

AERIAL 2016



**Sale & Purchase and
Repossession Workshops**

**Training & Development Conference
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AERIAL 2016

Aircraft sale and purchase workshop

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The Allen & Overy team

Aviation finance and leasing



Harry Upcott

Partner

Tel +44 203 088 3186

harry.upcott@allenovery.com

Litigation



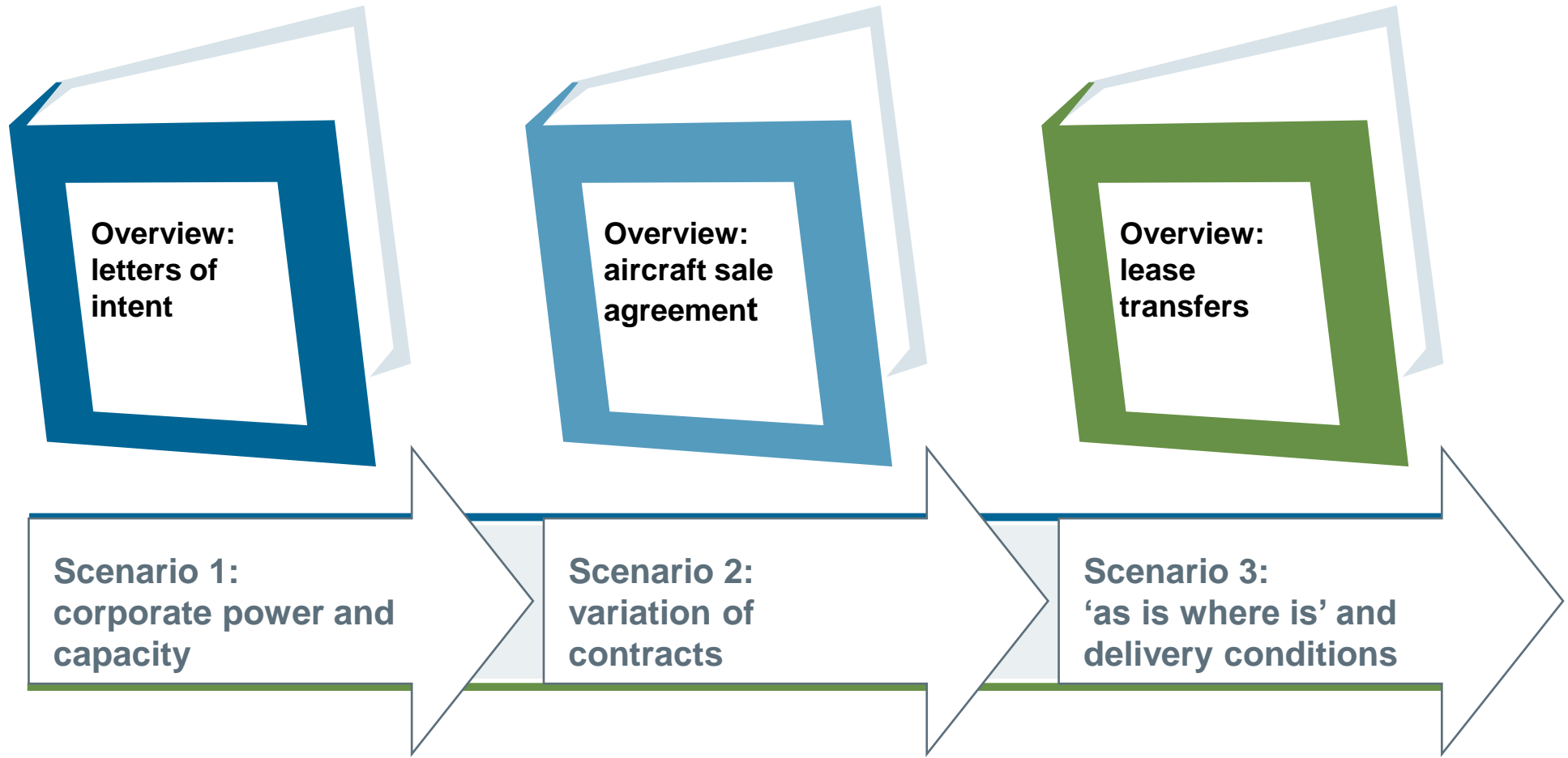
James Partridge

Partner

Tel +44 203 088 3726

james.partridge@allenovery.com

What we will cover



The base scenario

- Aviation X is leasing a 16 year old Boeing 737 classic to West African Airways (WAA)
- The lease is mid-term
- Moscow Air Limited (MAL) expanding and looking to acquire additional aircraft
- MAL looking to enter the African market and sees acquiring a lease with WAA as a good entry point
- Aviation X keen to sell this aircraft
- Aviation X and MAL looking to sign an LOI and to complete the sale as soon as possible

