Aircraft operating leasing: a legal and practical analysis in the context of public and private international air law

Hanley, D.P.

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PART 1:

INTRODUCTION

1 INTRODUCTION

1.1 Context

The aim of this study is to examine the aircraft operating lease from both a legal and practical point of view and, in particular, to contextualise it in light of both public and private international air law.

Personal property leasing can be traced back to ancient times: Lawrence and Minan[6] note that chartering of ships originated in the times of the Phoenicians and that the code of the Babylonian king Hammurabi[7] referred to the leasing of personal property.[8]

Although aircraft, not constituting or being attached to land, or real estate, do indeed constitute personalty, or personal property,[9] commercial aviation is very much a product of the 20th century.

As a discrete field of jurisprudence, aircraft leasing is, therefore, comparatively young, having taken off, as it were, only on a major scale since the 1980's[10] - and yet already over a quarter of the world's commercial aircraft fleet is leased.[11] Its importance is therefore growing very quickly.

The duty of lawyers specializing in aircraft operating leasing is to record with certainty the commercial terms agreed between the leasing company (the lessor) and the airline (the lessee) in the hope that good drafting will enable the parties to be clear about their respective rights and obligations under the contract and about their rights in the event of a breach of the terms thereof by the other party.

This desire was well summarized by Hamblen J of the English High Court in *Celestial Aviation Trading 71 Limited v Paramount Airways Private Ltd.*[12] where he stated:

> "The lessor, having a reversionary right to the asset, needs to know and agree with precision with the lessee: (a) the obligations of each party, (b) the events that will entitle the lessor to terminate the contract and recover its asset and (c) provisions which will show how, as a matter of business practicality, the contract will be terminated, the asset recovered and possession returned by the lessee to the lessor."

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[6] Lawrence W H & Minan J H, *The Law of Personal Property Leasing*, Thomson West, 2003, 1.01.
[7] *Floruit circa* 1750 BC.
[8] Code of Hammurabi: "236. If a man rent his boat to a sailor, and the sailor is careless, and the boat is wrecked or goes aground, the sailor shall give the owner of the boat another boat as compensation." as set out in http://avalon.law.yale.edu/ancient/hamframe.asp on 20 November 2010.
[9] Nolan J R and Nolan-Haley J M, *Black's Law Dictionary*, West Publishing Co., 6th edition, 1990.
[10] Abeyratne R I R, *Aviation Trends in the New Millenium*, Ashgate, 2001, 1.
[11] Morrell P S, *Airline Finance*, Ashgate, 3rd edition, 2007, 196.
[12] [2010] EWHC 185 (Comm) at paragraph 72.

Typically, aircraft operating leases may run between 100 to 200 pages or so. As Wilson has noted, in the context of short term aircraft engine operating leases,

> "As much as a lessee may complain about the complexity of a lease, lessors have a point in justifying complex documentary requirements. Thorny legal issues exist, and lessors are entitled to ensure that sufficient legal protections are in place before transferring possession of their expensive assets."[13]

Nevertheless, the two parties do not enjoy complete freedom to contract on whatever terms they wish. For example, the lessor, in particular, may be subject to constraints imposed by its financier. Likewise, the lessee may be subject to regulatory constraints concerning aircraft registration or foreign remittances or other matters depending on its jurisdiction. The European Civil Aviation Conference,[14] for example, has, while recognizing that leasing is a common practice in the airline industry and that a flexible approach to it can bring economic benefits to air carriers and consumers alike and help air carriers to meet market needs better, also recognized that:

> "leases should not be used as a means to circumvent applicable laws, regulations or international agreements"[15]

and, accordingly, it went on to recommend, *inter alia*, that:

> "[f]or the purpose of ensuring safety and liability standards and compliance with any applicable economic conditions, all leasing arrangements entered into by air carriers[16] should receive prior approval from the appropriate authorities."[17]

While concerned that a rigid approach to leasing would be counter-productive, Abeyratne[18] cautions against allowing overly flexible arrangements to the point where safety might be threatened, and calls for the two aspects of freedom of contract in leasing and safety to be addressed harmoniously so that "a cautious balance of the elements of freedom and compulsion is maintained."

