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LEGAL AND PRACTICAL CONSIDERATIONS CONCERNING CROSS BORDER REPOSSESSIONS OF LEASED AIRCRAFT

1. INTRODUCTION

Aircraft repossessions are typically contemplated when airlines face severe financial strain and can no longer meet lease or loan obligations. Even though air passenger traffic has rebounded to a healthy level since COVID-19, several airlines have become insolvent (consider, e.g., recently, Silver Airways, Bonza, Air Belgium, Blue Air) which in many ways is a product of mounting operational pressures, rising costs, and supply chain challenges. These factors and others regularly prompt lessors to consider repossessing their aircraft as a means of protecting their assets and investments. This article discusses several legal and practical considerations that lessors should take into account before commencing the repossession process. It also explains how aircraft can be “arrested” when in foreign jurisdictions, and the steps to be taken after repossession.

2. CONTRACTUAL BASIS OF AIRCRAFT REPOSSESSION IN A DEFAULT SCENARIO

Typically, Aircraft Lease Agreements (“**Leases**”) provide that the Lessor can, by written notice, terminate the Lease and repossess the Aircraft from the Lessee upon the occurrence of a continuing Event of Default.

The Lessor should strictly comply with any requirements for sending or serving notices specified in the Lease, and ensure that any relevant grace period has lapsed or otherwise expired. Where the occurrence of a continuing Event of Default can be clearly established by reference to documentary evidence (such as outstanding invoices for the non-payment of Rent), the Lessor is likely to be on firmer ground in demanding that the Lessee return the Aircraft (and valuable Aircraft Documents) to the Lessor in accordance with the contractual Redelivery Condition at the Redelivery Location specified in the Lease. In that regard, the Lessor should have obtained a legal opinion from counsel in the Lessee's home country at the inception of the leasing transaction which removes any doubt that the terms of the Lease, including the remedies provisions, are enforceable in that country. Where it has been some time since the last legal opinion was obtained, it would be prudent for the Lessor to check with local counsel that the case remains the same. Depending on the Aircraft's physical location (parked or routes flown) it may be necessary to obtain further legal opinions from other relevant jurisdictions regarding the Lessor's right to repossession and the impact of any liens.

What the Lessor must ensure when repossession is initially contemplated (so that it can commence



legal action against the Lessee if necessary) is, *first*, that it has not inadvertently waived or forborne the Lessee's defaults and Events of Default (Leases typically contain boilerplate "no waiver" provisions but this does not necessarily prevent Lessors from waiving their rights through express words or actions), and, *second*, that it has in its possession the complete set of the lease documentation (including any Irrevocable Deregistration Power of Attorney), demand letters and other relevant correspondence with the Lessee.

However, even if the Lessor believes it has a legal right to repossess the Aircraft, the Lessor may encounter various obstacles prior to repossession (which will be discussed in this note). Although many Leases contain self-help remedies, most jurisdictions do not recognise, and therefore will not enforce, such remedies. The Aircraft and valuable Aircraft Documents will often be situated in locations restricted from general public access and, accordingly, where consensual repossession cannot be achieved, it will often be in the Lessor's interest to obtain a court order to take possession of the Aircraft and Aircraft Documents.

3. POSSIBILITY OF VOLUNTARY SURRENDER OF AIRCRAFT

In some cases, the Lessee may comply with such a demand of the Lessor voluntarily, especially where the Lessee sees no prospect of overcoming its financial difficulties, or otherwise wishes to reduce the number of aircraft in its fleet. That would be ideal for the purpose of repossessing the Aircraft because the Lessee would then cooperate in deregistering and exporting the Aircraft, handling customs and tax clearances, ensuring that the original Engines and the aircraft maintenance records are redelivered together with the Airframe, and repositioning the Aircraft to a mutually agreed Redelivery Location. In such a case, the Aircraft can be redelivered to the Lessor free from any possessory liens.

What remains to be discussed between the Lessor and the Lessee would then be the extent to which the Lessor may waive, wholly or partially, the Lessee's performance of its obligations to put the Aircraft in the appropriate redelivery condition pursuant to the Lease and to pay for the outstanding Rents that have accrued before redelivery, where the Lessee is likely suffering

from financial difficulties. Oftentimes, a sensible compromise, possibly involving a deferred payment plan, can be agreed upon and documented in a Settlement Agreement between the Lessor and Lessee. When negotiating such a Settlement Agreement, the Lessor must take care not to inadvertently waive its rights, and to make clear that such terms of settlement are made "subject to contract" and on a "without prejudice save as to costs" basis.