Seller:

Aviation X (Aviation X)
Incorporated in Ireland





Buyer:

Moscow Aircraft Leasing (MAL)
Incorporated in Russia

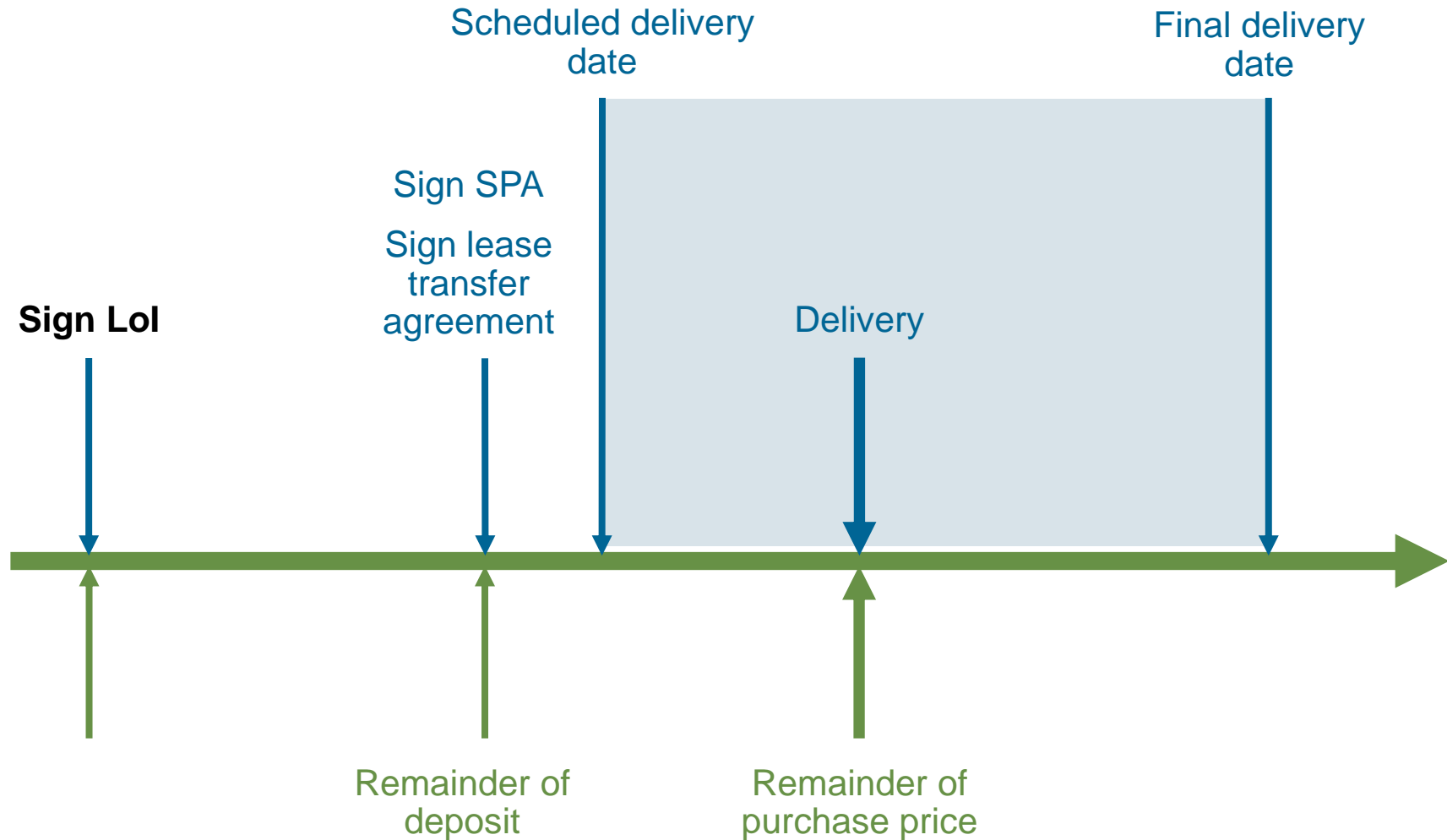
Lessee:

West African Airways (WAA)
Incorporated in Nigeria

LOI/term sheet negotiations and the pre-sale period

	<p>LOIs and term sheets are preliminary, short form documents recording key terms of a particular transaction.</p> <p>Once entered into the parties proceed to the documentation phase.</p>	
	<p>Only limited provisions in an LOI are typically legally binding:</p> <ul style="list-style-type: none"> – keeps upfront discussions brief and allows for further negotiation – key terms need to be considered (confidentiality; fees/deposit; exclusivity; dispute resolution) 	
	<p>Deposits:</p> <ul style="list-style-type: none"> – practice varies as to whether a non-refundable deposit/fee is paid on signing an LOI – often linked to exclusivity; potential losses for the Seller 	
	<p>Cape Town Convention and aircraft sales:</p> <ul style="list-style-type: none"> – once an aircraft sale agreement is signed, there is a potentially registerable international interest – important for the Seller than no registrations are made pre-completion – once sale completed, the sale can be registered to evidence change in title although this does not create an international interest 	

Sales and purchase timeline



Aircraft sale agreement

Delivery location:

- take advice from local counsel/accountants as to applicability of sales taxes, stamp duty or other taxes
- is it possible to effect delivery in international airspace or another tax neutral jurisdiction?
- sellers will typically expect the buyer to assume risk of delivery taxes
- check that the engines are/will be on the aircraft at delivery

Delivery condition:

- customary for aircraft sales to be ‘as is where is’
- if the aircraft is subject to an existing lease a comprehensive inspection by the buyer will not be possible
- if the aircraft is not in service the buyer should determine whether delivery conditions are met rather than looking to lessor for confirmation

Conditions precedent

- the technical records should be complete
- ‘back-to-birth’ bills of sale should be provided
- on delivery the insurances will need to be updated and replacement certificates provided
- corporate authorisations and supporting legal opinions will be required
- if the aircraft is subject to a lease, replacement operative documents, including: assignment of insurances/reinsurances, air navigation charges letters, IDERA/de-registration power of attorney, warranty access documentation

Transfer of the lease

The lease must transfer to the purchaser simultaneously with title to the aircraft

Airlines are not enthusiastic about participating in the transfer process but their co-operation is required:

- to establish flight plans for the aircraft/engines
- to effect a legal transfer of the lease
- to update applicable registrations with the aviation authority
- to update the insurance certificates/broker's letter of undertaking

The lessee:

- will not accept additional liabilities or gross-up obligations
- will require reimbursement for out-of-pocket expenses (including legal fees)
- may attempt to use the process to secure lease concessions/waivers
- may seek a consent/administration fee

Scenario 1: Corporate power and capacity

1 June

The execution version of the Sale Agreement circulated by email

2 June

Sale Agreement signed by Aviation X (as seller)

3 June

MAL (as buyer) circulates its signature page. MAL requests that the Sale Agreement is dated 29 May as MAL's power of attorney expires on 30 May and no other authorised signatories are available



Question: should Aviation X agree to backdate the Sale Agreement?

Scenario 1: Corporate power and capacity

Dating of documents: documents should not be backdated

Corporate power and authorisations:

- does MAL have the power to enter into the transaction?
- can that power be exercised by directors or other agent without board/shareholder resolution?
- are there any limits on that power?