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[13] Wilson F S, *Mastering Engine Leasing: The Master Short-Term Engine Lease Agreement will serve as models for future standardization in the aviation industry*, Air Finance Journal, 1 September 2007.

[14] ECAC Recommendation on Leasing of Aircraft, Recommendation ECAC/21-1, 2-3 July 1997 in *Study on Aircraft Leasing*, Air Transport Committee, 156th Session of the Council, ICAO, 1999, at Appendix B.

[15] *Ibid.*

[16] This is somewhat ambiguous – it is unclear whether the reference is to all leasing arrangements entered into by air carriers as lessees or only those leasing arrangements entered into by air carriers as lessors, as contrasted with non-airline lessor. *Vide* 3.5.1.4 *infra*.

[17] *Ibid.*

[18] Abeyratne R I R, *Aviation Trends in the New Millenium*, Ashgate, 2001, 459.

With due respect to Abeyratne, this is confusing: it is hard to imagine (and indeed he does not explain) how safety could be compromised by virtue only of an airline operating an aircraft pursuant to a dry operating lease[19] rather than pursuant to a finance lease or pursuant to a secured loan or, for that matter, pursuant to outright ownership and it is submitted that safety is not really a valid concern in this context. Maintenance and safety in the context of aircraft operating leases will be discussed at 2.6.10 (Covenants) and 2.6.11 (Indemnities), *infra*.

The seasoned legal practitioner may be familiar with how various issues are typically resolved in the aircraft operating lease but may not always be familiar with the theoretical reasoning underlying such resolution. This is particularly so because many aircraft finance lawyers come to their field through more general financing law rather than through more general air law and thus may not be immediately familiar with applicable principles of public and private international air law. Likewise, when negotiating a lease, practitioners should bear in mind that ultimately if it comes to litigation, it will be adjudicated by a judge who may be unfamiliar with the commercial background: it is crucial therefore that the lease be properly drafted to reflect the intent of the parties and with an awareness of the regulatory and legal framework within which the judge must analyse the lease.

[19] *Vide* 3.5.1.4 *infra*.

1.2 "Practical" v "Legal"

At this stage, it is appropriate to explain what is meant by "practical" and "legal" in the title of this study and why such contextualization is necessary or at least desirable. It is conceded that perhaps other terms could be used, but they seem as good as any others with some explanation.[20]

This study, limited as it is to the aircraft operating lease, has been influenced by the works of those who have gone before. In particular, this author draws attention to the work of, while in no way comparing himself to, Sir Roy Goode whose book, Commercial Law, is "a synthesis of the theory underlying commercial relationships and the practice which governs their operation."[21] As Sir Roy points out, for such a synthesis:

> "[t]he greatest difficulty… lies not in the sophisticated rule but in the fundamental concept. Rules may change, concepts are more permanent. Hence it is the theoretical framework of a subject which commands the closest attention, for it is that which endures when the detailed rule has passed into oblivion."[22]

1.2.1 "Practical"

By "practical" is meant the approach of the legal practitioner in the field of aircraft operating leasing.[23] Such a practitioner may work in a commercial aircraft leasing company, as lessor, an airline, as lessee, or a private practice law firm representing either lessor or lessee. Practitioners in this field are, for the most part, highly qualified and experienced lawyers dealing in assets worth in the many millions of United States dollars. Certain practices are common among them, and the format of this study will broadly follow that of a typical aircraft operating lease deal for such practitioners, with such practices being discussed where they arise in Part 3.

Given the large sums of money involved, industry practice is highly developed, and all practitioners wish to ensure that such practice is, save where specifically negotiated otherwise, followed should matters end in litigation - the last thing they want is to find that a court has refused or is unable to enforce a provision of an aircraft operating lease on which they seek to rely due to a contrary judicial precedent, persuasive academic article, regulation, statute, or international treaty or other agreement or instrument.

