



# **INSOL International**

## **Aircraft repossession upon a default - a review of the issues in the United Kingdom, USA, India and Nigeria**

**November 2019**

**TECHNICAL PAPER SERIES NO 45**

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## Acknowledgement

INSOL International is very pleased to present a technical paper titled 'Aircraft repossession upon a default - a review of the issues in the United Kingdom, USA, India and Nigeria' by Henry Kikoyo, partner, Brown Rudnick LLP with contributions provided by Oluseye Opasanya SAN, partner and Mitchell Aghatise, associate, Olaniwun Ajayi LP in relation to Nigeria; and Ajay Kumar, partner, RNClegal / Rajinder Narain & Co in relation to India.

Due to unique exposure and susceptibility to macro-economic factors, airlines often find themselves financially distressed and defaulting on their financing obligations. Typically, an aircraft financing or operating lease agreement includes provisions that provide for the repossession of the aircraft in the event of such default. Repossession of an aircraft, however, is not as simple as enforcing the lessor's rights in relation to the contract – in fact, the practical issues that accompany repossession are manifold and highly dependent on the jurisdiction in which the aircraft finds itself. Aircraft are a mobile asset and change location and jurisdiction on a frequent basis, which further complicates recovery in a default situation. Moreover, it is a highly regulated market with significant safety and geopolitical implications, which create further complications.

The airline industry has introduced protocols to ease the creation and registration of securities and expedite recovery of aircraft in default scenarios. The view is that this in turn reduces the risk in relation to aircraft financing, reduces the cost of financing and increases the availability of financing. This paper outlines the key industry protocol, namely the Cape Town Convention (CTC). The CTC was intended to create international standards for registration of contracts of sale, security interests, leases and conditional sales contracts as well as provide legal remedies for defaults in financing arrangements. India, Nigeria and the United States have all ratified the CTC and the United Kingdom has acceded to the CTC along with the rest of the European Union.

Notwithstanding the above, financiers still face practical issues when confronted with a defaulting operator / lessee; as the analysis here shows, this depends on the local laws in each jurisdiction. This paper covers four jurisdictions – the United Kingdom, the United States, India and Nigeria. All four jurisdictions have codified procedures and laws regarding repossession, many of them similar to one another yet, as will be seen, the ease of aircraft repossession is quite different in each jurisdiction.

INSOL International sincerely thanks Henry Kikoyo, Oluseye Opasanya, Mitchell Aghatise and Ajay Kumar for this detailed analysis of aircraft repossession in these jurisdictions and for providing our members with this excellent technical paper.

November 2019



## Aircraft repossession upon a default - a review of the issues in United Kingdom, USA, India and Nigeria\*

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With contributions provided by Oluseye Opasanya SAN, Partner and Mitchell Aghatise, Associate, Olaniwun Ajayi LP in relation to Nigeria; and Ajay Kumar, Partner, RNClegal / Rajinder Narain & Co in relation to India.

### 1. Introduction

Aircraft are vital but capital-intensive plant and machinery for airline companies. Historically, these assets represented 80-90 per cent of the capital expenditure for airlines.<sup>1</sup> In the past, most airlines were government owned, and their respective governments either directly or indirectly (for example, through loan guarantees) supported their aircraft acquisitions. More recently however, most airlines (whether privately or government owned), often require some form of third-party solution to finance aircraft acquisitions. The market has answered this need by providing various financing structures which are facilitated by the possibility of repossession and re-sale of the aircraft. Such financing solutions include operating leases, financing leases, long term debt (loans or bonds) and other structured financing products.<sup>2</sup>

The ability to repossess, re-sell or re-lease aircraft, therefore, is a critical factor in the financing of aircraft acquisitions. In turn, the risks associated with repossession have implications for the pricing of financing. Repossession and recovery of aircraft is influenced by a combination of factors, including but not limited to:

- the laws or regulatory regime of the country in which the aircraft is registered (i.e. its home country), the laws of the location of the aircraft at the time of repossession, and any international protocols applicable to the airline business and relevant agreements in place;
- political and / or administrative considerations in the home country and / or the country in which the aircraft is located; and
- competing proprietary and other rights in relation to the aircraft, including rights pertaining to ownership, operation of the aircraft and / or security rights.

Aircraft, just like ships and trains, are high value mobile assets which move from one location to another including from one jurisdiction to another and as such, the above factors, among others, can immensely complicate the process and economics of aircraft repossession.

This paper considers the issues in relation to post-default repossession of aircraft from four representative countries: the United Kingdom, the USA, India and Nigeria.<sup>3</sup> This paper is not a comprehensive review of the legislative framework on aircraft repossessions in each of these four jurisdictions, but is only intended to provide a high-level overview.

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\* The views expressed in this paper are the views of the authors and not of INSOL International, London.

<sup>1</sup> Peter S Morell, *Airline Finance*, 4 Edition, page 107.

<sup>2</sup> Operating leases are financing arrangements whereby the owner of the aircraft grants the airline (operator) an exclusive right to use the aircraft for an agreed period of time, in return for a periodic payment of rent / other payments. A financing lease involves the acquisition and ownership of the aircraft with funds provided by the owners (equity), and debt which is usually secured with a mortgage against the aircraft. Lessors of aircraft under an operating lease will often have purchased the aircraft through a finance lease. One of the key differences between an operating lease and a finance lease is that in the case of the latter, the aircraft is treated as an asset of the airline and is placed on its balance sheet.

<sup>3</sup> A default entails a breach by a counterparty of (or failure by a counterparty to comply with) the terms and conditions of a contract. The common events of default include non-payment, insolvency of the airline / its affiliates and breach of certain covenants especially the covenant to maintain airworthiness of the aircraft. Other typical defaults include cross default (default on other contracts of a certain material value), suspension of business, failure to pay air navigation charges and revocation of licences or permits. Virtually every aircraft lease or secured lending document contains provisions allowing the owner or financier to seize the leased or financed aircraft and to arrange for its deregistration and export upon a default. See *Cape Town Convention Journal*, "De-registration and Export Remedies under the Cape Town Convention", Dean N Gerber and David R Walton, November 2014.

## 2. Aircraft repossession steps upon default

Repossession of an aircraft will normally include the following steps:

- default and grounding notice in respect of the aircraft;
- arrest of the aircraft, which includes airport access;
- deregistration of the aircraft;
- export of the aircraft; and
- access to the aircraft original documents.

### 2.1 Default and grounding notice

Having established that a default has occurred, the owner, lessor or financier will serve a notice of default (in accordance with the contractual terms) clearly specifying the relevant default, demanding that such a default is cured by a specified time or if that is not possible, that the underlying agreement(s) are terminated and the operator must fly and “ground” the aircraft at a specified airport.

The “grounding” of an aircraft refers to the cessation of commercial flights or operation of the aircraft. Grounding is often used within the context of an aircraft which requires modification or repair to facilitate the necessary work to be undertaken.<sup>4</sup> However, within the context of aircraft repossession, upon a default, the owner, lessor or financier may issue the operator a “grounding notice.”<sup>5</sup> The purpose of the grounding notice is to keep the aircraft at a particular preferred location whilst the owner, lessor or financier pursues any other appropriate remedies to achieve repossession.<sup>6</sup> The right to ground the aircraft derives from the agreements in place between the parties. It may be that the aircraft operator chooses to ignore such notice(s), in further breach of the agreements, and in such a case the assistance of the relevant court will likely be required in order to enforce the grounding notice.

