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

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Aircraft Operating Leasing: A Legal and Practical Analysis
in the Context of Public and Private International Air Law

PART 4:

CONCLUSION

4 CONCLUSION

4.1 *Overall conclusions*

This will attempt to synthesise the practical and theoretical lessons learned from the foregoing to show that the basic concept of the aircraft operating lease is intact but that, given the number of courts which may, rightly or wrongly, apply any number of legal provisions which override the provisions of the lease, we are dealing here more with art than with science. Certain recommendations will also be made.⁸⁴⁶

It is essential, in this author's view, that practitioners understand aircraft operating leases, and the issues associated therewith, not only in the context of practice but also in the context of relevant legislation and case law and, above all, in the overall context of public and private international air law.

Further, relevant provisions of public and private international law have been shown to be available to practitioners, and possibly of aid to their client's legal position, if only they are aware of them. In particular, the provisions of the Cape Town Convention on events of default and remedies come to mind.

Certain problems for practitioners in the field of the aircraft operating lease arising from certain provisions of, or *lacunae* in, public and private international air law have been identified examined and certain proposals are made in 4.2 *infra* in respect thereof by way of remedy.

Before then, it is worthwhile here to review the principal parts of the aircraft operating lease in light of the research and analysis set out in Part 3 *supra*. Dividing the lease in the same manner as in 2.6 *supra*, the following broad conclusions can be drawn:

Pre-Delivery

This covers the parties, recitals, definitions, representations and warranties, and conditions precedent.⁸⁴⁷

These generally reveal any do not any tension between the practice and law of aircraft leasing and are generally not the focus of the public or private air law and other instruments but are still influenced by and reflective of them. Perhaps this is not surprising, as, at this point, the aircraft has not yet been tendered for delivery to the airline, and thus legal disputes are less likely. Further, rights of third parties are not yet involved.

For example, the parties to the transaction will be determined by reference, *inter alia*, to applicable double tax treaties, and options regarding state of registration of the aircraft.

⁸⁴⁶ *Vide* 4.2 *infra*.

⁸⁴⁷ *Vide* 2.6.1-2.6.5 *supra*.

Likewise, the conditions precedent listed, showing which licenses and approvals the lessee must have in place, will reflect the relevant legal provisions of the jurisdiction of the state of the lessee and, where different, the state of registration of the aircraft. These in turn are driven, at least in part, by the provisions of the public and private air law instruments to which such states are party.

Post-Delivery

This covers term and delivery, payments, taxes, manufacturer's warranties, covenants, indemnities, and insurances.⁸⁴⁸

Not surprisingly, this area sees more disputes, involving as it does, the condition and operation of the aircraft at and after delivery, and significant payment obligations.

Challenges to the provisions of leases dealing with conclusivity of the acceptance certificate seem inconsistent with challenges requiring precise conformity to delivery condition: it seems inconsistent that a court would, on the one hand, entitle a lessee to precise conformity to contracted delivery condition, while on the other hand allowing the lessee to disregard contractual agreements as to conclusivity of acceptance of delivery. Nevertheless, case law examined at 3.7 *supra* has shown how national legislation may provide for tests of reasonableness which override contractually agreed conclusivity. These challenges reveal a tension between law and practice, but not a particular relation to public and private international air law.

This is not so of the covenants, touching, as they do, on such critical issues as maintenance, liens, registration, and replacement of parts and engines, all of which are, to a greater or lesser extent, the subject of provisions of the public and private air law instruments.

Maintenance, being closely related to safety, is of concern to public international air law as well as national law. As discussed at 3.10.2 *supra*, the lease does not, and cannot, reduce the minimal requirements of such laws and will, if anything, set higher contractually required minima. Thus, the lease provisions reflect, but are not in tension with, such laws, something which should give comfort to those concerned that the increase in aircraft leasing may be of concern from a safety perspective. Indeed, this should be considered a public benefit of leasing.

Liens are a great concern to lessor, since the lessor may stand to lose title to its aircraft for debts incurred by its lessee, and these risks are increasing most noticeably within the European Union as a result of the Eurocontrol and emissions liens. Proposals to give the lessor the tools to manage such increased risks are made in 4.2 *infra*.

The role of the Chicago Convention and the variety of national laws passed as to registration are reflected in the discussion at 3.10.2 *supra*, as is the more active role of the

⁸⁴⁸ *Vide* 2.6.6-2.6.12 *supra*.