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[20] Originally, this author had considered using "theoretical" instead of "legal" but was swayed in his final choice by the title of the DCL Thesis of Margo R D, *Aviation Insurance in the United Kingdom: Law and Practice*, McGill University, 1979.

[21] Street H, Foreword to First Edition, in Goode CBE QC Sir Roy, *Commercial Law*, 2nd edition, Penguin Books, 1995, at xxiv.

[22] Goode CBE QC Sir Roy, *Commercial Law*, 2nd edition, Penguin Books, 1995, at xxvi.

[23] Other forms of aircraft leasing and financing, such as finance lease, are discussed at 2.1, *infra*.

In terms of the aircraft operating lease, each deal involves a high value asset, and tends to be a something of a tailor-made or bespoke agreement, based on a model lease produced by the lessor (occasionally, in the case of a powerful airline lessee, by the lessee), with each lessor having its own preferred form. Thus, forms of lease vary even if overall their content is similar in effect to reflect then prevailing market practice.

To that extent, such leases, being fully negotiated by the parties, differ both from wet leases[24] and from short term engine leases, where lessees typically have less bargaining power and the leases are correspondingly more one-sided, leading to difficulty in enforcement in case of breach by the lessor.[25] This is because these are more typically entered into at short notice on an emergency basis where an airline finds itself needing an aircraft or engine at short notice due to a problem with another of its aircraft, or one of the engines on such aircraft.

Bunker[26] sets out in detail some of the problems which can be encountered with wet leasing, especially given the fact that generally the immediate need is so intense that there is less than ideal negotiation of the terms of the wet lease[27] or adequate due diligence: one of his primary cautions is to identify the wet lessor and to establish its *bona fides.*[28]

With short term engine leasing, IATA,[29] in conjunction with the Aviation Working Group,[30] has prepared an agreed form Master Short-Term Engine Lease Agreement[31] which is freely available for use and adaptation by parties. It is only suitable for short term leases of engines but there has been some discussion of extending such standardization process further. Wilson[32] has commented:

> "While some might say that it remains to be seen if document standardization comes to other aspects of aircraft finance, others think it inevitable and that the only questions is, 'When?'"

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[24] "Wet leasing of an aircraft entails the transfer for use of an aircraft along with the cockpit crew, cabin crew, maintenance and hull insurance….A wet lease is generally concluded for a very short term….A wet lease is similar to an aircraft charter, except that the wet lessee must be an airline holding its own operating licenses and permits, and the aircraft must be operated under the lessee's flight designator codes and route authorities": Bunker D H, *Aircraft Wet Leasing: the Perils and the Benefits*, Annals of Air and Space Law, Volume XXV, 2000, 67-82, at 67-68.

[25] "…a judge's hands may be tied where, for example, a one-sided lease agreement fails to include any lessor default or adequate termination provisions in favour of the lessee", Bunker, *op. cit*., at 81.

[26] Bunker D H, *International Aircraft Financing, Volume 1: General Principles*, IATA, 205, at 229-244.

[27] *Id.*, at 241.

[28] *Id.*, at 243.

[29] *Vide* http://www.iata.org on 11 April 2011.

[30] *Vide* http://www.awg.aero on 11 April 2011.

[31] IATA Document No. 5016-00, *Master Short-Term Engine Lease Agreement*, 2002.

[32] Wilson F S, *Mastering Engine Leasing: The Master Short-Term Engine Lease Agreement will serve as models for future standardization in the aviation industry*, Air Finance Journal, 1 September 2007.

It is the intent of this author that this study should flag the principal legal issues to be considered in developing a standard form aircraft operating lease and he will make certain recommendations in that regard.