### 2.2 Arrest or seizure

The arrest or seizure of an aircraft leads to grounding of the aircraft with the assistance of a court order from the jurisdiction where the aircraft is located. This will normally entail making a summary application to the relevant court for a seizure order, which will vest temporary control of the aircraft into a custodian. The custodian may for example be a ground handling service provider. A seizure order may not necessarily grant the owner, lessor or financier control / custody of the aircraft and the ability to fly it away from the seizure location. Moreover, depending on the jurisdiction, there may also be practical issues with gaining access to the airport. Generally, it is the airport and its security that can authorise access to the restricted areas in which aircraft are typically found. This may be a particular issue if the operator is a state-owned airline.

In practice, having “seized” the aircraft, the owner, lessor or financier will typically make a further application to the court at which they will submit evidence of the operator’s breaches and their right to repossess and take control of the aircraft.<sup>7</sup> Conversely, the operator is entitled to oppose such an application. This can potentially be a leverage point for the operator since the longer these

<sup>4</sup> Aviation engineers use the term Aircraft on Ground or AOG in aviation maintenance to indicate that an aircraft is facing a technical problem serious enough to prevent an aircraft from flying.

<sup>5</sup> Grounding notices are typically in letter form. They will normally instruct the operator to cease flying and park the aircraft at a prescribed time and location.

<sup>6</sup> There are practical considerations to be taken into account in relation to where it is most appropriate to ground an aircraft. One of those considerations may be the efficiencies of the legal regime applicable to a particular location. In addition, sometimes it may be necessary to establish the location of the aircraft. This can be done by (i) contacting the Central Flow Management Unit of Eurocontrol (in the case of an aircraft that flies into Europe), or (ii) contacting Air Traffic Organisation of the FAA (in the case of aircraft that is or may have been in the USA), or (iii) obtaining the services of an aircraft repossession company, or (iv) in the case of non-jet aircraft, contacting the control tower at the base of the aircraft.

<sup>7</sup> The owner, lessor or financier will seek an order for repossession and de-registration of the aircraft. The application will likely be by way of summary proceedings on the basis that the evidence of breach by the operator is incontestable or irrefutable. For example, this may likely be the case with payment defaults especially where the operator has previously acknowledged that an amount is due and outstanding.

proceedings continue, the greater the scope for losses that may be suffered by the owner due to the resultant delay in redeploying the aircraft plus related ground handling costs such as parking charges (which attach to the aircraft) and daily maintenance tasks in order to ensure the continuing airworthiness of the aircraft.<sup>8</sup>

## 2.3 De-registration

Obtaining possession of the aircraft is not in itself sufficient to allow the owner, lessor or financier to properly redeploy the aircraft if it is not coupled with the practical and legal ability to de-register it with the concomitant right to re-register the aircraft in a suitable alternative jurisdiction.

Under the Chicago Convention<sup>9</sup> aircraft have the nationality of the state in which they are registered. An aircraft cannot be registered in more than one state but its registration may be changed from one state to another,<sup>10</sup> so long as such registration is in compliance with the laws and regulations of the contracting state in which such aircraft is registered.<sup>11</sup> Each member state of the Chicago Convention has complete flexibility in deciding the requirements it will impose for registration, including whether only its nationals may own aircraft on its register (as is indeed done by most jurisdictions), and whether the registered entity should be the owner or the operator (where the owner and the operator are not the same entity).<sup>12</sup> Typically, a lessor or financier has greater control over the deregistration process in an owner-based registration regime; the converse is true in an operator-based regime.<sup>13</sup>

## 2.4 Export

The export of the aircraft is an essential part of repossession and the collaboration of the respective aviation authority is vital, especially in an adversarial situation.

Upon deregistration of the aircraft, the next step is to export it from its former country of registration. In order to do so, an Export Certificate of Airworthiness (COA) is required from its former aviation authority to transport the aircraft and to clear customs.<sup>14</sup> An Import COA will need to be issued for the new country of registration, which is only released if the aircraft has conformed to the local aviation authority's regulations and requirements.

Airport and aviation authority fees may have been incurred which may lead to such entities exercising liens over the aircraft until such debts have been satisfied. Further, fuel, aircraft handling and maintenance checks are additional costs the lessor will need to settle. In default scenarios, entities providing such goods / services often require upfront payments.

## 2.5 Access to aircraft documentation

Airlines or aircraft operators are highly regulated due to the requirements of airline safety. An aircraft is probably of little value without the supporting documentation, logbooks and records (i.e. the documents which the lessor expected upon redelivery of the aircraft, from suitability to back-to-birth traceability documents for aircraft components, to documents required for airworthiness) as to its ownership and competing proprietary or security interests, maintenance and operations history. Therefore, the ability to access the aircraft documentation is a critical part of any successful repossession and potentially a key constraint as well.

<sup>8</sup> Aircraft become "non-current" and non-airworthy almost immediately if the required daily maintenance, preservation and protection tasks are not performed.

<sup>9</sup> This is the Convention on International Civil Aviation, 7 December 1944.

<sup>10</sup> *Idem*, article 18, 61 Stat at 1185.

<sup>11</sup> *Idem*, article 19, 61 Stat at 1185.

<sup>12</sup> Dean N Gerber and David R Walton, Cape Town Convention Journal, *Supra* note 3, page 51.

<sup>13</sup> *Ibid*.

<sup>14</sup> For example, the guidance issued by the UK Civil Aviation Authority provides that when exporting an EASA aircraft to another EU member state an Airworthiness Review Certificate (ARC) is required. When exporting a non-EASA aircraft, compliance with the requirements set by the importing authority is required. Any exceptions must be agreed in writing by the importing authority. See <https://www.caa.co.uk/Commercial-industry/Aircraft/Airworthiness/Certificates-and-permits/Certificates-of-airworthiness/Exporting-a-UK-Registered-Aircraft/>.



### 3. The Cape Town Convention

The Cape Town Convention on International Interests in Mobile Equipment (the CTC or Cape Town Convention) along with its associated Aircraft Protocol (the Aircraft Protocol) deserves specific mention since they are international protocols that are directly relevant for the purposes of repossession. The CTC was created to help overcome some of the legal and procedural inefficiencies in domestic or national rules. The CTC and its associated Aircraft Protocol came into effect on 1 March 2006 and has been ratified by 79 contracting states.<sup>15</sup>

Domestic law or procedural rules in relation to seizure, deregistration and export of aircraft can sometimes present significant impediments to the basic contractual repossession rights sought by the aircraft owners. For example, if a jurisdiction requires a lessor or financier to satisfy specific tax obligations of the operator airline before it can repossess its aircraft, this can be an impediment to repossession.<sup>16</sup> Similarly, if a court order is required in order to deregister and export an aircraft, this can expose the lessor or financier to the inefficiencies of the relevant judicial system, and also additional costs. Moreover, in the case of government owned airlines the relevant authorities or institutions may not be collaborative in order to protect their airline.

The aims of the CTC are manifold, but the primary aims are to bring speed, certainty and cost-savings to repossession, deregistration and exportation of mobile assets, and improve protection of the interests of creditors of mobile assets generally.<sup>17</sup>

Owners, lessors or financiers have access to the remedies under the CTC provided:

- the country of registration of the aircraft acceded to the CTC; and
- they registered their interests at the International Registry created under the CTC.<sup>18</sup>

The CTC covers three main types of remedies:

- self-help (non-judicial) remedies;
- relief pending final determination; and
- de-registration and export for an aircraft through the use of an Irrevocable De-Registration and Export Request Authorisation (an IDERA).<sup>19</sup>

<sup>15</sup> <https://www.unidroit.org/status-2001capetown>

<sup>16</sup> For example, despite the declaration of Russia under Article 54(2) of the CTC that self-help remedies shall be available, repossession without the recourse to courts or arbitration may in practical terms be unsuccessful and self-help may result in liabilities if not exercised cautiously. The lessor may be unable to clear the aircraft through customs without the cooperation of the lessee and may be required to discharge all outstanding customs payments. See Ludwig Weber, Public and private features of the Cape Town Convention, *Cape Town Convention Journal*, 2015, Vol 4, No, 3-66, page 65.