In other situations, the Lessee may resist the Lessor's demand if the Lessee considers the Aircraft to be critical to its (the Lessee's) continued operation and rehabilitation. A forced repossession will then be required, but the Lessor may face obstacles which can broadly be divided into two categories: (1) those concerning the physical objects of the Aircraft, its Engines, its documents and records, and (2) those relating to the legal system(s) of the Lessee's home country and/or the country in which the Aircraft is situated. These, along with the possible solutions in each case, are discussed further below.

4. OBSTACLES REGARDING PHYSICAL OBJECTS

4.1. Legal issues concerning Engines

The Lessor must first ascertain whether the original Engines are installed on its Airframe. As it is common for airlines to swap engines within its fleet, and sometimes even pool their engines with other airlines, the Engines may (for the time being) be installed on another airframe. Ideally, the Lessor would have obtained a Recognition of Rights Agreement ("**RORA**") from the relevant owner, lessor and/or mortgagee of the airframe to which its Engines are temporarily installed, to the effect that the relevant owner/lessor /mortgagee will not assert any ownership interest on the Lessor's Engines. This would prevent the Engines from being deemed (under local law) to have merged with the airframe to which they are temporarily installed.

If a RORA has not been entered into, the Lessor should notify the relevant owner/lessor /mortgagee about its ownership of the Engines to avoid a scenario where the relevant owner/lessor /mortgagee may intentionally or inadvertently assume ownership or possession of the Engines together with their airframes.



4.2. Aircraft Documents

Aircraft values can be devalued by up to 80% if there are no, or incomplete, technical records (including, dirty fingerprint (“**DFP**”) and back-to-birth (“**BtB**”) records). It is therefore important for the Lessor to ascertain the location of aircraft manuals and technical records, and to consider, prior to serving any termination or repossession notice, whether to exercise its rights under the Lease to inspect the Aircraft and Aircraft Documents. This can help reduce the time and cost of reconstituting Aircraft Documents, should the Lessee refuse to co-operate to achieve a consensual repossession.

4.3. Liens

Sometimes the Engines (along with the Airframe itself) may be situated in, or be undergoing maintenance at, a maintenance, repair and overhaul (“**MRO**”) facility, or at a manufacturer’s facilities. Where the Lessee is not paying Rent to the Lessor due to financial difficulties, it is possible that the maintenance provider or manufacturer may not have been fully paid for its repair work on the Airframe or Engines. In most countries, the maintenance provider or manufacturer has a legal right to exercise what is called a “repairer’s lien” on both the equipment and the technical records in its possession. Such a lien will rank in priority above the interest of both the Lessor and the Lessor’s mortgagee bank. The Lessor would have little choice but to first pay for the outstanding repair expenses to secure the release of the Aircraft and/or its Engines, and then seek to recover them from the Lessee by way of legal proceedings (pursuant to a contractual indemnity and/or in an action for damages). If liquidation proceedings have commenced against the Lessee, the Lessor must prove its claim in the liquidation of the Lessee. In view of such a risk, the Lessor should ensure that any Security Deposit paid by the Lessee is always kept replenished, or that any Standby Letter of Credit procured by the Lessee is kept effective and renewed, so that the Lessor may apply the Security Deposit and/or Standby Letter of Credit amounts against such expenses prior to terminating the leasing of the Aircraft. Additionally, it is sensible to check whether any demand under a Guarantee can be made requiring the Guarantor to pay any amount the Lessee has failed to pay.

Besides repairer’s liens, airport and navigation authorities may have statutory liens over the Aircraft for unpaid fees and charges and tax and customs authorities may have tax liens for unpaid taxes and duties. Such liens are often draconian in that they may extend to not only the specific aircraft to which an outstanding sum relates (tail lien), but to the entire fleet of the Lessee (fleet lien). The Lessor, then, could technically be asked to be responsible for, or share in, the payment of all amounts owed by the Lessee to the relevant authority. In practice, however, some airports may refuse to release a Lessor’s Aircraft unless all of the outstanding amounts owing from the airline have been cleared, irrespective of whether the airport actually has any legal right to impose a fleet lien for such outstanding amounts. In such circumstances, it may be necessary for the Lessor to co-ordinate with other affected lessors. In addition to negotiating with the relevant authority for a fair allocation of responsibility, the Lessor would ideally have been making inquiries with the airport and navigation authorities pursuant to the Eurocontrol Letter and Aviation Authority Letter, which the Lessor should have obtained when leasing the Aircraft to the Lessee, to see if the Lessee has been making payments current. If the Lessee falls behind in payment to the authorities, or otherwise demonstrates serious financial problems, the Lessor should consider terminating the Lease quickly so that the Aircraft will cease to be an aircraft within the Lessee’s fleet susceptible to a fleet lien.