1.2.2 "Legal"

By "legal", on the other hand, is meant *not* a body of law that somehow exists only in theory and is not applied, as contrasted with practice, but rather that body of law, involving public and private international air law, statutes, regulations, and judicial precedent which indeed applies to any legal issues which may arise under an aircraft operating lease.[33] These will be examined as they arise in the context of an operating leasing transaction in the following pages. Such body of law may differ from the industry practice but, ultimately, while courts may take note of industry practice, in the case of disputes as to the interpretation or enforcement of provisions of aircraft operating leases, the courts will, or should, apply the *lex lata*, the law as it is, and cannot easily ignore it simply because the outcome is inconvenient from the point of view of the aircraft operating lease industry.

It is certainly desirable, therefore, that such courts, and those practicing before it in the context of contentious litigation, should at least be familiar with the industry practice in respect of which they are asked to adjudicate. Likewise, it is incumbent on legal practitioners specializing in putting the transactions together to be aware of the legal framework within which those courts, who will adjudicate in case of dispute, operate.

To put it another way, the practical approach, guided by a desired certain commercial outcome, is deployed in putting the lease together, but the legal, or more theoretical, approach, applying the law to disputes arising thereunder, takes the lease apart in order to analyse it and to apply the law to it.

If it may be said that many aircraft finance lawyers are not as familiar with public and private international air law, it may fairly be said also that public and private international air law did not always, until relatively recently, take full account of the fact that ownership and operation of a given aircraft may be in different hands. This is not surprising, since the aircraft operating lease only really took off after the 1970's,[34] growing rapidly in the 1980's and 1990's.[35]

By contrast, most public and private international air law treaties have been in place before the mid-1970's, the Montreal Convention[36] of 1999 and the Cape Town Convention[37] of

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[33] For more on the source of public and private international air law, *vide* Diederiks-Verschoor I. H. Ph., *An Introduction to Air Law*, Seventh Revised Edition, Kluwer Law International, 2001, at 3-4; Bunker D H, *International Aircraft Financing, Volume 1: General Principles*, IATA, 2005, at 603 *et seq*, and Dempsey P S, *Public International Air Law*, McGill University, 2008, at 5-6.

[34] Bunker D H, *The Law of Aerospace Finance in Canada*, McGill, 1988.

[35] *Study on Aircraft Leasing*, Air Transport Committee, 156th Session of the Council, ICAO, 1999.

[36] Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999.

2001 being the more recent developments in the field of private air law treaties and the amendment to the Chicago Convention[38] of 1944 by the addition of Article 83 *bis*[39] being a more notable recent development in the field of public air law treaties.

It is desirable, it is submitted, for those putting a lease together to know how it may be taken apart later, and it is equally desirable for those taking a lease apart later to know how and why it was put together the way it was.

Sir Roy Goode has written that:

> "[t]he commercial lawyer of today needs to know not only his or her own law but of developments in what has come to be known as transnational commercial law, the corpus of law that grows from international conventions and other instruments of harmonization and from conscious and unconscious parallelism in judicial thinking in different jurisdictions."[40]

This statement, it is submitted, is equally true if "aircraft finance lawyer" is substituted for "commercial lawyer" and "public and private international air law" for "transnational commercial law."

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[37] Convention on International Interests in Mobile Equipment signed at Cape Town on 16 November 2001.
[38] The Convention on International Civil Aviation, signed at Chicago on 7 December 1944.
[39] *Vide* 3.15.8 *infra*.
[40] Goode CBE QC Sir Roy, *Commercial Law*, 2nd edition, Penguin Books, 1995, at xx.

1.3 *Aim and Methodology*

It is the aim of this study to provide an original contribution to legal science by examining, from a legal perspective, a typical lease transaction from the start of the deal through to execution of the documentation, discussing not only the typical issues that arise and their resolution, but the reasons underlying them. It is submitted that a comprehensive examination of the interrelationship between the law on the one hand and the practice of the typical provisions aircraft operating leases on the other hand has been a somewhat understudied area of aircraft finance law to date.

