the Convention will not be addressed in this outline, but will feature in future research and work.
[9] Goode R., *Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Objects* (5th edn, UNIDROIT 2022) 1.

Table 9. Comparative Frame – Purpose and functions of the International Registry

	Nature of the International Registry	**Purpose of the International Registry**	**Registration Process**	**Priority Determination**	**Accessibility and Transparency**	**Role in Dispute Resolution**
Cape Town Convention	Operates as a neutral, global, and electronic platform for managing international interests, independent of any single jurisdiction. Provides for a 'notice-based', rather than documentary, system	Establishes a centralised electronic registry for recording international interests in high-value mobile equipment.	Specifies procedures for registering interests, requiring consent from all parties involved.	Determines priority based on the order of registration, ensuring clear precedence for registered interests.	Mandates that the registry be accessible globally, promoting transparency and confidence among parties.	Provides supporting records for judicial resolution of disputes involving registered interests.
Aircraft Protocol	Designed specifically to accommodate the complexities of aircraft leasing and financing, integrating with international aviation standards.	Adapts the registry framework to aircraft objects, enhancing global recognition of recorded interests.	Introduces aviation-specific registration protocols to streamline the process for aircraft objects.	Reinforces priority rules tailored to the aviation sector, ensuring alignment with industry practices.	Promotes accessibility by ensuring the registry meets the needs of international aviation stakeholders.	Supports aviation-specific dispute resolution by offering tailored records and verification mechanisms.

Table 10. Comparative Frame – Creation, enforcement, and priority of international interests in Protocols of the Cape Town Convention

	Creation of International Interests	**Enforcement of International Interests**	**Priority of International Interests**
Aircraft Protocol	Specific to high-value, specifically identified mobile aircraft assets	Timebound enforcement provisions, including expedited remedies for repossession in insolvency, and facilitates deregistration and export	Centralised 'first-to-register' system with global recognition, ensuring financing confidence.
Rail Protocol	Applies to railway rolling stock with unique identifiers	Enforcement but with limits given the policy objective of continuity of service due to public utility nature of rail equipment.	Priority integrates regional systems with unique identifiers for localised operation.
Space Protocol	Covers spacecraft and related equipment; includes provisions for a range of intangible assets.	Accounts for remote and non-physical enforcement, addressing unique operational challenges. Public service limits included.	Centralised registry prioritising 'first-to-register' for high financial stakes and orbital conflicts.
MAC Protocol	Covers a diverse mining, agricultural, and construction equipment financing.	Streamlined enforcement provisions, but suited for smaller, less complex transactions	Simplified registration and priority rules for medium-value assets in diverse markets.

Topics for further research and study

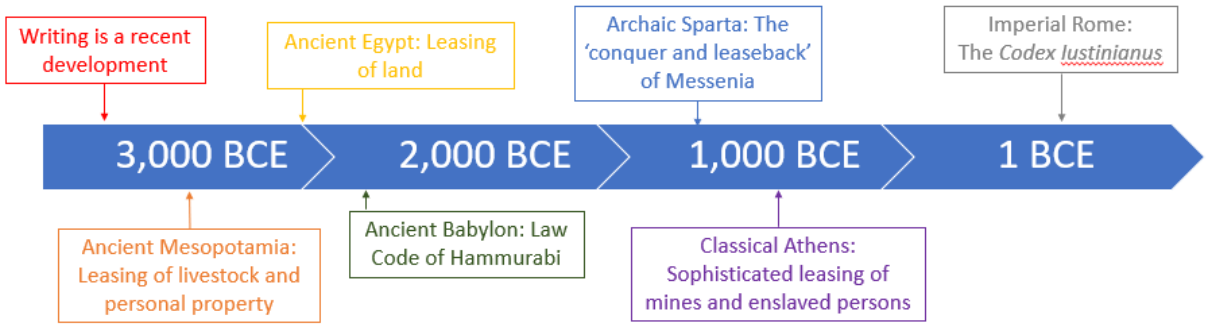
1. To what extent can a Lessee under different types of Leases transfer a greater interest in leased property than it has? Address the same under common, civil, Chinese, and Islamic-based legal systems. To what extent has international law developed or impacted this question?

2. What are the major differing consequences that flow from whether or not a Lessee (under various types of Leases) has a property interest in a leased asset?

3. Trace the historical development and public policy advantages and disadvantages of Tax-driven Leasing. Has there been international regulatory/tax competition impacting that development?

4. Will the public policy limitations on exercising remedies under the protocols to the Cape Town Convention (other than its aircraft protocol) adversely impact their ability to facilitate leasing?

2. History of Leasing



I. CRADLES OF CIVILISATION: Agricultural Leasing in Mesopotamia and Egypt

In Mesopotamia, the fertile plain between the Tigris and the Euphrates rivers, the leasing of both property and livestock is apparent from the middle of the third millennium BCE.[10] The limited available evidence[11] suggests that the terms of such leases were determined mainly by custom,[12] implying that the practice was well-established even at this early stage. Indeed, it has been suggested that preindustrial societies tended to practice leasing agricultural land *before* they practice selling it.[13]

In Egypt, the leasing of land appears to be commonplace by 2002 BCE,[14] and it can likewise be inferred that the practice long predates this period. Leasehold of agricultural property was advanced in many respects, with frameworks in place for sharecropping, subleasing, and the hire of third-party labour to carry out fieldwork on fields rented to smallholder-tenants.[15]

The Law Code of Hammurabi (dating to the 18th century BCE), one of the oldest deciphered texts of length anywhere in the world, prescribes a number of laws and penalties with respect to leasing. These include the allocation of risk in the event of *force majeure*,[16] the right of the tenant to employ hired labour,[17] and the penalty for failing to cultivate the rented field.[18]

Hammurabi's edicts extend to maritime matters, stipulating that if a man rents his boat to a sailor, who subsequently wrecks the vessel through negligence, the sailor is to procure another boat as compensation.[19] This thereby

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[10] Piotr Steinkeller, *The Renting of Fields in Early Mesopotamia and the Development of the Concept of 'Interest' in Sumerian* (1981) 24 Journal of the Economic and Social History of the Orient 113, 129-39; Elizabeth Stone, *Economic Crisis and Social Upheaval in Old Babylonian Nippur* in Louis D Levine & T Cuyler Young Jr (eds), *Mountains and Low-Lands: Essays in the Archaeology of Greater Mesopotamia* (1977) 268.

[11] *See*, for example, James B Pritchard (ed) and Theophile J Meek (trs), *Ancient Near Eastern Texts Relating to the Old Testament* (1955) 218: 'Mashqum, the son of Rim-Adad, has rented for one year from Ribatum, a hierodule of Shamash. As the rent per year he shall pay 1-1/2 shekels of silver, with 2/3 shekel of silver received as the initial payment on his rent'.

[12] Robert C Ellickson and Charles D Thorland, 'Ancient Land Law: Mesopotamia, Egypt, Israel' (1995) 71 Chicago-Kent Law Review 321, 370.

[13] Frederic L Pryor, *The Origins of the Economy: A Comparative Study of Distribution in Primitive and Peasant Economies* (Academic Press 1977) 143; Ellickson and Thorland (n 12) 321.

[14] Klaus Baer, 'Eleventh Dynasty Farmer's Letters to His Family' (1963) 83 Journal of the American Oriental Society 1, 3-4, 6, 9.

[15] Ellickson and Thorland (n 12) 369-71.

[16] §45 in John Huehnergard (ed and tr) *Key to a Grammar of Akkadian* (3rd edn, Eisenbrauns 2013) 82: 'If a man gave his field to a tenant farmer for rent and has also received the rent for his field, (and) afterwards Adad has inundated the field or else a flood has carried (it) off, the loss is the tenant farmer's only'.

[17] §47 in ibid 64: 'If a tenant farmer, because he did not recover his expenses in the previous year, has said he would plough the field (again) (or, has said, 'I will plough the field (again)'), the owner of the field will not object; that very tenant farmer of his may plough his field, and he will receive grain at the harvest according to his contract(s)'.

[18] §42 in ibid 89: 'If a man rented a field for cultivation but has not produced any grain in the field, he will be convicted of not working the field and will give the owner of the field grain corresponding to his neighbours'.

[19] §236 in Mervyn EJ Richardson (ed and tr) *Hammurabi's Laws: Text, Translation and Glossary* (T & T Clark International 2004) 108-9.

evidences an early form of remedy in the event of a total loss, making provision for an early (in modern terminology) Time Charter or Wet Lease, envisaging a scenario in which a sailor and his boat can be hired,[20] and legislating on where liability for cargo rests.

II. STRANGERS ON THEIR OWN LAND: Athenian cleruchies, Spartan Helotage, and Achaemenid Persia

In archaic-era Greece, the Spartans systematically subdued their Messenian neighbours over the course of a century. The Messenians, who came to be known as 'Helots', were left to till their plots (*klēroi*) and were compelled to send a rent (*apophora*) to Sparta.[21] This afforded the opportunity for the Spartans to develop a professional, standing military based, in no small part, on the lease-back of conquered territory to a dispossessed native population.

Thucydides describes a similar[22] strategy deployed by the Athenians during the Peloponnesian War.[23] Following the revolt of the inhabitants of the island of Lesbos, the Athenians divided their land into 3,000 *klēroi*, 2,700 of which were apportioned by lot to citizens of Athens. The natives of the island continued to work the fields, but now under the compulsion to pay two *mnai* per year per *klēros* to their new Athenian landlord. Each of the new 2,700 Athenian 'lessors' became automatically liable to taxation and military service as a heavy-armed infantryman.[24] The income from the lessees on Lesbos amounted to more than three times the highest annual tax paid by any Athenian subject during the Peloponnesian War.[25]

Finally, standing at the head of the largest, wealthiest, and most administratively sophisticated empire the world had ever seen, the Achaemenid kings of Persia asserted political and economic power through grants of land (558-331 BCE).[26] The extraordinary Murašû archive, dating to the second half of the 5th century BCE, evidences the commercial dealings of a firm which handled the administration of land in lower Mesopotamia, where everything was royal territory owned by the king. This land was divided into smaller plots and rented out on (theoretically) permanent, hereditary leases[27] in return for rent and military service[28] or labour requirements, which could be settled by cash in lieu.[29] These plots could be sub-leased to third parties.[30] The Achaemenid framework was sufficiently established in Egypt by Herodotus' day that he could report on its origin by the legendary king Sesostris.[31] In the wake of the conquest of Alexander the Great, the Ptolemaic dynasty[32] adopted this 'ancient practice' wholesale into their new kingdom,[33] accruing benefits both military (through the ability to settle soldiers in convenient areas) and economic (through the extraction of rent).[34]

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[20] §237 in ibid.

[21] Tyrtaeus fragment F6 W in William HS Jones and Henry A Ormerod (eds and trs) *Pausanias: Description of Greece* (London 1918) 249: 'Like asses worn by their great burdens, bringing of dire necessity to their masters the half of all the fruits the corn-land bears'. Myron *FGH* 106 F 2: 'Leaving the land to them they (the Spartans) fixed the share which they (the Messenians) forever had to hand over to them'. *See* also Pausanias IV 14.4-5 and Aelian *VH* VI 1.

[22] Alfonso Moreno, *Feeding the Democracy: The Athenian Grain Supply in the Fifth and Fourth Centuries BC* (Oxford University Press 2007) 320.

[23] Thucydides *History of the Peloponnesian War* III.50.

[24] Moreno, *Feeding the Democracy* (n 22) 95; Miriam Valdés Guía, '*Zeugetai* in Fifth-Century Athens: Social and Economic Qualification from Cleisthenes to the End of the Peloponnesian War' 1 *PNYX* 2022 1 45, 48, 67.

[25] Robin Osborne, *The Athenian Empire* (4th edn, LACTOR 1 2000) 91.

[26] Manning, JG, *Land and Power in Ptolemaic Egypt: The Structure of Land Tenure* (Cambridge University Press 2003) 104.

[27] Christopher Tuplin, 'Administration of the Achaemenid Empire' in Ian Carradice (ed), Coinage and Administration in the Athenian and Persian Empires (Oxford 1987) 153.

[28] AT Olmstead, *History of the Persian Empire* (University of Chicago Press 1959) 4: 'The land is owned by the divine king who represents the usufruct to his earthly deputy… tillers of the soil therefore pay the deputy rent, not taxes'.

[29] Tuplin (n 27) 154-5; UET 4.109 (397/6).

[30] Godfrey Rolles Driver (ed and tr), *Aramaic Documents of the Fifth Century BC* (Oxford Clarendon Press 1956) no.10; Peter Thonemann, 'Estates and the Land in Early Hellenistic Asia Minor: The Estate of Krateuas' (2009) 39 *Chiron* 1 363, 369.

[31] Herodotus *Histories* II.109 in Alfred Denis Godley (ed and tr), *Herodotus* (London 1920) 397-399: 'This kind moreover (so they said) divided the country among all the Egyptians by giving each an equal square parcel of land, and made this his source of revenue, appointing the payment of a yearly tax… From this, to my thinking, the Greeks learnt the art of measuring land'.

[32] Stretching down across three centuries to history's most famous woman – Cleopatra.

[33] Manning (n 26) 54-8, 99-125.

[34] ibid 103-4.

III. EXPLOITATIVE LEASING: Enslaved persons and silver in Classical Athens

The leasing of enslaved persons, whereby the master would receive indirect income (*apophora* or *misthos*) from their labour, 'took on exceptional scope in classical Athens',[35] to the extent that an infamously cantankerous, aristocratic commentator specifically condemns it.[36] Ismard[37] and Weber both note the significance of the transformation of enslaved people from property to 'a source of rents rather than labour'.[38] The scale of this market, in the fourth century BCE in particular but also in the latter fifth century BCE, is borne out repeatedly in source materials.[39] In the 340s BCE, Demosthenes' speech *Against Pantainetos* details a transaction involving the 'lease' (*misthōsis*) of a mining facility and slaves, which has qualities common to both the lease and secured loan.[40] That could be seen as an early ancestor of the finance lease.[41]

IV. MOVING TOWARDS *MODERNITAS*: Leasing in Republican and Imperial Rome

By the second and first centuries BCE, the concept of *locatio conductio*[42] was well-established in Roman law,[43] recognising leases of agricultural land, urban residential assets, and personal property.[44] The conception the Roman jurists had of this practice is strikingly similar to our understanding of the modern lease: the 'parties agreed that the *conductor* (hirer) would pay *merces* (rent) in return for the *uti frui* (use and enjoyment)',[45] corresponding neatly to the broad definitions sketched in our annex. The most powerful city on earth, with a population of around one million, almost necessarily had well-developed leasing law, given that most of the residential population lived in rented *cenacula*.[46] It was common for tenants to sublease their *cenacula*, and a body of law accordingly developed to accommodate this.[47]

As with the general conceptualisation of *locatio conductio*, many of the specific laws that come down to us closely track the details of modern leasing.[48] The jurists Gaius and Paulus are both recorded as commenting on the similarity between leasing and sale and purchase,[49] familiar from our discussion in Section 1.[50] In his *Institutiones*, written around 161 CE, Gaius poses an infamous question to this point.[51] If gladiators are provided under a contract (*ea lege*) for 20 *denarii* each for those who are unharmed but 1,000 *denarii* for those killed or debilitated, is this a contract sale and purchase (*emptio et uenditio*) or lease and hire (*locatio et conductio*)? Gaius is of the opinion that

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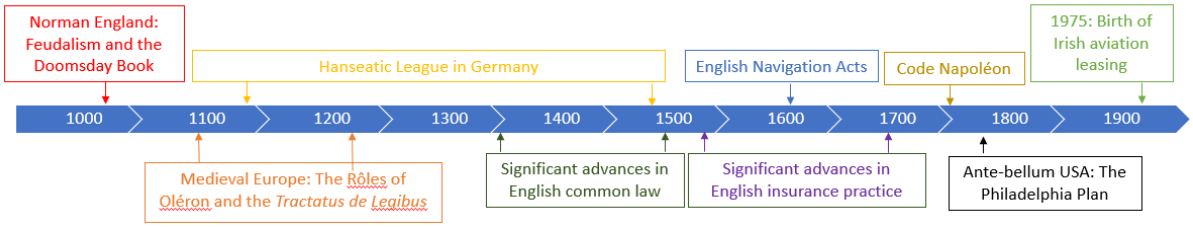
[35] Paulin Ismard, 'Renting slaves in classical Athens. Anatomy of a Legal Form' in Werner Riess and Kaja Harter-Uibopuu, *Symposion 2019. Vorträge zur griechischen und hellenistischen Rechtsgeschichte* (Hamburg 2019) 3-4.
[36] Ps.-Xenophon, *Athenaion Politeia* 1.11: 'For where there is a naval power, it is necessary from financial considerations to be slaves to the slaves in order to take a portion of their earnings, and it is then necessary to let them go free'.
[37] Ismard (n 35) 3-4.
[38] RI Frank (tr), Max Weber, *The Agrarian Sociology of Ancient Civilizations* (Tübingen 1924) 54.
[39] Aeschines (1.97) accuses his opponent's father of hiring 12 slaves for his workshop; Demosthenes (27.18-20; 28.12) employed hired slaves from Therippides for several years in his workshop.
[40] Demosthenes 37.4-5.
[41] For a full discussion on the applicability of modern concepts of sale with the right of redemption and finance leasing, *see* Chryssa Papathanassiou 'Evidence of finance leasing in the ancient mines of Laureion' (2021) SSRN Electronic Journal 1, 7-19.
[42] *Locatio* meaning to 'lease out' (as in the modern French 'location') and *conductio* meaning to 'take over'.
[43] Paul Duplessis, *Letting and Hiring in Roman Legal Thought: 27 BCE – 284 CE* (Brill Academic Publishing 2012) 10 uses the mid-second century as the hard backstop for the *de iure* recognition of *locatio conductio*, speculating that its *de facto* origin significantly pre-dates this period. McGinn 170 concludes that its origins are 'unrecoverable in strictly historical terms.' *See* further Robert Fiori *La Definizione della 'locatio conductio'* (University of Rome 1999) *passim* for a sketch of a tripartite development in the concept.
[44] Bruce Frier, *Landlords and Tenants in Imperial Rome* (Princeton University Press 1980) 56–70; Dennis Kehoe, *Investment, profit, and tenancy: The Jurists and the Roman Agrarian Economy* (University of Michigan Press 1997) 137–166.
[45] DuPleissis (n 43) 14; Fiori (n 43) 7.
[46] Bruce Frier, 'The Rental Market in Early Imperial Rome' (1977) 67 *Journal of Roman Studies* 27, 27.
[47] Ulpian *Digest* 9.3.5.1.
[48] Kehoe (n 44) 9 rightly notes the difficulty in using legal sources as evidence of earlier legal frameworks. The opinions of jurists like Ulpian, Neratius, and Gaius are recorded in the *Digesta* of the Emperor Justinian (sixth century CE) and are refracted through his vision and aims.
[49] *Digesta* 19.2.1-2. *See* below, Part V.
[50] *See Table 6: Similarities and Differences – Finance Lease, Hire Purchase, Conditional Sale, Mortgage.*
[51] Gaius *Institutiones* 3.146.

Roman law could accommodate such a contract by making it contingent on events: those gladiators unharmed were let and hired, whereas those killed or maimed were bought and sold. The terms Gaius used for these terms were 'conditional sale' and 'conditional hire' (*sub condicione… uenditione aut locatione*).

In the context of realty leasing, provision is made for situations where a tenant remains in possession beyond the end of a lease, corresponding to a modern tenancy at will.[52] Ulpian (citing Pomponius) records basic protections for residential tenants but explains that where a landlord offers an evicted tenant 'another house which is just as convenient', the lessor may be released from his obligation,[53] which has a notable parallel in English law.[54] Additionally, in the *Codex Iustinianus*, the emperor Antoninus Pius (mid-second century CE) is recorded as listing a set of grounds on which a landlord may evict a tenant who has paid their rent,[55] all three of which are represented in England's Landlord and Tenant Act 1954.[56] Finally, the edicts of the emperor Alexander reflect the modern principles of quiet enjoyment and the right of tenants to do anything they please that is not prevented by contract.[57]



V. SHADOWS OF THE PAST: Feudalism in the Middle Ages

While the Eastern Roman Empire continued its rule, centralised authority in Western Europe collapsed in the fifth century CE. What later emerged across Christendom, including in Anglo-Saxon and later Norman England, was a feudal system of land ownership that bears fascinating resemblance to, in particular, the Achaemenid practice discussed above. As remains the case in Great Britain and Northern Ireland to this day, the monarch was the only owner of land in England, which others merely held[58] either as freehold[59] or non-freehold. The monarch would grant land to barons and nobles in exchange for military service, who would in turn do the same to lesser lords in a pyramid structure.

[52] Ulpian *Digesta* 19.2.13.11: 'Where, after the term of his lease has elapsed, the tenant remains on the premises, not only is a renewal of the lease held to have been made, but also any pledges which have been given as security are still considered to be encumbered. This, however, is only true where another party had not encumbered the property at the time of the original lease, otherwise his fresh consent will be necessary'.
[53] ibid 19.2.9.
[54] Landlord and Tenant Act 1954 ss.25 and 30(1)(d).
[55] *Codex Iustinianus* IV.65.3: 'If you have paid to the owner the entire amount of the rent of a house, which you say that you have leased, you cannot be ejected against your consent, unless the owner can prove that the building is required for his own use, or he desires to repair it, or you have not acted as you should have done with reference to the property leased'.
[56] Landlord and Tenant Act 1954 ss.25 and 30(1)(a), (f), and (g).
[57] *Codex Iustinianus* IV.65.6: 'No one is prevented from leasing to another property which he himself has rented for his own enjoyment, if nothing to the contrary has been agreed upon'.
[58] The English 'tenant' derives from the French (and Latin) for 'holding'.
[59] However, note that even 'freehold' land was not immune from the requirement to pay to the king as owner a feudal relief in order to inherit: Ivor J Sanders, *English Baronies, A Study of their Origin & Descent 1086-1327* (Oxford 1960) *passim*.

VI. LAW AND COMMERCE: from the Rôles of Oléron to Napoleon

The Rôles of Oléron or the *Jugements de la mer*, codified in the 12th or 13th century[60] on the eponymous Isle of Oléron off the French west coast,[61] at first regulated the wine trade between Brittany, Normandy, England, Scotland, and Flanders.[62] However, the Rôles of Oléron were so attractive against a backdrop of 'piracy, smuggling, homicide, and [the] atrocities committed during wartime'[63] that they spread all across Northern Europe by the mid-14th century. They were in use in England during the reign of Edward III;[64] stood as France's official law of the sea by 1364;[65] were widely-known as the *Vonesse van Damme* in the Low Countries;[66] and reached the Atlantic ports of the Iberian peninsula.[67] Across 24 articles,[68] the laws established mechanisms for settling a range of disputes at sea. These include the termination of the pilot's responsibility,[69] mariners' entitlement to bring aboard food and drink,[70] crew wages,[71] and liability where a poorly-steered vessel crashes into a moored ship.[72] By establishing clear rules and procedures, the Rôles of Oléron helped ensure fair and consistent handling of maritime leases and other contractual agreements in the maritime industry.[73] The Black Book of the Admiralty incorporates the Rôles of Oléron.[74]

The *tractatus de legibus et consuetudinibus regni Angliae*[75], attributed to the Justiciar of England between 1180 and 1189, Ranulf de Glanville,[76] is the 'first textbook of the English common law'.[77] Composed in the late waning year of the reign of Henry II (r.1154-1189),[78] this text deals with whether mere tenants can be compelled to appear

[60] The 12th century has traditionally represented the consensus date: *see* Leon Trakman, 'From the Medieval Law Merchant to E-Merchant Law' (2003) 53 University of Toronto Law Journal 3 265, 271 and William Tetley, 'The lack of uniformity and the very unfortunate state of maritime law in Canada, the United States, the United Kingdom, and France' (McGill University, Meredith Memorial Lectures, 27 September 1986) 340. However, some scholars put it later, in the 13th century (generally in or shortly before 1286): *see* Edda Frankot, 'Maritime Law and Practice in Late Medieval Aberdeen' (2010) 89 *The Scottish Historical Review* 2 136, 136 and Karl-Friedrich Krieger, *Ursprung und Wurzeln der Rôles d'Oléron* (Cologne and Vienna, 1970) 71.