Classes of signatories:

- directors (or equivalent)
- attorneys-in-fact
- agent

If a counterparty is a connected person additional authorisations and formalities may be required

Scenario 1: Corporate power and capacity

Certain types of contracts have additional requirements:

- guarantees: is corporate benefit test satisfied?
- deed (powers of attorney, security documents, bills of sale, intercreditors)
 - additional ‘ceremonial’ formalities to reflect gravity of the undertaking concerned
 - amendments to a deed should be made by way of deed

Signing procedures for English law governed documents:

- special instructions now in place for signing guarantees and other deeds
- any changes to the documents post-execution need to be carefully considered

Functions/purpose of notaries, apostilles and legalisation

Scenario 2: variation of contracts

- The Sale Agreement contains the following clause: *‘No amendment or addition to this Agreement shall be valid unless agreed in writing by each of the parties hereto.’*
- MAL notifies Aviation X that it will not be in a position to close on the scheduled delivery date and seeks various extensions to the delivery date under the purchase agreement
- 27 July: Aviation X emails MAL with ultimatum to fund and accept aircraft by 1 August
- 28 July: MAL responds (by email): *‘We will provide you with the revised delivery date as soon as arrangements for registration have been confirmed. Please acknowledge.’*
- 28 July: Aviation X replies (by email): *‘Please advise of this date as soon as possible’*
- 15 August: having heard nothing, Aviation X emails MAL and advises that Aviation X would exercise its rights to terminate the Sale Agreement unless delivery is effected by 20 August
- 16 August: MAL’s lawyers contact Aviation X referring to 28 July email exchange: *‘There is no date limit for our client to take delivery of the Aircraft, but it will proceed as soon as possible’*



Question: does the 27/28 July email exchange vary the contract or can the Seller still terminate for breach?

Scenario 2: variation of contracts

Historic Authorities

- Approach of Court of Appeal not consistent on effectiveness of amendment and waiver clauses (compare *United Bank Limited v Asif* and *I-Way Ltd v World Online Telecom UK Limited*)
- Current edition of Chitty on Contracts provides that the issue ‘...*remains to be conclusively resolved...*’
- Issue will always be fact sensitive
- While the starting point is that such clauses are effective, recent case law has again demonstrated that an oral agreement can override an entire agreement clause

Scenario 3: ‘as is, where is’ and delivery conditions

Sale at the end of the lease term

- Buyer (an airline) inspects the aircraft before entering into the Sale Agreement
- Seller agrees with existing lessee to amend the return conditions to match delivery conditions under the Sale Agreement
- C Check instigated as part of redelivery process. Buyer inspects again post-C Check and identifies 75 defects. Arrangements agreed between Seller and Buyer for rectification
- One week after completion of the C Check, Buyer accepts aircraft and signs Acceptance Certificate
- Buyer operates the aircraft for 115 flights
- 3 months following delivery aircraft is grounded following a pre-inspection check by Buyer’s maintenance team
- AOC subsequently revoked, investigations reveal a number of severe defects impacting airworthiness of the Aircraft (none of which were identified at the time of delivery) many of which would have been in place at the date of delivery
- Aircraft grounded. Buyer sues Seller for breach of contract



Question: do the “as is, where is” provisions override delivery condition provisions?

Scenario 3: ‘as is, where is’ and delivery conditions

The relevant provisions of the purchase agreement included:

4.1 *‘The Seller shall deliver the Aircraft ‘as is, where is’ and in the condition required in schedule 2, except for any items identified in any Delivery Reservations Agreement.’*

7.3 *‘DELIVERY BY THE BUYER TO THE SELLER OF THE ACCEPTANCE CERTIFICATE WILL BE CONCLUSIVE PROOF AS BETWEEN THE SELLER AND THE BUYER THAT THE BUYER HAS EXAMINED AND INVESTIGATED THE AIRCRAFT, THAT THE AIRCRAFT AND THE MANUALS AND TECHNICAL RECORDS ARE SATISFACTORY TO THE BUYER AND THAT THE BUYER HAS IRREVOCABLY AND UNCONDITIONALLY ACCEPTED THE AIRCRAFT WITHOUT ANY RESERVATIONS WHATSOEVER (EXCEPT FOR ANY ITEMS NOTED IN ANY DELIVERY RESERVATIONS AGREEMENT).’*

The Acceptance Certificate included the following provision:

‘(e) the Aircraft complied in all respect with the condition required at Delivery under clause 4.1 and schedule 2 of the Agreement, except for the items listed in the Delivery Reservations Agreement.’

