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Airline insolvency and repossession – New Zealand

What are the principal types of insolvency proceedings?

In New Zealand, the principal corporate insolvency proceedings are voluntary administration, creditors' compromise or liquidation (each under the Companies Act 1993, **CA 1993**), receivership (under the Receiverships Act 1993) and statutory management (under the Corporations (Investigation and Management) Act 1989). Voluntary administration and creditors' compromise are designed to be corporate rescue / turnaround procedures, whereas liquidation is usually a terminal insolvency process. Receivership is focused on producing a return for the appointing secured creditor. In receivership, the debtor company's business is sometimes sold, but there is often a shortfall for unsecured creditors and the company shell often ends up in liquidation. There are no particular regimes or requirements for airline insolvencies in New Zealand (other than the application of Cape Town Convention as discussed below).

As a response to COVID-19, the New Zealand Government has also introduced a statutory measure to assist companies struggling with debt, business debt hibernation (CA 1993; introduced by the COVID-19 Response (Further Management Measures) Legislation Act 2020¹). Initially available until 24 December 2020 but has been extended to be available until 31 October 2021, business debt hibernation introduces an automatic one month moratorium after notification to creditors, which can be extended to a further six months if approved by the majority of² the debtor's creditors.

At least one (small) insolvent airline in New Zealand has in the past gone through liquidation, ceased operations and the founder been adjudged bankrupt³. As of the time of writing, we are not aware of any New Zealand airlines that have commenced voluntary administration or liquidation proceedings, although in April 2020 Virgin Australia (which previously operated from New Zealand) closed its New Zealand operations, making a number of staff redundant.

During **voluntary administration**⁴, a licensed insolvency practitioner is appointed as an administrator who will take control of and run the debtor's business, and investigate its financial condition. The aim of the process is to maximise the chances of the company, or its business, continuing. However, where that is not possible, the administrator seeks to maximise the return for the company's creditors and shareholders. While the administrator is in place, the debtor's directors stay in office, but have a very limited role in assisting the administrator by providing the company's accounts,

records and any other information required, and a statement of the debtor's business affairs and financial circumstances for presentation at the first creditors' meeting. That first creditors' meeting must be held within 8 working days from the appointment of the administrators and allows creditors to appoint a creditors' committee if they wish to do so, and/or to replace the administrators.

On the appointment of the administrator, a statutory moratorium comes into effect, during which creditors are unable to enforce certain rights (including repossession) against the debtor airline without the consent of the administrator or the permission of the court. The moratorium does not apply to secured creditors who hold a security interest over all or substantially all of the company's assets, if those creditors elect to enforce their security interest within 10 working days after the administrator is appointed (subject to the Cape Town "waiting period", if applicable, as discussed further below). The moratorium also does not apply to secured creditors, owners and lessors who have already taken steps to enforce their security interest prior to the appointment of the administrator, and should not apply to lessors who have already taken steps to repossess the leased property⁵. The moratorium is overridden, in respect of certain registered 'mobile equipment' (including aircraft), by the Cape Town Convention Alternative A insolvency regime discussed in more detail below at the end of the 60-day "waiting period".

The administrator must call a "watershed meeting" within 25 working days of appointment although, in some instances, this period will be extended. At the watershed meeting creditors vote on the future of the company. The moratorium will expire when creditors vote at the watershed meeting to end the administration and return the company to its directors, appoint a liquidator, or enter into a *deed of company arrangement* (unless a moratorium, of one form or another, is imposed through that deed of company arrangement). A deed of company arrangement (**DOCA**) is a binding agreement between an insolvent company and its creditors, administered by a third party such as an administrator, governing that company's affairs. If approved, a DOCA binds all ordinary creditors who were entitled to vote as well as property owners, those who lease property to the company and secured creditors (if they voted in favour of the DOCA). Ordinarily a DOCA will provide that the company will only make partial payment of certain debts.

Under **statutory management**, a process instituted by the government on the recommendation of the Financial Markets Authority, a statutory manager is appointed to oversee the affairs of the company in financial difficulty. A moratorium applies to proceedings or enforcement action being taken or continued by any person (including secured creditors) against the company, without the statutory manager's consent. The statutory manager must preserve the interests of shareholders, creditors, and the public interest. Assets of the company may be transferred or removed in the statutory manager's discretion. The payment of debt or discharge of obligations can also be suspended by the statutory manager, which can include lease rentals payable to lessors as well as loan repayments. There is no set time period for the moratorium or suspension.

Liquidation is a terminal procedure, in which operations usually cease and the debtor is wound up to pay the creditors' claims. Subject to the application of the New Zealand Personal Property Securities Act 1999 (**PPSA**), as discussed below, leased aircraft would generally not fall within the insolvency estate of a debtor airline.