<sup>17</sup> Aircraft Finance Briefing – A Practical Guide to the Cape Town Convention (2016) Dentons.

<sup>18</sup> The remedies under the CTC are only available for contracts created after the relevant country acceded to the CTC. It does not apply retroactively - i.e. to pre-existing transactions or arrangements. This is an important due diligence point for advisors to an insolvent airline which is undergoing a restructuring as that process involves assessing the risk associated with loss of valuable aircraft assets. The International Registry is a global electronic registry established under the CTC which was set up for the purposes of registering international interests as defined in Article 2 of the CTC as well as prospective international interests, assignments and acquisition of interests by subrogation, registrable non-consensual rights and subordinations of interests. In line with the Aircraft Protocol, the mandate of the International Registry is limited to interests in aircraft objects i.e. airframe, aircraft engines and helicopters. The Registry may also register contracts of sale and prospective sales of aircraft objects. Registration of interest enables the creditor to preserve priority over other competing interests. In insolvency it enables the effectiveness of the registered interest as against the competing creditors and the airline. See further: Ludwig Weber, *supra* note 16.

<sup>19</sup> Donald Gray, Jason MacIntyre & Jeffrey Wool, The interaction between Cape Town Convention repossession remedies and local procedural law: a civil law case study (2015) *Cape Town Convention Journal* 17, 18.

### 3.1 Self-help (non-judicial) remedies

The CTC provides for a declarations system by ratifying states in respect of the above remedies. All ratifying states have an obligation to make a mandatory declaration at the time of ratification in respect of the availability of self-help remedies.<sup>20</sup> However, notwithstanding this, there are states which are non-compliant.<sup>21</sup> There are several other declarations which are of an optional nature, including the remedy on speedy relief pending determination. It is important that due diligence is done on whichever of these optional remedies the contracting state has declared as these may be critical to the overall risk assessment associated with repossession and recovery of an aircraft in such jurisdictions.

The self-help remedies empower the owner, lessor or financier to take certain enforcement action without the requirement for judicial intervention such as an application for a court order. For example, provided there is prior agreement between the airline and the financier, a mortgagee of an aircraft can repossess its aircraft, sell or lease the aircraft or collect any income arising from management or use of the aircraft object.<sup>22</sup>

Similarly, under Article 10 of the CTC, a lessor is entitled to terminate the agreement and take possession or control of the aircraft to which the agreement relates without judicial intervention.<sup>23</sup> Article 14 of the CTC sets out the requirement of the exercise of any non-judicial remedy to conform to local law procedural requirements<sup>24</sup> and Article IX of the Aircraft Protocol provides that all remedies must be exercised in a “commercially reasonable” manner.<sup>25</sup>

### 3.2 Relief pending final determination

The remedy for ‘speedy’ relief by a creditor, pending final determination by a court, is intended to facilitate, among others, the quick resolution of any issues pertaining to repossession of the aircraft.<sup>26</sup> The court has the power to make an order for:

- preservation of the aircraft and its value;
- possession, control or custody of the aircraft;
- immobilisation of the aircraft;
- lease or management of the aircraft and the income therefrom; and
- if specifically agreed between the parties, the sale and application of proceeds therefrom and / or de-registration of the aircraft and export of the aircraft object from the territory in which it is situated.<sup>27</sup>

<sup>20</sup> Article 54(2) of the CTC.

<sup>21</sup> For example, as of 2015, of the 68 States which ratified the CTC, 52 States had declared the self-help remedies, however 8 States had declared that self-help remedies shall not be available and another 8 had not made any declaration (Bahrain, Belarus, Bhutan, Cameroon and Saudi Arabia) on the subject – see Ludwig Weber, *supra* note 16, page 56. In addition, there are contracting states which have ratified the CTC but not the Aircraft Protocol, which means there is no treaty relationship with these states regarding aircraft objects and therefore any registrations in the International Registry are not enforceable - Ludwig Weber, *supra* note 16, page 58.

<sup>22</sup> These remedies are set out in Article 8 of the CTC. The agreement between the parties to this self-help remedy can be done at any time and does not need to be in writing. See Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edition, UNIDROIT 2013) para 4.330.

<sup>23</sup> *Supra* note 19, Gray, MacIntyre and Wool, 19.

<sup>24</sup> CTC, Article 14 and the Aircraft Protocol, Article IX.

<sup>25</sup> Whether the exercise is of a “commercially reasonable” nature is a finding of fact and will vary depending on the circumstances.

<sup>26</sup> Roy Goode, *The Cape Town Convention on International Interests in Mobile Equipment: a Driving Force for International Asset-Based Financing* (2002) *Uniform Law Review*, 1.

<sup>27</sup> The key provision for relief pending final determination is Article 13, which is read together with Article X of the Aircraft Protocol. CTC, Article 13.



### 3.3 De-registration and export of aircraft

The remedy for de-registration and export of the aircraft is available to a creditor where it has been agreed by the debtor.<sup>28</sup> Following a default, a creditor may:

- de-register the aircraft; and
- export and physically transfer the aircraft from the territory in which it is situated.

The CTC permits two declarations that provide substantial treaty-based procedural enhancements. First, a creditor can act with court authorisation under the above-described advance relief provisions.<sup>29</sup> This is premised upon a creditor seeking such relief from a court in the jurisdiction where the aircraft is registered (or in the context of export, where it is located). A creditor's entitlement to utilise the court route depends on whether or not the parties agreed to it in the contract.<sup>30</sup>

Second, a debtor may issue an IDERA in accordance with Article XIII of the Aircraft Protocol which (a) irrevocably grants the 'authorised party' the right to request de-registration and exportation, and (b) places obligations on the local civil aviation authority to honour such requests, and, with other applicable administrative authorities, to cooperate with and assist the authorised party in an expeditious manner.<sup>31</sup> Therefore, the IDERA route does not require a court order and instead provides a standing direction to the applicable registration authority. However, the registration authority is required to exercise its obligations in accordance with applicable aviation safety laws and regulations.<sup>32</sup>

## 4. United Kingdom

The UK has collaborative regulatory and authoritative bodies in addition to legislation that is readily enforced in relation to aircraft repossession. The key legislation in the UK is the Civil Aviation Act 1982 (the CAA 1982) and the Air Navigation Order 2009 (the Order). The CTC was also implemented into domestic law through the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (the CTC Regulations). In addition, whilst the UK is still a member of the European Union, European legislation has direct application in the UK.<sup>33</sup>

The UK permits lessors to repossess their aircraft without a court order or any other form of official permission. Typically, the lease will contain a list of events of default which entitle the lessor to seek repossession.<sup>34</sup> and importantly, a lessor can only exercise rights granted to it under the lease agreement peaceably and lawfully.<sup>35</sup> Although the self-help remedy benefits from lower costs and speedier repossession, the lack of judicial stamp of approval exposes the lessor to higher risk. For example, in the event that the aircraft is wrongfully repossessed, damages may be significant and where the lessor seeks physical repossession of the aircraft, it may be involved in offences such as trespass or wrongful interference.<sup>36</sup> A subsequent sale of the asset (and the passage of a good title) may also be open to challenge and / or the pricing may be impacted.

<sup>28</sup> The Aircraft Protocol, Article IX. The deregistration and export remedies are available only where agreed by a debtor albeit such agreement can be given at any time and need not be in writing.

<sup>29</sup> Article 13 of the CTC (as modified by Article IX of the Aircraft Protocol).

<sup>30</sup> Article IX(1) of the CTC. Such agreement need not be in writing and can be of a general nature. Dean N Gerber and David R. Walton, *Supra* note 3, page 55.

<sup>31</sup> *Ibid.*

<sup>32</sup> The Aircraft Protocol, Article XIII (3).