[61] The reader should note that as part of the Duchy of Aquitaine, the island was property of the Anglo-Norman kings in England, and our oldest extant copies are of English origin: Frankot (n 60) 137.

[62] Frankot (n 60) 136.

[63] Timothy J. Runyan, 'The Rolls of Oleron and the Admiralty Court in Fourteenth Century England' (1975) *American Journal of Legal History* 95, 95.

[64] *Pilk v. Venore*, printed in Hubert Hall (ed), *Select Cases Concerning the Law Merchant, A.D. 1239-1633* (Selden Society 1930).

[65] Edda Frankot, 'Medieval Maritime Law from Oléron to Wisby: Jurisdictions in the Law of the Sea' (2007) University of Aberdeen 152-3 with n 69.

[66] Frankot (n 60) 137.

[67] Tetley (n 60) 340.

[68] Surviving manuscripts are not unanimous about the contents of the document. For example, Pols, 'Les Rôles d'Oléron et leurs additions' (1885) 9 Nouvelle revue historique de droit français et étranger 454, 454 discusses two manuscripts found in the ancient maritime law of the Netherlands, of which 'une surtout contenait des additions qui me paraissaient dignes d'être connuues de ceux qui s'occupent de l'histoire du droit maritime' (one in particular contains some additions that strike me as worthy of being well-known by those who concern themselves with maritime law history).

[69] §24 in James Shepherd, 'The Rôles d'Oléron: A lex mercatoria of the Sea?' in Vito Piergiovanni, 'From lex mercatoria to commercial law' 24 Comparative Studies in Continental and Anglo-American Legal History 207.

[70] §21 in Shepherd (n 69) 215.

[71] §19 in ibid 214.

[72] §15 in ibid 214.

[73] Runyan (n 63) 111: 'The Rolls of Oléron… were clearly intended to bring the English seas under the rule of law'.

[74] E Merrick Dodd Jr, 'The New Doctrine of the Supremacy of Admiralty over the Common Law' (1921) 21 Columbia Law Review 7 647, 647 n 4.

[75] 'Treatise on the laws and customs of the kingdom of England' (our translation).

[76] Josiah Cox Russell, 'Ranulf de Glanville' (1970) 45 Speculum 1 69, 69. However, *see* Ralph Turner, 'Who Was the Author of Glanvill? Reflections on the Education of Henry II's Common Lawyers' (1990) 8 Law and History Review 1 97, 97: 'not many scholars today accept his authorship'.

[77] HG Richardson and GO Sayles, *Law and Legislation from Aethelberht to Magna Carta* (Edinbugh 1966) 117.

[78] Turner (n 76) 97.

in court,[79] lessor's remedies for repossession in an event of default,[80] and the litigious process where a debt arises from (*inter alia*) 'Letting'.[81]

Having had its 'formal' beginning in the 12th century, but with roots stretching back further,[82] the Hanseatic League developed into what has been described as 'the most important political formation in German history of the late Middle Ages'.[83] The Hanseatic League came to encompass commercial settlements all over northern Europe and established a 'commercial monopoly in the Baltic'.[84] As a trading network, it was beneficial for League Members to abide by merchant codes to unify trading relations and provide a consistent legal framework for various maritime activities,[85] including provisions for resolving disputes arising from maritime leasing.[86]

Through final years of the Middle Ages and into the early-modern period, the English common law came to recognise admiralty law as a distinct body of jurisprudence. This process had calcified a specialised set of rules and procedures in the context of maritime commerce and disputes by the 16th century. As England began to join the likes of Portugal and the Netherlands in global exploration during the 16th and 17th centuries, the English Navigation Acts regulated seaborne trade and played a crucial role in the continuing development of English commerce and maritime law.

Following codification of this nature in English law, the 17th and 18th centuries bore witness to significant advances in the context of insurance. Key developments include the founding of Lloyds of London in the later 1600s, which drastically reshaped the approach to risk and litigation, and the Maritime Insurance Act 1745, which formally entrenched marine insurance principles. These twin achievements paved the way for England, and ultimately Great Britain, to occupy the centre-ground of international maritime insurance.

Across the Channel, in 1807, as part of the broader Code Napoléon of 1804, the Emperor of France established the French Commercial Code.[87] Napoleon's 'greatest achievement, that which endures to this day',[88] covers leasing at length[89] and sets out the rights and remedies available to lessors and lessees.[90] The French Commercial Code sought to ensure a fair and transparent balance between the rights of lessors and lessees in a twofold manner. Firstly, by specifying the liabilities and obligations of the parties, including for maintenance, repairs, and insurance, the Code of Commerce ensured that all parties are aware of their duties and potential liabilities. Secondly, by providing guidelines on the formation, execution, and termination of leasing contracts and outlining procedures for the resolution of disputes arising from the same, the Code of Commerce cast a long shadow over the maritime industry.

[79] Book III, Chapter I.
[80] Book X, Chapter XVIII.
[81] Book X, Chapter III.
[82] Cornelius Walford, 'An Outline History of the Hanseatic League, More Particularly in Its Bearings Upon English Commerce' (1881) 9 Transactions of the Royal Historical Society 82, 89.
[83] MM Postan, *Medieval Trade and Finance* (Cambridge University 1973) 192. *See* Frederick Gareau, 'A Contemporary Analysis of the Hanseatic League' (1982) 47 Il Politico 1 97, 97 nn 1-4. *See* also Gordon Scott Harrison, 'The Hanseatic League in Historical Interpretation' (1971) 33 *Historian* 1 385, 385: 'During the thirteenth and fourteenth centuries, northern European commerce was dominated by an association of lower German city-states that constituted one of the most impressive political organisations of the medieval and modern worlds'.
[84] Hyman Palais, 'England's First Attempt to Break the Commercial Monopoly of the Hanseatic League, 1377-1380' (1959) 64 American Historical Review 4 852, 852.
[85] Ulf Christian Ewert and Stephan Selzer *Institutions of Hanseatic Trade: Studies on the Political Economy of a Medieval Network Organisation* (Peter Lang AG 2016) 93: 'Deliberate attempts of harmonisation were made by the Hanse to create a more homogenous commercial setting for merchants'; ibid 156-7: 'To make these institutions work effectively, public institutions such as the merchant law or the communal responsibility to enforce the merchants' property rights abroad were also necessary'.
[86] Harrison (n 83) 385.
[87] Pierre Crabitès, 'Napoleon and the French Commercial Code' (1930) *ABA Journal* 258, 258.
[88] Charles Summer Lobinger, 'Napoleon and His Code' 32 (1918) Harvard Law Review 2 114, 115.
[89] Code Napoléon Book II, Title III, Chapter I and Book III, Title VIII.
[90] The reader may be reminded of the section of Justinian's *Corpus Iuris Civilis* dedicated to *locatio conductio.* There is little doubt that Napoléon was influenced in this endeavour by his imperial forebear.

VII. SHRINKING A CONTINENT: Railroad Infrastructure in the 19th-century United States

Following the Civil War, the American railroad entered its golden age.[91] 'Few other institutions in the country did business on so vast a scale or financed themselves in such a variety of ways'.[92] The boom from 1866 to 1873 doubled American railway mileage[93] and energised financial innovation, including the development of stock exchanges and the specialisation of investment banking and security brokerage firms.[94]

With that being said, however, and with a few exceptions (as discussed below), finance leasing does not play a major role until the latter stages of the century. Funding came from a combination of capital from American banks, the extension of credit from European investors,[95] and federal support. The convertible mortgage bond replaced common stock when surplus funds became unavailable, with Wall Street and British capital markets at the fore.[96]

It had been well-established in Pennsylvania since 1819[97] that, as a result of a general prohibition on 'all conveyances made with intent to defraud creditors',[98] there could be no contractual separation of possession from ownership. As a result, while mortgages on real property were common, there was no legal device available to establish an interest in personal property as security for a debt'.[99] The solution, appearing first as a means of financing canal boats,[100] was what is known as the 'Philadelphia Plan' or bailment-lease. A bank or trust company purchased an asset from the manufacturer and leased it to an operator in exchange for regular rent paid over an agreed period, at the end of which the operator would be entitled to purchase the asset for a nominal amount.[101] Funding for the purchase of the asset would come from investors who purchased 'equipment trust certificates'.[102] Case law confirmed that the lessor's interest would be valid against third parties.[103] The trustee used the proceeds from certificate sales and an advance rent payment from the railroad to purchase the equipment, distributing subsequent rents as principal recovery and dividends.[104] After the trust term, typically 15 years, the trustee transferred the equipment to the railroad without additional cost, with railroads often guaranteeing the trust certificates.[105] In this way, Pennsylvania's railroad industry adopted 'the forerunner of modern-day conditional sale leasing'.[106]

The Philadelphia Plan 'has survived almost without change while other types of personal property security have undergone a century and a half of legal evolution'.[107]

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[91] John Stover, *American Railways* (University of Chicago Press 1961) 60.
[92] ibid 50-59.
[93] Joseph Schumpeter, *Business Cycles* (Martino Publishing 2014) vol 1 335.
[94] Leland H. Jenks, 'Railroads as an Economic Force in American Development' (1944) 4 Journal of Economic History 1 1, 9-10.
[95] ibid 9: 'British, Dutch, and German investors were then buying nearly half of the Civil War debt… to the amount of more than a billion dollars par'. Dorothy Adler, *British Investment in American Railways, 1834-1898* (University of Virginia Press, Charlottesville, Eleuthesia Mills-Hagley Foundation, 1970) 2.
[96] AD Chandler, 'Patterns of American Railroad Finance, 1830-1850' (1954) 28 Business History Review 3 248, 250-1; 256; 263.
[97] *Clow v Woods*, 5 S. & R. 275 (Pa. 1819).
[98] James A. Montgomery Jr., *The Pennsylvania Bailment Lease* (1931) 79 University of Pennsylvania Law Review 920, 920.
[99] Michael Downey Rice, 'Current Issues in Aircraft Finance' (1991) 56 Journal of Air Law and Commerce 4 1027, 1029.
[100] Michael Downey Rice, 'Railroad Equipment Financing' (1989) 18 Transport Law Journal 85, 87. *See* further Montgomery Jr. (n 98) 920.
[101] Peter Nevitt and Frank Fabozzi, 'History of Equipment Leasing' (1985) 3 Journal of Equipment Lease Financing 1 48, 49-50; Arthur S Dewing, 'Railroad Equipment Obligations' (1917) 7 American Economic Review 2 353, 361-3.
[102] Rice, 'Railroad Equipment Financing' (n 100) 87; John Stevenson, 'Railroad Equipment Financing' (1951) 7 The Analysts Journal 3 11, 11.
[103] *Lehigh Coal & Nav. Co. v. Field*, 8 Watts & Serg. 232 (Pa. 1844); Rice 'Current Issues in Aircraft Finance' (n 99) 1030.
[104] Rice, 'Current Issues in Aircraft Finance' (n 99) 1030.
[105] ibid.
[106] Nevitt and Fabozzi (n 101) 50.
[107] Rice, 'Current Issues in Aircraft Finance' (n 99) 1030.

VIII. ENTER AVIATION: Building on the past, growing dramatically

The commercial aviation industry has seen dramatic growth and transformation since the first flights took off at the beginning of the 20th century. Alongside both technological developments and demand for increasingly sophisticated aircraft, as well as larger and more technologically integrated airline fleets, aircraft leasing and financing have seen a similarly dramatic and pronounced evolution. Leasing has grown in terms of scale and complexity, markedly so since the 1970s, to provide the backbone for the growth of the airline industry.

Civil aviation had contributed significantly to the war effort on both sides of the conflict during the Second World War, from the provision of logistical support to the establishment and running of the aircraft manufacturing process and the training of pilots. The strategic and commercial importance of air travel was clear and by the late 1940s many countries, in particular the United States, had well-developed aviation industries and robust infrastructure in place. The technological advancements made contributed to the development of long-range aircraft, such as the Lockheed Constellation in 1943.

Another key technological advancement during the Second World War had been the development of the jet engine, which would revolutionise the commercial aviation market following its introduction in the 1950s. The Boeing 707,[108] the de Havilland Comet, and the Douglas DC-8[109] were among the first commercial aircraft fitted with jet engines and dubbed 'jetliners'. Travelling on such a model became increasingly attractive to passengers, given the drastically reduced flight times and quality of flying experience.[110]

A decade after the introduction of the Boeing 707, the birth of the Boeing 747 marked a shift in the size and scale of passenger aircraft, showcasing improvements in systems and materials. However, whilst the Boeing 747 could carry more passengers, it also became much more expensive to the airline to purchase and to operate. By the 1960s, aircraft values had increased dramatically.[111] 'The cost of new equipment, once computed in thousands, was now computed in millions', caused to a degree by 'galloping inflation' but 'mainly due to the growth of the size of aircraft'.[112] Additionally, the total operating expenses across the airline industry doubled between 1955 and 1960, climbing from US$1,490,776,000 to US$2,803,575,000.[113] As a result, airlines who wanted to operate the latest aircraft models and to benefit from the best available economics and offer the best service were generally reluctant to make the significant capital expenditure required to make such purchases.

Leasing offered a natural solution to this, whereby an airline would make an initial payment of a security deposit and an advance rental, followed by a commitment to make monthly payments in return for the use of the aircraft, not unlike the modern expression of the aircraft operating lease. This negated the need to tie up large sums of capital in aircraft ownership and facilitated deployment of financial resources elsewhere (i.e., for operational needs or for investment in business expansion).[114] Furthermore, leasing allowed airlines to keep these assets off their balance sheets, thereby improving their financial ratios, making them more attractive to investors,[115] and allowing for access to aircraft for airlines with limited capital reserves.[116] This was especially significant during periods of thinner profit margins, and the flexibility on offer was paramount in an industry that experiences seasonal shifts in demand.

Airline deregulation first took root in the United States with the Airline Deregulation Act of 1978. This drastically changed the US aviation landscape, allowing airlines to set their own fares, choose routes freely, and ultimately

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[108] First introduced in 1958.

[109] RF Agnew, 'The Birth and Growth of the Aircraft Leasing Business' (*World Leasing Yearbook*, 7 May 2019) <https://www.world-leasing-yearbook.com/feature/the-birth-and-growth-of-the-aircraft-leasing-business/> accessed 30 September 2024.

[110] https://airandspace.si.edu/explore/stories/commercial-aviation-mid-century.

[111] David I Johnston, 'Legal Aspects of Aircraft Finance (Part I)' (1963) 29 Journal of Air Law and Commerce 4 161, 161.

[112] David I Johnston, 'Legal Aspects of Aircraft Finance (Part II)' 29 Journal of Air Law and Commerce 4 299, 299 n 5.

[113] Official Publication of the Air Transport Association of America, *Facts and Figures about Air Transportation* (22nd edn, 1961) 19.

[114] *See* Section 3.

[115] Johnston 'Legal Aspects of Aircraft Finance (Part II)' (n 112) 301. *See* Section 3.

[116] See *Section* 3.

compete with each other on market-driven terms.[117] As a result, the industry saw a plethora of new entrants, many of them, in time, low-cost carriers who found ways to undercut legacy airlines and offer cheaper fares. [118]

The economic pressures of deregulation accelerated airline bankruptcies and consolidations, with storied brands such as Eastern Air Lines and Pan American, filing for bankruptcy in March 1989 and January 1991 respectively. Meanwhile, the entry of many new competitors, coupled with the sharp rise in fuel prices during the 1970s,[119] made fleet flexibility essential for airlines to survive. As airlines scrambled to adjust to this more competitive and unpredictable environment, leasing companies saw a surge in demand to provide aircraft on a leasing basis.[120] This approach played a significant role in helping airlines manage financial distress by offering an alternative to heavy capital investments in aircraft, which would have been difficult for airlines under financial strain.[121]

The origins for aircraft finance products were not too far removed from other asset finance products that were prevalent on Wall Street a century earlier, taking advantage of a legal framework that offered legal certainty for investors. As we have explored, the Philadelphia Plan equipment trust became the preferred method for financing railroad equipment and has remained largely unchanged, despite other personal property security devices evolving over time.[122] In the 1950s, airlines adapted the railroad equipment trust for aircraft financing, incorporating the bailment-lease, trustee, certificates, and guarantee. The main change was renaming 'dividends' to 'interest'. This perhaps marked the birth of structured aircraft finance.[123]

Since then, many financing products with varying degrees of complexity have emerged and evolved to meet the diverse needs of airlines and investors. A common denominator underpinning each such financing product is recognition that improving access to credit for financing aircraft and other equipment requires a stable, predictable framework for secured financing of highly mobile equipment.[124]

In more recent years, more structured and complex products have emerged. The Asset Backed Securities structure ('**ABS**') involves pooling aircraft leases across an often-diverse group of airlines and issuing securities backed by these assets. Investors then purchase these securities, providing the issuer with capital. The cash flows from the underlying assets (the lease rentals) are used to pay interest and principal to the investors. Lessors have used ABS to raise debt financing against a pool of aircraft that remain on their balance sheets and for which the lessors retain residual value risk, and also have sold pools of aircraft into the ABS market with third-party equity investors in the ABS structures taking on the residual value risk.

The complexity of aircraft finance products, with leasing features, will continue to develop on the back of vibrant market innovation in past decades. It is now estimated that by early 2036, a further $5.3 trillion worth of aircraft will need to be financed in order to keep up with demand.[125] In their 2024 Global Market Forecast, for example, Airbus predict that the global Fleet-In-Service will double between 2024 (24,240) and 2043 (48,230).[126] Boeing concur, anticipating a need for almost 44,000 new aircraft by 2043 to meet an almost 100% increase in demand for passenger and freight aircraft.[127]

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[117] s 2493, Airline Deregulation Act of 1978 95th Congress (1977-1978).
[118] Melvin Brenner, James Leet, and Elihu Schotr, *Airline Deregulation* (Westport: Eno Foundation 1985)
[119] David Parish, 'The 1973 – 1975 Energy Crisis and Its Impact on Transport' (*RAC Foundation*, October 2009, Report 09/107) 2: 'Oil… went up from around US$3 per barrel before the war to over US$11 per barrel by January 1974 and around US$15 per barrel by November 1974'.
[120] G Van Hovell tot Westerflier, 'Aircraft leasing, a challenge since the 70s' (2021) 56 *Transportation Research Procedia* 113
[121] Johnston 'Legal Aspects of Aircraft Finance (Part II)' (n 112) 299-300.
[122] Rice 'Current Issues in Aircraft Finance' (n 99) 1030-1.
[123] ibid 1031.
[124] Nuria de la Peña, 'Reforming the Legal Framework for Security interests in Mobile Property' (1999) 2 Uniform Law Review 347, 347.
[125] Vitaly Guzhva, Sunder Raghavan, and Damon J D'Agostino, *Aircraft Leasing and Financing: Tools for Success in International Aircraft Acquisition and Management'* (Elsevier Science, 2024) 6.
[126] <https://www.airbus.com/sites/g/files/jlcbta136/files/2024-07/GMF%202024-2043%20Presentation_4DTS.pdf>
[127] 'Boeing Forecasts Demand for Nearly 44,000 New Airplanes Through 2043 as Air Travel Surpasses Pre-Pandemic Levels' (*Boeing*, 19 July 2024) <https://investors.boeing.com/investors/news/press-release-details/2024/Boeing-Forecasts-Demand-for-Nearly-44000-New-Airplanes-Through-2043-as-Air-Travel-Surpasses-Pre-Pandemic-Levels/> accessed 23 December 2024

It remains to be seen what products will emerge in the coming years. Nevertheless, it is clear that with aircraft leasing growing from representing just 0.5% of the world's commercial aircraft in 1970[128] to constituting over half of the global fleet in 2024,[129] the next decades will inevitably have scope for innovation, rapid growth, and business opportunity in the aircraft financing sector.

IX. THE FLYING IRISH: The Birth of an Industry

Any assessment of the development of aircraft financing would be incomplete without space given to Ireland and the driving role it has come to play in global aircraft leasing. At the time of writing, more than 50 aircraft leasing companies are based in Ireland, with the majority of them having their headquarters there and with more than half of the international leased fleet managed through Irish companies.[130] The industry supports 5,000 jobs and accounts for more than half a billion euros in the Irish economy.[131]

'The supply side of the aircraft leasing industry is deeply rooted in Ireland.'[132] On its west coast, in a rural corner of the Emerald Isle, Shannon airport furnished European airlines with a final refuelling station before their transatlantic journey. As planes evolved to fly higher and further and faster and Shannon airport found itself slipping into disuse, then-Aer Lingus executive Tony Ryan worked with the Irish government to devise an extraordinary solution. Together, they created an enterprise zone in Shannon with a 10% corporate tax rate, ushering a new era of aircraft leasing that Ireland.

Having successfully helped his employer, Aer Lingus, manage excess capacity with an innovative Wet Lease of aircraft in the early 1970s, Ryan set up Guinness Peat Aviation ('**GPA'**) in 1975 as Ireland's first aviation leasing business. With a peak valuation of $4 billion,[133] GPA (with ILFC in the United States[134]) came to dominate the aircraft leasing market and became the world's largest lessor through the twilight of the 1980s. In 1990, it placed an aircraft order valued at $20 billion, representing 10% of the world's aircraft production.[135]

Despite a dramatic downfall following its attempted flotation on the stock market in the aftermath of the First Gulf War, GPA leaves a formidable legacy in Ireland. From her interview with 11 senior figures from across the aviation sector, Enda Dunne found that the influence of GPA and Tony Ryan feature 'highly' in reasons given for Irish success.[136]

In 1987, Dermott Desmond and Ruairi Quinn, building on the concept of the Shannon Free Zone, developed the International Financial Services Centre as a special economic zone in the Dublin docks producing a range of commercial opportunities. It provided commercial infrastructure for the Irish companies who now own or control almost one half of the world's global leased fleet.[137]

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[128] Ralph Murphy, *Aviation Financing* (5th edn, Bloomsbury 2022) 6.

[129] CAPA – Centre for Aviation's Fleet Database estimates 53% of aircraft globally were leased in February 2024: 'Aircraft leasing in equilibrium at just over half the world fleet' (*CAPA*, 9 February 2024) <https://centreforaviation.com/analysis/reports/aircraft-leasing-in-equilibrium-at-just-over-half-the-world-fleet-675212> accessed 23 December 2024

[130] Sebastian Wandelt et al, 'Is the aircraft leasing industry on the way to a perfect storm? Finding answers through a literature review and a discussion of challenges' (2023) 111 Journal of Air Transport Management 4, 5.

[131] Enda Dunne, *Aircraft leasing A review of Ireland's role in its past, present and future development* (National College of Ireland 2019) 1.

[132] ibid.

[133] Edel Corrigan, 'Aircraft leasing is a secure sector in Ireland, but how to ensure it stays that way?' (*The Irish Times*, 19 January 2023) < https://www.irishtimes.com/special-reports/2023/01/19/aircraft-leasing-is-a-secure-sector-in-ireland-but-how-to-ensure-it-stays-that-way/> accessed 6 November 2024.

[134] There is a parallelism in the origin, role, and impact of the International Lease Finance Corporation ('**ILFC**'), founded in 1973 by Leslie and Louis Gonda and Steve Udvar-Házy. *See* the further research and work section below calling for a study on the impact of ILFC and how it interacted and compared with that of GPA.