5. OBSTACLES CONCERNING LOCAL LEGAL SYSTEMS

5.1. Problems in Implementation of Cape Town Convention

Other obstacles a Lessor may encounter when repossessing their Aircraft are likely to be associated with the legal system(s) of the jurisdiction(s) in which the Lessee or the Aircraft and Engines are situated.

Several states that are signatories to the Cape Town Convention on International Interests in Mobile Equipment and its Aircraft Protocol (“**CTC**”) agreed that Lessors who adduce evidence of default pending the final determination their claim are entitled to interim ‘speedy relief’, which



includes possession, control or custody of the aircraft object. Most CTC contracting states commit to provide such interim “speedy relief” within 10 calendar days. Importantly, such interim “speedy relief” is only available where the aircraft is in a CTC contracting state at the time of enforcement, and prior to the onset of insolvency.

However, even where a country has signed or acceded to the CTC, its civil aviation authority may still refuse to deregister, or facilitate the export of, an Aircraft when the Lessor seeks to utilise the IDERA after the occurrence of a continuing Lessee default or Event of Default. This may be because of unspoken concern or bias to protect its local airlines, local employment and tax revenues. Also, a contracting state may not have enacted the appropriate local law to implement the CTC after accession, or a court may otherwise impose an arbitrary requirement that the Lessor must first obtain a final judgment (in some cases from the jurisdiction’s apex or supreme court) against the Lessee in the foreign court chosen by the Lease Agreement as the venue for dispute resolution, thereby defeating the purpose and intent of IDERAs designed to enable speedy repossession of leased or financed aircraft.

These and other problems concerning the implementation of the CTC were observed in some countries during the COVID-19 pandemic. Just how quickly in practice a Lessor can obtain the interim “speedy relief” intended by the CTC to protect the aircraft assets of lessors varies greatly between the Declarations made by the contracting states and also depends on attitudes of the local courts.

5.2. Insolvency Protection

Another issue which greatly affected Lessors during the COVID-19 pandemic and its aftermath is the fact that airlines in many countries resorted to insolvency protection and restructuring. This often involves a prolonged period of moratorium, during which a Lessor cannot commence legal action against the Lessee to repossess its Aircraft or cover Rents. Although most CTC contracting states commit to a maximum “waiting period” (typically 60 days) beyond which a leased or financed Aircraft must be released to an unwilling Lessor or mortgagee, irrespective of whether the

moratorium period under local law has expired, there have been instances where such an international commitment has not been honored. Accordingly, a Lessor would be well advised to regularly monitor the financial health of its Lessees and determine whether the leasing should be terminated early on the grounds of (among other things) cross-financial defaults, receivership over the Lessee’s assets, and bankruptcy petitions against the Lessee. If the Lessor terminates the Lease and repossesses its Aircraft before any insolvency moratorium commences, it would avoid a situation in which it would not be able to repossess its Aircraft, and not receive Rents at the same time.

5.3. Non-consensual Rights or Interests

A Lessor should also take note that the CTC allows a third party (unknown to the Lessor) to register a “non-consensual right or interest” against the airframe and engines in the International Registry (“IR”) established under the CTC because of a dispute between the third party and the Lessee. Since the registration of a non-consensual right or interest does not require the consent of either the Lessee or the Lessor, and since the IR does not verify the legitimacy of such registration, it is possible to make such registrations without any proper basis. In such a case, the Lessor may need to rely on the Lessee to resolve the dispute with the third party and procure the discharge of the registration. If the Lessee is unable or unwilling to do that, as a final resort the Lessor may apply to the Irish courts (which have special jurisdiction over the IR as the IR has its centre of administration in Ireland) for an order to discharge the registered “non-consensual right or interest”. To avoid this, a Lessor would be well advised to check and require the Lessee to remove any unexpected filings at the IR before the Lessee becomes insolvent.