<sup>33</sup> Mark Bisset, Clyde & Co LLP, *Getting the Deal Through, Aviation Finance and Leasing 2018*, England and Wales (2018) Bloomberg Law.

<sup>34</sup> Patrick Farrell, 'England and Wales' in Ravi Nath and Berend Crans (eds), *Aircraft Repossession and Enforcement: Practical Aspects* (Kluwer Law International 2009) 285.

<sup>35</sup> Mark Bisset, 'England & Wales' in Mark Bisset (eds), *Getting the Deal Through: Aviation Finance & Leasing 2017* (Law Business Research Ltd 2017) 49, 52.

<sup>36</sup> *Idem*, 53.

As is seen in the other jurisdictions referred to below, self-help often requires cooperation between the lessor and lessee which, at the repossession stage, tends to be unlikely notwithstanding the provisions of the contract.<sup>37</sup>

The lessor can apply to the court for a possession order, in the event that the self-help remedy cannot be utilised. Equally, a judicial order may be more beneficial to a lessor given that it demonstrates to third parties, such as airport authorities who have the power to deregister and export the aircraft, that the lessor's right of repossession has arisen.<sup>38</sup> The Commercial Court of the Queen's Bench Division of the High Court is where the majority of cases arising out of aircraft financing or leasing are heard. Although the court is at the mercy of its schedule, a possession case can often be heard within two months of service of the Claim Form. In the following situations, however, a swifter judgment can be sought:

- failure by lessee to acknowledge particulars of claim – judgment in default may be obtained in 14 days;
- failure by lessee to file a defence – judgment in default may be obtained in 28 days; or
- no arguable defence on lessee's part – lessor may proceed to summary judgment.<sup>39</sup>

Once a lessor has taken physical possession of the aircraft and / or a court order for possession has been made, the lessor must take the steps necessary to de-register and export the aircraft. Generally, the CAA can cancel the registration of an aircraft where it sees fit, as a matter of practice, however, de-registration requires the consent of all registered mortgagees,<sup>40</sup> although, if an interest created on or after 1 November 2015 is registered in the Aircraft Mortgage Register, the mortgagee's consent is not required.<sup>41</sup>

There are two key ways that an aircraft can be deregistered in the UK: deregistration power of attorney (DPoA) and irrevocable de-registration and export request authorisation (IDERA).

#### 4.1 DPoA

The local laws of aviation allow for the lessor to create a power of attorney complying with the rules under the Powers of Attorney Act 1971 that is revocable unless it is 'connected with an interest',<sup>42</sup> meaning a security interest. There is no guarantee that a court or the Civil Aviation Authority (the CAA) will accept the power of attorney, however, it is standard for a lessor to take such a power of attorney upon the expectation that it will be accepted.<sup>43</sup>

#### 4.2 IDERA

Alternatively, as a signatory to the CTC, the UK allows for the issuance of an IDERA. In the UK, an IDERA must be in a form prescribed by the CAA in Form CA50, it must be submitted to the CAA for recordation and it must relate to an existing international interest created on or after 1 November 2015.<sup>44</sup> When a lessor is seeking deregistration, Form CA54 needs to be submitted to the CAA and the CAA is then obliged to deregister the aircraft.

After deregistration, in order to physically export the aircraft out of the UK, the lessor must obtain an Export COA to certify that the aircraft complies with safety rules and the described type certificate data sheet and ensure that the aircraft is in a condition for safe operation. Typically, after the application for the Export COA has been submitted and the required fee paid, the process takes around 15 working days.<sup>45</sup>

<sup>37</sup> *Supra* note 34, Farrell, 285.

<sup>38</sup> *Supra* note 33, Bisset, 53.

<sup>39</sup> *Supra* note 33, Bisset, 52.

<sup>40</sup> All parties entered on the UK Aircraft Mortgage Register.

<sup>41</sup> *Ibid.*

<sup>42</sup> Powers of Attorney Act 1971.

<sup>43</sup> *Supra* note 33, Bisset, 51.

<sup>44</sup> *Ibid.*

<sup>45</sup> <https://www.caa.co.uk/Commercial-industry/Aircraft/Airworthiness/Certificates-and-permits/Certificates-of-airworthiness/Exporting-a-UK-Registered-Aircraft/>

On 1 October 2017, the English airline, Monarch Airlines, filed for administration (a formal insolvency process under English law) which meant the airline could no longer continue operations given that an insolvent airline cannot hold a valid AOC / operating licence. Further from the onset of administration, the airline is effectively run by the administrators (insolvency practitioners)<sup>46</sup> and the existing management cease to have control of the company. The administrators (KPMG) were appointed and, among other things, commenced the return of leased aircraft to lessors, as well as any related parts and equipment.<sup>47</sup> It took just a week for all the leases to be terminated and for lessors to take initial steps to repossess their aircraft. The lessors then needed to reach agreements with the CAA and certain airports that were exercising liens<sup>48</sup> over the aircraft thereby prohibiting access to these assets. Nonetheless, all aircraft were returned to lessors and moved to alternative locations within six weeks of KPMG's appointment.<sup>49</sup>

There is typically an automatic moratorium which comes into effect upon a company entering into administration, however, aircraft leases entered into after the CTC Regulations have been enacted (and subject to the debtor agreeing the creditor can exercise its remedies under the CTC Regulations upon the occurrence of an event of default, which is the current market standard), are not caught by the "stay" of proceedings, and are instead covered by the CTC. Under the terms of the CTC which the UK has adopted, the lessee must either give up the aircraft to the lessor or cure all debts upon the expiry of a 60 day "waiting period". The lessor can repossess its aircraft after the 60-day waiting period without any recourse to the English courts.<sup>50</sup>

Needless to say, it is evident that in the UK, even where there is no full cooperation between the lessor and lessee, the process of repossessing an aircraft is markedly simpler than in the jurisdictions discussed below, going so far as, in Monarch's case, to requiring no court intervention<sup>51</sup> (albeit it should be noted that administrators are essentially officers of the English courts). Nevertheless, lessors should act quickly in an administration (or other insolvency) scenario and engage with the insolvency practitioner. Where the aircraft continues to be used after the airline has become insolvent (e.g. for repatriation of passengers), it may be possible to agree with the insolvency practitioner that any post-insolvency fees / expenses should be paid as an expense of the administration (i.e. in priority).

## 5. United States of America

The United States of America (the USA) is made up of 50 states, each with their own laws covering various aspects. The aviation legal framework, however, is regulated almost entirely by the federal government.<sup>52</sup> This paper focuses on New York law, which is a popular choice of governing law for many aviation contracts.

The primary legislation in the USA is the Federal Aviation Act (FA Act) which was incorporated into the Federal Transportation Code. In addition, the USA is party to over 100 open skies aviation agreements with foreign trading partners,<sup>53</sup> one of these international agreements is the CTC.<sup>54</sup>

<sup>46</sup> Craig Montgomery, Alan Ryan, Abbey Walsh and Marvin Knapp, 'National differences lead to very different outcomes for insolvent European airlines', *INSOL World, 1st Quarter 2018, Focus: Technological advances and insolvency practice*, 26, 27.

<sup>47</sup> Mark Craggs, 'Lessons learned from airline insolvencies' (2018) Norton Rose Fulbright.

<sup>48</sup> Airports, CAA or Eurocontrol can impose tail or fleet liens - *Airline Insolvency Review* (March 2019).

<sup>49</sup> *Ibid.*

<sup>50</sup> S.37 International Interests in Aircraft Equipment (Cape Town Convention) Regulations.

<sup>51</sup> *Ibid.*

<sup>52</sup> Garrett J. Fitzpatrick, James W. Hunt and Mark Irvine, 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide' (September 2018) *The Aviation Law Review* (ed 6), 2.