[135] 'Tony Ryan, Founder of Ryanair, the budget carrier which transformed European air travel' (3 October 2007, The Times) <https://www.thetimes.com/article/tony-ryan-z95x3bt8qt9>

[136] Dunne (n 131) 29.

[137] ibid 1.

In parallel with and reinforcing these commercial developments were policy ones, especially the creation and refinement of an attractive system of domestic and international taxation.

Completing the circle, Ireland is also the home of the Cape Town Convention's International Registry of aviation assets, fulfilling Tony Ryan's call for a global aircraft registry to be located in Ireland.[138]

All of this, coupled with a leading professional service sector, has resulted in over €120 billion of aircraft assets being either owned or managed through Ireland, up from €27 billion in 2007,[139] with no signs of slowing. Importantly, the impact of aviation leasing is societal: from the doldrums of the 1970s, Irish GDP per capita now far exceeds that of the United Kingdom, trailing only Luxembourg and Switzerland in the IMF global rankings.[140] Aircraft leasing proudly played an important role in that progression.

X. UCC ARTICLE 2A: Codifying personal property leasing in the U.S.

In the United States, prior to the enactment of Uniform Commercial Code ('**UCC'**) Article 2A – Leases ('**Article 2A**'), the equipment leasing industry was rapidly expanding. During the 1950s, the leasing of equipment accelerated at an average rate of 30% each year.[141] By 1986, leases accounted for $90 billion in new equipment, and one third of all the new equipment in the United States was financed via lease transactions.[142] Yet leasing was constrained by lack of uniform law among the States, resulting in substantial uncertainty,[143] particularly for multi- or inter-State transactions.

Article 2A was primarily enacted for the purpose of alleviating conflict among State court decisions regarding lease transactions.[144] Before Article 2A, state courts determined the *rights and obligations* of parties to a lease by analogising to either a sales transaction under Article 2 of the UCC ('**Article 2**') or a secured transaction under Article 9 of the UCC ('**Article 9**'), neither of which was designed for to cover leases.[145] To address these issues, the American Bar Association conducted a three-year study during the 1980s.[146] In 1985, the National Conference of Commissioners on Uniform State Laws approved the Uniform Personal Property Leasing Act.[147] The sponsors of the UCC then implemented this Act in 1987, with slight changes, into the UCC as UCC Article 2A – Leases.[148] Article 2A has been adopted in all states except Louisiana.[149] It explicitly details the law regarding the definition, nature, and effect of lease contracts for goods.[150]

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[138] *See* https://www.rte.ie/archives/collections/news/21397349-gpa-and-aviation-industry/

[139] Vinson & Elkins, 'The Role of Ireland in Aviation: From GPA's Legacy to a Sustainable Future' (Vinson & Elkins, 9 September 2024) <https://www.velaw.com/insights/the-role-of-ireland-in-aviation-from-gpas-legacy-to-a-sustainable-future/> accessed 1 November 2024.

[140] International Monetary Fund, GDP per capita, current prices <https://www.imf.org/external/datamapper/NGDPDPC@WEO/OEMDC/ADVEC/WEOWORLD> accessed 12 November 2024.

[141] Amelia H Boss, 'The History of Article 2A: A Lesson for Practitioner and Scholar Alike' (1988) 39 Alabama Law Review 3 575, 576; Richard L. Barnes, 'Distinguishing Sales and Leases: A Primer on the Scope and Purpose of Ucc Article 2a' (1995) 25 University of Memphis Law Review 873, 879. *See* further Edwin E Huddleson, 'Old Wine in New Bottles: UCC Article 2a-Leases' (1988) 39 Alabama Law Review 615.

[142] Barnes (n 141) 879-880.

[143] Gladys Goschka and Frederick Melamed, 'A Uniform Leasing Law at Last' 76 Michigan Bar Journal 1200, 1200.

[144] Michael I. Spak, 'Pledge Allegiance to the Code: Dodging the Draft with Liberty and Leases for All' (1993) 13 Journal of Law and Commerce 79. Hal W Mandel and Jeefrey M Shapiro, 'Finance Leasing Under New UCC Article 2A' *Metropolitan Corporate Counsel* (March 1996): The widespread success of equipment leasing industry and uncertainty within the law was not the only reason for a need for uniformity among the states regarding the leasing of goods. The need also arose from developments in international law and the increasing amounts of cross-border leases.

[145] Mandel and Shapiro (n 144)

[146] Huddleson (n 141) 616.

[147] ibid 617 with n 144.

[148] ibid.

[149] Bart Banino, Chelsea Schell, and Keith Pinter, 'Aviation Finance & Leasing in USA' (*Lexology*, 25 June 2019) 5.

[150] Goschka and Melamed (n 143) 1200.

As a threshold matter, Article 2A explicitly defines a 'lease of goods' and clarifies the distinction between true leases and leases disguised as security interests.[151] Before Article 2A was enacted, state courts analysed this issue by looking to the parties' subjective intent.[152] Article 2A abandoned this test, and instead created a definition for a 'lease'. Under Article 2A-103(j), a lease is defined as 'a transfer of the right to possession and use of goods for a term in return for consideration, *but a sale, on approval or a sale on return, or retention or creation of security interest is not a lease*'.[153] However, Article 2A's definition of a lease should be read with the amended Section 1-201(37), now Section 1-203 ('**Section 1-203**'), which states that 'whether a transaction creates a lease or a security interest is *determined by the facts of each case*'.[154]

The legal requirements of a lessor to enforce its rights are more favourable for a lessor under a true lease. The result is that now lessors tend to argue the transaction to be a true lease, while lessees argue the transaction to be a secured transaction.[155]

If a lease is categorised as a finance lease, the lessor automatically has certain benefits and is subject to stricter requirements, which, prior to the enactment of UCC Article 2A, needed to be specifically described in the lease.[156] UCC Section 2A-209 expressly makes the lessee a third-party beneficiary of the supply contract between the supplier of the goods and the lessor.[157] Therefore, the lessee has the same rights that the lessor has in its contract with the supplier, including those arising from express or implied warranties.[158] However, once the lessee accepts the leased goods, they may not cancel the lease.[159] If the goods are defective, the lessee's only remedy is against the supplier rather than the finance lessor.[160]

XI. TRANSNATIONAL COMMERCIAL LAW: Part 1, the UNIDROIT Convention on International Financial Leasing

UNIDROIT's multilateral Convention on International Financial Leasing (the '**UNIDROIT Convention'**), adopted at a diplomatic convention in Ottawa in 1988,[161] represents a significant milestone in the harmonisation of private commercial law[162] and heralded a shift in cross-border finance leasing law. The UNIDROIT Convention is reflective of global business' move towards obtaining capital assets via finance lease mechanisms to reduce the financial burden of acquiring equipment.[163] Indeed, the speed with which financial developments and globalisation had outpaced the legal frameworks underpinning traditional leasing[164] made it apparent that its application to movable leased assets would spawn cross-jurisdictional legal issues.[165]

The UNIDROIT Convention provides a comprehensive legal framework for finance leasing on an international scale. The primary aim is to reduce uncertainty with regard to cross-border finance leasing by standardising rules applicable to such agreements. The UNIDROIT Convention covers, centrally, the rights and obligations of parties, remedies in the event of breach, and the impact when a party becomes insolvent. While only 11 countries have

[151] Huddleson (n 141) 618.
[152] Mandel and Shapiro (n 144).
[153] UCC §2-A-103(j). Our emphasis.
[154] UCC §1-203 (our emphasis). *See* also Spak (n 144) 81.
[155] Barnes (n 141) 890. See further David M Steinhold and Amanda Hayes, 'Guide to UCC Rules' (*Nolo*, 5 December 2023) <https://www.nolo.com/legal-encyclopedia/what-is-the-ucc.html> accessed 13 November 2024.
[156] Equipment Leasing and Finance Association, *The Executive Guide to Remedies* (9 January 2015) pt 3.
[157] Mandel and Shapiro (n 144).
[158] ibid.
[159] Goschka and Melamed (n 143) 1202.
[160] ibid.
[161] David A Levy, 'Financial Leasing Under the UNIDROIT Convention and the Uniform Commercial Code: A Comparative Analysis' (1995) 5 *Indiana International & Comparative Law Review* 2 267, 269.
[162] Preamble, Unidroit, 'UNIDROIT Convention on International Financial Leasing' (*UNIDROIT*, 28 May 1988) <https://www.unidroit.org/english/conventions/1988leasing/convention-leasing1988.pdf> accessed 8 October 2024
[163] Pablo Mendes de Leon, 'Rights in Aircraft' in Pablo Mendes de Leon (ed), *Introduction to Air Law* (Kluwer Law International BV 2022) 557.
[164] Levy (n 161) 267
[165] *See* Part C.

ratified the UNIDROIT Convention since 1988, it set important precedent and principles, paving the way for the Cape Town Convention that followed.[166]

There are five key objectives through which the UNIDROIT Convention intends to ballast international finance leasing with a uniform regime. We shall explore these objectives in the following summaries.

Facilitating the Tripartite Lease Agreement: 'Tripartite' refers to the three parties involved in a typical finance lease structure – the lessor, lessee, and manufacturer.[167]

New Rules on Lessor Liability: In a finance lease the lessee will often exercise sole judgment in the lessor's purchase of the asset. This is deemed to remove lessor liability where the asset is non-conforming. Furthermore, the inclusion of 'hell or high water' clauses in a finance lease allows a lessor to demand rent be paid regardless of any issues that may befall a lessee.[168] Accordingly, Article 10 of the UNIDROIT Convention provides a lessee with direct rights against a supplier[169] and the lessor largely escapes liability unless it intervenes in the selection of the supplier or asset.[170]

Liabilities of the lessor to third parties: The lessor largely escapes any liability to third parties in the event of death, personal injury, or damage to property caused by the leased asset,[171] where the lessor is acting in its capacity as lessor alone.[172]

Protection in the event of insolvency: Article 7(1) ensures the lessor's proprietary rights in an asset are valid against a lessee's trustee in bankruptcy, liquidator, or administrator.[173]

Remedies against the lessee: The UNIDROIT Convention also provides basic remedies for the lessor against a defaulting lessee.[174]

XII. LEASING IN TRANSNATIONAL COMMERCIAL LAW: Part 2, the Cape Town Convention

Effectively replacing the prior treaty supporting international aviation financing and leasing,[175] one of the most successful and innovative commercial law treaties ever to have been concluded, the Cape Town Convention provides a legal framework for the secured financing and leasing of uniquely identifiable high value mobile equipment. The Cape Town Convention was adopted in 2001 and covers aircraft equipment, rail equipment, space equipment, and mining, agricultural, and construction equipment. However, its use within the aviation industry has primarily defined its success, providing a clear and consistent international legal framework for the protection of secured aircraft creditors and lessors and facilitating financings and leasing across the industry.

To date, the Cape Town Convention has 87 contracting states. However, for any particular item of equipment, it does not come into force within a particular contracting state until a related Protocol has itself come into effect. The Aircraft Protocol[176] was signed in 2001, entered into force in 2006, and now has 84 contracting states. The

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[166] *See* Section 2, sub-section XII.
[167] *See* Bridge, Gullifer, Low, and McMeel (n 5)273-6/13-020-024 and McKendrick (n 3)839-41/28.13-15.
[168] Herbert Kronke, 'Financial Leasing and its Unification by UNIDROIT' (UNIDROIT, 2011) <https://www.unidroit.org/english/publications/review/articles/2011-1&2-kronke-e.pdf> accessed 8 October 2024.
[169] Article 10.1.
[170] Article 8.1(a).
[171] Art 8.1(c).
[172] Art 8.1(c).
[173] Art 7.1(a).
[174] Art 13.1.
[175] International Civil Aviation Organization *Convention on the International Recognition of Rights in Aircraft* (1948). Retrieved from https://www.mcgill.ca/iasl/files/iasl/geneva1948.pdf (the 'Geneva Convention'). The Geneva Convention was mainly a choice of law convention, which, while serving the purposes of the industry in the period of 1948 – 1990 did not align law with developing best practices and the needs of international finance. The latter was essential, given the large number of developing jurisdictions, such as China, India, Russia, and Brazil, entering the financial part of the aviation sector in the 1990s.
[176] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town on 16 November 2001).

Rail Protocol[177] was adopted in 2007 and entered into force on 8 March 2024, currently with 4 contracting states (and the European Union). Other protocols are yet to come into force and so the following focuses on the application of the Cape Town Convention to the aviation and rail industries.

The Cape Town Convention and associated Aircraft Protocol and Rail Protocol (together, the '**Convention and Protocols**') provide a consistent and stable legal framework for aircraft and rolling stock secured creditors and lessors internationally. The rights of creditors can be registered in a global public registry (the '**International Registry**'), recognising the priorities of security and other property interests in such assets. The Convention also creates a basic framework of default and insolvency-related remedies in the event of a default by an underlying debtor under a Lease or a loan, for example. As proven by the success of the Aircraft Protocol, a consistent set of underlying principles across jurisdictions will provide creditors including lessors with greater certainty and confidence when making credit decisions and should, as a result, reduce borrowing costs and credit insurance premiums and enhance ratings by rating agencies.

Where the convention applies, then, regardless of the private international law of a particular jurisdiction, the interest created in the object will constitute an 'international interest' and the Convention and relevant Protocol will apply to that interest in any Contracting State (i.e. a state that has ratified the Convention).

A creditor is able to register its international interest with the International Registry, which has the effect of establishing the priority of the international interest in all Contracting States over other subsequently registered or unregistered property interests in the asset and protecting such interest in the case of an insolvency of the debtor.[178] This registration system is a notice register and *not* a title register. Assignments of international interests can also be registered with the International Registry, which allows secured creditors to register their interest as assignee of an international interest such as a lease.

The Convention and Protocols set out certain remedies that are available to creditors upon the default of a debtor under the relevant transaction documents.[179] These include the ability for a lessor to terminate the relevant lease agreement, a secured party or a lessor to take possession or control of the asset, and a secured party or lessor to sell the asset, grant a lease of the asset, or collect or receive income in respect of the asset. The creditor may seek a court order to exercise such remedies, but it can also proceed without such a court order provided that, depending on the relevant remedy, the Contracting State has not required leave of the court for exercise of such remedy in its ratifying declarations and the debtor has agreed to the availability of such remedy prior to its exercise (i.e. in the underlying agreement).[180]

In addition, the Protocols provide creditors with the remedy of procuring the export and physical transfer of the asset from the territory in which it is situated, with the relevant Contracting State required to ensure that the relevant authorities co-operate in the exercise of such remedy.[181]

The Cape Town Convention had three key aims with respect to insolvency protections. Firstly, to ensure the effectiveness of the creditor's rights in an international interest in insolvency, provided that international interest has been registered in the International Registry prior to the commencement of the insolvency proceedings or need not be under national law (which is the case for leases in several jurisdictions). Secondly, to establish an insolvency regime with specific and timebound rights and remedies for a creditor to rely upon in an insolvency context, aimed at strengthening the position of the creditor against the debtor or insolvency administrator and reducing the risk for creditors of a lengthy delay in asset recovery leading to a delay in repayment and increased risk of deterioration. A creditor who is able to rely predictably on contract and property rights in an insolvency context, will have greater confidence in decision making when granting credit, and refine the creditor's risk calculations as part of its pre-underwriting risk pricing process. Thirdly, to establish a clear choice of law rule the in cross border insolvency

[177] Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg on 23 February 2007).
[178] Aviation Working Group, 'Principles-Based Guide to the Official Commentary' (August 2023) 1.5.1. *See* further discussion below.
[179] Cape Town Convention Chapter III.
[180] Aviation Working Group, 'Principles-Based Guide to the Official Commentary' (August 2023) section 5.
[181] Rail Protocol, Article VII(1).

context, requiring application of the key declaration made by the debtor's true home jurisdiction. *See* part D of this outline below.

Topics for further research and study

1. To what extent did English law on ship financing and leasing provide a conceptual bridge between leasing law in the late Middle Ages and its modern formulation and content?

2. How has the role of party autonomy evolved and been regulated, over space and time, relating to rights between parties to leasing transactions?

3. Compare the tax regimes, domestic and international, in the United States and Ireland on incentivising equipment leasing. Would there be an objection if, today, developing countries adopted similar provisions in an effort to acquire market share?

4. Is there evidence to support an increased amount of aircraft leasing as a result of the adoption of Article 83bis to the Chicago Convention of 1944 (or was its value more limited to distribution of regulatory responsibly for such leasing transactions)?

5. Compare the impact on the aviation leasing industry of GPA and ILFC, and evaluate how their actions, growth, and reach, together, impacted the industry as a whole.

3. Motivations and Economics of Leasing

I. Why lease?

These tables summarise the economic objectives of, and benefits to, Lessors and Lessees in leasing transactions:

Table 11. Economic Objectives in Personal Property Leasing

	Capital Conservation	Access to Assets	Tax Benefits	Off-Balance Sheet Financing	Avoidance of Depreciation	Steady Income Stream	Asset Utilization without Ownership	Flexibility to Upgrade
Description	Preserve cash or capital for other uses.	Gain access to assets without upfront cost.	Benefit from tax deductions or advantages.	Keep liabilities off the balance sheet.	Avoid the financial impact of asset depreciation.	Generate consistent income streams from leasing.	Use assets without taking ownership responsibilities.	Upgrade to newer assets as needs evolve.
Lessor (Personal Property)	No	No	Yes	No	No	Yes	No	No
Lessee (Personal Property)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes

Table 12. Economic Benefits in Personal Property Leasing

Economic Impact	Description	Lessor Impact	Lessee Impact
Revenue Generation	Lessors gain steady income through rental payments.	Yes	No
Tax Advantages	Lessors can benefit from deductions related to depreciation and operating costs.	Yes	Yes
Asset Depreciation Management	Lessors manage asset depreciation while deriving revenue.	Yes	No
Market Reach Expansion	Leasing expands lessor's customer base by reaching clients unable to purchase outright.	Yes	No
Financial Flexibility	Lessees reduce upfront costs, conserving capital for other uses.	No	Yes
Operational Efficiency	Lessees can operate efficiently without ownership burdens.	No	Yes
Cost Savings	Lessees avoid large initial investments and high maintenance costs.	No	Yes
Upgrading Opportunities	Lessees access newer technology or assets through flexible agreements.	No	Yes

The following table lays out an example of the 'day 1' cashflow requirements for an end user of Property, in three different scenarios: (1) the end user pays cash at delivery of the Property from the manufacturer, (2) the end user, as Lessee, takes the Property on Finance Lease and (3) the end user, as Lessee, takes the Property on Operating Lease. This illustrates the point made above, that a cash-strapped end user may prefer the comparatively lower up-front cash requirements of a Finance Lease, if it wishes to own the Property, or the even lower up-front cash requirements of an Operating Lease if it prefers not (or cannot afford) to own the Property in time.

The following simple example assumes that:

- The purchase price of the Property, an aircraft, is $55 million, which is one professional appraiser's view of the market value of a new Airbus A320N/Boeing 737-8 at January 2024.[182]

- The Lessor under the Finance Lease requires a 20% payment of initial Rent to reduce its exposure to the asset value of the aircraft, and does not require a security deposit.

[182] 'Aircraft Values and Lease Rates report' (*IBA*, 22 February 2024) < https://www.iba.aero/resources/articles/aircraft-values-lease-rates-update-february-2024/#:~:text=The%20general%20sentiment%20for%202024,lack%20of%20new%20aircraft%20deliveries>

- The Lessor under the Operating Lease will charge $400,000 as a monthly Rent[183] and requires a security deposit equal to 2 months' Rent.

Table 13. Simple Day 1 Cash Flow Comparison for End User of Property

	(A) Purchase Price	**(B) Initial Rental Payment**	**(C) Security Deposit**	**(D) Total Cash Required at Delivery (A+B+C)**
Scenarios at Delivery				
(1) Pay Purchase Price in Cash	$55,000,000	$0	$0	**$55,000,000**
(2) Finance Lease	$0	$11,000,000	$0	**$11,000,000**
(3) Operating Lease	$0	$400,000	$800,000	**$1,200,000**

If we carry on the same example to see what the overall cashflow requirements for the end user might be, in a very simple example, the following table extends to show us how it might look. For this extended example, we further assume:

- The Term for both the Finance Lease and Operating Lease is eight years.
- The Finance Lessor charges, effectively, a 7% per annum interest rate on unamortised amounts, and the outstanding balance ($44 million, at delivery) amortises to zero over the Term. The Rent is fixed, with equal monthly payments of interest and principal amortisation, mortgage style.
- There are no maintenance payments under the Operating Lease.
- The Lessor has no tax drag or benefit, and there is no default or unexpected cost arising during the Term. Also, there are no maintenance costs or payments.

Table 14. Simple Full Term Cash Flow Comparison for End User of Property

	(A) Purchase Price	**(B) Initial Rental Payment**	**(C) Security Deposit**	**(D) Total Cash Required at Delivery (A+B+C)**	**(E) Monthly Payment**	**(F) Total Monthly Payments During Term**	**(G) Total Cash at Delivery Plus Total Monthly Payments, Net of Security Deposit (D+F-C)**
Scenarios at Delivery							
(1) Pay Purchase Price in Cash	$55,000,000	$0	$0	**$55,000,000**	$0	$0	$55,000,000
(2) Finance Lease	$0	$11,000,000	$0	**$11,000,000**	$599,885	$57,588,960	$68,588,960
(3) Operating Lease	$0	$400,000	$800,000	**$1,200,000**	$400,000	$38,400,000	$38,800,000

The full-term cashflow requirement for the end user that pays cash at delivery to own the Property certainly appears attractive; however, one must observe that the end user's cash does not come free of charge. Indeed, continuing on with our example from the aviation world, the cost of equity in the US Air Transport sector at January 2024, as computed by NYU Stern, is 9.71% per annum.[184] At this rate, one could say that the true cost to the end user of a $55 million all-equity cash investment in the Property over the course of eight years, on our simplified assumptions above, is more than $100 million. Logically, it would make sense for the end user, whose

[183] ibid.
[184] https://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/wacc.html

cost of equity is 9.71% and who wishes to own the Property to avail of the Finance Lease, in which 80% of the purchase price is funded at an interest rate which is below its cost of equity.

On the other hand, the option in our example with the lowest cash flow requirement for the end user is the Operating Lease, which also makes sense logically. The Lessee has acquired far less than full ownership of the Property: in the Operating Lease, the Lessee has exclusive right to use and possess the Property for eight years and then must return it to the Lessor. Therefore, as Merrill puts it, this is a 'get less/pay less' scenario.[185]

II. What is a basic pricing model for a Lease?

The table below sets out a very simple pricing model demonstrating how a Lessor might hope to obtain a cash flow return from its investment in an aircraft. It assumes:

- The Property is purchased for $55 million, on 1 January in Year 1.
- The Lessee pays rent equal to $400,000, per month, for a lease ending the day before the 8th anniversary of delivery, on 31 December in Year 8.
- The Property is financed with a loan equal to 80% of the purchase price, which amortises to 70% of its original balance at the end of eight years, i.e., from $44 million to $31 million. The loan bears interest at a fixed rate of 3.7%, which is based on the average cost of debt in Q4:2023 of the largest aircraft lessor in the world, Aercap (NYSE:AER).In our assumptions this interest rate is fixed for the eight-year Term.[186]
- The Lessor has administrative costs of $74,450 per Year, which is a based on the SG&A and Leasing Costs from AER's 2023 income statement, spread across its 3,542 aircraft owned and under management at year-end 2023.
- On 31 December in Year 8, the Lessor sells the aircraft for its depreciated accounting value. Under the Lessor's accounting policy, it depreciates aircraft on the basis of a 25-year life to 10% of its original cost, meaning at the end of Year 8 the residual value of the aircraft is 71% of its original cost. The Lessor's returns for this transaction are highly dependent upon this assumption.
- The Lessor has no tax drag or benefit, and there is no default or unexpected cost arising during the Term. Also, there are no maintenance costs or payments, no insurance costs for the Lessor, and no transaction costs.