Lessors should note that under the PPSA, ownership of an aircraft is not alone sufficient to protect the lessor's interest in it in all circumstances. An aircraft lease for a term of more than 1 year will give rise to a deemed security interest which, if not perfected by registration on the New Zealand Personal Property Securities Register, may result in a legal owner risking losing title to the aircraft, and that aircraft being available to satisfy obligations owed by a debtor airline to its creditors. However, lessors and holders of registered international interests can take comfort that, where applicable, the Cape Town Convention (and Aircraft Protocol) have effect in place of any other New Zealand law relating to personal property (see below for more on Cape Town). Similarly, sub-leases into New Zealand for a term of more than 1 year may also give rise to a similar deemed security interest and the risks noted above, and so registration of the international interest in any New Zealand sub-lease is recommended. The usual practice in New

Zealand is for lessors' and financiers' interests to be registered under both regimes.

Has New Zealand adopted the 2001 Cape Town Convention and its Aircraft Equipment Protocol (together, Cape Town)?

Yes. New Zealand ratified Cape Town and made it part of New Zealand domestic law via the Civil Aviation (Cape Town Convention and Other Matters) Amendment Act 2010 (which amended the Civil Aviation Act 1990) giving Cape Town the force of law in New Zealand.⁶

Cape Town declarations

"Alternative A" insolvency regime	Yes, 60-day waiting period
IDERAs	Yes
Self-help remedies	Yes
Choice of law	Yes

Alternative A overrides all moratoria on repossessing aircraft under New Zealand insolvency law. Unless the insolvent airline has cured all relevant defaults, creditors under registered international interests are entitled to the return of their aircraft no later than 60 days after the airline goes into insolvency.

Can creditors use "self-help" to repossess leased or mortgaged aircraft?

Yes. New Zealand law allows a lessor or mortgagee to repossess an aircraft on a relevant default without a court order. Sometimes lessors or mortgagees voluntarily go to court to obtain a court order that will help with the repossession process.

How long does the aviation authority typically take to deregister an aircraft when an IDERA is invoked?

The Civil Aviation Authority of New Zealand will typically deregister an aircraft as soon as practicable but, in any event, within five working days of receiving the request.

In addition to IDERAs, lessors and mortgagors typically take irrevocable deregistration powers of attorney (enabling them to sign any other documents and take other actions that are required to export the aircraft). New Zealand law broadly recognises such powers of attorney as irrevocable and effective.

Are there any non-consensual liens which would take priority to an ownership interest / mortgagee's

rights as a secured creditor?

Yes. There are various New Zealand law aircraft liens and detention rights (together, **relevant rights**) that allow a creditor to detain an aircraft as security for specific liabilities. They take priority to ownership or security interests, including registered international interests.

Relevant rights include statutory aircraft detention rights for certain airport and other charges, common law liens (i.e. for maintenance providers in possession of an aircraft they have improved) and contractual liens (which will be subject to the PPSA priority regime).

Are there any "fleet liens" (i.e. a lien for debts relating to one aircraft that may be asserted against any aircraft in the airline's fleet, regardless of ownership)?

No.

Key practical considerations for lessors and financiers:

- **Search** – a search of the New Zealand Personal Property Securities Register should be undertaken of the relevant lessee or debtor for the reasons outlined in this note. If a legal owner or lessor fails to take the steps available to it under Cape Town, New Zealand personal property securities law applies and, in general, the order (and correctness) of registration on the New Zealand Personal Property Securities Register will determine rights to the aircraft and other associated personal property.
- **Engage with stakeholders** – if it is necessary for a lessor or financier to repossess an aircraft, that security holder will need to liaise with a number of parties, including the Civil Aviation Authority of New Zealand and the Aviation Security Service, to obtain access to the aircraft and all necessary security clearances.

This article was co-written by Zenas Kim, Solicitor in our office in Auckland.

1. <https://www.business.govt.nz/> ↩
2. Clause 24 of Part 4 of Schedule 13 of the Companies Act 1993 requires approval of at least 50% of the creditors by number and value. ↩
3. <https://www.nzherald.co.nz/> ↩
4. Generally the directors of the debtor appoint the administrator. A secured creditor (often a bank), a liquidator or the High Court on application of a creditor, liquidator or the Registrar of the Companies Office can also appoint an administrator. ↩
5. Under section 239ABQ of the Companies Act, where a lessor has entered into possession or assumed control over the leased property, or has exercised any power for that purpose (including by filing a claim for possession), then, subject to any limitations imposed by the Court under s239ABS, the lessor can continue with enforcement. As noted above, where the Cape Town Convention applies, the moratorium is overridden by the Cape Town Convention Alternative A insolvency regime. ↩

6. <http://www.legislation.govt.nz/>,
<http://www.legislation.govt.nz/.html> ↩

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