<sup>53</sup> Anita Mosner, Richard Furey, Judith Nemsick, Jim Rodrigues and Jennifer Nowak, 'Aviation in the USA' (2018) *Lexology*, 1.

<sup>54</sup> Thomas A. Zimmer, 'Getting the Deal Through, Aviation Finance and Leasing 2018, United States' (2018) *Bloomberg Law*, 1.

There are several issues which will need to be worked through to determine the rights, remedies and routes which may be available to the lessor / financier, including what their exact status is (i.e. are they a lender or a lessor), and whether the debtor has filed for bankruptcy, or not.

In the USA, once a debtor files for bankruptcy under Chapter 11 of the US Bankruptcy Code (the Code), secured creditors are normally prevented from repossessing their collateral provided it is "adequately protected".<sup>55</sup> The moratorium is intended to allow debtors to keep their assets while they reorganise / restructure their business. The Code generally promotes equality of treatment among creditors, however, aircraft lessors / financiers may have special status in such bankruptcies under section 1110 of the Code (Aircraft equipment and vessels), including repossession of aircraft, provided they have either perfected their lien over the relevant assets or recorded their interests with the FAA registry or by filing a Uniform Commercial Code financing statement.

Under section 1110, the aircraft lessors / financiers have rights to immediate surrender and return of the aircraft, equipment, records and documents unless the debtor-in-possession (DIP) "...agrees to perform all obligations of the debtor under such security agreement, lease, or conditional sale contract" and cure all pre- and post-petition defaults prior to the expiry of 60 days after the bankruptcy order. If such agreement cannot be made, there is no automatic stay that is triggered and the lessor / financier's contractual remedies will be exercisable, which normally includes repossession rights.

Outside of bankruptcy, similar to the aforementioned jurisdiction, the USA allows for the use of self-help in repossessing aircraft in the wake of an event of default. The remedy is provided for in the New York Uniform Commercial Code (N.Y.U.C.C) §2A-525(2) which provides that after an event of default has occurred, the lessor has the right to take possession of the property, however, it must be done so without breaching the peace. There are no specific guidelines that describe what is considered to "breach the peace" however, it is understood that using physical force to take control of the property is not permitted and using a law enforcement officer to obtain control without judicial process is similarly prohibited.<sup>56</sup> The use of the self-help remedy is, however, dependent on the location of the aircraft; if the aircraft is located in heavily secured facilities where public access is restricted, exercising the remedy will be significantly more difficult.<sup>57</sup>

The US Commercial Code provides statutorily enumerated default 'triggers', the occurrence of which entitles the lessor to exercise self-help or other lawful remedies.<sup>58</sup> These statutes expressly state, however, that the event of default 'triggers' in the official agreements – i.e. the lease – supersede the statutory default 'triggers'.<sup>59</sup>

Where the self-help remedy is inappropriate given the circumstances, a lessor can commence judicial remedies to enforce its rights. These remedies include, but are not limited to:

- *Replevin action or arrest action*: a replevin action is a simple repossession action for a specified property and an action to arrest an aircraft is an action *in rem*.
- *Breach of contract action*: this action is one where the lessor seeks a judgment that the lessee is liable for the failure to pay amounts due or other breaches of contract.
- *Confession of judgment*: a confession of judgment is an expedited remedy whereby the lessee consents, in advance, to the judgment.<sup>60</sup>

Once the aircraft has been repossessed, whether through the non-judicial route or via judicial proceedings, the lessor must seek deregistration and export before it can fly the aircraft out of the jurisdiction.

<sup>55</sup> 11 U.S. Code § 361

<sup>56</sup> N.Y. U.C.C. § 9-609, Official Comment 3.

<sup>57</sup> Michael J. Edelman, Edward K. Gross, Dean N. Gerber, Michael G. Davies and Ronal Scheinberg, 'United States' in Ravi Nath and Berend Crans (eds.) *Aircraft Repossession and Enforcement: Practical Aspects (Kluwer Law International 2009)* 1033, 1035.

<sup>58</sup> U.C.C. § 2A-501; U.C.C. § 9-609; U.C.C. § 9-610.

<sup>59</sup> U.C.C. § 2A-504.

<sup>60</sup> S. 3218, New York Civil Practice Law and Rules.

As a signatory to the CTC and the Aircraft Protocol, the primary method of deregistration in the USA is through the use of an IDERA in the form attached to the Aircraft Protocol and as prescribed by the CTC. For aircraft subject to the CTC and the Aircraft Protocol for which there is an IDERA, pursuant to Article IX(5) and (6) of the Aircraft Protocol and Code 14 of Federal Regulations (the CFR) section 47.47, the Federal Aviation Administration (the FAA) is required to accept a request from the authorised party for deregistration and export if:

- the IDERA is submitted properly to the FAA's registry;
- each of the following are filed with the registry:
  - a written request for deregistration with a detailed description of the aircraft and the country to which it is to be exported;
  - evidence satisfactory to the FAA that any securities created before 28 February 2006 have been satisfied; and
  - written confirmation that any priority securities ranking above that of the requestor have been satisfied.<sup>61</sup>

However, there are situations where the requirements are different. For example, where the aircraft is subject to the CTC and the Aircraft Protocol but for which there is no IDERA, any request for deregistration and export must include:

- written confirmation that all outstanding, registered interests have been discharged or holders of such interests have consented; and
- evidence of the above.<sup>62</sup>

Where the aircraft is not subject to the CTC or the Aircraft Protocol, any request must include a release for export for all outstanding securities and unexpired leases with a term of six months or more.<sup>63</sup>

The deregistration process must be initiated by the holder of the Certificate of Registration, subject to the right of the IDERA Holder<sup>64</sup> and in order for the IDERA to be valid, it needs to be signed by the owner and the party that holds the Certificate of Registration.

## 6. India

The aviation legal regime in India does not exist in a uniform piece of legislation but is rather made up of aspects from Indian contract laws, Indian company laws and Indian foreign exchange regulations *et al.* Certain aspects of aircraft leasing are governed by statutory instruments: the (Indian) Aircraft Act 1934<sup>65</sup> read along with the (Indian) Aircraft Rules 1937 and the Civil Aviation Requirements, as prescribed by the Directorate General of Civil Aviation (the DGCA) from time to time.

<sup>61</sup> Cape Town Protocol, Arts IX(5) and (6), XIII; 14 C.F.R. 47.47.

<sup>62</sup> <[www.faa.gov/licenses%5Fcertificates/aircraft%5Fcertification/aircraft%5Fregistry/export%5Faircraft/](http://www.faa.gov/licenses%5Fcertificates/aircraft%5Fcertification/aircraft%5Fregistry/export%5Faircraft/)> (FAA website on 2 September 2008; on file with authors at Vedder Price P.C. (New York)).

<sup>63</sup> *Ibid.*

<sup>64</sup> Thomas A. Zimmer and Laura J. Bond, *Getting the Deal Through – Aviation Finance & Leasing 2017*, United States (2017) Vedder Price 172, 175.

<sup>65</sup> Section 5 provides the Indian Government to prescribe rules and reads as follows:

*"Power of Central Government to make rules- (1) [Subject to the provisions of section 14, the Central Government] may, by notification in the [Official Gazette], make rules regulating the manufacture, possession, use, operation, sale, import or export of any aircraft or class of aircraft [and for securing the safety of aircraft operation.] (2) Without prejudice to the generality of the foregoing power, such rules may provide for -*  
*(a) the authorities by which any of the powers conferred by or under this Act are to be exercised;*  
*[(aa) the regulation of air transport services, and the prohibition of the use of aircraft in such services except under the authority of and in accordance with a licence authorising the establishment of the service;]*  
*[(ab) the economic regulation of civil aviation and air transport services, including the approval, disapproval or revision of tariff of operators of air transport services; the officers or authorities who may exercise powers in this behalf; the procedure to be followed, and the factors to be taken into account by such officers or authorities; appeals to the Central Government against orders of such officers or authorities and all other matters connected with such tariff."*



India acceded to the Cape Town Convention and the associated Protocol (the Aircraft Protocol) on 31 March 2008. Only specific provisions of the CTC and the Aircraft Protocol became effective from 1 July 2008.<sup>66</sup> Under Indian law, an international convention ratified by India has the force of law without the need for specific legislative enactment (except that where such international convention is in conflict with a municipal provision, the municipal provision prevails); however, this does not apply in the case of the mandatory declarations of the CTC, which require specific enactment.