In this unrealistic, perfect world of cash flows laid out in the table below, the Lessor expects a return on equity of 16.55%.[187]

See next page.

[185] Merrill (n 1) 14-16.
[186] https://www.aercap.com/_assets/_b556be66c044169e56659f1b327b67af/aercap/db/539/13449/earnings_release/AerCap+2023+Fourth+Quarter+Earnings+Release+V21.pdf
[187] To demonstrate the sensitivity of the Lessor's returns to the residual value, if we assume that the Lessor is off by 20% in its residual value expectation, or the aircraft has declined in value to $31 million, the Lessor's expected return on equity declines by more than 50% to 6.84%.

Basic Lease Economics

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	**Totals**
Outflows									
(A) Purchase Price	-$55,000,000								**-$55,000,000**
(B) Administrative Cost	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	**-$595,600**
(C) Interest Expense	-$1,597,475	-$1,536,425	-$1,475,375	-$1,414,325	-$1,353,275	-$1,292,225	-$1,231,175	-$1,170,125	**-$11,070,400**
Inflows									
(D) Rent	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	**$38,400,000**
(E) Residual Value								$39,050,000	**$39,050,000**
(F) Net Cash Flow (excluding Loan Disbursement/ Repayments) **(A+B+C+D+E)**	**-$51,871,925**	**$3,189,125**	**$3,250,175**	**$3,311,225**	**$3,372,275**	**$3,433,325**	**$3,494,375**	**$42,605,425**	**$10,784,000**
(G) Loan Disbursement/Repayment at Maturity	$44,000,000							-$30,800,000	
(H) Loan Amortisation	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$13,200,000
Equity Cash Flow (F+G+H)	**-$9,521,925**	**$1,539,125**	**$1,600,175**	**$1,661,225**	**$1,722,275**	**$1,783,325**	**$1,844,375**	**$10,155,425**	**$10,784,000**
Return on Equity (IRR function applied to Equity Cash Flow)	**16.55%**								

To take our simple example further, and demonstrate how a Lessor might risk-weight its model to aid in its decision about which lessee to choose, one could add a notional credit charge, with the following additional assumptions:

- Lessee A presents, in the Lessor's judgment, a 5% risk of default. Lessee A is based in a non-Cape Town country and the Lessor believes that it will take 9 months to recover possession of the Property after default, with lost revenue therefore of [9 x $400,000 = $3.6 million], and with an out-of-pocket recovery cost of $2 million. A very simple, notional annual credit charge for this risk might therefore be [$3.6million + $2 million] x 0.05 = $280,000. This is a noncash burden, reflecting the risk of the Lessor's perceived Loss Given Default, that could be added as an annual charge to the Basic Lease Economics model, as noted below.

- The burden of this annual notional credit charge lowers the expected return on equity for the Lessor to 12.89%

See next page.

Basic Lease Economics – Lessee A Notional Credit Charge

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	**Totals**
Outflows									
(A) Purchase Price	-$55,000,000								**-$55,000,000**
(B) Administrative Cost	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	**-$595,600**
(C) Interest Expense	-$1,597,475	-$1,536,425	-$1,475,375	-$1,414,325	-$1,353,275	-$1,292,225	-$1,231,175	-$1,170,125	**-$11,070,400**
(NCC) Notional Credit Charge	-$280,000	-$280,000	-$280,000	-$280,000	-$280,000	-$280,000	-$280,000	-$280,000	**-$2,240,000**
Inflows									
(D) Rent	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	**$38,400,000**
(E) Residual Value								$39,050,000	**$39,050,000**
(F) Net Cash Flow (excluding Loan Disbursement/ Repayments) **(A+B+C+NCC+D+E)**	**-$52,151,925**	**$2,909,125**	**$2,970,175**	**$3,031,225**	**$3,092,275**	**$3,153,325**	**$3,214,375**	**$42,325,425**	**$8,544,000**
(G) Loan Disbursement/Repayment at Maturity	$44,000,000							-$30,800,000	
(H) Loan Amortisation	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$13,200,000
Notional Equity Cash Flow **(F+G+H)**	**-$9,801,925**	**$1,259,125**	**$1,320,175**	**$1,381,225**	**$1,442,275**	**$1,503,325**	**$1,564,375**	**$9,875,425**	**$8,544,000**
Notional Return on Equity (IRR function applied to Notional Equity Cash Flow)	**12.89%**								

An alternative case might be the following:

- Lessee B presents, in the Lessor's judgment, a 10% risk of default. Lessee B, however, is based in a Cape Town country which has selected Alternative A and the Lessor therefore believes that it will take 2 months to recover possession of the Property after default, with lost revenue of [2 x $400,000 = $0.80 million], and with an out-of-pocket recovery cost of $1 million. A very simple, notional annual credit charge for this risk, reflecting the Lessor's perceived Loss Given Default, might therefore be [$0.80 million + $1 million] x 0.10 = $180,000.

- The burden of this smaller, annual notional credit charge results in the expected return on equity for the Lessor to 14.18%, which is a higher notional expected return than the Lessee A model produces. The Lessor may therefore prefer to lease the Property to Lessee B on the assumptions we have made in these alternative cases.

See next page.

Basic Lease Economics – Lessee B Notional Credit Charge

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	**Totals**
Outflows									
(A) Purchase Price	-$55,000,000								**-$55,000,000**
(B) Administrative Cost	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	**-$595,600**
(C) Interest Expense	-$1,597,475	-$1,536,425	-$1,475,375	-$1,414,325	-$1,353,275	-$1,292,225	-$1,231,175	-$1,170,125	**-$11,070,400**
(NCC) Notional Credit Charge	-$180,000	-$180,000	-$180,000	-$180,000	-$180,000	-$180,000	-$180,000	-$180,000	**-$1,440,000**
Inflows									
(D) Rent	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	**$38,400,000**
(E) Residual Value								$39,050,000	**$39,050,000**
(F) Net Cash Flow (excluding Loan Disbursement/Repayments) **(A+B+C+NCC+D+E)**	**-$52,051,925**	**$3,009,125**	**$3,070,175**	**$3,131,225**	**$3,192,275**	**$3,253,325**	**$3,314,375**	**$42,425,425**	**$9,344,000**
(G) Loan Disbursement/Repayment at Maturity	$44,000,000							-$30,800,000	
(H) Loan Amortisation	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$1,650,000	-$13,200,000
Notional Equity Cash Flow **(F+G+H)**	**-$9,701,925**	**$1,359,125**	**$1,420,175**	**$1,481,225**	**$1,542,275**	**$1,603,325**	**$1,664,375**	**$9,975,425**	**$9,344,000**
Notional Return on Equity (IRR function applied to Notional Equity Cash Flow)	**14.18%**								

These are very simple examples. There are transactional enhancements that the Lessor could make in order to deal with differences in perceived credit and jurisdictional risk, for example, adding security deposits (which might be larger for Lessee A given the outsized jurisdictional risk) to reduce or offset the notional credit charge or increasing rentals, say, for Lessee A so that the Lessor is compensated for the perceived risk. One could also imagine more complex, nuanced risk pricing models, for example, running the cashflows on a monthly basis, fine tuning the assumptions (e.g., making an assumption about residual value that is not tied to the Lessor's accounting policy or adding transaction costs), and including maintenance cash flows in the model.

Finally, we can look at a very simple profit and loss calculation to show how the Lessor's accounting might look for our simple model, going back to our original model assumptions (and omitting all notional credit charges):

See next page.

Basic Lessor Profit and Loss

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	**Totals**
Revenue									
(A) Rent	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	$4,800,000	**$38,400,000**
Expense									
(B) Depreciation	-$1,980,000	-$1,980,000	-$1,980,000	-$1,980,000	-$1,980,000	-$1,980,000	-$1,980,000	-$1,980,000	**-$15,840,000**
(C) Interest Expense	-$1,597,475	-$1,536,425	-$1,475,375	-$1,414,325	-$1,353,275	-$1,292,225	-$1,231,175	-$1,170,125	**-$11,070,400**
(D) Administrative Cost	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	-$74,450	**-$595,600**
(E) Net Income **(A+B+C+D)**	**$1,148,075**	**$1,209,125**	**$1,270,175**	**$1,331,225**	**$1,392,275**	**$1,453,325**	**$1,514,375**	**$1,575,425**	**$10,894,000**
Simple Profitability Metric									
(F) Average Depreciated Asset Value	$54,010,000	$52,030,000	$50,050,000	$48,070,000	$46,090,000	$44,110,000	$42,130,000	$40,150,000	
(G) Net Spread **[A - C]/F**	**5.93%**	**6.27%**	**6.64%**	**7.04%**	**7.48%**	**7.95%**	**8.47%**	**9.04%**	

We can see that the transaction earns a profit from Year 1 onwards, on our somewhat heroic assumptions that this Lessor has the same administrative costs and interest expense as the largest aircraft lessor in the world, Aercap, and also assuming no defaults, taxes, or maintenance costs or payments. We also assume that no gain or loss is recorded in Year 8 upon sale of the aircraft, which we assume to be executed at the Lessor's depreciated book value. However, there are two points that even this simple profit and loss calculation demonstrate:

- Depreciation and interest expense are the two biggest expenses for a lessor.

- The profitability of a transaction for the Lessor should improve over time. In our model, depreciation and administrative costs are fixed, and (importantly) interest expense declines every year as the Lessor's loan is paid down. So the expenses should reduce Year on Year. At the same time, the Rent is fixed and therefore the revenue remains the same Year on Year. In this common scenario, the profitability of a transaction for the Lessor will improve over time. We can see this demonstrated in the "Net Spread" calculation, which is a common way for a Lessor to gauge the profit margin on its investments, and as we see the Net Spread increases over time as the Rent remains fixed and both interest expense and the depreciated asset value decline.

Topics for further research and study

1. What methodologies do lessors use to apply risk adjustments to lease modeling to aid in decision-making, and how are those reflected in the models?

2. What transactional enhancements are used to deal with perceived credit and jurisdictional risks, and which ones are the most effective in practice?

3. How do investors think about returns on leasing vs. other investments, or about returns in aircraft leasing vs. other ways of investing in aviation?

4. Do lessors deliver relatively stable ROEs over time and across industries?

5. Within the aviation and maritime sectors, do lessors deliver consistently attractive ROEs compared to other ways for investors to put equity to work in the sector.

6. Over the last twenty years, what is the economic impact of leasing, by sector: (a) aviation, (b) maritime, (c) rail, (d) construction and mining, (e) agriculture, and (f) information technology. How are economic gains distributed within these sectors among manufacturers, Lessors, Lessees, and, when different, other end users?

7. How can the broader macro-economic benefits, such us greater trade, tourism, and employment, associated with or attributed to leasing, be quantified and measured?

8. Does leasing, or at least leasing of most modern technology assets, have favorable climate impacts. How can that be quantified and measured?

PART B

Liability for damages caused by leased property

1. Theories of Lessor and Lessee Liability

I. Introduction

Where damage is caused to third parties by leased property there are three theories of liability that may potentially be applied to lessees and lessors: (i) absolute liability, (ii) strict liability, and (iii) fault liability or negligence.

Whether the burden of liability falls on the lessor or the lessee will depend on the applicable theory of liability, the circumstances of the damage caused, and the jurisdiction. The law, in most jurisdictions, has developed to reflect the position that lessors should not, in the majority of cases, be held liable for damage to third parties. In circumstances where the aircraft is being operated by another party, such as a lessee in a leasing context, subject to any fault attributable to the lessor, it is that operating party which shall be held liable for damage caused to third parties.

The position is relation to aviation is discussed further below. The same analysis is not necessarily applicable as far as maritime law is concerned, although there are a range of international legal conventions that determine the imposition and allocation of liability, certain of which are included in Table 15.

Table 15. List of International Maritime Conventions on Liability

Convention	**Relevance to the Imposition and Allocation of Liability in the Maritime Industry**
International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, 1924, as amended by the Brussels Protocol 1968 (The Hague-Visby Rules)	Addresses liabilities of carriers, including leasing liabilities for time-charterers under the contract of carriage.
United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules, 2008)	Expands carrier liability, including time-charter and leasing agreements, for multimodal transport obligations.
International Convention on Civil Liability for Oil Pollution Damage (CLC, 1969)	Shipowner liability covers charterers and lessees for oil pollution damage.
Convention on Limitation of Liability for Maritime Claims (LLMC, 1976)	Allows limitation of liability for shipowners, charterers, and lessees under leasing agreements.
MARPOL (International Convention for the Prevention of Pollution from Ships, 1973/78)	The main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes.
Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL, 1974)	The Convention establishes a regime of liability for damage suffered by passengers carried on a seagoing vessel. It declares a carrier liable for damage or loss suffered by a passenger if the incident causing the damage occurred in the course of the carriage and was due to the fault or neglect of the carrier.

II. Absolute Liability

Absolute liability posits that liability arises whenever the circumstances stipulated by the legislature for such liability to arise are met. The theory is similar to that of strict liability, with the distinction that there is no requirement that the damage must be caused by the person to be held liable.[1]

[1] Adriaan Jeroen Mauritz, '*Liability of the operators and owners of aircraft for damage inflicted to persons and property on the surface*' (2003), 35 < https://scholarlypublications.universiteitleiden.nl/access/item%3A2961492/view> accessed 25 October 2024.

Absolute liability is a founding principle of the international conventions addressing liability for damage sustained by third parties on the surface and to passengers and cargo.[2] Under the Rome Convention, the burden to prove liability is low and simply requires the victim to prove that the damage in question was caused by an aircraft in flight or by any person or thing falling from that aircraft.[3] Similarly, under the Warsaw and Montreal Conventions, a victim is only required to prove that there was an accident that caused the death or injury in question and that it took place either on board the aircraft or during embarkation or disembarkation.[4] These international conventions offer limited defences to mitigate or avoid liability to third parties. Further, in a leasing situation, they are weighted in favour of lessors, by bestowing liability upon the 'operator' or 'carrier' who will generally be deemed to be the lessee. However, under the Rome Convention the lessor, as registered owner, will need to rebut the presumption that it is the operator by reference to the parties' roles under the lease agreement. As a *quid pro quo* for lessees facing absolute liability, in certain circumstances, liability under the international conventions is limited.

Notably, where such international conventions apply, the liability regime set out pursuant to the principles of absolute liability is intended to provide a third party with its sole and exclusive remedy for all damage incurred by it. Depending upon the application of the international conventions by domestic courts, this may mean that no alternative claim may be brought against the lessor, or against the lessee (to seek to avoid the limits on liability imposed under the international conventions). However, domestic courts have often been inconsistent on these points.

III. Strict Liability

Strict liability requires that the person to be held liable must have caused the damage suffered, but a victim need not prove fault or negligence. So far as concerns third party passenger and cargo/baggage claims, the Warsaw and Montreal Conventions have been widely adopted by ICAO member states such that the majority of such claims, for both international and non-international carriage (to the extent the Warsaw and Montreal Conventions have been transposed into national law, or similar provisions apply), are subject to absolute liability.

The absence of strict liability aviation law international conventions is a notable distinction between the aviation and maritime legal landscapes. For passenger liability specifically, the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (the '**Athens Convention**'), as amended by the 2002 Protocol, introduced strict liability on carriers where a passenger suffers death or personal injury from a shipping-related incident up to a limit of 250,000 SDR.[5] Although founded on strict rather than absolute liability, there are similarities in the key features of the Athens Convention and Montreal regime, as illustrated in Table 16.

See next page.

[2] *See* the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed in Rome, on 7 October 1952 (the '**Rome Convention**'), Convention for the Unification of Certain Rules for International Carriage by Air, signed in Warsaw on 12 October 1929 (the '**Warsaw Convention**') and Convention for the Unification of Certain Rules for International Carriage by Air signed in Montreal on 28 May 1999 (the '**Montreal Convention**') respectively.
[3] Rome Convention 1952, Article 1(1).
[4] Warsaw Convention 1929, Article 17 and Montreal Convention 1999, Article 17(1).
[5] Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, Article 3.

Table 16. A Comparison between the key features of the Athens Convention 1974 and the Montreal Convention 1999

Name of Convention	Parties Covered by the Convention	Prima Facie Liability	Limits of Liability	Defences to Liability	Is the Convention the Sole and Exclusive Remedy for Claims?
Athens Convention 1974	Passengers and their luggage during sea carriage.	Carrier is liable for personal injury or luggage loss if the incident occurs during carriage and is due to the carrier's fault or neglect.	Limits are 250,000 SDR per passenger per incident for personal injury, and 2,250 SDR for cabin luggage.	Carrier can defend by proving the incident was caused by: (1) war or natural disaster; (2) act or omission of the claimant; (3) third-party negligence.	Generally, yes, but national laws may supplement claims not covered by the convention.
Montreal Convention 1999	Passengers and their baggage during international air transport.	Carrier is strictly liable for damage up to 100,000 SDR per passenger; beyond this, liability arises only if negligence or wrongful act is proven.	113,100 SDR for death or injury per passenger; 1,131 SDR for baggage loss.	Carrier can defend by proving the damage was: (1) not due to their negligence; (2) wholly caused by the claimant or a third party.	Yes, it provides the sole and exclusive remedy for claims under its scope.

So far as concerns liability for surface damage in an aviation context, the relatively low number of ratifications of the Rome Convention means that lessors and lessees are at an increased risk of incurring liability under the national law of the jurisdiction in which the damage occurred. Given the number of jurisdictions in which the Rome Convention does not apply, there is necessarily significant variability in the liability standards. Broadly speaking, the approaches to liability where jurisdictions have imposed national laws to address this area fall into three general groups, as set out in Table 17 below.

Table 17. Comparison of National Law Models for Lessor and Lessee Liability for Surface Damage

Least Favourable Approach for Lessors →		**Most Favourable Approach for Lessors**
Group 1	**Group 2**	**Group 3**
The Owner (Lessor) is held strictly liable regardless of whether it has possession or control over the aircraft. While rare, under certain national laws, such as those of Greece,[6] Norway,[7] and Cyprus,[8] lessors may find themselves, *prima facie*, strictly liable for surface damage to third parties, despite not being in possession of the aircraft at the time the damage was caused.	The Owner (Lessor) is held strictly liable as the presumed operator of the aircraft but has the ability to rebut this presumption, resulting in a transfer of liability to the lessee. This is the most common approach.	The operator of the aircraft (Lessee) is held strictly liable, and the Owner (Lessor) will only be held liable to the extent it has been negligent or is at fault by its own actions. In certain civil law jurisdictions, such as Germany and France, a lessee (in its role as aircraft operator) will automatically be liable for surface damage caused to a third party and may only mitigate its liability by the defence of contributory negligence. If liability is proved under German law a lessee may benefit from a liability cap, but would be subject to unlimited liability under French law.

[6] Greek Civil Aviation Code, Articles 117-119.
[7] Norwegian Aviation Act 1993, ss 11-1.
[8] Cyprus Civil Aviation Law (N.213(I)/2002), s 232.

Most jurisdictions follow a presumption and transfer of liability model (Group 2). The relevant legislative instruments will allocate liability for surface damage to either the owner or the operator (or, in a leasing context, to the lessor or lessee respectively). Subject to the satisfaction of codified circumstances, a transfer of liability may occur. This is typically a transfer from lessor to lessee, though the opposite does also occur. The circumstances vary, although a common requirement is that the owner/lessor has leased an aircraft to another party for a minimum period of time or that operational control has been assumed by an entity other than the owner/lessor. This transfer of liability reflects the position under the Rome Convention that the owner is held *prima facie* liable as the presumed operator but has the opportunity to rebut the presumption. A comparison of jurisdictions which do and do not utilise the transfer of liability model is illustrated in Table 18 below. Where jurisdictions have legislated to protect third parties from surface damage, lessees are most likely to find themselves subject to a regime of strict liability. The burden of liability on a lessee can vary materially as there is no unified standard. For lessors, the burden of liability, or rather its absence, is more predictable.

Table 18. Comparison of Jurisdictions: Transfer of Liability for Surface Damage under National Law

Legal System	***Prima Facie* Liable Party (Authority)**	**Can Liability Transfer?**	**Liability Transfer Direction**	**When does liability transfer?**
Common Law (United States)	Operator/Lessor (Federal Aviation Act 49 U.S. Code § 44112 as amended by Federal Aviation Reauthorization Act 2018)	Yes	Lessee to Lessor	The transfer mechanism is not explicit, but the presumption is that the lessee or operator is liable and liability shall transfer to the lessor only in circumstances when the aircraft is in 'the actual possession or operational control of the lessor'. Further a lessor must have leased an aircraft for a minimum of 30 days to be considered a lessor pursuant to the legislation.
Common Law (England)	Operator/Lessor (Section 76(4), Civil Aviation Act 1982)	Yes	Lessor to Lessee	If the owner demised, let or hired out the aircraft for more than 14 days and the pilot, navigator or other operative member of the crew is not employed by the owner then the person to whom the aircraft has been demised, let or hired out will be taken to be the owner for the purposes of the 1982 Act. Therefore, the owner of an aircraft will not be liable after the 14-day window except in instances of a wet lease / ACMI lease.
Civil Law (France)	Operator/Lessee (Article L6131-2, French Transport Code)	No	N/A	N/A
Civil Law (Germany)	Operator/Lessee (Section 33, Luftverkehrsgesetz – LuftVG)	No	N/A	N/A
Civil Law (Denmark)	Lessor/Owner (Consolidated Air Navigation Act 2024)	Yes	Lessor to Lessee	Where the owner transfers use of the aircraft to an independent user and the independent user assumes responsibility for the operation and maintenance of that aircraft. No minimum time period applicable.
Chinese Law	Operator/Lessee (Sections 157-158, Civil Aviation Law of the People's Republic of China)	Yes	Lessee to Lessor	If control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person (i.e. the Owner/Lessor) shall still be considered the operator.
Singapore	Operator/Lessor (Section 42(4), Singapore Air Navigation Act 1966)	Yes	Lessor to Lessee	Where any aircraft has been bona fide demised, let, or hired out for a period exceeding 14 days to any other person by the owner of the aircraft and no pilot, commander, navigator, or operative member of the crew of the aircraft is in the employment of the owner, the person to whom the aircraft has been demised, let or hired out is considered liable under the legislation.

Table 18 illustrates that, where applicable, liability may be transferred either on the basis of an assumption of control by the transferee or when the transferor has demised, leased, or hired an aircraft to a transferee for a period in excess of a stipulated duration. A period of 14 days is considered sufficient in the United Kingdom and Singapore, whilst 30 days is the minimum in the United States. Regardless of the exact duration, the time periods

are typically short enough to ensure that almost all commercial aircraft finance and operating leasing arrangements are subject to this rule. Consequently, in a commercial aircraft leasing context, the *prima facie* presumption of liability on the lessor in jurisdictions where this is the default liability position is not likely ever to be operative.