In terms of layout, this study is divided into four parts in addition to the various Annexes and Tables at the end:

(1) Introduction, which as its name implies is introductory;

(2) Overview, which is largely descriptive;

(3) The Aircraft Operating Lease, which is largely analytical and based on research, and constitutes by far the greater body of this study, and

(4) Conclusion, which is largely prescriptive.

Finally, a Supplement is added after the end of this study which sets out a real example of a form of aircraft operating lease for a used aircraft, as used by a leading commercial aircraft leasing company. This form will differ in detail from those used by other leasing companies but in overall terms of layout and content is representative of the current state of the market. This Supplement should be valuable in illustrating many of the points made in the body of the text itself and cross-references are made where appropriate.[41]

In terms of methodology, there are two main ways of undertaking the analysis of this subject.

One is a systematic overview of public and private international air law, examining each international agreement in turn, and discussing where the provisions of each have an impact on aircraft operating leasing. Such a methodology may be seen in, for example, Pompongsuk.[42]

The other is a systematic overview of the aircraft operating lease, examining each major section thereof in turn, and researching and discussing where the provisions thereof have

[41] This author is grateful to Loren M Dollet, Esq, of Newport Beach, California, who is Executive Vice President of Aviation Capital Group Corp., where this author is employed, for his kind permission to add the Supplement.

[42] Pompongsuk P, *International Aircraft Leasing: Impact on International Air Law Treaties.* LLM Thesis, McGill University, Montréal, 1997.

been impacted, *inter alia*, by relevant provisions of substantive law. Such a methodology may be seen, for example, in Bunker.[43]

The methodology chosen in this study is the latter rather than the former for several reasons, among them, the following:

- Many provisions of substantive law (the theory, as discussed at 1.2 *supra*) need to be considered, not only those set out in public and private international air law agreements, but also case law, statutes and regulations (which differ by jurisdiction), taking into account both common and civil law systems where appropriate

- It is arguably more important to avoid problems in the interpretation of leases by addressing these issues at the time when the lease is being put together during the drafting and negotiation stage rather than *ex post facto* when it is being taken apart for analysis during litigation, by which stage it is too late to remedy any problems

- This author was personally more familiar, at the outset of this research, with the situation of the legal practitioner who needs to understand better the theoretical framework in which he operates rather than *vice versa*

This study differs from Bunker,[44] however, in having a more detailed discussion in relation to each section of the typical aircraft operating lease agreement under analysis. The reason for this is that Bunker is not confined to aircraft operating leasing but examines other forms of lease and indeed of aircraft financing. Further, although the major sources of air law are considered,[45] a detailed contextualization of the aircraft operating lease in that setting is outside the scope of that work.

This examination will be carried out in the context of reviewing the current literature in this area and making reference, where appropriate, to the results of extensive research into relevant learned articles and texts, case law, regulations, statutes, and international treaties, particularly those relating to public and private international air law.

In that regard, many different domestic legal systems may come into play: the governing law of the lease itself, the law of the jurisdiction of the lessor, the law of the jurisdiction of the lessee, the law of the state of registration of the aircraft pursuant to Article 17 of the Chicago Convention, and the *lex situs* of the aircraft all come to mind. To that extent, the examples given should be seen as precisely that: examples. The particular combinations of laws that may apply in a given case will often vary from deal to deal as each of the factors just cited changes.

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[43] Bunker D H, *International Aircraft Financing*, IATA, 2005, Volume 2.
[44] *Op. cit.*
[45] *Op. cit.*, Volume 1, Chapter 6.

Cross-border aircraft operating leasing is thus characterized by what Simon Hall describes as an "absence of a uniform body of law,"[46] with the rules of private international law governing, for the time being, "what law applies, and, accordingly, what laws will govern the consequences of the contractual relations involved."[47]

The governing law of the cross border aircraft operating lease will, in the vast majority of cases, be English or New York law, since the English and New York courts have great experience in interpreting and enforcing operating lease provisions, thus reducing uncertainty of interpretation. This author has rarely seen in twenty years of practice in the field a cross border aircraft operating lease governed by the laws of any other common law jurisdiction and has never seen one governed by the laws of a civil law jurisdiction.[48]

This study will focus primarily, therefore, on English and, to an extent, New York law as the governing law of the lease, as well as to relevant principles and provisions of European Union law, but will refer to other systems of law elsewhere in the world where appropriate in addition to relevant principles of public and private international air law.