6. INTERIM INJUNCTION

If consensual repossession cannot be achieved, and if the Aircraft is not parked on the ground and/or is not undergoing maintenance at an MRO or manufacturer’s facility, it may be necessary to consider whether it is possible to “arrest” and repossess the Aircraft when it lands in a foreign airport (particularly one in a creditor-friendly



jurisdiction). In such a scenario, the Aircraft is less likely to be affected by possessory or statutory liens of (among others) repairers, fuel providers, or airport or governmental authorities in the Lessee's home base. Even if the insolvency moratorium has commenced in the Lessee's home country, it is possible that such moratorium has no extraterritorial effect (particularly if the Lessor has not taken any step in the insolvency proceedings or filed any proof of debt) or that the insolvency administrator has not applied for recognition of the moratorium overseas. It may therefore lay open to the Lessor to apply directly to the foreign court in which the Aircraft is due to land for a Court Order to arrest the Aircraft, assuming the relevant Lease permits (as they typically do) the Lessor to bring legal actions in any jurisdiction.

Alternatively, and in circumstances where the Lease provides for exclusive jurisdiction of the English Courts, the Lessor may apply for an interim injunction in the English Courts, and then ask the foreign court to recognise and enforce that interim injunction. This is likely to take more time, and some jurisdictions may not recognise and enforce orders of the English Courts.

In the United Kingdom (and in most other common law jurisdictions) the relevant legal process is to apply for an "interim injunction" to immobilise and preserve the value of the Aircraft while the main legal action is commenced (concurrently) against the Lessee for breach of the Lease. The Lessor would make its application on a without-notice, *ex parte* basis while the Aircraft is flying to the UK (without giving any warning to the Lessee). In deciding whether to exercise its discretion to grant the injunction, the English court will consider, based on the evidence provided by the Lessor in the form of an affidavit (and because such application is made without notice, the Lessor must give full and frank disclosure, even about issues which do not support its case):

- a) whether there is a serious issue to be tried in the main legal action (that is to say, whether the Lessor's claim has merits);
- b) whether monetary damages alone would not be an adequate remedy where the Lessor succeeds at the trial; and

- c) whether on the "balance of convenience" the interim injunction sought should be granted in the circumstances, taking into account potential harm to the Lessee's operation and inconvenience that may be caused to its customers.

Given the drastic effect of an interim injunction, the Lessor will be required to give an uncapped "cross-undertaking" to pay the Lessee damages if it was later held that the interim injunction was wrongly granted. If the Lessor cannot provide satisfactory evidence of its ability to satisfy this cross-undertaking in damages, it may be required to provide a bank guarantee, or some other form of security or assurance. An interim injunction obtained in a creditor-friendly foreign jurisdiction is a powerful tool that the Lessor may deploy to repossess the Aircraft or force the Lessee to negotiate, provided the Aircraft is still airworthy and capable of being ferry flown to an appropriate storage destination afterwards with adequate ground maintenance capabilities to ensure that relevant ongoing (mid-to-long term) storage maintenance tasks are performed.

7. AFTER REPOSSESSION

The Lessor should also plan ahead and consider what would happen after it successfully repossesses the Aircraft and de-registers it from the aircraft register administered by the Lessee's national aviation authority, before the Aircraft can be re-leased or sold to an onward operator. These considerations include (among other things):

- (a) whether the nationality requirement for registering the Aircraft in the Lessor's intended new country of registration is satisfied, or whether an owner trust structure or registration under the name of a maintenance organisation is otherwise needed;
- (b) whether the maintenance condition of the Aircraft and standard of Aircraft Documents qualifies it for a certificate of airworthiness in the intended new country of registration;
- (c) whether an export certificate of airworthiness ("**ECOA**") issued by Lessee's national aviation authority is needed for the



ferry flight to the storage location and for the re-registering the Aircraft in the intended new country of registration;

- (d) whether the Aircraft will be covered by the Lessor's standby fleet insurance policy or whether additional temporary insurance coverage is required to cover any ferry flight and ground risks at the storage location;
- (e) whether a continuing airworthiness management organisation (“**CAMO**”) must be hired for the continuing upkeep of the Aircraft.

8. CONCLUSION

All aircraft repossessions present their own challenges. Securing repossession involves a combination of both legal expertise and practical experience. This article has set out some of the key obstacles and considerations that must be taken into account before embarking on the repossession process.

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