The transfer mechanism of the assumption of control also favours the lessor. For example, in the United States, whereas previously a lessor may be held liable if lessees or third parties could prove control of the aircraft by that lessor, the Federal Aviation Authority Reauthorization Act 2018 has made it more difficult for third parties to succeed in such claims. The difficulties faced in holding lessors liable may also be attributable to: (i) the prevailing view that federal provisions pre-empt state laws (which may typically provide for more effective recourse against the lessor), (ii) a reasonably clear understanding of 'operational control' being defined as 'the exercise of authority over initiating, conducting or terminating a flight',[9] and (iii) clarity on the applicable factors for judges to apply, as per *U.S. v King*, which include an assessment of control over three areas: aircrew, aircraft, and flight management.[10]

Lessees and lessors may both be able to benefit from certain defences. These defences typically comprise either mitigation (often by proving contributory negligence of the third party) or exclusion of liability. Exclusions from liability are rare, although in certain jurisdictions an operator may be able to avoid liability if it operates an aircraft in accordance with a specified standard, for example 'in conformity with air traffic regulations concerned of the State'[11] or if particular circumstances have arisen to cause or contribute to the damage, such as armed conflict or domestic unrest.[12]

Strict Liability of Lessors: Control Theory

The Control Theory is a lessor-specific legal concept that seeks to justify the allocation of liability away from a lessee and onto the lessor in circumstances where third parties have suffered damage. It is predicated on the notion that if a lessor 'controls' a lessee, it could be liable for damage caused by the use of the lessor's asset. Application of the theory is limited in practice.

This could arise under a number of jurisdictions:

(i) Under English law, the 'control test' is one of the elements that the court considers when determining whether an employer has sufficient control over an employee to be held vicariously liable for that employee's actions.[13]

(ii) Under Danish law liability can transfer 'if the owner has left the use of the aircraft to an independent user who has assumed full responsibility for the operation and maintenance of the aircraft'.[14] The specification of an 'independent user' suggests that if a lessor had significant control of the lessee's actions, there may be an argument that the lessee did not constitute an 'independent' user.

(iii) In the United States, the *In re September 11 Litigation* case discussed the existence of a duty to ground victims. The Court said that 'courts have imposed a duty where the defendant has control over the third-party tortfeasor's actions… the key in each [situation] is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm'.[15]

However, in all of these jurisdictions, it is unlikely that the above tests would apply to a lessor in a sophisticated lessor-lessee relationship and it does not appear that the courts in any jurisdiction have applied Control Theory to place liability on the lessor.

[9] Federal Aviation Regulations 14 C.F.R. §1.1.
[10] *United States v King* (2020) (4:19-CV-01418, United States District Court, S.D. Texas, Houston Division).
[11] Civil Aviation Law, Chapter XII, Article 157-158.
[12] Article 82, Qatar Law No. 15 of 2002 on Civil Aviation as Amended.
[13] *See Yewen v Noakes* (1880) 6 QBD 530; *Short v. J & W Henderson Ltd* (1946) SC HL 24.
[14] Danish Aviation Act 1927, Article 127.
[15] *Re September 11 Litigation* 280 F. Supp. 2d 279 (S.D.N.Y. 2003).

IV. Negligence and Fault Liability

Proving fault or negligence in aviation accidents is difficult due to the substantial evidential burden that is invariably involved. As a result, combined with the adoption of a strict liability regime in many jurisdictions, successful negligence or fault liability claims are rare.

Liability for negligence remains relevant in the United States where there has been a reluctance to ratify international conventions or pass federal statutes on the subject of surface damage, so that third parties suffering surface damage must prove that owners or operators of the implicated aircraft were negligent in order to receive compensation for their personal injury or property damage.[16] Nevertheless, United States cases seeking to prove the negligence of lessee operators remain limited and have resulted in conflicting case law.[17] This is likely to be because of the difficulties involved in meeting the standard of proof for negligence cases and the limited applicability of potentially helpful legal maxims such as *res ipsa loquitur* that move the evidential burden to the operator rather than the victim of surface damage.[18] Further, negligence claims against lessees by third parties rarely reach trial and claims are settled as swiftly and conveniently as possible to avoid, wherever possible, complicated and lengthy judicial proceedings and the associated risk of negative publicity against the airline or carrier (when they are lessees in a commercial aircraft leasing context).

Negligence claims against lessors are even more rare, despite the existence of a cause of action in the United States which appears to offer third parties the possibility of a claim against the comparatively well-capitalised lessors with potentially another layer of available liability insurance.[19] One theory of liability for such a claim is negligent entrustment, which derives from either (i) a defective aircraft, or (ii) a lessor leasing an aircraft to an operator who is incapable of operating the aircraft safely.[20] The relevance of negligent entrustment to commercial aviation leasing remains unclear, particularly as certain commentators consider the cause of action simply as a way to facilitate the access of third parties to plaintiff-friendly courts.[21] Because the successful claims typically concern aircraft rentals between businesses and inexperienced or underqualified individual pilots, the courts are yet properly to scrutinise a claim against an established commercial aviation lessor. The incentives to settle out of court apply equally in the few cases of negligent entrustment which do concern commercial aviation and lessors, given the particular difficulty in establishing a standard of care to be applied to a lessor and how far a lessor might be required to carry out investigations in relation to the lessee beyond the required airline licences and certificates.

The dispute over the liability arising from the crash of Air Philippines Flight 541 is a rare example of a case where the claimants' lawyers employed an argument of negligent entrustment argument against a commercial aviation lessor.[22] As Air Philippines could not be sued in the United States, the claimants ran a negligent entrustment argument against the previous lessors of the aircraft and the lessor owner at the time of crash. Although this case was ultimately settled out of court by Air Philippines' insurers (without any admission of liability), the case raised fundamental questions as to whether the responsibility of policing safety in the industry should lie with regulatory authorities or whether that responsibility should lie with aircraft lessors, especially considering a typical aircraft lease contains extensive provisions as to the maintenance standards of the aircraft. How far a lessor might be required to investigate beyond the required airlines licenses and certificates remains an ongoing debate.

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[16] GI Whitehead Jr., '*Legal liability of owners and operators of aircraft in general aviation for damage to third parties*' (1963) (15 Syracuse Law Review 1), 2.
[17] For example, two similar surface damages cases: *Rehm v United States* 196 F. Supp. 428 (E.D.N.Y. 1961) and *In re Air Crash Disaster at Cove Neck Long Island* (Ny, 885 F. Supp. 434 (E.D.N.Y. 1995) resulted in conflicting outcomes as to whether a duty of care is owed by operators to persons on the surface.
[18] *Shawcross & Beaumont: Air Law* (Issue 170, March 2020) Vol 1, Chapter 24 V-411 [620 – 630]. *See* also *Northwestern National Insurance Co v US* 2 Avi 14,962 (DC III, 1949).
[19] Christoper R Barth and Matthew J Kalas, 'Liability of Owners/Lessors and Negligent Entrustment' in Andrew J. Harakas (ed), *Litigating the Aviation Case* (4th edn, American Bar Association 2017) 219 and White v. Inbound Aviation, 69 Cal. App. 4th 910 (Cal. App. 4th, 1999) concerning liability for renting an aircraft to a pilot who did not have sufficient training.
[20] Donal Patrick Hanley, *Aircraft Operating and Leasing*: *A Legal and Practical Analysis in the Context of Public and Private International Law Air* (2nd edn, Kluwer Law International BV 2017) 117.
[21] ibid 124.
[22] *Layug v. AAR Parts Trading, Inc.*, 2003 WL 25744436 (Ill. Cir. Ct., Cook Cty. May 16, 2003).

Topics for further research and study

1. Does and should the role of a lessor as mainly, partially, or minimally a ‘financing party’ impact its liability for injury caused by a leased asset, and, if so, how?

2. Trace the development of lessors in the maritime and shipping industry in terms of their having a greater role and interest in the leased asset, its maintenance and residential value, on the one hand, and lessor liability for third party damages, on the other.

3. Does international law on third party liability (for passengers, cargo, and surface damage victims) need reform or are potential claimants sufficiently protected by national laws?

4. To what extent is reform of the Rome Convention required to resolve uncertainties in the scope and application of the existing liability regimes for surface damages suffered by third parties?

5. Trace the development of negligent entrustment as a cause of action and the debate as to whether it should exist as a cause of action in the aviation sector? To what extent is it the responsibility of regulatory authorities to regulate safety in the aviation industry and to what extent should a lessor be required to police safety?

2. Special Case: Liability with a Proximate Cause of War and Terrorism

I. Introduction

Terrorism and warfare bring specific challenges for the aviation industry as they involve, in most cases, acts against governments rather than private companies. This poses questions about why and whether the operator (almost exclusively an airline or carrier and therefore also a lessee in a leasing context) or the lessor should be liable for third party damages resulting from an act of war or terrorism.

II. International Law and Attempts at Reform

International law, as it currently stands, is unfavourable to lessees (and to some extent lessors) where damage is suffered by third parties due to war and terrorism. Anchored by the concept of absolute liability, neither the Rome Convention nor the Montreal Convention offer no relief or waiver of liability for lessees (or lessors who cannot rebut the presumption of liability) impacted by acts of war or terrorism that subsequently lead to damage on the ground or to passengers respectively.

Attempts to reform the international legal regime in this area culminated in the Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft[23] (the '**Unlawful Interference Convention**'), which allocates liability where a third party suffers damage as a result of unlawful interference with an aircraft as a result of terrorism and, to a lesser extent, warfare on commercial aviation. Although not yet in force due to a lack of ratifications, the two key features of the Unlawful Interference Convention are those which shield lessors or non-operators from liability and which acknowledge that airlines should not be obligated to compensate victims to an unlimited degree. Although the focus of the Unlawful Interference Convention is on the liability for third party surface damage as a result of acts of terror or war, the principles and purpose of the convention logically apply to third party liability arising from damage to passengers. In both cases, the Unlawful Interference Convention can be studied to determine how liability should be allocated following events that impose damages at such a scale that no single entity within the aviation industry (whether operator, lessor, manufacturer, or insurer) can provide redress.

Liability is structured in layers, recognising the comparative ease certain entities may have in obtaining insurance. Operators are liable in the first instance and as liability at this first stage is limited to a fixed quantity of Special Drawing Rights ('**SDR**') corresponding to the applicable mass of the aircraft, most lessee operators should be able to rely on their insurance cover for most claims. Should the damages exceed the fixed SDR limits, compensation may be paid by the International Civil Aviation Compensation Fund up to a ceiling of 3,000,000,000 SDR.[24] The final layer of liability arises only where the claimant third party can prove that the damage was caused by the negligence of the operator. In such circumstances the operator will be liable for further damages. This structure of liability addresses events that are of low probability but may result in significant liability exposure and which have traditionally presented challenges from an insurance perspective.[25] This allows liability still to be channelled to the operators with mechanisms, such as an International Fund, to limit the compensation burden. There is no right of recourse under the Unlawful Interference Convention against an owner, lessor, or financier retaining title or holding security in an aircraft, thereby implementing a stricter interpretation than under the Rome Convention.

III. Liability for Lessors in Negligence?

In the absence of adequate international law to address liability arising from damage caused by war and terrorism, where ground damage may be severe, third parties may resort to negligence claims against operators or lessors. The aforementioned difficulties faced by third parties in bringing a successful claim against such entities apply equally in circumstances where damage has been caused by an intervening act of terrorism or war. However, lessors and operators should be aware that in instances where the surface damage is substantial, there is a precedent for

[23] Adopted on 2 May 2009 at the International Conference on Air Law at Montreal.
[24] *Shawcross & Beaumont: Air Law* (Issue 170, March 2020) Vol 1, V, 401 and Article 18(2), Unlawful Interference Convention.
[25] Jeffrey Wool, "*Lessor, Financier, and Manufacturer Perspectives on the New Third-Party Liability Conventions*" (2010) The Air & Space Lawyer, Volume 22, Number 4 <https://awg.aero/wp-content/uploads/2019/09/AirSpace-224-FINAL-AUTHOR-VERSION.01-11-12.Wool_.pdf> accessed 10 November 2024.

such parties to be held liable for the consequent surface damage. In *re September 11 Litigation*, the New York District Court considered whether the 'Aviation Defendants', comprising the airlines and aviation security companies, owed a duty of care to individuals killed or injured on the ground when the aircraft impacted the World Trade Centre. The Court held that 'the Aviation Defendants owed a duty of care, not only to their passengers to whom they conceded they owed this duty, but also to victims on the ground'.[26] This duty was recognised on the basis of an analysis of the scope of a tortfeasor's duty, as set out in *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc.*,[27] which concerned the collapse of a skyscraper in New York. Although a duty was held to apply, the Court also declared that this judgment had no bearing on whether the Aviation Defendants' conduct was the proximate cause of the damage or whether the terrorists' actions 'constituted an intervening act breaking the chain of causation'.[28] Consequently, until the issues of proximate causation and intervening acts in the context of terrorism against aviation are interrogated further by Courts, lessees (and possibly lessors) should consider that they may be at risk of breaching a broad duty of care where damage is caused to surface victims, even in circumstances where the deliberate actions of a hostile third party have directly caused that damage.

IV. Reform of rules on liability for damage arising from War and Terrorism

There remain calls for reform in this area, with a view to establishing a clear set of rules governing the allocation of liability where damage to third parties is caused by a leased aircraft as a result of an act of terror or war. The absence of recent case law means there is limited visibility on how national courts would respond to claims arising from such acts and whether they would recognise and adopt the principles incorporated into the Unlawful Interference Convention. Despite the protection afforded under the international regime, lessors are not completely shielded from the risk of disproportionate liability. As explained above (*see Table 17*), a minority of jurisdictions enforce strict liability on the lessor or owner. Further, certain national legal systems, such as the UK, impose strict liability on the owner of an aircraft with the ability to transfer liability to the operator where factual circumstances apply. Although the United Kingdom's Civil Aviation Act 1982 gives the aircraft owner or lessee the right to be indemnified by the true perpetrators should they find themselves liable, the chances of recovery against terrorists (or their supporters) are low.[29]

Any discussion of reform in this area requires consideration of significant issues, such as: whether a state has a duty to compensate its citizens and commerce, including those participating in the aviation industry, where an act of terrorism is aimed at the state;[30] the fact that the magnitude of the liability of an operator in such situations may be so great that it is unable to continue operating, for example, because it has insufficient recourses and/or its insurance arrangements are insufficient to cover the liability; and whether risk in this area can justifiably be allocated to a lessee, as operator of the aircraft, and not to the lessor on the basis that its role as lessor is merely to provide a financial service in the provision of credit.[31]

Ultimately in a commercial leasing context, however, the limited risk of strict liability being imposed on lessors ultimately reflects the existing legal and economic reality of the aviation industry, that these lessor entities provide a financial service in the provision of credit, whilst the lessees operate and control the aircraft, and in doing so should therefore bear the risk of liability.[32]

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[26] *Re September 11 Litigation* 280 F. Supp. 2d 279 (S.D.N.Y. 2003) at 11.
[27] 750 N.E.2d 1097, 1101 (N.Y. 2001) (Kaye, Ch. J.). The Court would be asked to consider: 'the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability'. *See Re September 11 Litigation* 280 F. Supp. 2d 279 (S.D.N.Y. 2003) at 11-15.
[28] *Re September 11 Litigation* 280 F. Supp. 2d 279 (S.D.N.Y. 2003) at 12.
[29] ibid 21.
[30] H Caplan, 'Post 9/11-Air Carrier Liability Towards Third Parties on Land or Water as a Consequence of War or Terrorism' (2005) (Journal of Air & Space Law, Vol. XXX/1), 11.
[31] Wool (n 22).
[32] Wool (n 22).

Topics for further research and study

1. Consider the benefits of the adoption of a separate convention not solely reliant on strict or absolute liability such as the Unlawful Interference Convention.

2. Consider the arguments for and against the creation of an International Fund for the purposes of compensation payable to address liability arising from events of unlawful interference with aircraft.

3. Contractual Protections and Liability

In the type of financed commercial aircraft lease arrangement envisaged in the Assumed Facts, although the primary contractual relationship created is between lessor and lessee, the lease parties' relationships with financiers, manufacturers, and service providers will also inform and affect the liability risk for the lessor and lessee.

The default allocation of liability risk in aircraft lease documents falls upon the lessee. However, the lessor is not exempt from liability risks, which may arise both in relation to third parties and in connection with its own obligations to any financier (for example, servicing repayments under a Facility Agreement or obligations under an aircraft mortgage).

Whilst extensive representations and covenants given by a lessee and widely-drafted event of default provisions will offer lessors and financiers recourse against the lessee, third party liabilities are usually mitigated through the inclusion of comprehensive indemnity provisions. As lessors and financiers do not retain control over or possession of a leased asset, they accordingly take the view that they should not be liable for third party claims that arise in connection therewith. As was seen in the above discussion in relation to negligence, successful claims at common law against a lessor could result in uncapped damages and so it is important that a lessor (and a financier) have the ability to recover any such liability from the lessee. Successful reliance on an indemnity requires that it is legally enforceable under the applicable law of the jurisdiction and is of an appropriate scope. Practically, whether or not a lessor can enforce an indemnity will depend on both the solvency and adequacy of the assets of the lessee against which a judgment may be enforced.

By way of protection for lessors and financiers, as part of the insurance requirements under a lease that a lessee must comply with, a lessee will be required to insure its indemnity obligations under the lease, and procure that the lessor and financier are named as additional insureds for their respective rights and interests under the liability insurance cover that is to be put in place. In addition, the lessor or financier may carry liability insurance which is designed to provide protection in certain circumstances where the lessee's insurance fails to respond or its limits are exceeded.

PART C

Conflict of laws in international leasing transaction

For every legal issue arising in a contract, there must be a method of resolving said issue. This will be the case whether that issue relates to the substantive contractual terms in a contract, property matters arising from the contract (such as who owns an asset and whether it has been validly transferred), procedural law matters dealing with the issues in question, enforcement of the contract and the remedies thereunder, and finally what happens in an insolvency of the parties to the contract. When that contract is an international contract, the waters are muddied and the key question is: which system of law will apply to that specific issue at that specific time? Will it be the governing law of the contract as chosen by the parties? Or the law relating to where an asset that is the subject of the issue is situated at any given time? Or should it be the law of the jurisdiction applicable to one or other of the parties in the dispute? In addition, assets such as aircraft and ships are highly mobile assets and regularly cross international borders and spend time in international waters or international airspace. An interest that has been validly created and perfected in one jurisdiction may be invalid or unenforceable in another jurisdiction. Conflict of laws rules are rules that are recognised widely in both common and civil law systems and seek to answer many of these questions in respect of these issues. This section investigates these matters in more detail.

1. Conflict of Laws – Contractual Issues

Contracts are relationships between parties that consist of a set of mutual rights and obligations. But which law will govern the substantive rights and obligations agreed between the parties? While there may be different rules between jurisdictions, the underlying principles relating to contractual matters are universally accepted and, indeed, national legislation and international treaties have, to a large extent, sought to reflect those principles.

I. The Key Principle – Party Autonomy and Choice of Law

For most legal systems, the foundation for its conflict of laws rules is party autonomy – parties should be allowed to choose the law that is to govern their contractual relationship. This key principle is widely accepted as the rule, with differences across legal systems tending to relate more towards the limits on such freedom. It is often referred to as the 'proper law of the contract'. Whatever choice of law is made, the key principle is that the courts should honour the choice of law made by the parties where this has been set out in the contract, either expressly or impliedly, providing the parties with certainty in their dealings.

If no express or implied choice of law is set out in the contract, the courts will look to another of the well-established rules for determining which law should apply to the resolution of an issue and will consider widely accepted doctrines such as the most significant relationship or closest connection to the contract, the law of the contracting place, or the law of the place of performance.

II. Exceptions to the Key Principle

Notable variations to the key principle of party autonomy relate to public policy considerations and mandatory rules that apply in the forum. For example, a judge may decide that a foreign law chosen by the parties is inapplicable because such application would result in a violation of public policy within the forum, or that some other mandatory rule of the forum should apply (for example, one relating to employment or insolvency matters).

Additionally, the doctrine of *renvoi* may alter the conflict of laws analysis. Consider the scenario where the forum court is located in jurisdiction A and applies its conflict of laws rules such that it looks to the application of a foreign law, that of jurisdiction B, which was the choice of the parties. Should the forum apply jurisdiction B's domestic law to the issue in question, or should it take into account jurisdiction B's own conflict of laws rules, which may refer back to the laws of jurisdiction A, or even the law of a third jurisdiction? Referring back to the laws of jurisdiction A or a third jurisdiction will constitute *renvoi* (the English translation being 'sending back') and will constitute an exception to the general principle of applying the choice of law of the parties (the laws of jurisdiction B in this case). Not all jurisdictions will accept *renvoi* and so whether or not *renvoi* will apply in a given set of circumstances will depend upon the jurisdiction involved.

In an attempt to harmonise conflict of laws rules, international treaties and conventions will often override the rules set out in national law.

Topics for further research and study

1. For each of sections 1 to 4 in this Part C, consider the applicability and content of the public policy and mandatory rules exceptions as they apply to international leasing.