It is important to examine the structuring of the transaction and the letter of intent which precedes the negotiation of the lease first since these will set the parameters for the lease itself – for example, by determining who will be the parties to the lease and whether the lease will be directly from the lessor to the lessee or will consist of a head lease from the lessor to a special purpose company set up by the lessor for that purpose and a sublease from such special purpose company to the lessee. Even more complicated structures may be required depending on the particular jurisdiction and the requirements of the lessor's financiers.

Turning then to the lease itself, the major issues in aircraft operating leasing will be analysed from both a legal and practical point of view, with subjects divided according to the main typical sections of an aircraft operating lease. One reason for this is that, in practice, this is typically how, in this author's experience, leases are negotiated and legal, as well as commercial, technical and other, issues are encountered – by a page by page turning through the draft lease, section by section, by counsel for both lessor and lessee together with other representatives of either party.

As will be seen in Part 3, the influence of the public and private air law treaties is to be found mainly in respect of safety and maintenance, licensing and certification, liability to

[46] Clark T (editor), *Leasing Finance*, Euromoney, 1985, at 73.
[47] *Id.*, at 75.
[48] That is not to say, of course, that it does not or cannot happen. *Vide, e.g.*, Fortier J M, *Leasing of Aircraft in the Province of Quebec*, Annals of Air and Space Law, Volume XV, 1990, at 61-73, where the author discusses finance (but not operating) leasing in the Canadian civil law province of Quebec, in particular, the exemption of aircraft on finance lease, or *crédit-bail*, as defined in Article 1603 of the then Civil Code of Lower Canada, from the provisions of Chapter First of the Lease of Things of such Civil Code, from the requirement that it be in good repair and that lessor grant a warranty against latent defects.

third parties, as well as issues pertaining to registration and enforcement of remedies. Less evident, if evident at all in some cases, is a concern with the commercial aspects of the operating lease or the allocation of risk by the parties *inter se*[49]. Accordingly, as the provisions of the lease are gone through, this study shall, depending on the section in question, dwell to a greater or lesser extent on applicable public and private international air law.

Professor Sir Roy Goode,[50] in his Official Commentary[51] to the Cape Town Convention, distinguishes private and public international air law. He echoes Abeyratne[52] in referring to states' balancing of each state's legal philosophy and the need to respect a high degree of autonomy for the parties.

Further, he points out that, although the Cape Town Convention is framed on a basis consistent with the preamble to the Chicago Convention that:

> "international civil aviation may be developed in a safe and orderly manner and that the international air transport services may be established on the basis of equality of opportunity and operated soundly and economically",

the third preamble to the Aircraft Equipment Protocol to the Cape Town Convention is carefully worded, so as to "avoid any implication that the Convention has to be construed by reference to the provisions of the Chicago Convention",[53] as follows:

> "MINDFUL of the principles and objectives of the *Convention on International Civil Aviation*, signed at Chicago on 7 December 1944"

According to the Official Commentary,[54] the Cape Town Convention, together with the Aircraft Equipment Protocol thereto, provides "an international legal regimen for security and related interests in aircraft", thus helping:

> "to reduce legal uncertainty caused by differences in national laws and thereby opening up to developing countries access to finance at reasonable cost".

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[49] As will be discussed in Part, 3 *infra*, only the Cape Town Convention and Aircraft Protocol thereto, of the international air law instruments, is directly concerned with contractual rights *inter partes*; for the most part, the others deal with the rights and obligations of third parties, such as passengers, those on the ground, tax authorities, air navigation and other service providers, etc.