## 6.1 Self-help remedies

India provides for both the use of self-help remedies and formal judicial proceedings to repossess aircraft.

As a matter of general law, self-help remedies are permitted only in limited circumstances.<sup>67</sup> In the case of aircraft repossession, where the self-help remedy is to be utilised, the following clauses must exist in the contract:

- serving a default notice;
- circumstances under which the notice can be waived;
- procedure for taking possession;
- final opportunity for remediation by the defaulting party before the sale / auction of the property; and
- procedure for the sale / auction of the property.<sup>68</sup>

Where the above provisions exist in the contract and steps are taken as required by law, as a practical matter, self-help will normally succeed where swift action is taken, and an element of surprise is built in.

Utilising the self-help remedy requires access to the airport and the aircraft which, in practice, is nearly impossible without an application to the Indian court or the Airports Authority of India.<sup>69</sup>

## 6.2 Formal judicial proceedings

In light of the difficulty described above, lessors have typically taken formal judicial proceedings to repossess their aircraft. This may even be preferable as:

- in the event of a wrongful repossession, damages can be significant, especially in relation to breach of third-party rights;
- the self-help remedy may lead to civil offences such as trespass, and certain criminal offences;
- Indian civil aviation authorities may refuse to grant a licence, airworthiness certificates and / or other necessary permissions for exporting the aircraft or continued operations in India;
- the lessor may be required to maintain the aircraft in the necessary state of repair and would need to be diligent in the collection of revenues, and be liable for all sums lost through its default; and
- a private sale by the lessor of the aircraft may be challenged on grounds such as the authority of the lessor to pass good title, the right to sell, among others.<sup>70</sup>

<sup>66</sup> Getting the Deal Through, Aviation Finance and Leasing 2018, India: Ashwin Ramanathan, Akansha Aggarwal and Rishiraj Baruah, Bloomberg Law, 2018.

<sup>67</sup> The use of muscle power or other similar action which may lead to a breach of peace is viewed seriously and can lead to cancellation of the bank's license. The Supreme Court of India has come down heavily against strong arm practices and the Reserve Bank of India issued guidelines on the subject – see Ravi Nath Aircraft Repossession and Enforcement, Practical Aspects, Edited by Ravi Nath and Berend Crans, *Kluwer International Law*, 2009.

<sup>68</sup> *Idem*, page 388.

<sup>69</sup> *Idem*, page 387.

<sup>70</sup> *Idem*, page 388.



Until the recent Jet Airways insolvency,<sup>71</sup> the general perception in relation to repossession of aircraft from India was based on the negative experiences faced by lenders in the cases of Kingfisher Airlines<sup>72</sup> and SpiceJet.<sup>73</sup>

### 6.2.1 Kingfisher Airlines

Kingfisher, an Indian airline started commercial operations in 2005 with four new Airbus A320-200 aircraft and quickly grew until it had a fleet of 60 aircraft. Despite the airline routinely posting losses, it continued to grow its fleet and at one point placed orders with Airbus totalling more than 100 aircraft. Unfortunately, Kingfisher's financial troubles continued, and it was forced to cease operations in 2012, having recorded losses of USD 1 billion. The authorities suspended its operating certificate. In the normal course, one would expect that de-registration and export of the aircraft from an airline would be relatively simple to accomplish in such circumstances. Indeed, DVB Aviation Finance Asia PTE Ltd (DVB), a German financier of two Airbus A320-232 aircraft leased to Kingfisher, in pre-Cape Town Convention transactions, was able to seize the aircraft outside of India (in Turkey) where the aircraft were located at the time the leases were terminated. The only issue to attend to was the de-registration of the aircraft in accordance with the remedies accorded under the operating lease agreements. Following receipt by the DGCA of letters from DVB requesting de-registration and notwithstanding that DVB possessed a de-registration power of attorney, Kingfisher notified the DGCA that it objected to the de-registration and unilateral termination of the operating lease and that it had competing proprietary interest in the aircraft. Thereafter, the DGCA required DVB to supply a certificate from Kingfisher confirming that it had no objection before processing the de-registration, forcing DVB to commence court proceedings against Kingfisher and the DGCA seeking among other things, an order directing DGCA to immediately de-register the aircraft. The court eventually directed DGCA to de-register the aircraft and directed that Kingfisher's no objection certificate was not required if DVB had the benefit of a de-registration power of attorney, empowering it to de-register the aircraft (which it did). The delay in achieving de-registration of the aircraft greatly inhibited the remarketing effort, and in turn limited loss mitigation on the lessor's part.

It is important to highlight that Kingfisher was not subject to the CTC, as the aircraft were leased to Kingfisher before India ratified the CTC. This demonstrates an important due diligence point, for example for financiers in securitisation structures which involve merely an assignment of leases leaving the original contract intact.

### 6.2.2 SpiceJet

Similarly, SpiceJet came under severe financial pressure, resulting in termination by several lessors of their agreements and demands for the return of their aircraft. Two key lessors, Wilmington Trust SP Services (Dublin) Limited and AWAS, brought proceedings in the Delhi High Court to de-register and repossess their aircraft. The court held that the DGCA is obliged to deregister the aircraft and has no discretion in the matter, so long as the conditions in the sub-rule are met.

The resulting delay arising from the involvement of a court procedure in both cases propagated uncertainty for financiers and lessors of aircraft in India in relation to the ease of repossessing aircraft which has a knock-on effect on the cost of aircraft financing.

The decision as to whether the aircraft is to be de-registered or not is a decision for the DGCA. The DGCA may cancel a registration at any time provided it is satisfied that, as per rule 30(6) of the Aircraft Rules, 1937:

- such registration is not in conformity with paragraph 3.1 of the Aircraft Rules;<sup>74</sup>
- the registration has been obtained by furnishing false information;
- the aircraft could more suitably be registered in some other jurisdiction;
- the aircraft has been destroyed or permanently withdrawn from use;

<sup>71</sup> State Bank of India, leading a consortium of lenders petitioned the Indian National Company Law Tribunal on 20 July 2019 under Section 7 of the Insolvency and Bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process against Jet Airways (India) Limited.

<sup>72</sup> *Supra* note 3, Dean N Gerber and David R Walton, Cape Town Convention Journal, November 2014.

<sup>73</sup> *Ibid.*

<sup>74</sup> This paragraph includes definitions and interpretations of the legislation.

- it is inexpedient in the public interest that the aircraft should remain registered in India;
- the lease in respect of the registered aircraft:
  - has expired;
  - has been terminated by mutual agreement between the lessor and lessee;
  - has been otherwise terminated in accordance with the provisions of the lease agreement or the terms of the lease; or
- the Certificate of Airworthiness in respect of the aircraft has expired for a period of five years or more.<sup>75</sup>

Even where all of the above consents and authorisations have been provided, a lessor must still obtain permission from the Airport Authority of India and a ferry flight – or exit – permit from the DGCA to physically export the aircraft out of India.<sup>76</sup> To ensure that such permission is given, the lessor must provide the following documents:

- export licence from the Director General of Foreign Trade;
- proof of deregistration of the aircraft from the DGCA;
- temporary Certificate of Registration for flying out of India (more commonly referred to as a “ferry flight permit”); and
- Export Certificate of Airworthiness issued by the DGCA<sup>77</sup>.