Scenario 3: 'as is, where is' and delivery conditions

Olympic Airlines SA v ACG Acquisition XX LLC

- Observations of the judge as to market practice:
 - operating lessors only undertake maintenance where an aircraft is: '*...in a hiatus of operational activity between one lease and another...*'
 - risk typically transfers to lessee at delivery
 - lessees typically accept risk of non-compliance with delivery conditions
- Case highlighted the importance of the following contractual provisions:
 - opportunity for lessee to conduct inspections prior to accepting delivery and to require rectification of defects
 - designation of the Acceptance Certificate as an Operative Document and corresponding '*legal, valid and binding*' representation from the Buyer
 - '*conclusive proof*' provisions in the disclaimer

Scenario 3: ‘as is, where is’ and delivery conditions

In our scenario

- Sale is mid-lease term
- Aviation X would not accept risk that WAA (as the existing lessee) was in compliance with its obligations [unless it had actual knowledge of a default?]
- MAL may still do an inspection to the extent that the existing lease allows it
- Transfer would be “*as is, where is and with all faults*”
- Acceptance Certificate wording remains important between Aviation X and MAL
- MAL would then be taking risk of WAA properly complying with:
 - maintenance and other operational conditions during the lease term
 - return conditions at the end of the lease term

Questions?

These are presentation slides only. The information within these slides does not constitute definitive advice and should not be used as the basis for giving definitive advice without checking the primary sources.

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CLYDE & Co

Repossession

AERIAL – Nairobi, March 2016

Mark Bisset

Introduction

- Practical Preliminaries
- Procedure - Cape Town Convention
- Examples

Preliminaries (1)

- Governing Law / Jurisdiction
 - Where to arrest?
 - Where to bring the claim?
- Evidence of ownership / mortgage
- Proof of default
- Where is the aircraft?
 - Habitual base
 - Scheduled routes
 - Access rights
- Where are the technical records?
- State of Registration / de-registration
 - Owner or operator registration?
- Ferry flight procedures / approvals
- Customs Status – tax payable?
- Export Procedures

Preliminaries (2)

- Is the airline in administration / liquidation?
- Has the aircraft been sub-leased?
- What if there is more than one aircraft involved? (arrest?)
- Is Cape Town relevant?
- Political interference?

Preliminaries (3) - Engines

- Have the engines been swapped?
- If so has title transferred?
- Engine accession?
- Maintenance status
- PBH program status?
- Other engine interests? RORA?
- Engine technical records
- Customs status of engines
- Cannibalisation of parts?

Cape Town Convention (1)

- Convention on International Interests in Mobile Equipment / Aircraft Protocol, November 2001 “Cape Town Convention”
- In force from 1 March 2006
- Registrations can be effected in respect of:
 - Mortgages
 - Security agreements
 - Conditional sale agreements
 - Leases
 - Contracts of sale
 - Prospective interests (e.g. purchase options)
 - An assignment of an international interest may itself be registered

Cape Town Convention (2)

International interests may be registered

- For airframes and engines, where the debtor is located in a Contracting State
- For airframes only, where aircraft is registered in a Contracting State
- An assignment of a registrable international interest is itself automatically registrable

Enforcement of *international interest* e.g. rights of mortgagee / lessor

Country of enforcement must recognise the international interest

Contracting States – in Africa (24)

Angola

Burkina Faso

Burundi

Cape Verde

Congo

Cote d'Ivoire

Egypt

Ethiopia

Gabon

Ghana

Kenya

Lesotho

Madagascar

Malawi

Mozambique

Nigeria

Rwanda

Senegal

Seychelles

South Africa

Sudan

Tanzania

Togo

Zimbabwe

“Relief pending final determination” (Article 13)

- May be disapplied by Article 55 declaration in whole or in part
- “adduces evidence of default” – standard of proof? likelihood of ultimate success?
- “pending final determination” i.e. interim measure (“advance relief”)
- “to the extent that the debtor has at any time so agreed”
- “speedy relief”
 - (a) Preservation of the aircraft and its value
 - (b) Possession, control or custody
 - (c) Immobilisation
 - (d) Lease
- Court may impose terms to protect debtor
- Local “interim relief” remedies remain available

“Relief pending final determination” (Article X)

- If Article XXX(2) declaration made
- “Speedy” – number of days as per declaration
10 calendar days is recommended
- Adds (e) – sale – a surprising remedy for *interim* relief

Remedies of chargee (Article 8)