Geneva Convention and the Cape Town Convention on the issue of title to replacement parts and engines, discussed also at 3.10.2 *supra*.

The insurance provisions, as the maintenance provisions, reflect the legally required minimum coverage, which they do not and cannot reduce, but if anything, the lease provisions increase such required coverage beyond the minima, which gives increased protection to third parties who suffer damage. This is a benefit of leasing in that the airline may not otherwise, and is not otherwise legally required, to have such increased insurance coverage. The indemnity provisions, which are closely linked to the insurance provisions, are very intimately bound up with the provisions of the Warsaw Convention, the Montreal Convention and other private air law instruments. These instruments, concerned as they are with protection of third parties, are not concerned with the contractual allocation of risk as between the private parties to an aircraft leasing contract. Nevertheless, they should be coherent and fair as regard the liability of the lessor, and certain observations and recommendations in this regard are made in 4.2 *infra*.

Post-Lease Term

This covers redelivery, events of default, remedies, assignment, governing law, dispute resolution, miscellaneous and execution.⁸⁴⁹

Disputes as to redelivery tend to be based on factual issues and national law rather than international law.⁸⁵⁰ The Cape Town Convention deals with protection of contractually agreed remedies⁸⁵¹ in case of default.⁸⁵² The Cape Town Convention likewise deals with enforcement of duly registered assignments⁸⁵³ and of dispute resolution provisions.⁸⁵⁴

The other public and private air law instruments are not, otherwise, as much in evidence in this part, which, given that the issues dealt with here do not affect third parties, is not surprising.

It is a fact that this study focuses more on areas of potential breach by lessees than by lessors. Although he freely admits to working for an aircraft leasing company, this emphasis reflects, not a bias towards lessor, but the simple fact that most undertaking in a lease are on the part of the lessee. The lessor's obligations are essentially limited to certain reimbursement obligations (maintenance reserves and security deposit) and its covenant of quiet enjoyment to the lessee. The lessee's obligations are many and varied, as is natural given that the lessee has operational possession and control of the aircraft during the lease term. Simply put, there is a lot more scope for breach on the part of the lessee under the operating lease than on the part of the lessor.

⁸⁴⁹ *Vide* 3.13-3.20 *supra*.

⁸⁵⁰ *Vide* 3.13 *supra*.

⁸⁵¹ *Vide* 3.15 *supra*.

⁸⁵² *Vide* 3.14 *supra*.

⁸⁵³ *Vide* 3.16 *supra*.

⁸⁵⁴ *Vide* 3.18 *supra*.

4.2 Recommendations

This author believes that operating leasing of aircraft should be encouraged for reasons of public benefit for the reasons he sets forth in the following paragraphs.

The public international air law safety objectives of the Chicago Convention would be enhanced by encouraging airlines to meet maintenance and redelivery requirements of operating leases, which typically go beyond the Standards and Recommended Practices made under the Chicago Convention as well as going beyond FAA or EASA or other local aviation authority requirements. The fact that the lessor's motives in having such high maintenance standards are primarily to preserve its equity in, and value of, its aircraft in no way cuts across the public benefit that flows therefrom.

Further, the public protection of the private international air law instruments would be enhanced by encouraging airlines to take out liability insurance for greater amounts, as typically required by leases, thus providing greater coverage than required under national law or private international air law⁸⁵⁵ – and ultimately therefore providing greater protection for passengers and third parties.

Both the legally required minimum liability insurance requirements and the legally required minimum maintenance requirements are precisely that – *minima*. States have, therefore, an interest in encouraging airlines to observe their contractual obligations to meet a higher standard than the legally required *minima*. This is not only because enforcing higher contractually required minimum requirements on insurance and maintenance benefits the lessor in terms of increasing insurance covering of any potential liability on its part and because it is likely to maximize the residual value of the aircraft, although those benefits to the lessor are real. Rather, states should enforce such contractual requirements precisely because they provide increased protection to the public by way (i) of increasing safety, by making an accident less likely to occur in the first place, in the case of contractually required maintenance obligations in excess of the legally required minimum, and (ii) if an accident should nevertheless occur, by providing that more insurance coverage will be available for compensation to the public than is required by law.

In order to encourage, therefore, aircraft operating leasing, this author sets out below certain recommendations in respect of both public and private international air law as well as in connection with the practice of aircraft operating leasing.