### 6.3 Legislative developments

In 2015, the Government of India amended the Aircraft Rules 1937, inserting Rule 30(7) in order to give more effect to the CTC and the Aircraft Protocol.<sup>78</sup> Rule 30(7) mandates that the DGCA shall cancel any registration of an aircraft registered in India within a period of five working days on the receipt of an application from the holder of the IDERA along with the original or notarised IDERA and a certificate that all Registered Interests ranking in priority have been discharged or such holders have given their consent to deregistration and export.<sup>79</sup>

Following further aviation industry criticism in relation to the continuing difficulties with aircraft repossession in India, the Indian authorities also introduced a series of further measures. On 16 November 2018, the DGCA issued an Aeronautical Information Circular or “AIC” No. 12 of 2018 which deals with “Standard Operating Procedure for Implementation of Rule 32A Relating to Export of Aircraft Covered under Cape Town Convention”. Apart from setting up the procedure to be adhered to following receipt of an application from an IDERA Holder, the AIC provides the format in which an IDERA Holder is to make an application to the DGCA for deregistration on the basis of an IDERA.<sup>80</sup>

On 11 March 2019, the DGCA issued a further AIC titled “Effective Implementation of the Cape Town Convention – Issuance of Revised Standard Operating Procedures for Export of Aircraft.” It is understood, however, that this was subsequently withdrawn and that AIC No 12 of 2018 continues to be in effect.<sup>81</sup>

<sup>75</sup> Rule 30(6), Aircraft Rules, 1937.

<sup>76</sup> *Supra* note 67, Nath and Crans, page 388.

<sup>77</sup> *Ibid.*

<sup>78</sup> Sarin & Co. Aviation Law, New Law: Aircraft in India to be De-registered within 5 days, 2 April 2017.

<sup>79</sup> *Ibid.*

<sup>80</sup> <https://www.expertguides.com/articles/deregistering-and-exporting-an-aircraft-under-indias-cape-town-convention-rules-and-regulations/arfafjcf>.

<sup>81</sup> The AIC of 11 March 2019, which was subsequently withdrawn provided for revised standard operating procedures for export of aircraft to make it easier for companies which have leased aircraft to airlines in India to take them back in case the airline company defaults on payments due under the lease. The operating procedures include, among others:

All airport operators to designate an officer to deal with matters pertaining to export of aircraft covered by the CTC. Upon the occurrence of an event requiring deregistration of an aircraft, the IDERA holder is required to file a request in the prescribed format, following which the DGCA will immediately post the request on its website giving the date of receipt and certain information in relation to the aircraft.

The DGCA is required to take necessary steps to deregister the aircraft. The airport authorities will calculate the amounts due in relation to the aircraft in question for a period of three months immediately preceding the date of the

### 6.3.1 Jet Airways

The recent insolvency of Jet Airways has tested the revised regime in relation to aircraft repossession in India. The speed at which lessors or financiers have repossessed their aircraft from Jet Airways has been surprising. In mid-2018, Jet Airways had a total of 124 aircraft in its fleet. After the airline reported losses for three consecutive quarters in 2018, it started defaulting on its commitments. From December 2018 until March 2019, the airline grounded 100 of its aircraft after defaulting on lease rental payments. It was reported that as at 30 July 2019, Jet Airways had only 11 aircraft left. In fact, the speed of aircraft repossession in Jet Airways appears to have been so effective that this accelerated the company's insolvency, thereby dissipating value for the creditors as a whole. The situation might have been different for lessors and financiers had a petition been made earlier to put Jet Airways into formal Indian insolvency, which would have brought into play a moratorium.

## 7. Nigeria

There are particular practical challenges associated with the Nigerian jurisdiction, which hinder or undermine the efficiencies in relation to aircraft repossession. Contrary to some of the existing negative perceptions, a number of these challenges can be overcome if stakeholders receive appropriate legal advice both at the time of executing the aircraft financing transaction and at exit. There are concerted steps which can be taken by stakeholders to bypass some of the challenges which have historically been faced by aircraft lessors or financiers in Nigeria.

Given the challenges faced with aircraft repossession in Nigeria, it might be appropriate to give some context on aircraft financing in Nigeria. Nigerian aircraft lessees are generally given a riskier credit rating by international aircraft lessors. This poor perception stems from a long history of defaults by certain aircraft lessees in Nigeria, which to an extent overshadows the successful leasing or financing transactions. Industry commentators have stated that Nigerian lessees serially default due to particular difficulties they face including high financing costs (which tend to factor in the perceived higher risk), and currency risks.<sup>82</sup> Nigerian lessees have also held the view that they may be victims of exploitative behaviour perpetuated by foreign leasing companies, including: inflated lease rates; costly maintenance reserves; lack of requisite operational support; and higher than market standard insurance premiums.<sup>83</sup> Consequently, lessors and lessees appear to be at an impasse when it comes to aircraft financing in Nigeria.<sup>84</sup> These issues were particularly prevalent between 2014 – 2016 following the crash in oil prices, which led to significant fluctuations of the Nigerian naira against international currencies of trade such as the US dollar and the pound sterling. The crash had significant knock-on impact on the operations of a number of airline companies, which in turn faced the risk of insolvency and wide scale defaults on payment obligations. Consequently, Nigerian operators received a lower credit rating among aircraft lessors, with industry practitioners going so far as to suggest that there is now an unofficial blacklist of Nigerian aircraft lessees among aircraft lessors across the world.<sup>85</sup>

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declared default (i.e. the date when the request for deregistration was received by DGCA) and then raise the same within 5 working days. Any amounts due prior to the three months preceding the date of the declared default shall not be included in the aforesaid calculation. Any other organisation covered under the proviso to sub-rule (7) of rule 30 which has outstanding dues pertaining to the aircraft may also raise bills and communicate the same to the DGCA within 5 working days.

The IDERA holder may make the payments and provide evidence to the DGCA, along with a request for permission to export the aircraft. Once permission is granted by the DGCA for the aircraft to leave India, the IDERA holder may approach the airport where the aircraft is parked and clear any dues accrued after the date of the declared default and upon such payment the aircraft can depart from India.

<sup>82</sup> Nigeria's cash problem: Multiple exchange rates, wild swings and dollar shortages, Eleni Giokos, 2 May 2017 <https://money.cnn.com/2017/05/02/investing/nigeria-naira-currency-dollars/index.html>

<sup>83</sup> Chinedu Eze, 'Nigeria: Risk Concerns Push Airlines' Insurance to N13 Billion Annually' *THISDAY* 29 August 2019 <https://allafrica.com/stories/201908290408.html>

<sup>84</sup> Chinedu Eze, 'Why Aircraft Leasing Companies Rip-off Nigerian Airlines' *THISDAY*, 14 September 2018.

<sup>85</sup> International aviation politics killing Nigerian airlines on foreign routes – Onyema, Air Peace chairman, the Punch, 16 June 2019

The negative perception of Nigerian aircraft lessees has been further aggravated by the fact that attempts at repossession by aircraft lessors sometimes meets resistance before the Nigerian courts – in some cases purportedly for justifiable reasons and in others based on spurious reasons to frustrate repossession attempts.

The Federal Government of Nigeria (FGN) has in recent years made a policy decision to step in with a view to streamlining the aviation financing sector and bringing it in to line with market standards. For example, it plans to set up an aircraft leasing company (the Air SPV) to help domestic and African carriers lease aircraft on commercially appropriate terms. As at the date of this paper, the FGN is still at the stage of seeking private partners for the venture.<sup>86</sup> At this point, it is understood that the structure being contemplated will involve the Air SPV setting up a new intermediary company which will lease aircraft from international lessors and consequently sub-lease the aircraft to domestic operators. If such a structure is put in to place, this will inevitably have implications for aircraft repossession.