The table below sets out the laws applicable to contractual issues across a set of illustrative jurisdictions, including where international treaties may apply:

Table 19. Conflict of Laws Analysis for Contractual Issues

Legal System	Primary Rule	Details	Exceptions	*Renvoi*
Common Law (New York)	Party autonomy governs, but public policy can override	The New York General Obligations Law and Restatement (Second) of the Conflict of Laws emphasise party autonomy. UCC applies to contracts for the sale of goods	Mandatory Rules: certain statutes (e.g. labour, securities and consumer protections) cannot be derogated by foreign law. Public policy: foreign law violating US principles (e.g. discrimination laws) is excluded	*Renvoi* generally excluded for contracts under the Restatement (Second) of Conflict of Laws and UCC. Substantive foreign law is applied
Common Law (England)	Party autonomy is recognised; closest connection applies if no choice is made	English common law (post-Brexit): strong favour for party autonomy and closest connection principle. Rome I Regulation as included in English law post Brexit withdrawal	Mandatory rules: English courts can override foreign law if it contradicts key statutory provisions (e.g. financial services regulations). Public policy: contracts contrary to public morals or fundamental policy are void	*Renvoi* excluded in contracts under English common law. Courts apply the substantive law of the chosen or applicable jurisdiction
Civil Law (France)	Party autonomy governs; absent choice, closest connection applies	Governed by Rome I Regulation: Party choice of law prevails. If no choice, the law of the country most closely connected to the contract applies	Mandatory rules (Art 9 Rome I): French labour, consumer or competition laws may override foreign laws. Public policy: laws violating *ordre public* are excluded	*Renvoi* excluded for contractual issues under Rome I Regulation, which applies in France. No reference to foreign conflict rules; substantive law applies
Civil Law (Germany)	Party autonomy applies; fallback to closest connection	Rome I Regulation: identical to France. For consumer and employment contracts, mandatory protective rules of the weaker party's habitual residence may apply	Mandatory rules: German employment, consumer, and competition laws override. Public policy: courts reject foreign law for violating Grundrechte (constitutional rights)	As above
Civil Law (Outside of Rome I Regulation)	Most jurisdictions uphold the principle of party autonomy; absent choice, default rules apply	Under the principles codified in the relevant jurisdiction's domestic law	Mandatory rules and public policy exceptions will likely apply, as set out in the relevant domestic law	Will differ according to the relevant jurisdiction
Chinese Law	Party autonomy is recognised, subject to restrictions	PRC Civil Code (2021): Parties may choose applicable law. If no choice is made, the law of the place with the closest connection applies. Certain contracts (e.g. labour) have mandatory rules	Mandatory rules: Chinese laws governing labour, consumer rights and public welfare. Public policy: foreign law inconsistent with Chinese sovereignty or socialist principles is excluded	*Renvoi* excluded in most contractual disputes. Chinese courts apply the substantive law of the chosen jurisdiction or applicable jurisdiction
Islamic Law	Contractual autonomy is limited by Sharia principles	Sharia rules emphasise fairness and avoidance of forbidden elements (e.g. riba, gharar). Local codifications (e.g. UAE, Saudi Arabia) apply conflict rules consistent with Sharia	Mandatory Rules: Contracts violating Sharia principles (e.g. riba/usury, excessive uncertainty) are void. Public policy: local Islamic principles override foreign law	*Renvoi* partially accepted, depending on jurisdiction. Some Islamic jurisdictions may consider conflict rules if they align with Sharia
International Instruments – Rome I Regulation	Party autonomy is the cornerstone; closest connection applies otherwise	Covers EU Member States (excluding Denmark). Consumer and employment contracts are subject to mandatory rules protecting the weaker party	Mandatory rules: Art 9 Rome I allows overriding foreign law by local mandatory provisions (e.g. tax, labour or environmental laws). Public policy: Art 21 excludes laws	*Renvoi* excluded explicitly under Rome I Regulation (Art 20). Substantive law of the applicable jurisdiction is applied

			violating EU public order	
Hague Principles on Choice of Law in International Contracts	Party autonomy is upheld; rules provide guidance where choice of law is absent	Recognises freedom of choice for applicable law and provides a framework for resolving disputes where no choice is made, focusing on closest connection	Mandatory rules: parties cannot exclude overriding mandatory rules of the forum or a state with a close connection to the dispute. Public policy: same exclusions apply	*Renvoi* excluded. The Hague Principles are intended to simplify conflict rules by applying only the substantive law of the chosen or applicable jurisdiction
UNIDROIT Principles	Non-binding but influential model for international commercial contracts	Provides guidance on international contracts and encourages party autonomy. Can be incorporated into contracts as governing terms	Mandatory rules / public policy: if incorporated, local forum rules on public policy or mandatory rules override terms conflicting with fundamental principles	*Renvoi* not applicable. UNIDROIT Principles are applied directly if chosen without reference to conflict rules of national law.
Cape Town Convention	Respects party autonomy, allowing contracting parties to choose the governing law for their agreement. Where the Cape Town Convention applies, its provisions take precedence over conflicting domestic laws to the extent of the matters it governs.	Article 5(1) of the Cape Town Convention allows the parties to a transaction governed by the Cape Town Convention to designate the law applicable to their contractual rights and obligations, as long as this choice is made expressly or clearly from the terms of the contract. If the parties do not select a governing law, Article 5(2) provides that the applicable law will be the law determined by the conflict of laws rules of the forum where the issue arises. For discussion on choice of law in an insolvency context, *see* Part D.	The Cape Town Convention recognises certain exceptions to the general rules on the choice of law when it comes to public policy and mandatory rules. These exceptions are not explicitly detailed in the Cape Town Convention itself but are implied through its interaction with domestic legal systems. Public policy: the convention does not override fundamental principles of public policy in the forum state. Courts may refuse to apply a law chosen by the parties or the convention if doing so would violate the forum's public policy. Mandatory rules: even if the parties have chosen a governing law under Article 5(1), mandatory rules may still apply and override conflicting provisions of the chosen law or the convention.	The Cape Town Convention does not explicitly address renvoi, nor does it require is application – the doctrine of renvoi is generally inconsistent with the objectives of the Cape Town Convention which aims to provide predictable and uniform rules. If the parties have chose a governing law under Article 5(1), renvoi is generally excluded because the choice of law is explicit and intended to apply to the substantive rules of the selected jurisdiction. In the case of an Article 5(2) application, the forum's conflict of laws rules determine applicable law which may lead to an application of the renvoi doctrine.
Geneva Convention[1]	Does not establish specific rules for choosing the law applicable to contracts but implies that the law of the country where an aircraft is registered (the state of registration) may play a significant role in determining rights and obligation concerning the aircraft.	The convention provides for the recognition of certain rights in aircraft, such as those related to mortgages.	Allows for exceptions based on public policy	No guidance provided under the convention

[1] The Convention on the International Recognition of Rights in Aircraft signed at Geneva on 19 June 1948. Note that the Geneva Convention (where applicable) covers rights and interests that do not constitute international interests under the Cape Town Convention (including in respect of aircraft below the relevant thresholds in the Cape Town Convention) – Article XXIII of the Aircraft Protocol provides that the Cape Town Convention supersedes the Geneva Convention for states which are a party to both.

2. Conflict of Laws – Property Issues

An agreement such as a mortgage or a lease agreement will not only provide parties with contractual rights, but also proprietary rights such as rights of ownership of an asset and rights to transfer an asset or the rights created by a security interest over an asset.[2] In the same way as a contractual dispute can involve several different international aspects, so can a property dispute, where parties to the dispute may be located in one or more jurisdictions which may differ from the jurisdiction where the asset is located.

We have seen that there is a set of generally applicable conflict of laws rules that apply to a contractual dispute. Although for property matters we are able to glean some guiding principles, these are less standardised across different legal systems than their contractual counterparts.

The guiding principles differ depending upon the type of property in question. This requires an initial characterisation analysis as to whether a particular asset is classified as immovable or movable property, which in itself requires a conflict of laws analysis.[3] This may be straightforward in respect of assets such as land and buildings, but in the case of aircraft, for example, some jurisdictions may classify these as immovable while others classify them as movable.[4] For the purposes of this article, we are assuming that an aircraft is a movable asset.

I. Immovable Property

For immovable property such as land or buildings, the general principle is that the *lex situs* rule will apply, which refers to the law of the place where the property is located. This will be the case even where the parties to the dispute are located or incorporated elsewhere. The rationale for such application of the rule is one of sovereignty – the property is a part of the jurisdiction in which it is located and so the rules of that jurisdiction are the most appropriate rules to apply to that property, whether in respect of its usage, how it is taxed, how it is owned, or how such ownership can be transferred. All property within that jurisdiction would be treated similarly, leading to certainty and predictability.

II. Movable Property – Tangibles

In respect of movable property, the position is not quite so simple. For tangible, movable property such as goods and vehicles, the guiding principle is that the *lex situs* rule will also apply. Similar to the analysis for immovable property, this ensures consistency in treatment of property.[5] The table below sets out the analysis for creation, perfection and priority of interests in tangible movables (excluding aircraft and ships):

[2] Lawrence Collins and Jonathan Harris, *Dicey, Morris, and Collins on the Conflict of Laws* (16th edn, Sweet & Maxwell 2022) 25-006: 'A distinction must be drawn between the contractual effects of the transfer and its proprietary effects'.
[3] ibid r 135: For example, under English conflict of law rules the law of a country where the property is situated (the *lex situs* rule) will apply to determine whether an item is an immovable or a movable.
[4] Dominic Pearson and David Osborne in Graham McBain, *Aircraft Finance: Registration, Security and Enforcement* (Sweet & Maxwell 2024) vol 1 A5.
[5] Collins and Harris (n 1) r 136.

Table 20. Conflict of Laws Analysis for Property Issues – Tangible Movables (Excluding Aircraft and Ships)

Legal System	Creation of interests (leases, sales, mortgages)	Perfection of security interests	Priority of competing interests
Common Law (New York)	*Lex situs*: the law of the location of the tangible property generally governs the creation of interests	*Lex situs* or *lex domicilii*: typically, perfection is governed by the law of the jurisdiction where the property is located or where the property owner resides (e.g. UCC filings in New York for personal property)	*Lex situs* or *lex domicilii*: priority is determined by the law of the jurisdiction where the property is located. If the property is mobile, the jurisdiction where the debtor resides may apply
Common Law (England)	*Lex situs*: the law of the location where the property is situated typically governs the creation of interest in tangible property	*Lex situs*: perfection typically depends on the location of the property (e.g. possession or registration of interests). English law generally applies to tangible property located in England	*Lex situs*: priority rules follow the law of the location where the property is situated. If it involves personal property, the law of the jurisdiction where the property is situated or the parties are domiciled may apply
Civil Law (France)	*Lex situs*: interests in tangible property are governed by the law of the country where the property is located at the time the interest is created	*Lex situs* or *lex loci solutionis*: perfection is governed typically by the law of the jurisdiction where the property is located. However, in the case of movable property, perfection can sometimes be governed by the place where the transaction occurs (for example, registration)	*Lex situs*: priority is determined by the law of the location where the property is situated. If immovable, it follows the law of the property's location, but for movable property, the law where the interest was perfected can control priority
Civil Law (Germany)	*Lex situs*: creation of an interest is typically governed by the law of the place where the property is located at the time the interest is created	*Lex situs* or *lex loci actus*: perfection is typically governed by the law of the place where the property is located, or the jurisdiction where the act (e.g. transfer or registration) took place	*Lex situs*: priority rules depend on the location of the property. If it is movable, priority may depend on where the property is or where registration has occurred. For immovable property, priority follows the law of the location of the property
Chinese law	*Lex situs*: interests in tangible property are generally governed by the law of the place where the property is located	*Lex situs* or *lex loci actus*: perfection of interests is typically governed by the law of the place where the property is located (e.g. registration). If movable, perfection may depend on the location of the debtor or property	*Lex situs*: priority rules follow the law of the jurisdiction where the property is located. For movable property, priority may also be influenced by where the property or debtor resides
Islamic law	*Lex situs*: Islamic law often follows the law of the property's location for the creation of interests, though certain matters may be governed by the laws of the domicile or the religious law of the parties	*Lex situs* or *lex loci actus*: perfection of interests is often tied to where the property is located or where an act (such as a contract or pledge) takes place. In some cases, Islamic law may impose requirements (e.g. possession for gifts)	*Les situs*: priority of rights generally follows the law of the place where the property is located. Islamic law also places weight on possession, and local customs may affect how priority is determined

However, not all chattels can be treated the same, and it has long been considered that ships and aircraft may need to be treated differently due to their transitory and international movements. Indeed, even ships and aircraft are different types of property and should not necessarily be treated in the same manner.[6]

For ships, the general principle that has been recognised internationally is that the law of the ship's registry or flag (*lex registri*) will apply to questions as to ownership and transfer of a ship, including whether mortgages or sales of ships may be valid. This deviation from the general principle of the *lex situs* is considered necessary given the length of time that a vessel may spend on the high seas and thus not under the jurisdiction of any one state.[7]

[6] Pearson and Osborne (n 3) A2.
[7] Conflicts of Laws in the Law of the Air, Michael Milde, McGill Law Journal Vol. 11, 232.

However, this exception is not itself without exception globally, and case law in England has certainly given rise to some questions as to whether the *lex situs* of the ship should be the governing law in such contexts.

While there has been less commentary and case law on the matter in respect of aircraft, international trends point towards the *lex registri* being the preferred governing law for issues relating to property. By their nature, aircraft are the most mobile of assets and in a single day an aircraft could be located in several different jurisdictions, or indeed, the location could be unknown or difficult to determine. As a result, applying the *lex situs* rule as the governing law may give rise to unforseeability and uncertainty of legal relations for parties as regards property matters at any given time,[8] as well as disputes as to where an aircraft may actually be situated at the relevant time. The *lex registri* application solves many of these issues, particularly where an aircraft may be flying in international airspace and therefore subject to the control of no state if *lex situs* were to be applied.

However, the direction of travel towards the *lex registri* as the governing law for aircraft property matters is not uniform, as illustrated by the position under English law, which, for the time being at least, is settled on the *lex situs* of the aircraft as governing. This reflects the position under English law for tangible movables generally, which is a well-settled principle[9] and reflected in English case law.[10] Recent case law has also confirmed the *lex situs* principle as applying to aviation property matters,[11] with the point appearing to be settled in the *Blue Sky* case[12] where the court confirmed that in respect of transfers of title for tangible movables, the effectiveness of such a transfer will be governed by the *lex situs*, i.e. the law of the place where the aircraft was physically located when the mortgage relating to such aircraft took effect, excluding any *renvoi*.

The table below sets out the analysis for creation, perfection and priority of interests in aircraft across different jurisdictions:

See next page.

[8] *See* Conflicts of Laws in the Law of the Air, Michael Milde, McGill Law Journal Vol. 11, p 233-236.
[9] Collins and Harris (n 1) r 124.
[10] *Cammell v Sewell* (1858) 3 H&N 617; 157 ER 615.
[11] *Lex situs* after *Blue Sky*: William J Glaister, Robert Murphy, Marisa Chan, Ellie Dunne & Julian Acratopulo, 'Is the Cape Town Convention the solution?' (2012) 1 Cape Town Convention Journal 1 3.
[12] *Blue Sky One Ltd & ors v Mahan Air and another* (2009) EWHC 3314 (Comm) *and* (2010) EWHC 631 (Comm).

Table 21. Conflict of Laws Analysis for Property Issues – Aircraft

Legal System	**Creation of interests (e.g. leases, sales, mortgages)**	**Perfection of security interests**[13]	**Priority of competing interests**
Common Law (New York)	Law of the jurisdiction where the aircraft is registered governs the creation of interests	Governed by the law of the jurisdiction where the aircraft is registered or located	Law of the jurisdiction where the aircraft is registered or located determines priority
Common Law (England)	Law of the jurisdiction in which the aircraft is registered determines priority[14]	Law of the jurisdiction in which the aircraft is registered determines priority	Law of the jurisdiction in which the aircraft is registered determines priority
Civil Law (France)	Law of the jurisdiction where the aircraft is registered	Law of the jurisdiction where the aircraft is registered	Law of the jurisdiction in which the aircraft is registered determines priority
Civil Law (Germany	Law of the jurisdiction where the aircraft is registered governs the creation of interests	Law of the jurisdiction where the aircraft is registered applies	Law of the jurisdiction where the aircraft is registered governs the priority of competing claims
Chinese Law	Law of the jurisdiction where the aircraft is registered applies	Law of the jurisdiction where the aircraft is registered applies	Law of the jurisdiction in which the aircraft is registered governs priority
Islamic Law	Law of the jurisdiction in which the aircraft is registered	Usually the law of the jurisdiction where the aircraft is registered	Law of the jurisdiction where the aircraft is located or registered determines priority
Cape Town Convention	*See* Section IV below	*See* Section IV below	*See* Section IV below
Geneva Convention	Law of the state where the aircraft is registered is often applied to determine the legitimacy of property interests associated with the aircraft (e.g. ownership, mortgages, liens). If an interest is validly created and registered in the country of registration, it is typically considered as valid and enforceable internationally	*See* creation section	Priority of competing claims over an aircraft is often determined by the first-in-time principle based on the law of the state of registration of the aircraft. In the case of competing property interests (such as two creditors with conflicting claims to a mortgage), the rights registered earlier under the law of the country of registration would generally take precedence

[13] NB perfection requirements may also be required in national companies registers in certain jurisdictions.
[14] But note AI here takes no account of the discussed *Blue Sky* case in respect of mortgages.

Topics for further research and study

1. Could there be a third offering for the applicable law governing aviation property disputes, being the proper law of the transfer as chosen by the parties? Consider whether such a rule would be more appropriate as compared to either the *lex registri* rule or the *lex situs* rule.

2. Consider further the rules for ships and how they differ from those set out for aircraft.

3. Consider which rules apply to aircraft engines, given that these are not separately registered in an aircraft registry.

4. Consideration to be given to the rules regarding the priority of non-consensual rights and interests such as liens and detention rights under applicable law in the relevant jurisdictions and the effect of the Cape Town Convention on such matters.

III. Movable Property – Intangibles

The category of intangible movables is vast and can cover property such as shares, intellectual property, and debts. It can further include property that does not appear to have any root in contractual matters, property that consists of a single right or a bundle of rights, and property that may require its ownership to be registered on a specific property register.[15] As such, a consideration of the conflict of law rules for such items may not give rise to an appropriate 'rule' for such a wide category of assets and is beyond the scope of this article. Instead, the primary focus for this section is on the conflict of laws relating to security in intangible assets such as assignments of receivables.

Secured transaction regimes differ vastly across legal systems globally and so conflict of law rules again become critical in being able to determine which regime will apply to different issues within a particular transaction. Possibly the most important question for a creditor will be whether notice of the security interest needs to be filed in order to perfect it (i.e. make it effective as against third parties) and, if so, where it should be filed. This will depend upon what laws govern the perfection of the security interest and requires a conflict of laws analysis. Likewise, important questions as to the creation of the security interest (the validity, effectiveness, and enforceability of the security interest) and the priority of the security interest (the ranking among competing interests in the same item of property) will depend upon the law applicable to that issue.

There is no agreed universal principle for such matters, with possible contenders being the law governing the assigned claim, the law of the grantor, or the law chosen by the parties in the contract.

Similar exceptions as to public policy and mandatory rules will apply to the application of conflict of law rules to property matters as to contractual matters. Similarly, the issue of *renvoi* may apply to property matters but is not discussed further in this context.

The following table sets out the different conflict of law regimes across jurisdictions in respect of assignments of receivables:

See next page.

[15] *See* Collins and Harris (n 1) 25-058.

Table 22. Conflict of Laws Analysis for Property Issues – Intangible Movables – Assignments of Receivables

Legal system	General	Creation of security interest	Relationship between assignor and assignee (contractual matters)	Assignability of claim	Effectiveness (validity) against third parties / perfection of the assignment	Priority of the security interest	Relationship between assignee and debtor
Common Law (New York)	UCC governs	Law chosen by the parties, provided that the transaction bears a reasonable relation to the relevant state	Law chosen by the parties, provided that the transaction bears a reasonable relation to the relevant state	Not covered but likely to be considered to be the law governing the assigned claim	Law of the debtor's location (UCC 9-301) Additionally, UCC requires notice to the debtor or a filing of a financing statement	Law of the debtor's jurisdiction (UCC 9-301)	Not clear but likely to be the law of the debtor's jurisdiction or the law governing the assigned claim
Common Law (England)	English legislation[16] which substantively reflects the Rome I Regulation	*See* Rome I analysis English common law – proper law of the contract Dicey Rule 143(1)(a)	*See* Rome I analysis English common law – proper law of the contract Dicey Rule 143(1)(a)	*See* Rome I analysis English common law – proper law of the contract by which the receivables are created Dicey Rule 143(1)(b)	*See* Rome I analysis English common law – not explicitly set out in English law – position is considered to be the proper law of the contract by which the receivables are created (location of receivable) or the law of the debtor's domicile	*See* Rome I analysis English common law - *see* comments on perfection	*See* Rome I analysis English law – proper law of the contract by which the receivables are created Dicey Rule 143(1)(b)
Civil Law (France)	Rome I governs (where applicable)	*See* Rome I analysis French law – primarily governed by the law of the contract between the parties	*See* Rome I analysis French law – primarily governed by the law of the contract between the parties	*See* Rome I analysis French law - law governing the receivable (i.e. the law of the underlying contract between the assignor and debtor)	*See* Rome I analysis French law – generally governed by the law of the assignor's domicile	*See* Rome I analysis French law – law of the assignor's domicile or the location of the receivable	*See* Rome I analysis French law – law governing the receivable (i.e. the law of the underlying contract between the assignor and debtor)
Civil Law (Germany)	Rome I governs (where applicable)	*See* Rome I analysis	*See* Rome I analysis	*See* Rome I analysis	*See* Rome I analysis	*See* Rome I analysis	*See* Rome I analysis

[16] The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019.

		German law – primarily governed by the law of the contract between the parties	German law - primarily governed by the law of the contract between the parties	German law – law governing the receivable (i.e. the law of the underlying contract between the assignor and debtor)	German law – governed by the law of the assignor's domicile or the law of the place of the receivable	German law – law of the assignor's domicile or the location of the receivable	German law – law governing the receivable (i.e. the law of the underlying contract between the assignor and debtor)
Civil Law Generally (Outside of Rome I Regulation)		Law of the contract	Law of the contract	Law governing the receivable (i.e. the law of the underlying contract between the assignor and debtor)	Law of the assignor's habitual residence or the law of the place where the receivable is located (the debtor's domicile)	Law of the assignor's habitual residence or the law of the location of the receivable	Law governing the receivable (i.e. the law of the underlying contract between the assignor and debtor)
Chinese Law		Law of the contract	Law of the contract	Law of the place where the receivable is located (usually the debtor's domicile or the place of performance of the underlying obligation)	Law of the assignor's habitual residence or the laws of the jurisdiction where the receivable is located	Law of the place where the receivable is located (i.e. debtor's domicile)	Law of the place of performance of the underlying obligation (usually the debtor's domicile)
Islamic Law	Will depend upon relevant local codifications	Primarily governed by Sharia law as it applies to the underlying contract	Primarily governed by Sharia law as it applies to the underlying contract	Governed by Sharia principles. The law of the place of performance (debtor's domicile) and influence the assignment of claims	Governed by Sharia principles.	Law of the place where the receivable is located (debtor's domicile)	Law of the place of performance (debtor's domicile)
Rome I Regulation		Law of the contract (Art 14(1))	Law of the contract (Art 14(1)) Includes the proprietary aspects of an assignment between assignor and assignee (Recital 38)	Law governing the assigned claim (Art 14(2))	Law governing the assigned claim (Art 14(2))	Not specifically covered	Law governing the assigned claim (Art 14(2))
UNCITRAL Model Law on Secured Transactions		Law of the state in which the grantor of the security is located (Art 86)	Law chosen by the parties (Art 84)		Law of the state in which the grantor of the security is located (Art 86)	Law of the state in which the grantor of the security is located (Art 86)	Law governing the receivable being assigned (Art 96)

IV. Property Issues and the Cape Town Convention

As discussed previously, where the Cape Town Convention applies it creates an international interest in an aircraft object, which is a *sui generis* interest in property and can be registered, providing the creditor with priority protections. This interest may derive from a lease agreement, a title reservation agreement, or indeed a security agreement (such as a mortgage). Assignments of international interests are also able to be registered. As a result, the Cape Town Convention addresses conflict of law issues concerning property by establishing uniform rules for the creation, registration, priority, and enforcement of international interests. It also provides mechanisms to resolve conflicts and ensure legal certainty across jurisdictions.

The table below outlines the approach of the Cape Town Convention to conflict of laws in property issues:

Table 23. The Cape Town Convention and Conflict of Laws in Property Issues

General approach	**Determination of applicable law**	**Creation and perfection of an international interest or assignment of an international interest**	**Priority rules**	**International Registry as a mechanism to avoid conflicts**	**Enforcement across borders**
Uniform substantive rules take priority. The Cape Town Convention seeks to displace national conflict of laws rules with uniform substantive rules. Once applicable, the convention's provisions govern the creation, priority, and enforcement of international interests, avoiding the need to resort to local conflict of laws principles	When the convention or its protocols do not address a specific issue, Article 5 provides guidance and the applicable law is determined by the domestic conflict of laws rules of the forum	The interest does not need to be registered or perfected in order to ensure its validity or continued existence. Registration establishes the priority of the interest. Lex situs is irrelevant for the purposes of creation of the interest. Matters such as whether a party has the capacity to contract, or whether there is a valid agreement in place, will be matters of domestic law.	Registration in the International Registry is the decisive factor for the priority of an international interest. The convention establishes clear, uniform priority rules under Articles 29-30 whereby a registered international interest has priority over unregistered interests or subsequently registered interests, irrespective of national laws.	The International Registry system for recording international interests ensures transparency and reduces disputes. It provides a centralised, searchable database. The registry is independent of any specific jurisdiction, mitigating the need to navigate local property laws.	The convention also standardises enforcement rules for property issues, ensuring consistent treatment across jurisdictions that are parties to the treaty. This reduces reliance on domestic conflict of laws frameworks.

3. Conflict of Laws – Procedural Law Matters

I. General

Regardless of the law chosen by the parties as the governing law, or the law applicable to a property dispute, the prevailing rule is that matters of procedural law will be governed by the law of the forum state (*lex fori*). The substantive law of another jurisdiction may be used to resolve the key substantive law matters as regards the rights and obligations of the parties to the dispute, but a court will do this using its own rules of procedure.

The table below sets out what constitutes procedural law across different legal systems:

Table 24. What is Procedural Law?