4.2.1 Article 83 *bis* of the Chicago Convention

It is submitted that encouraging greater use of transfers of safety oversight under Article 83 *bis* of the Chicago Convention is desirable from a lessor's point of view since the lessor's ability to register the aircraft in its name in a suitable jurisdiction will enable it to

⁸⁵⁵ Bearing in mind that no minimum insurance requirements are set out in the Montreal Convention.

deregister⁸⁵⁶ as required in the event of exercise by it of its remedies under the lease will encourage compliance by airlines with their lease obligations.

Even if this of itself does not ensure return of possession of the aircraft to the lessor, the ability on the part of the lessor to ensure deregistration means that, at least, it can prevent the lessee from operating the aircraft while not paying for it under the lease or otherwise breaching its lease obligations and thus greater use of Article 83 *bis* would be of benefit to lessors.

States may not particularly care about a private debt due by an airline to a lessor, for example, for unpaid rent, or about a reduced residual value, as a result of failure to maintain as required by the lease, seeing these as private disputes between private parties. But states should care about promoting principles of public and private international law and in particular about safety.

One potential way in which greater use of Article 83 *bis* could be achieved rather than by cumbersome bilateral negotiations⁸⁵⁷ would be for an agreement to be developed whereby states that are party thereto may agree freely thereunder to allow Article 83 *bis* delegations *inter se*, at least for aircraft dry leased from non-operators, thus addressing safety and regulatory concerns as to wet leases and as to dry leases from other airlines.

By analogy with the International Air Services Transit Agreement and the International Air Transit Agreement, whereby the Chicago Convention foresees certain arrangements subject to the consent of the states concerned, and such consent is, by the parties thereto, granted on a global basis, this author proposes that states which are satisfied with each others' safety standards could consider voluntarily entering into a multilateral agreement Article 83 *bis* agreement whereby they would agree in advance that any aircraft⁸⁵⁸ on the register of any one member state could be the subject of a delegation of all or any of the responsibilities of such state of registration to the member state of the operator.

The model ICAO agreement set out at Annex 12 *infra* could be adapted for such multilateral use. The main consideration would be for notification⁸⁵⁹ of the delegation rather than the multilateral agreement itself to deal with the responsibilities transferred, the aircraft covered and the lease terms thereof. Thus, a new multilateral agreement would not need to be entered into each time.

⁸⁵⁶ And consequently deny then lessee the ability wrongly to prevent a deregistration.

⁸⁵⁷ See Annex 12 for the model agreement set out at *Guidance on the Implementation of article 83 bis of the Convention on International Civil Aviation*, ICAO, 2002, at 9-14.

⁸⁵⁸ The types could be restricted or not, as the states may choose.

⁸⁵⁹ Under Article 83 *bis* (b) of the Chicago Convention, notification of the delegation to bind another state party must be made to the ICAO Council and be made public or be directly notified to such other state party itself.

That said, no such multilateral agreement has been entered into as of the date hereof. The multilateral agreement entered into among the Russian Federation states⁸⁶⁰ simply provided for application of the provisions of Article 83 *bis* among the parties to such multilateral agreement prior to its coming into effect under the Chicago Convention.

With owned aircraft, an airline need only comply with the requirements of its national aviation authority. With a leased aircraft the subject of an Article 83 *bis* transfer, in addition thereto, the requirements of such aviation authority of the operator will also have to be approved by the state of registration, and the lessor will further require under the lease compliance with FAA and/or EASA requirements as well as additional contractual requirements.

The fact that Article 83 *bis* has not been widely availed of so far is no reason not to consider the benefits of its being more widely used.

4.2.2 Cape Town Convention and IDERA

It is submitted that the public goals which can be achieved by greater reliance on Article 83 *bis* transfers may equally, and perhaps more realistically, be achieved by states becoming party to the Cape Town Convention and by giving effect to the provisions therein relating to IDERA.⁸⁶¹ However, in order for this to be effective, aviation authorities and national courts need correctly to interpret the Cape Town Convention with respect thereto.

It is to be hoped that in due course it will be clear from judicial precedent or from other authoritative guidance that safety is not in any way at issue in allowing deregistration of an aircraft pursuant to an IDERA without providing proof first of the removal of the nationality and registration marks of the aviation authority to whom the deregistration request has been made.