## 7.1 Applicable legislation

The aviation industry is regulated by the Nigerian Civil Aviation Authority established pursuant to the Nigerian Civil Aviation Authority Act 2006 (CAA 2006) which has the power to, *inter alia*, register aircraft, issue, validate, renew, extend or vary certificates and licences.

In addition to the CAA 2006, Nigeria ratified the CTC and the Aircraft Protocol, which came into force on 14 November 2006.<sup>87</sup> Whilst the remedies contained in the CTC are applicable in Nigeria, there have been constraints in certain instances which have caused concern in the international aviation community. Nigerian law provides for several routes in relation to repossessing and deregistering an aircraft consistent with agreed contractual terms. In the absence of any vitiating factors, the Nigerian court will generally enforce the terms and conditions stipulated in an aircraft leasing or financing agreement especially where all perfection steps have been undertaken in accordance with the CAA 2006. Some of the rights of a lessor can be enforced without recourse to the courts whilst others may require court intervention. By way of example, certain acts such as forfeiture of aircraft will require court approval, whereas other administrative acts (such as deregistration) can be done without recourse to the courts - all that is required is issuance of appropriate notification to the lessee and the Nigerian Civil Aviation Authority (NCAA) by way of a notice of default and termination of the lease, specifying all relevant events of default coupled with a written request for deregistration of the aircraft.

Generally, where there is cooperation from the lessee and all the necessary documentation is readily available, the process can take up to a week. In practice, it typically takes longer and can take significantly more time where there is no cooperation from the lessee.

## 7.2 Judicial process

Where the self-help remedy is not successful, a lessor can file in the Federal High Court<sup>88</sup> for any of the following:

- an order for specific performance under the lease agreement and a mandatory injunction compelling or directing the NCAA to give effect to the relevant DPoA;
- a mareva injunction preventing the aircraft from being flown out of the jurisdiction;
- foreclosure of a mortgage;
- delivery and possession;
- attachment and sale; and
- damages.

For a claim to be successfully heard, the lessor would need to provide material facts including as follows:

<sup>86</sup> Maureen Ihua-Maduenyi, FG seeks private investors for aircraft leasing, 9 April 2019, <https://punchng.com/fg-seeks-private-investors-for-aircraft-leasing/>

<sup>87</sup> <https://www.unidroit.org/status-2001capetown>

<sup>88</sup> The court with subject matter jurisdiction by way of Section 251 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

- evidence that the parties entered into a valid and binding lease agreement;
- proof that the lessee is in breach or default of the terms and consequently, the agreement has been terminated; and
- proof that the aircraft is validly registered in Nigeria.

Documents such as the lease agreement, the default notice, a valid DPoA and a registration certificate would be used as evidence.

Whilst proceedings are pending, the court has wide discretion to make preservation orders including granting an order for the grounding of the relevant aircraft. The court would need to be provided with sufficient materials in order to grant the relief sought to maintain the status quo and prevent further loss to the applicant.

### 7.3 Deregistration power of attorney (DPoA)

Nigeria, though a signatory to the CTC, still utilises the DPoA and it is actually an important tool in the deregistration of an aircraft. The DPoA makes enforcement of rights faster and less cumbersome, particularly where the DPoA is irrevocable and contains clauses allowing the lessor to apply to deregister the aircraft upon a default and also confers the right to sign all necessary documents for removal and / or export of the aircraft out of Nigeria.<sup>89</sup>

The DPoA can be challenged, for example, where the lessee disputes the claim that a default has occurred.<sup>90</sup> It is thought that the challenges associated with enforcement of a DPoA are better managed if it is structured from the outset as a separate, independent and collateral contract. If such a structure is adopted, separate consideration may be offered by the lessor to the lessee, or the collateral contract is treated as part of the security instrument in support or furtherance of the aircraft leasing transaction. In this regard, it is akin to giving authority to a lessor to step in and act for and on behalf of the lessee during the lease period.

In practice, an irrevocable DPoA and IDERA are quite similar and would be filed alongside a request for an export license with the NCAA at the same time as the aircraft is deregistered. When the lessor returns to the NCAA the original certificate of registration, the NCAA removes the aircraft from the Nigerian aviation register and issues a certificate of airworthiness for export and a ferry permit. Permission should also be sought from other relevant agencies in the export process being: the Federal Airports Authority of Nigeria (the FAAN), the Nigerian Airspace Management Authority and the Nigerian Customs Service.

The export license is obtained only after the aircraft has been deregistered as this requires production of proof that the aircraft has been validly deregistered.

### 7.4 Risk associated with aircraft repossession

A key risk associated with aircraft repossession in Nigeria, is that of litigation and court involvement, which adds a level of complexity and uncertainty to the repossession process. For example, in 2018 a Nigerian charter specialist TopBrass Aviation (TopBrass), the lessee, instituted an action in court against, *inter alia*, SeaGold Investment Limited (SeaGold), the NCAA, the FAAN, and the Director General of the NCAA, and one Usman Mukhtar.<sup>91</sup>

In broad terms, TopBrass is reported to have entered into two agreements with SeaGold – being:

- a finance purchase agreement for the purchase of two aircraft; and
- an operating lease agreement (together, the Agreements).

In order to pay towards the eventual purchase of the assets, TopBrass was paying USD 210,000.00 per aircraft per month – which was higher than the sum of USD 80,000.00 which it would have been required to pay for the lease element alone. The lease was for a term of 24 months.

<sup>89</sup> Article XIII, Civil Aviation Act, 2006.

<sup>90</sup> *Idem*, Article XVI.

<sup>91</sup> Kelvin Osa-Okunbor, Attempt to remove aircraft sparks row at Lagos Airport, *The Nation*, 17 September 2018.



TopBrass alleged that during the term of the lease, SeaGold was provided with a letter of credit for the amount of USD 1.3 million in addition to an IDERA in favour of SeaGold such that SeaGold, in the event of a default, would have unfettered access to the aircraft for repossession purposes.

TopBrass alleged that it had not defaulted under any of the Agreements<sup>92</sup> and notwithstanding the lack of an event of default, SeaGold attempted to repossess the aircraft in December 2015. TopBrass instituted proceedings against SeaGold and applied for an interlocutory order restraining SeaGold from repossessing the aircraft pending determination of its substantive claim.<sup>93</sup> The interlocutory order was granted.

While the court order restraining repossession subsisted, SeaGold applied to the NCAA and FAAN to deregister the aircraft. This application was granted, and the aircraft was deregistered. TopBrass then alleged that by having the aircraft removed from the register despite the court order from 2015, SeaGold was in contempt of court.<sup>94</sup>

The real issue in relation to repossession of aircraft from Nigeria is not the interference of the courts. The challenge is the pace at which matters are resolved by the Nigerian courts – especially where an injunction subsists, valuable assets may be locked up for potentially lengthy periods which prevents lessors from limiting or mitigating their losses further.

In summary, the challenges associated with aircraft repossession and recovery in Nigeria demonstrate the need for thorough due diligence on the lessee, borrower or operator. There are a number of uncertainties that remain in the process which may add delays and costs. Where possible, cooperation between the lessee and the lessor generally offers the quickest outcome and litigation ought to be avoided where possible.

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<sup>92</sup> Oyetunji Abioye, 'Stolen' jets: We'll meet TopBrass in court, says NCAA, *the Punch*, 18 September 2018.

<sup>93</sup> Editorial Board of *Airlinerwatch*, Contractual disagreement between TopBrass Aviation and Seagold Investment heats up, 17 September 2018.

<sup>94</sup> *Supra* note 91, Osa-Okunbor.





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