- “to the extent the chargor has so agreed”
- Subject to Article 54 declaration
 - (a) take possession or control
 - (b) sell or grant a lease
 - (c) collect or receive income
- Apply for a court order for any of the above
- “commercially reasonable manner”
- Article IX – procure de-registration and export

Remedies of lessor (Article 10)

- Subject to Article 54 declaration
 - (a) Terminate agreement and take possession or control
 - (b) Apply for a court order for the above
- “commercially reasonable manner”
- Article IX – procure de-registration and export
- Note that country from which exported may be different from state of registration (especially if Article 83bis arrangement e.g. Bermuda / Russia)

Procedural requirements (Article 14)

- “in conformity with the procedure established by the laws of the place where the remedy is to be exercised”

Self-help

- “Article 54(2) – declaration if remedy “which is not expressed to require application to the court may be exercised only with leave of the court”
- Substantial damages if wrong?
- Evidencing rights to third parties e.g. airport authorities
- Access? Trespass?
- Queries from buyers?

De-registration and export (Article X)

- “IDERA ROUTE” (cf. “COURT ROUTE”)
- Does not require court order (CAAC procedures – requires local court approval)
- “Article X(6) – within 5 working days
- “in conformity with applicable aviation safety laws and regulations” – see Ireland requirements e.g. Mode S code negated
- Article XIII – IDERA – if Article XX(1) declaration
- IDERA is recommended by Aircraft Sector Understanding (ASU)
- IDERA must be recorded by aircraft registry– “other administrative authorities” must co-operate
- Export may be from another country using IDERA?

Insolvency (Article XI)

- Alternative A (“Hard Option”)
 - give possession at end of waiting period
 - 60 days is recommended
- Alternative B (“Soft Option”) [Mexico only]
 - give notice that will cure default and perform obligation, or
 - give opportunity to take possession
- Neither selected – local insolvency rules apply – frequently a moratorium on enforcement

Liens

- Repair charges
- Air navigation charges (e.g. Eurocontrol – *Zoom* case)
- Airport charges
- Emissions trading charges (e.g. EU ETS)
- Other statutory charges

Example (1) – DVB/ Kingfisher

- Two A320-232 aircraft repossessed in Turkey
- Leases pre-dated CTC, terminated 2012
- Under DGCA Rules, basis for registration in India had been removed by lease termination
- Kingfisher objected to de-registration on basis that (a) had a right under the lease to purchase the aircraft and (b) had acquired equity in the aircraft
- DGCA required DVB to produce a no objection certificate from Kingfisher
- Indian court eventually (8 April 2013) directed DGCA to de-register aircraft and held that no objection certificate not required if DVB had the benefit of de-registration powers of attorney (which it did)

Example (2) – AWAS / SpiceJet

- High Court of New Delhi judgment – 19 March 2015
- three 737 aircraft – all IDERAs
- Aircraft operated despite lease termination
- Application to de-register 26 December 2014
- DGCA consulted with SpiceJet
- DGCA bound to de-register upon receipt of (i) original or notarised IDERA, (ii) certificate that prior registered interests discharged or none or have consented – lodged 9 January 2015
- Court ordered de-registration
- “an international is required to be interpreted in good faith...the courts must prod the concerned statutory authorities to act in consonance with the provisions of international conventions to which [India]s is a party...a court ought not to proceed in a manner which retards funnelling of much needed private finance business transactions into India...”

Example (3) – ACG / Hunnu Air

- Two A319-112 aircraft
- Aircraft repossessed in Hong Kong on 3 / 5 November 2014
- Court orders obtained but not via Cape Town Convention as Hong Kong not a CTC contracting state
- Exported from Hong Kong on 30 November 2014
- Effort to de-register from Mongolia commenced on 7 November pursuant to IDERAs
- De-registration accomplished on 24 November 2014

Example (4) – GECAS/ PT Adam Skyconnection

- Seven 737 aircraft
- No IDERAs recorded for any aircraft (Indonesia)
- No International Registry registrations
- Termination notice 6 March 2008
- Repossession obtained 17 March 2008
- De-registration from Indonesia achieved 26 March 2008 using de-registration powers of attorney
- No court order was sought
- CTC was not in force in Indonesia when these leases were entered into but was in force when the repossessions occurred

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