Legal system	What is procedural law?	Relevant examples
Common Law (New York)	Encompasses the legal framework for how civil and criminal cases are handled in state and federal courts. It determines how lawsuits are filed, trials are conducted, evidence is presented, and judgments are enforced.	Includes the Civil Practice Law and Rules for civil cases and the Criminal Procedure Law for criminal cases, supplemented by federal procedural laws for cases in federal courts.
Common Law (England)	Refers to the rules that govern how legal disputes are initiated, conducted, and resolved in courts and includes laws and regulations on filing cases, managing evidence, conducting trials, issuing judgments, and handling appeals. Procedural law ensures fairness and consistency in the application of substantive law.	Includes the Civil Procedure Rules 1998 for civil cases and the Criminal Procedure Rules for criminal cases.
Civil Law (France)	Consists of codified rules that structure legal proceedings in civil, criminal, and administrative matters. It defines the stages of litigation, including how cases are filed, evidence is gathered, and judgments are enforced. The goal is to provide a structured and predictable process for resolving disputes.	The Code de procédure civile governs civil matters while the Code de procédure pénale governs criminal cases.
Civil Law (Germany)	Refers to the formal rules governing the conduct of legal proceedings in civil, criminal, and administrative courts. Procedural law ensures that cases are heard fairly, evidence is properly presented, and decisions are reached in a consistent manner.	The Zivilprozessordung regulates civil proceedings, while the Strafprozessordung governs criminal procedures.
Chinese Law	Consists of the laws that regulate the processes for resolving disputes and enforcing rights through the civil courts. Chinese procedural law also emphasises mediation and arbitration as alternative methods for resolving disputes.	The Civil Procedure Law governs civil cases, the Criminal Procedure Law applies to criminal cases, and the Administrative Procedure Law provides mechanisms for citizens to challenge government actions.
Islamic Law	Refers to the rules derived from Sharia that govern how legal disputes are resolved in accordance with Islamic principles. It includes guidelines for filing cases, presenting evidence, witness testimony, and ensuring justice.	These rules are based on classical jurisprudence (fiqh) but are often codified in modern states, such as Saudi Arabia's Law of Criminal Procedures or UAE's Civil Procedure Code, to fit contemporary judicial systems.

The table below sets out what will be the governing law for procedural law matters across different legal systems, including examples of what will or will not be considered as a procedural law matter in such jurisdiction:

Table 25. Conflict of Laws Analysis for Procedural Law Matters

Legal system	General rule	Key principle	Substantive vs procedural law	Rules of evidence	Limitation periods
Common Law (New York)	Law of the forum (*lex fori*)	Procedural rules include court procedures, evidence and limitation periods (with some exceptions). Borrowing statutes may influence limitation periods	Clear distinction: substantive law governs rights and obligations; procedural law governs judicial processes	Governed by New York procedural law in New York courts	Generally procedural; borrowing statutes may require applying foreign shorter periods
Common Law (England)	Law of the forum (*lex fori*)	Procedural rules include court procedures, evidence and limitation periods (with some exceptions)	Clear distinction: substantive law governs rights and obligations; procedural law governs judicial processes	Governed by English procedural law in England	Generally procedural but may be substantive under the Foreign Limitation Periods Act 1984
Civil Law (France)	Law of the forum (*lex fori*)	Procedural law is distinct from substantive law but can include rules like evidence and deadlines	Clear distinction: substantive law governs rights and obligations; procedural law governs procedural mechanisms	Governed by French procedural law in France	Treated as substantive, often requiring application of foreign substantive laws
Civil Law (Germany)	Law of the forum (*lex fori*)	Procedural law is distinct from substantive law; time limits for filing are procedural	Clear distinction: substantive law governs rights and obligations; procedural law governs court procedures	Governed by German procedural law in Germany	Treated as substantive, so foreign limitation laws may apply
Chinese Law	Law of the forum (*lex fori*)	Procedural law includes court procedures, evidence rules and judicial timelines	Clear distinction: substantive law governs rights and obligations; procedural law governs judicial mechanisms	Governed by Chinese procedural law in Chinese courts	Treated as substantive, foreign limitation laws may apply in cross-border cases
Islamic Law	Law of the forum (*lex fori*), often shaped by local codification of Sharia law	Procedural law includes evidence rules and procedures codified in national laws, often derived from Sharia principles	No traditional distinction in classical Islamic law, but modern systems often distinguish due to codification	Governed by local procedural rules, typically influenced by Sharia and national statutes	Treated as substantive or procedural, depending on the jurisdiction and codified rules
Cape Town Convention	Law of the forum	Does not establish a detailed framework for resolving procedural conflicts of law	Instead it refers to the domestic legal system of the adjudicating state, as long as this does not contradict the convention's substantive provisions[17]	-	-
Geneva Convention	Does not specifically prescribe rules regarding jurisdiction for procedural matters related to the enforcement of rights in aircraft.	Instead, it allows individual countries to apply their own jurisdictional rules to matters involving aircraft rights. This means that procedural issues, such as where a claim is filed or where an action can be brought, are generally determined by the domestic laws of the country where the legal action is initiated.	The convention focuses on the recognition of substantive property rights rather than providing detailed rules for resolving procedural conflict of laws issues. It is implied that countries should recognise the property rights of the aircraft under the law of the country of registration, even if the legal proceedings are taking place in a different country.	-	-

[17] Where procedural rules intersect with substantive rights provided by the Cape Town Convention (e.g. enforcement of international interests), the convention takes precedent to ensure uniformity and predictability. For example, Article 8 governs remedies upon default and may override procedural rules of the forum if they conflict with the convention's substantive enforcement provisions.

II. Cape Town Convention

See Section 4 below for discussion on the exercise of remedies in conformity with procedural law.

Topics for further research and study

1. What is the distinction between a substantive and a procedural issue? What constitutes procedural law? Consider how the courts will need to first characterise such an issue before ruling on it as a matter of law.

2. Procedural law will determine whether or not a court has jurisdiction over a party (personal jurisdiction) or the subject matter of the dispute (subject matter jurisdiction). In addition, *in rem* jurisdiction may apply (where an asset is located within the territory of the jurisdiction and the court has authority over the asset as a result). Is a court permitted to decline jurisdiction if there is a more appropriate jurisdiction that may apply? If so, what factors are relevant for such a decision?

3. How does procedural law impact upon how a court recognises and enforces judgments made by foreign courts on a matter? How do international treaties affect this?

4. Conflict of Laws – Enforcement/Repossession

I. Enforcement/Repossession of Collateral

Conflict of laws may also play an important part in an enforcement and repossession scenario, where parties from different jurisdictions contracting under another governing law are dealing with enforcing security rights and remedies over tangible assets located in yet another jurisdiction or over intangible assets. Many of the concepts already discussed in this article will come into play, starting with the law chosen by the parties to govern their contractual relationship. While certain remedies available to creditors may be set out in statute, the contract will likely expand on those remedies and provide additional remedies. Therefore, the substantive law of the jurisdiction chosen by the parties will set out the remedies available to the parties.

In contrast, remedies are generally seen to be procedural in nature, and so while the initial set of remedies available to a creditor may be a substantive law point decided by the law chosen by the parties in the contract, whether those remedies are actually available, and how they are to be made available, will be procedural and will therefore be a matter for the court required to enforce the remedy, which for the most part will be the jurisdiction where the asset is located at the time of enforcement. Courts will usually only enforce security interests over assets located in their jurisdictions.

Usual exceptions as to public policy may also have a bearing on repossession and the jurisdiction may refuse to enforce a foreign repossession order if doing so would result in a contravention of its own public policy.

The following table sets out the conflict of laws rules relating to repossession of tangible property across jurisdictions and under relevant international treaties or other model laws:

See next page.

Table 26. Conflict of Laws Analysis for Repossession of Tangible Property

Legal system	**General rule**	**Key principles**	**Legal basis (where applicable)**
Common Law (New York)	Law chosen by the parties, provided that the transaction bears a reasonable relation to the relevant state	Party autonomy	UCC general article 1-301
Common Law (England)	*See* Rome I analysis. English common law – *lex fori*	*See* Rome I analysis. English common law – *lex fori* governs procedural matters, being the law of the place where the remedy is being enforced, typically the location of the asset	Rome I as incorporated into English law post Brexit English common law principles
Civil Law (France)	*See* Rome I analysis French law – *lex fori*	*See* Rome I analysis French law – French procedural rules apply to enforcement (*lex fori*), being the law of the place where the remedy is being enforced, typically the location of the asset	*See* Rome I analysis
Civil Law (Germany)	*See* Rome I analysis German law – *lex fori*	*See* Rome I analysis French law – German courts apply *lex fori* for procedural matters in enforcement, being the law of the place where the remedy is being enforced, typically the location of the asset	*See* Rome I analysis
Civil Law (Outside of Rome I Regulation)	*Lex fori*	Courts generally apply *lex fori* for procedural matters in enforcement, being the law of the place where the remedy is being enforced, typically the location of the asset	Relevant codified laws of the jurisdiction
Chinese Law	Lack of clarity		
Islamic Law	Lack of clarity		
Rome I Regulation	Law of the country where performance takes place	In relation to the manner of performance and the steps to be taken in the event of defective performance (e.g. the way in which remedies are available or implemented), regard is had to the law of the country where performance takes place, which would be the place where the remedy is being enforced, typically where the asset is located	Article 12(2)
UNCITRAL Model Law on Secured Transactions	*Lex situs* (tangibles) Law applicable to the priority of the security right (intangibles)	Tangibles – the law of the location of the tangible asset governs enforcement of security interests Intangibles – the law applicable to priority is the law of the state in which the grantor of the security is located	Tangibles - Article 88(a) Intangibles – Article 88(b) and Article 86

II. The Cape Town Convention and the Geneva Convention

It should also be noted that international treaties will play an important part in harmonising the rights and remedies available to creditors, with one of the most important such treaties being the Cape Town Convention. Where the Cape Town Convention applies to a transaction, it confers a specific set of remedies on creditors which are in addition to any procedural and substantive remedies that are permitted to a creditor under applicable law.[18]

Where these remedies do not require court authorisation under the Cape Town Convention, unless a contracting state has otherwise made a relevant declaration under the Cape Town Convention, leave of the court for exercise of the remedy will not be required even where the domestic law of the contracting state would otherwise require.[19] However, other than this, all the substantive remedies provided under the Cape Town Convention will need to be exercised in conformity with the procedural law of the jurisdiction where the remedy is exercised.[20] As a result, for the purposes of the Cape Town Convention, the exercise of remedies is a procedural matter rather than a substantive law matter, similar to the position generally in many jurisdictions.

However, the procedural law to be applied in a Contracting State must be applied in a manner that is compatible with the general substantive provisions of the Cape Town Convention.

While the Geneva Convention ensures the recognition of property rights, enforcement of those rights in other countries may still involve conflict of laws issues. For example, a court in one country may have to determine whether to enforce a property right (such as a mortgage) that was registered in another country. The enforcement of such rights is generally governed by the local laws of the jurisdiction where enforcement is sought, but the Geneva Convention provides that rights related to aircraft should not be undermined by foreign laws unless there is a strong public policy exception.

Topics for further research and study

1. Table 20 illustrates that many jurisdictions will apply the *lex fori* as to how remedies are exercised. How does this impact the availability of a specific remedy in a particular jurisdiction?

2. Consider how the position as to enforcement of security may differ in respect of intangible collateral.

[18] Principles-Based Guide to the Official Commentary, The Legal Advisory Panel of the Aviation Working Group, Principle 4.2.
[19] ibid Principle 4.4.
[20] ibid Principle 4.5.

5. Conflict of Laws – Insolvency Matters

See Part D, Section 5 below for discussion of cross-border insolvency law in relation to conflict of laws, jurisdiction, and recognition issues.

6. Application of the Conflict of Law Rules to the Assumed Facts

The Assumed Facts, as described earlier, contain a number of points of intersection with conflict of law rules from each of the contractual, property, procedural, enforcement, and insolvency perspectives discussed above and illustrates exactly how problematic a cross-border transaction can be in respect of a conflict of laws analysis for a forum state. The table below sets out some of these points of intersection, although any specific analysis will depend upon the jurisdictions involved:

Table 27. Analysis of Assumed Facts and Conflict of Laws Issues

Assumed Fact	Issue	Relevant conflict of law rule	Notes
Loan Agreement	Contractual rights and obligations of the parties	Likely to be the choice of law of the parties (the proper law of the contract)	Will apply to matters such as validity of the agreement, terms of the debt, conditions to the loan, interest and repayment obligations and representations, covenants, and events of default
	Remedies for enforcement	Substantive inclusion of remedies – as per the contractual rights and obligations, this will likely be the choice of law of the parties (the proper law of the contract) Exercise of the remedies themselves – likely to be considered a procedural matter by the forum where the remedy is exercised and so forum will apply its own procedural rules	May include sale of assets by a private sale or by public auction or repossession rights
Lease Agreement	Contractual rights and obligations of the parties	*See* loan agreement section above	Will apply to matters such as validity of the agreement, terms of the lease, rental payment terms and representations, covenants, and events of default
	Characterisation of a finance lease for the purposes of conflict laws relating to security interests	Likely to be the proper law of the contract dictating whether or not the finance lease would be re-characterised as a security interest	Including as to matters relating to creation, perfection, and priority of security
	Remedies for enforcement	*See* loan agreement section above	To include repossession rights
Mortgage	Contractual rights and obligations of the parties	Likely to be the choice of law of the parties (the proper law of the contract)	Matters such as the interpretation and performance of the contract, and the limitations thereunder
	Creation, perfection, and priority of the mortgage	Likely to be the law of the place where the aircraft is registered	Noting the *Blue Sky* exception as to *lex situs* for the creation of mortgages governed by English law. Perfection may also be required in companies and charges registers in some jurisdictions

Security Assignment of Lease Agreement[21]	Contractual rights and obligations of the parties	Likely to be the choice of law of the parties (the proper law of the contract)	Matters such as whether a valid assignment exists as a matter of non-proprietary matters, interpretation and performance of the contract, and the limitations thereunder
	Assignability of rights under the lease	Likely to be the law governing the lease agreement (the rights under which being the assigned claim)	Jurisdictions vary widely
	Does the lessee need to be notified of the assignment?	Perfection matter – may be the law of the debtor's domicile, the law where the receivable is located or the law governing the assigned claim	Jurisdictions vary widely
	Does a competing creditor's assignment rank in priority?	Priority matter – may be the law of the debtor's domicile, the law where the receivable is located or the law governing the assigned claim	Jurisdictions vary widely
	Has the lessee discharged its obligations under the lease by paying monies to the lessor?	A matter of the relationship between the debtor and the assignee – likely to be the law governing the lease agreement	Jurisdictions vary
	Remedies for enforcement	*See* loan agreement analysis above	*See* loan agreement analysis above

[21] Drawing on our earlier analysis as regards assignments of receivables, it can be seen that the conflict of laws analysis will depend upon the forum state's private international law and we are unable to draw many general conclusions applicable across jurisdictions.

PART D

The Impact of Insolvency Laws on Leasing Transaction

1. Introduction: Insolvency and Cross-Border Insolvency – Nature, Purpose, and Effects

Insolvency law in relation to a company is engaged where the company is insolvent, commonly meaning that the company is unable to pay its debts as they fall or due and/or the value of the company's assets is less than the value of its liabilities.[1] Insolvency law can also be engaged where a company is likely to become insolvent[2] or is otherwise facing financial difficulties that are affecting its ability to carry on business as a going concern[3] and that require resolution.

Where insolvency law is engaged, the directors of the company are required to have regard to the interests of creditors instead of shareholders, with the directors' duties shifting from being owed to shareholders to being owed to creditors.[4] In addition, depending on the company's financial position, the directors may be under an obligation to commence an insolvency proceeding in relation to the company.

Insolvency proceedings can broadly fall into to one of two categories, as illustrated in the table below:

Table 28. Types of insolvency proceedings

Type of insolvency proceeding	Examples	Objectives of proceedings
Terminal insolvency proceeding	UK – Winding up/liquidation USA – Chapter 7 France – Liquidation judiciaire Germany Bankruptcy Netherlands – Bankruptcy UAE - Winding up/liquidation (ADGM) India – Liquidation China – Bankruptcy	Collect in the company's property and assets to be realised, with the proceeds use to pay creditors (with any surplus paid to shareholders
Rehabilitation processes	UK – Restructuring plan and scheme of arrangement USA – Chapter 11 France – Sauvegarde Germany – StaRUG Netherlands – WHOA UAE – Deed of company arrangement (ADGM) India – Resolution plan (under the IBC) China – Rectification	Restore the company to financial health so that it can continue to trade following the completion of the proceeding Commonly require a compromise or arrangement, voted on by creditors, hat reduces or extinguishes some or all of the claims of creditors

Insolvency proceedings are generally a class remedy for the benefit of a company's creditors as a whole, with the interests of other stakeholders sometimes also being taken into account. The aims of an insolvency regime can include the rescue of the company or its business, the preservation of the company's assets and/or rights, the protection of the general body of creditors and sometimes other stakeholders (e.g. employees, customers), and the prioritisation of the rights of certain classes of creditors, in particular the rights of secured creditors and preferential creditors (e.g. employees, tax claims).

The various aims of insolvency law can sometimes conflict with each other, resulting in certain aims being prioritised above others. For example, the rescue of the company or its business may necessitate the continued operation of that business, which will require limitations being placed on creditor action and the prioritisation of the preservation of the company's assets and rights, even if that means that secured creditors, lessors, or other service providers are prevented from or delayed in exercising their rights.

The insolvency of a company can lead to a wide range of possible outcomes affecting the creditors and contractual counterparties of the company. Creditors may have their claims reduced or extinguished, payment delayed, and/or other terms adjusted. Similarly, contractual counterparties may have their contract terminated or the bargain with

[1] Insolvency Act 1986 ('**IA86**') s 123.
[2] *See* for example the provisions of IA86 Schedule B1 para 27(2)(a) in relation to the appointment of an administrator by the company itself.
[3] *See* Companies Act 2006 ('**CA06**') s 901A(2) in relation to restructuring plans.
[4] *See* for example under English law *BTI 2014 LLC v Sequana SA* (2022) UKSC 25.

the company amended so that it is on different terms, although it is also possible for an insolvency proceeding to affirm the contract and require any breaches to be remedied.

The international, cross-border nature of modern business raises a number of different issues in relation to the insolvency of a company that conducts business and has assets and creditors in multiple jurisdictions. Central to these issues is the question of where an insolvency proceeding can be commenced in relation to a company and the effect of an insolvency proceeding in one jurisdiction in another jurisdiction. For an insolvency proceeding to be effective in another jurisdiction, it must be recognised under the law of that jurisdiction, which in turn may be dependent on the jurisdictional basis on which the insolvency proceeding was commenced in the original jurisdiction. In addition, notwithstanding the jurisdiction in which an insolvency proceeding is commenced, the law applicable to certain questions in relation to the insolvency proceeding may be determined by another applicable law.

2. Key Elements of Insolvency and Cross-Border Insolvency Law

I. General insolvency law

Table 29. Key Elements of General Insolvency Law

Element of general insolvency law	Key features
Moratorium	Moratorium comes into effect at commencement of insolvency proceeding – prevents (without court order or consent of the company) (i) creditors from exercising their rights (e.g. enforcing security or bringing claim through court proceedings) and (ii) contractual counterparties from exercising their rights (e.g. a lessor from repossessing their property or a service provider from terminating a contract) Extent of moratorium may vary depending on particular insolvency proceeding (e.g. in a liquidation a secured creditor may be able to enforce security, but in another form of proceeding this may be precluded)
Pre-commencement and post-commencement unsecured debts	Insolvency proceeding results in a different regime for payment of these debts: (i) Pre-commencement – payment postponed until end of insolvency proceeding, with only a portion of the debt likely to be paid (if at all) (ii) Post-commencement – may be made in full, subject to rules around whether the contact under which the debt arises came into existence before or after the commencement of the proceeding and/or was assumed or rejected within the insolvency proceedings and/or the company benefited from the contract during the proceeding
Treatment of existing contracts	Contract can be disclaimed or rejected (generally taken up if the contract is unprofitable or onerous for the company, due to payment of an above market rate, for example) Contract may be adopted or affirmed, which will require the company to cure any defaults under the contract, including payment defaults prior to the commencement of the insolvency proceedings (generally taken up where the contract is crucial to the business or because economic terms are favourable) – results in the contractual counterparty being put in a favourable position as they may receive payment for pre-insolvency debts that would otherwise not be paid
Rights of creditors	May be amended or compromised, such that the company may be rescued and its business continued but with the creditors having their claims against the company reduced in order to return the company to solvency Amendment or compromise is generally imposed through a vote of creditors or classes of creditors, with a majority of a class being able to impose the compromise on dissenting members of that class Sometimes, one class of creditors may be able to impose the compromise on another class of creditors, notwithstanding the latter class's objection to the compromise (so called 'cross-class cram down')
Position of prospective creditors	May include lessors who may not be owed significant (or any) outstanding debts at the outset but who will be owed significant sums over the life of a contract – it is possible that future claims may be compromised through the insolvency proceeding, such that the amount owed under the contract in the future is reduced
Prior (antecedent) transactions	May be subject to review and reversal This may apply to transactions at an undervalue (where the company receives substantially less than it gives to its counterparty in the transaction) and preferences (where the company pays a debt ahead of other debts that rank equally with that debt) May also be reviewable and reversable due to being entered into shortly before the proceeding commenced (i.e. during a look back period), regardless of whether there are any elements of malfeasance or intention to harm the company or creditors[5] (such look back periods are generally short, such as 30 days or up to 3 months[6])

[5] Transactions at an undervalue and preferences generally require some level of malfeasance or harm to the company or its creditors, such as the dissipation of the assets of the company or one creditor gaining an unfair advantage over other creditors in terms of payment.

[6] While both transactions at an undervalue and preferences include elements of a look back period in the test for whether a transaction is reviewable, the look back period in these contexts is considerably longer (at least six months and often years).

Table 30: Comparative Frame – The Extraterritorial Effect of Stays in Different Jurisdictions

Jurisdiction	**Extraterritorial Effect**	**Explanation**
United States	Yes	Under the U.S. Bankruptcy Code (Chapter 11 and Chapter 15), the automatic stay has extraterritorial effect, covering assets and actions globally, provided jurisdiction is established.
England	Yes, but limited	Insolvency stays under the UK Insolvency Act 1986 apply extraterritorially to a degree, but recognition depends on whether foreign courts uphold COMI (Centre of Main Interests) principles.
France	Yes, within the EU	Under the EU Insolvency Regulation, French insolvency stays apply across EU member states but have limited effect outside the EU.
Germany	Yes, within the EU	Similar to France, Germany's insolvency stays under the EU Insolvency Regulation apply across the EU but lack direct effect beyond the EU.
China	No, unless bilateral agreements exist	Chinese insolvency law is territorial by default, with limited extraterritorial application. Recognition of foreign stays is rare unless under specific agreements (e.g., Hong Kong).
Islamic Law	No, territorial by default	Most Islamic jurisdictions adhere to territorial insolvency principles. Extraterritorial recognition may depend on bilateral treaties or reciprocity agreements.

As noted above, two examples of rehabilitation proceedings are UK schemes of arrangement/restructuring plans and US Chapter 11 proceedings. These two insolvency proceedings are used extensively for complex, cross-border restructurings for companies incorporated in the UK or US as well as for companies incorporated in other jurisdictions. Their wide usage is the result of various features (some of which are common between the two insolvency proceedings) that provide a powerful toolkit for resolving a company's insolvency.

See next page.