[50] Sir Roy was chairman of the Unidroit Study Group which initiated the Cape Town Convention as an ambitious private international law project.

[51] Goode R, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment: Official Commentary*, Unidroit, 2002, at 175-180.

[52] *Vide* 1.1 *supra.*

[53] *Ibid.*, at 176.

[54] *Op. cit.*, at back cover page.

Sir Roy continues that, although both the Cape Town Convention and Chicago Convention have a similar set of principles and objects, namely, the economic development of the international air transport sector, nevertheless, they address different subjects: the Chicago Convention is a public law convention establishing an international system centred on nationality to promote safe and secure flight operations whereas the Cape Town Convention is a private law convention designed to facilitate the financing and leasing of aircraft.[55] In his view, in any event, "principles of interpretation employed in dealing with one text are unlikely to apply in dealing with the other".[56]

Even if that is so, in the context of aircraft leasing, the key word is to be found in the above-quoted third preamble to the Aircraft Equipment Protocol to the Cape Town Convention: allowing that Sir Roy is correct that the Cape Town Convention does not *have to be* construed by reference to the Chicago Convention, it is still necessary to be *mindful* of both applicable principles of public international air law and of private international air law.

Perhaps his distinction is somewhat artificial – by way of comparison, the Warsaw Convention does not refer to the Paris Convention,[57] the predecessor of the Chicago Convention,[58] at all; and the Montreal Convention 1999, in its fourth recital, simply "reaffirms" the "desirability" of an orderly development of international air transport operations "in accordance with the principles and objectives of" the Chicago Convention. Indeed, the other public and private air law instruments referred to in this study do not refer to the Chicago Convention in this context at all.

With due respect to Sir Roy's role as chairman of the Unidroit Study Group which initiated the Cape Town Convention, it is not clear that the word "mindful" in the context of the Cape Town Convention connotes as great a sense of separation from the Chicago Convention as Sir Roy implies it does.

Given that one of its aims is to "ensure greater degree of certainty and enforceability of a lessor's contractual rights and obligations,"[59] the Cape Town Convention will be discussed at length throughout this work.

The main premise of this author is that, under the operating lease, the lessor wishes to pass all operational risk to the airline lessee, retaining only the credit risk of the lessee and the risk of the residual value of the aircraft at the end of the lease term but that, while this may work *inter partes,* this does not bind third parties whose rights are founded not in contract but in law.

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[55] *Ibid.,* at 180.
[56] *Ibid.,* at 180.
[57] The Convention relating to the Regulation of Aerial Navigation signed at Paris on 13 October 1919.
[58] *Vide* Article 80 of the Chicago Convention.
[59] Djojonegoro A, *The Unidroit Proposal For A Uniform Air Law: A New Aircraft Mortgage Convention?*, Annals of Air and Space Law, Volume XXII, Part II, 1997, at 54.

Too often, in this author's experience, lawyers in this field believe in absolute freedom of contract to allocate risk and too often find out, when it comes to litigation, that the courts refuse to enforce lease provisions in the way in which such lawyers had originally envisaged or even to enforce them at all. Practitioners should draft clearly, within the applicable legal and regulatory framework, so that courts can simply enforce the leases as drafted. Once that is done, for their part, courts should simply enforce the leases as drafted.

In short, this study, then, aims to bring the lawyer through an aircraft operating lease in such a manner as to give a thorough understanding not only of the practical manner in which leases are typically negotiated, drafted and executed[60] but of the theoretical legal reasons under applicable domestic and international law, whether by way of case law, statute or treaty, which underpin, or which should underpin, such practical manner.

More importantly, based on the research and analysis set out in this study, this author will consider if any patterns emerge in cases of divergence between the practical and the legal and will consider what implications such divergence may have in particular for the fields of public and private international air law.

[60] As to which, see also Bunker D H, *International Aircraft Financing, Volume 2: Specific Documents*, IATA, 2005, at 46-238.