Restrictions on enforceability of IDERA's set out therein should be properly limited to safety concerns, *proprement dit*. Requirements that the aircraft first be repossessed and nationality marks removed should not be imported as additional requirements contrary to the clear wording of the Cape Town Convention. To do so would be to limit the value of the IDERA, to restrict the lessor from the legitimate exercise of its rights under the Cape Town Convention, and to push the lessor back on other solutions, such as greater reliance on Article 83 *bis*.

The IDERA is not the only reason why wider adoption of the Cape Town Convention is desirable. Although it may not be a *panacea* as some its promoters may sometimes suggest, it does have real benefits in terms of providing for contractual certainty in allowing the parties to agree, for example, what constitutes a default, and in terms of allowing the

⁸⁶⁰ *Vide* 3.15.8 *supra*.

⁸⁶¹ In order to allow reliance on the IDERA, states must, of course, first become party to the Cape Town Convention.

parties a certain contractual freedom to agree remedies in the case of default.⁸⁶² Of course, where it applies, it is incumbent on the parties to an aircraft operating lease to take advantage of the Cape Town Convention by carefully reading it and by adapting the lease into which they enter to take account of its provisions, such as by expressly assenting in the leases to certain remedies provided for in the Cape Town Convention.

4.2.3 Eurocontrol, emissions and similar liens

Although such liens seem unjust to this author, liens in respect of Eurocontrol liabilities and emissions breaches⁸⁶³ seem to be a fact of life for lessors which will not go away. These liens are not simple rights of detention but extend beyond those to rights of sale of the lessor's aircraft for the unmet obligations of the airline.

A particularly worrying development is that discussed above in the case of Germany, where Germany seeks to impose not only a lien on the aircraft, but personal liability on the lessor as owner of the aircraft, for non-payment of travel tax by non-German airlines which have failed to appoint a German tax representative. This extension of liens in itself is objectionable in principle but imposing personal liability in addition represents a particularly unwelcome step by Germany.

Its justification for such a step is particularly difficult to understand in light of Germany's acceptance of a distinction between those having an operational role, such as airlines, and those not having an operational role, such as lessors, in the context of the Unlawful Interference Compensation Convention.⁸⁶⁴ Surely it cannot be argued that lessors have an operational role in the context of collection and payment by airlines of an air travel tax based on numbers of passengers carried by the airline as operator.

This author surmises that the real reason for the distinction is not a jurisprudential but a practical, opportunistic one. Governments may be willing to limit recourse for damage to third parties against lessors for the principled reason that they do not have operational control but also for the practical reason that the interests of third parties are protected in practice by requiring the airline to have a minimum of third party liability insurance in place to protect such third parties by ensuring payment of compensation in the event of damage, thus rendering at least somewhat academic the question of recourse to other parties such as a lessor.⁸⁶⁵

⁸⁶² Contracting states can obtain further benefits from entering into the Cape Town Convention not only in relation to the IDERA but the other provisions of the Cape Town convention discussed throughout this study. Further, by making qualifying declaration thereunder, as discussed at 3.14.4 *supra*, they can obtain for their airlines a reduction to the minimum premium rates of finance provided for in the Sector Understanding on Export Credits for Civil Aircraft – Final Text, set out at Annex 11 *infra*.

⁸⁶³ *Vide* 3.10.2.2.1 and 3.10.2.2.3 *supra*.

⁸⁶⁴ *Vide* 3.10.2.2.4 *supra*.

⁸⁶⁵ *Vide* 3.12.1 *supra*.

On the other hand, governments may be keen to extend recourse for themselves for unpaid Eurocontrol charges and air travel taxes as well as breaches of emission limits against lessors,⁸⁶⁶ not because they have any greater operational control against airlines in this context than they do in the context of damage to third parties – they clearly do not – but precisely because there are no insurances in place to cover a simple credit default by an airline. If the airline goes bankrupt or otherwise fails to pay, the government cannot claim on an insurance policy. Instead, it effects a similar result by simply turning the lessor into a sort of insurer of the airline's payment obligation. If the airline fails to pay Eurocontrol charges, the lessor's aircraft may be seized. If the airline breaches emissions limits, the lessor's aircraft may be seized. If the airline fails to pay a German air travel tax, the lessor's aircraft may be seized and/or the lessor may be sued as if it were the debtor. It is such a convenient system for governments that it is hard to see how, once entrenched, it would not be extended to cover many other areas of an airlines obligations. In other words, why stop there?