Table 31. Comparative Frame – UK vs US Insolvency Regimes

	UK Restructuring Plan/Scheme of Arrangement	**US Chapter 11 Bankruptcy**
Availability to foreign entities	Yes, provided the company has a "sufficient connection" to the UK. Debt and/or leases governed by English law would typically be sufficient.	Yes, provided the company has assets in the US (very low threshold).
Debtor in possession regime	Yes (low level of court supervision)	Yes (high level of court supervision)
Moratorium terms	No moratorium applicable under the UK Restructuring Plan or Scheme of Arrangement A separate moratorium regime is available but is much more limited in scope than the Chapter 11 worldwide stay. It is not yet clear how this will be used in practice.	Imposes worldwide stay on enforcement until confirmation of plan. Section 1110 gives mortgagees and lessors the right to recover 'aircraft equipment' after 60 days from a domestic US airline, if defaults are not remedied.
Are creditors' rights under the CTC triggered by virtue of an 'insolvency proceeding' in relation to the company?	Yes	Yes.
Ability to handback leased aircraft	Only as part of the final restructuring plan or scheme, if approved.	Yes – 'executory contracts' can be affirmed or disclaimed by the company. Gives company power to 'cherry pick' leases and contracts.
Creditor classes	Classes should include creditors whose interests are 'not so dissimilar as to make it impossible for them to consult together with a view to their common interest'.	Generally grouped on basis of the creditors' claims in one class being substantially similar. Unsecured creditors typically constitute one class but classes can be split on basis of different treatment under the restructuring plan.
Consent threshold required to approve restructuring plan	Approval of 75%, by value, of each creditor class for automatic approval by court (and majority by number for a Scheme of Arrangement)	Approval of 2/3rd by value and a simple majority by number of each class. Dissenting minority is bound, provided they would receive at least that which they would in a liquidation.
Cross-class cramdown	Available in Restructuring Plans (but not Schemes of Arrangement) at the discretion of the court, provided that: (1) One class of creditor votes in favour. (2) No member of a dissenting class would be worse off than in the "relevant alternative".	Available at the discretion of the court, provided that, amongst other things: (1) At least one class of "impaired" creditors votes in favour. (2) The plan is 'fair and equitable' to dissenting and junior classes. (3) The plan provides each creditor at least what it would have received in liquidation.
Timing	Uncontested process can be completed within 6 to 8 weeks. If contested, process may take longer.	Pre-confirmation stage is typically 6 to 12 months. Post-confirmation implementation stage is typically a number of years (3 to 5 is common).
Costs	Limited by relatively short process.	Relatively high due to length of process. Often in the millions of dollars pcm.
Forum for winding-up	No. If restructuring fails, a separate insolvency process would be required under domestic laws.	If restructuring fails, Chapter 11 process can be turned into a Chapter 7 winding-up.

II. Cross-border insolvency law

A further aspect of an insolvency regime is the recognition and comity framework that it employs in relation to cross-border insolvencies. In general, the presumption is that there will be a main insolvency proceeding, which is usually in the jurisdiction of incorporation of the company or where it has its COMI.[7] However, there are important exceptions to the general rule that the main insolvency proceeding will be in the jurisdiction of a company's COMI, with US Chapter 11 proceedings and UK schemes of arrangement and restructuring plans having lower jurisdictional thresholds for commencing the relevant insolvency proceeding. These exceptions are important as, together with the advantages these insolvency proceedings afford, they underpin the extensive use of US Chapter 11 and UK schemes of arrangement and restructuring plans to implement restructurings internationally.

In addition to the main insolvency proceedings, there may also be secondary insolvency proceedings commenced in other jurisdictions where a company has assets or creditors. Main or secondary insolvency proceedings may be recognised in other jurisdictions where no insolvency proceedings have been commenced (although generally it will only be the main insolvency proceeding that is recognised).

There will be some degree of comity and coordination between the main and secondary insolvency proceedings and in relation to the recognition afforded to these insolvency proceedings in other jurisdictions. Further, there will be some level of deference to the main insolvency proceeding in terms of the application of its insolvency regime to the company assets, creditors, and affairs in general. Nevertheless, there are often limits on this comity and coordination, with jurisdictions other than the jurisdiction of the main insolvency proceeding sometimes applying their insolvency regime in relation to the secondary insolvency proceeding or limiting the recognition they afford to the main insolvency proceeding.

[7] The COMI of a company is where it conducts the administration of its interests on a regular basis and which is ascertainable by third parties. There is a rebuttable presumption that a company's COMI is the place of its registered office/jurisdiction of incorporation.

3. What is the general and prevailing effect, absent transnational commercial law, on the rights of the Bank and the Lessor under the Assumed Facts?

For the purposes of considering the Assumed Facts and the effect of insolvency on the rights of the Bank and the Lessor, it is assumed that the insolvency proceedings commenced in relation to the Lessor and the Lessee are not terminal insolvency proceedings (e.g. liquidation) and instead are insolvency proceedings where the aim is to restructure and rehabilitate the company.[8] It is also assumed that the Bank has mortgage security over the Aircraft.

In general terms (leaving aside the cross-border insolvency points considered below), the insolvency of the Lessee and Lessor leads to the following:

Table 32. Application of Insolvency Law to the Assumed Facts

Insolvency Law Matter	Application to the Assumed Facts
Moratorium	Neither the Bank nor the Lessor can immediately enforce their rights against, respectively, the Lessor and Lessee due to the stay/moratorium For the Bank, the mortgage security over the Aircraft cannot be immediately enforced For the Lessor, the Aircraft cannot be repossessed
Payment of debts owed during the course of the insolvency proceeding	Neither the Bank nor the Lessor would receive payment in relation to the debts they are owed during the course of the insolvency proceeding For the Bank, there would be no payment of interest or principal due on the loan. However, providing the value of the security exceeds the amount of the loan and any enforcement costs, the Bank would expect to receive payment in full at some point For the Lessor, there would be no payment of rent due prior to the commencement of the insolvency proceeding. Whether payment is made of rent falling due during the insolvency proceeding will depend on a number of factors, including whether the Aircraft is used by the Lessee during this period and the specific rules applicable in the insolvency proceeding relating to payments for pre-existing contracts (including whether the lease is adopted or affirmed)
Compromise of claims	Both the Bank and the Lessor may have their claim compromised For the Bank, its claim may be reduced (although not below the level of the value of its security)[9] or the terms of its debt amended, such as the date for repayment being extended For the Lessor, its existing claim (i.e. any debt due before the insolvency proceeding is commenced) may be reduced or extinguished
Lessor's future claims	With regard to any future (prospective) claim: If the Lessee retains the right to use the Aircraft, the future claim may be reduced (but not extinguished) under the terms of an amended lease (for example, with the rent being set to the then current market rent for the Aircraft's type); or If the Aircraft is returned to the Lessor, the future claim may be extinguished or possibly reduced if unsecured creditors receive any payment, such payment to the Lessor being in relation to a portion of the damages claim relating to the termination of the Lease

The general position outlined above may be different if multiple jurisdictions are involved in terms of the location of the creditor, the jurisdiction in which the insolvency proceedings are commenced, and the location of the Aircraft.

Whether any cross-border insolvency issues arise will largely depend on the location of the Aircraft. If the Aircraft is located in the jurisdiction in which the Lessee's insolvency proceedings have been commenced, the stay will impact the Bank's and the Lessor's ability to enforce against the Aircraft. However, if the Aircraft is located in

[8] In a liquidation proceeding, the actions of the liquidator and the scope of the stay/moratorium are likely to lead to very different results for the Bank and the Lessor. In a liquidation, a secured asset is generally considered outside of the company's estate and therefore can be foreclosed on or realised by the secured creditor (i.e. the Bank) without legal recourse to the liquidator or the company. A liquidator is also likely to wish to redeliver the Aircraft to the Lessor as soon as possible, so that no further claims are incurred by the estate.

[9] It is unlikely that the Bank's claim would be extinguished providing the Aircraft had some value. However, in circumstances where the value of the Bank's security is zero, the full release of this claim may be possible.

another jurisdiction, the Bank and the Lessor may not be prevented from enforcing its security or repossessing the aircraft (respectively), unless the Lessee's insolvency proceedings have been recognised in the jurisdiction in which the Aircraft is located.[10]

[10] This assumes that the Bank and Lessor do not have a place of business in the jurisdiction where the Lessee's insolvency proceedings have been commenced; if it does have a place of business in that jurisdiction, practically they may be subject to the stay.

4. Key aspects of transnational commercial law impacting the rights of the Bank and the Lessor – the Cape Town Convention

I. The Primary Insolvency Jurisdiction

The general effect of an insolvency proceedings on the rights of the Bank and the Lessor are significantly modified by the application of the Cape Town Convention in circumstances where the 'home' jurisdiction of the Lessor/Lessee is a Cape Town Convention contracting party and the insolvency proceeding are in a jurisdiction that is also a Cape Town Convention contracting party.

It is first necessary to explain the meaning of the 'home' jurisdiction of the Lessor/Lessee under the Cape Town Convention. The key concept is that of the 'primary insolvency jurisdiction' ('**PIJ**'), which is defined as:

'the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be deemed to be the place of the debtor's statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise'.[11]

There is no definition of the 'centre of the debtor's main interest' in the Cape Town Convention, but the concept is to some extent aligned with the concept of the centre of debtor's main interests / centre of main interests ('**COMI'**) under general cross-border insolvency law.[12] A company's COMI is where it conducts the administration of its interests on a regular basis and which is ascertainable by third parties (i.e. the general body of creditors). There is a rebuttable presumption[13] that a company's COMI is the place of its registered office/jurisdiction of incorporation (reflected also in the definition of the PIJ under the Cape Town Convention).

The key difference between the concept of COMI under general cross-border insolvency law and the PIJ for the purposes of the Cape Town Convention is that for the PIJ the rebuttal of the presumption that the PIJ is the Contracting State in which the company's statutory seat or, if there is none, the place where the debtor is incorporated or formed requires it to be shown that creditors with interests under the Cape Town Convention (and not the general body of creditors) were able to ascertain that the debtor's business transactions were conducted in another state.[14]

II. Alternative A

The main provision of the Cape Town Convention that modifies the position under general insolvency law is Article XI — Remedies on insolvency. Article XI applies where a Contracting State that is the PIJ has made a declaration pursuant to Article XXX(3). That declaration can adopt either Alternative A or Alternative B. Alternative A is a more extensive framework that offers strong protection of the holder of an aircraft interest, whereas Alternative B is more limited.

The table below set out the impact of Alternative A on insolvency law, where adopted:

[11] Protocol Article I(2)(n).
[12] *See* the European Union Insolvency Regulation and the UNCITRAL Model Laws (*Table 34* below). The wording in the Cape Town Convention reflected the formulation in the UNCITRAL Model Law.
[13] *See* for example Article 3(1) of the European Union Insolvency Regulation.
[14] ibid. *See* Goode R., *Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Objects* (5th edn, UNIDROIT 2022) 3.123.

Table 33. Key Features of Alternative A

Key Feature	Further Information
Possession of the aircraft object / waiting period	Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall give possession of the aircraft object to the creditor no later than the earlier of: (a) the end of the waiting period; and (b) the date on which the creditor would be entitled to possession of the aircraft object if the Cape Town Convention did not apply.[15] The 'waiting period' shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction[16]
Preservation of the aircraft object	Unless and until the creditor is given the opportunity to take possession under paragraph 2: (a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and (b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.[17] Sub-paragraph (a) shall not preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value[18]
Retention of possession of the aircraft object	The insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations[19]
Deregistration / export remedies	With regard to the remedies in Article IX(1): (a) they shall be made available by the registry authority and the administrative authorities in a Contracting State, as applicable, no later than five working days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and (b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations[20]
Modification of obligations	No obligations of the debtor under the agreement may be modified without the consent of the creditor,[21] although this restriction shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement[22]
Priority	No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1), shall have priority in insolvency proceedings over registered interests[23]
Exercise of remedies	The Convention as modified by Article IX of the Protocol shall apply to the exercise of any remedies under Article XI[24]

Under Article XXX(4), all Contracting States must apply the Cape Town Convention in conformity with the declaration made by the Contracting State that is the PIJ, regardless of whether or not there is an insolvency proceeding pending in the Contracting State that is the PIJ.[25] Therefore, where there is an insolvency proceeding in a Contracting State that is not the PIJ of the debtor company, the Cape Town Convention declaration made in the PIJ is the applicable law that governs the rights of a party with an international interest in an aircraft object. Conversely, if the Contracting State applying the Cape Town Convention has made a declaration itself, the alternative adopted in that declaration is not relevant – in other words, the law of the jurisdiction of the insolvency proceeding is not applied.

Therefore, where the PIJ of a debtor company has made a declaration to adopt Alternative A, the rights of the Bank and the Lessor are significantly modified by the Cape Town Convention compared to general insolvency law. In particular:

[15] Article XI(2).
[16] Article XI(3); *see* also Article XI(9).
[17] Article XI(5).
[18] Article XI(6).
[19] Article XI(7).
[20] Article XI(8).
[21] Article XI(10).
[22] Article XI(11).
[23] Article XI(12).
[24] Article XI(13).
[25] On the centrality of Art XXX(4) and the application of the Cape Town Convention under Chapter 11, *see* the expert opinion of Professors Charles W Mooney, Jr. and John A E Pottow obtained by the Aviation Working Group and available at <https://awg.aero/wp-content/uploads/2024/05/Expert-Opinion-concerning-the-application-of-CTC-under-Ch.11-involving-a-non-US-debtor-May-2024.pdf>

(a) the obligation to give possession of the Aircraft object at the end of the waiting period substantially lessens the impact of a stay or moratorium on creditor enforcement action;

(b) the obligation to preserve the Aircraft object potentially gives rise to a requirement for the debtor company to use funds to pay for maintenance or other costs in relation to the Aircraft object that arise during the time when the debtor company retains possession of the Aircraft object;

(c) in order to retain possession of the Aircraft object, all defaults other than that relating to the commencement of insolvency proceedings need to be cured, and all ongoing obligations must be fulfilled, meaning that no pre-insolvency obligations can be avoided; and

(d) a creditor who has an international interest in an Aircraft cannot have their rights unilaterally amended and so therefore obligations under a loan or a lease cannot be reduced (e.g. the rent due cannot be reduced).

5. Key aspects of transnational commercial law impacting the rights of the Bank and the Lessor – cross-border insolvency law in relation to conflict of laws, jurisdiction, and recognition issues

The general position on cross-border insolvency law issues has been modified in two important ways. First, in relation to the European Union and its Member States (other than Denmark), the EU Insolvency Regulation ('**EUIR**')[26] is a comprehensive framework that covers the main cross-border issues that can arise. Second, UNCITRAL has developed a number of Model Laws to be implemented into national law that cover certain areas of cross-border insolvency law.

The table below illustrates how these frameworks have impacted cross-border insolvency law:

Table 34. Modification to Cross-Border Insolvency Law

General/Modifying Framework	Application	General Approach of Framework	Matters Impacting Cross-Border Insolvency Law
Comity	All States depending on their domestic law / conflict of law rules	Limited framework for recognition of cross-border insolvency proceedings under the principle of modified universalism	Generally, most jurisdictions will offer a foreign insolvency officeholder some level of recognition in their jurisdiction and will defer to a main insolvency proceeding in the jurisdiction of incorporation of a company or the jurisdiction in which the company has its COMI. However, this recognition will be limited and may be subject to override by local law
EUIR	Member States of the European Union other than Denmark	Comprehensive framework for cross-border insolvency proceedings	Opening of main proceedings where debtor has its COMI Applicable law in relation to issues that may arise in relation to insolvency proceedings Recognition of insolvency proceedings between Member States Cooperation between Member States in relation to insolvency proceedings Opening of secondary insolvency proceedings and their effect and cooperation with the main insolvency proceeding Insolvency proceedings of members of a group of companies
UNCITRAL Model Laws	Require implementation into national law	Cooperation and coordination	Cross-Border Insolvency (1997) – focuses on authorising and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws – adopted in 60 states, including the UK,[27] the US,[28] Canada, Australia, Japan, Korea, Brazil, and the UAE (ADGM and DFIC)[29] Recognition and Enforcement of Insolvency-Related Judgments (2018) – the Model Law is designed to provide states with a simple, straightforward, and harmonised procedure for recognition and enforcement of insolvency-related judgments to assist further the conduct of cross-border insolvency proceedings. It has yet to be adopted by any state Enterprise Group Insolvency (2019) – the Model Law focuses on insolvency proceedings relating to multiple debtors that are members of the same enterprise group. It has yet to be adopted by any state

[26] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).
[27] The Cross-Border Insolvency Regulations 2006 (SI 2006/1030).
[28] Chapter 15 of the US Bankruptcy Code.
[29] *See* the full list at <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.>

Therefore, where an insolvency proceeding is opened in one member state where a debtor company has its COMI, under the EUIR other Member States will recognise and give effect to that main insolvency proceeding (for example, by recognising the stay on creditor claims and security enforcement). A further important aspect of the EUIR is that it provides for a common set of rules in relation to the applicable law for certain matters,[30] although there are exceptions that apply to (i) rights *in rem*, which shall not be affected by the opening of the insolvency proceedings where the assets are located in another Member State,[31] and (ii) the rights of a debtor in immovable property, a ship, or an aircraft subject to registration in a public register, which shall be determined by the law of the Member State under whose the authority the register is kept.[32]

In respect of the Model Laws, where transposed into national law, the Model Law on Cross-Border Insolvency provides an effective framework for recognition of an insolvency proceeding in a foreign jurisdiction, such that, for example, a foreign insolvency officeholder can seek recognition of the foreign insolvency proceeding and obtain the benefit of a stay in the jurisdiction granting recognition. However, its impact may be limited in relation to insolvency judgments (for example, in relation to the compromise of creditor claims in a restructuring).

[30] *See* Article 7.
[31] *See* Article 8.
[32] *See* Article 14.

6. Identifying major, troubling, or controversial issues and normative aspects

There have been a number of controversial issues in relation to the application of the Cape Town Convention to insolvency proceedings, although in some cases these issues have been resolved.

First, the issue of forum shopping (choosing the jurisdiction in which to commence an insolvency proceeding) has arisen, where a debtor company has sought to suggest that the Cape Town Convention can be avoided by opening insolvency proceedings in a jurisdiction that is not the PIJ. However, the Cape Town Convention makes clear that such forum shopping does not offer any advantage, as Art XXX(4) provides that a contracting state must apply the declaration (e.g. as to Alternative A) made by the PIJ of the debtor company.[33]

Second, there has been debate in relation to whether a UK scheme of arrangement or restructuring plan constitutes insolvency proceedings for the purposes of the Cape Town Convention and therefore whether the provisions of Article XI(10) apply to such proceedings.[34] The argument that a scheme of arrangement or restructuring plan is *not* an insolvency proceeding for the purposes of the Cape Town Convention is based on a scheme of arrangement or restructuring plan not being a proceeding that is a collective judicial proceeding where the assets and affairs of the company are subject to the control or supervision of the court. However, this debate has now largely been settled in favour of schemes of arrangement and restructuring plans being insolvency proceedings for the purposes of the Cape Town Convention.[35]

Third, a question has arisen as to how an insolvency proceeding aimed at restructuring a debtor company can be compliant with the Cape Town Convention, in particular with Article XI(10), where ordinarily a restructuring would enable a compromise of creditor claims without the consent of all creditors. This question has been answered by designing the terms of any restructuring compromise to include a right for the creditor to take possession of the aircraft object if they are not willing to accept the compromise of their claims against the debtor company. Therefore, the creditor is given the option of either having their rights compromised pursuant to the terms of the restructuring or taking possession of the aircraft object.[36]

Fourth, issues arise in relation to whether a company in insolvency proceedings is required to comply with certain terms of the lease during the waiting period or when giving possession of the aircraft object, particularly where these lease terms would lead to the company bearing significant costs in so complying. Examples include:

1. Complying with the redelivery obligations at the end of the lease (e.g. on termination);

2. The cost of scheduled maintenance during the waiting period; and

3. Rent to be paid during/after the waiting period.

If there is a requirement to comply with the terms of the lease, the cost of so complying would be an expense within the insolvency proceeding or may be a preferential claim, in either case benefiting from priority status to be paid ahead of other creditor claims.

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[33] *See* n 24 above.

[34] Article XI(10) prohibits obligations of the debtor under the agreement being modified without the consent of the creditor. If the Cape Town Convention did not apply to a scheme of arrangement or restructuring plan, these proceedings could be used to unilaterally modify the debtor's obligations, with the creditor crammed down by the vote of other creditors.

[35] *See In re gategroup Guarantee Limited* (2021) EWHC 304 (Ch) (in relation to restructuring plans) and the expert opinion Expert Opinion on Status of UK Restructuring Plan and Scheme of Arrangement Proceedings under the Cape Town Convention by Professors Louise Gullifer and Riz Mokal obtained by the Aviation Working Group available at <https://awg.aero/wp-content/uploads/2021/04/Cape-Town-Convention-status-of-RPs-and-Schemes-Expert-Report-Revised-29-Apr-2021.pdf.>

[36] *In the Matter of Nordic Aviation Capital Designated Activity Company and in the Matter of The Companies Act 2014 to 2018 and in the Matter of a Proposal For a Scheme of Arrangement Pursuant to Part 9, Chapter 1 of the Companies Act 2014 to 2018* (2020) No. 162 COS.; *Re Virgin Atlantic Airways Limited* (2020) EWHC 2191 (Ch); *Re MAB Leasing Limited* (2021) EWHC 152 (Ch).

The first of these examples has been the subject of judicial decision, which determined that there was no obligation to comply with the terms of redelivery.[37] A number of points arise in relation to these examples and the wider issue they represent:

(a) As shown in the Virgin Australia Case, the starting point will always be the interpretation of the terms of the Cape Town Convention, with the approach to interpretation reflecting the fact that the Cape Town Convention is an international treaty;[38]

(b) Alongside pure legal questions of interpretation, care must be taken in relation to potential policy and practical issues that may arise. These policy and practical issues may work both ways;

(c) The Cape Town Convention is aimed at providing legal certainty and also protecting the interests of secured lenders and lessors of aircraft objects to reduce the risk and cost associated with financing aircraft objects. An approach that minimises the costs of enforcement to the lender or lessor and their potential loss should a debtor company enter an insolvency proceeding will be expected to promote cheaper financing;

(d) Conversely, an approach that places costs on the debtor company and that will ultimately be borne by the general body of unsecured creditors raises issues in relation to substantive insolvency law and intercreditor fairness, while also potentially creating incentives for debtor companies to give possession of aircraft objects precipitously when there is a possibility the aircraft object is not needed. This incentive may work against the lender or lessor, who may wish to keep open the possibility of the aircraft object being retained by the debtor company at the end of restructuring pursuant to an insolvency proceeding; and

(e) From a practical viewpoint, aircraft objects raise a number of novel issues. Aircraft can be located in almost any jurisdiction at the time an insolvency proceeding is commenced. Further issues arise in relation to engines, which may similarly be located anywhere and may be in locations where they cannot be removed from the airframe or where they are separated from the airframe on which they are supposed to be installed. At its simplest level, these practical challenges raise questions as to whether there is an obligation on the debtor company to ferry the aircraft or the engines to a convenient location in order to give possession.

(f) Notwithstanding that policy and practical issues may arise, where the provisions of the Cape Town Convention are clear as to what is intended, policy and practicality must be subordinated to that provision of the Cape Town Convention, which must be given effect.

Topics for further research and study

1. How broad is the scope of the obligation to comply with the terms of a lease during the waiting period or when giving possession? Consider, in particular:

a) Complying with the redelivery obligations at the end of the lease (e.g. on termination);

b) The cost of scheduled maintenance during the waiting period; and

c) Rent to be paid during/after the waiting period.

[37] *Wells Fargo Trust Company, National Association (as owner trustee) v. VB Leaseco Pty Ltd (administrators appointed)* (2022) HCA 8 (the '**Virgin Australia Case**'). This decision was based on the interpretation of the provisions of the Cape Town Convention and whether Article IX(3) was engaged when possession of the aircraft object was being given under Article XI(2). As the court held that giving possession under Article XI(2) was not a remedy, Article IX(3) was not engaged and there was no requirement to follow the terms of the lease.

[38] *See* Article 5 of the Cape Town Convention.