If such is really the case, with private lessors effectively and involuntarily being conscripted as enforcement agents of the European authorities, and effective guarantors of their lessee's performance of an increasing number of obligations owed to such authorities, at least those authorities must give the lessors the tools with which to act as such enforcement agents and guarantors effectively.

If performance by lessees of obligations relating to Eurocontrol and emissions and now also air travel tax is to be enforced by lessors it must, therefore, be by way of the lessors having effective and timely remedies available to them if their lessees fail to comply. Such remedies will be set out in the lease: it is important for European states, therefore, in particular, since they are notably the ones increasingly looking to lessors, to allow lessors to enforce expeditiously their remedies under leases in the case of default by lessees.

One way in which this can be achieved is, as advocated above, by greater reliance on Article 83 *bis* transfers and IDERA's - but it need not be limited to these. Even without such greater reliance, states should ensure that their courts quickly enforce lease obligations, and contractual remedies for breach thereof, insofar as possible in accordance with their terms. This is the simplest tool for helping lessors, with whom they have burdened the consequences for non-compliance, to ensure that their lessees pay their Eurocontrol charges and respect their emissions limits.

The alternative, if nothing is done, such that lessors are frustrated or unduly frustrated in enforcing their contractual remedial rights in case of breaches by lessees, will ultimately lead lessors to prefer jurisdictions which do not impose such onerous obligations on lessors and to avoid, or to charge a higher rent or otherwise impose protections to try to manage such increased risks in those jurisdictions which do impose such onerous obligations.

⁸⁶⁶ *Vide* 3.10.2.2.2, 3.10.2.2.3 and 3.10.2.2.4 *supra*.

4.2.4 Standardisation of documentation

One practical way in which courts can be encouraged quickly to enforce lease obligations is to ensure that they take account of relevant law including public and private international law. To encourage market efficiency, reduce transaction costs⁸⁶⁷ and documentation turnaround time, it is submitted that increased standardisation of the provision of aircraft operating leases is desirable, with the parties being free, of course, to adapt the terms.

The parties should have confidence that such standard forms will be enforced in accordance with their terms by national courts and, as case law builds up, greater certainty can be achieved with a greater number of judicial precedents interpreting similarly or identically worded lease provisions.

Bunker⁸⁶⁸ rightly expresses the difficult nature of such an endeavour:⁸⁶⁹

“Any attempt to standardize contract forms and internationalize contractual relationships are very difficult and confusing since the laws of the different interests are bound to be different, particularly between a civil law and a common law jurisdiction.”⁸⁷⁰

The difficulty is mitigated somewhat in the case of the aircraft operating lease by the fact that the governing law of the cross-border aircraft operating lease is almost always a common law one such as England or New York, as noted at 1.3 *supra*.

Further, there is precedent for such standardization, notably the International Swap and Derivatives Association Master Swap Agreement of 1992, the London insurance brokers standard aircraft insurance clauses AVN 67B and AVN 67C, not to mention shipping charters which have long used standard form documentation, IATA standard form ground handling agreements and, since 2002, the Master Short-Term Emergency Engine Lease Agreement.⁸⁷¹

IATA, representing airlines as operators of aircraft,⁸⁷² and the Aviation Working Group, representing manufacturers, lessor and financiers as direct or indirect suppliers of

⁸⁶⁷ According to Clark and Wool, reduction of transaction costs by overcoming national laws inconsistent with aircraft leasing and financing transactions is also expressly one of the motivating factors behind the development of the Cape Town Convention. *Vide* Clark L and Wool J, *International Aviation Finance Laws Revisited: A Report on the Development of the proposed Unidroit Convention on International Interests in Mobile Equipment applied to Aircraft*, *Annals of Air and Space Law*, Volume XXIII, 1998, at 272.

⁸⁶⁸ Bunker D H, *The Law of Aerospace Finance in Canada*, *Institute and Centre of Air and Space Law*, McGill University, 1988.

⁸⁶⁹ A caution echoed by Simon Hall in Clark T (editor), *Leasing Finance*, Euromoney, 1985, at 73.

⁸⁷⁰ *Id.*, at 61.

⁸⁷¹ 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.

⁸⁷² *Vide* <http://www.iata.org> on 11 April 2011.

aircraft,⁸⁷³ have been working jointly⁸⁷⁴ not only on the Master Short-Term Emergency Lease Agreement but also on standard forms of aircraft purchase and sale agreements, airframe and engine warranty assignments and engine recognition of rights agreements.

It is to be hoped that ultimately their co-operation will extend to the much more document-intensive aircraft operating lease and that the result of such co-operation will carefully take account of applicable principles of public and private international air law as discussed in this study with a view to ensuring insofar as possible that courts will enforce them in accordance with their terms.

4.2.5 Lessor's liability for acts of the airline (Montreal Convention 1999)

It is submitted that the tort theory of negligent entrustment as applied to aircraft lessors is unfair as, if this theory is followed, it applies a higher standard to lessors than the Chicago Convention applies to states which are party thereto. This is because the theory of negligent entrustment, if followed to its logical conclusion, requires lessors to look behind certificates and licenses granted by aviation authorities whereas, under Article 33 of the Chicago Convention, contracting states themselves cannot do so. Under Article 33, states must, rather, recognise certificates and licenses provided that the requirements under which they were issued are equal to or above minimum standards established under the Chicago Convention.

The theory of negligent entrustment also goes against the General Claims Convention and against this author's reading of the Montreal Convention in terms of the exclusive remedy for claimants thereunder being against the airline. Even if this author's reading of the Montreal Convention is wrong, it is submitted that the Montreal Convention should then be conformed to the trend set out in the General Claims Convention.

There is no justification for difference in treatment of claims brought against a lessor by passengers and those brought by parties on the ground - if anything, there is a greater argument in the other direction since a passenger will or should know who his carrier is whereas a party on the ground may not know who is operating an aircraft overhead.

There may be a justification for difference in treatment of claims by passengers against an airline, where a contract exists between the parties, on the one hand, and claims for injury or damage brought by non-passengers against an airline, where no contract exists between the parties, on the other hand. Such a distinction, however, cannot be made regarding claims brought against a lessor of aircraft. Claims for injury or damage against a lessor, whether brought by passengers or by non-passengers alike, are brought in the absence of a contract between the plaintiff and the lessor.

⁸⁷³ Vide <http://www.awg.aero> on 11 April 2011.

⁸⁷⁴ In the interests of full disclosure, this author here discloses that he is a member of the joint working group on behalf of the Aviation Working Group.

The General Claims Convention and the Unlawful Interference Compensation Convention both recognise the difference between parties having operational control of the aircraft, where there may be liability for damage caused, and parties not having operational control, where there may be no such liability. Given that operational control is a matter of fact which does not vary depending on under which instrument of private international air law a claim is brought, this author can see no reason why claims brought under the Montreal Convention should be distinguished in this regard.

This issue is not something that can be addressed by contractual drafting in the leases, as those only apply *inter partes*. Although indemnity provisions in the lease backed up by insurance coverage in large measure keep the problem from becoming one often encountered in practice, nevertheless, that is no reason for complacency – any one claim if not covered by insurances for any reason could have catastrophic consequences for a lessor given the large amounts that may be awarded against it.

If this author's view is correct, and the Montreal Convention 1999 prevents any claims which could be brought thereunder against the operator from being brought against the lessor, then this author has identified a *prima facie* inconsistency in the European Union with Council Directive 85/374/EEC, which expressly allow claims to be brought against manufacturers and lessors in terms not stated to be subject to the Montreal Convention 1999.

If, on the other hand, he is wrong, such that such claims may be brought against lessors, then, as stated above, it is hard to see why a claimant should be able to sue a lessor thereunder where the Montreal Convention 1999 applies but not thereunder where the General Claims Convention and the Unlawful Interference Compensation Convention apply.

His view is that, however politically unrealistic to think that it will necessarily happen, the Montreal Convention and Council Directive 85/374/EEC should at an opportune time amended so as to follow the system set out in the General Claims Convention and the Unlawful Interference Compensation Convention. Broadly, his proposal is that, for passenger and non-passenger alike, the only recourse in such a situation should be to the airline or other party with operational control of the aircraft. This would be without recourse to the right of the airline or any such other party to claim, in turn, from parties not having operational control of the aircraft. Even if his proposal does not meet favour, at least there should be consistency of approach in this area.

Nevertheless, even if lessors are found to be liable in United States courts for claims brought in respect of the operation of aircraft by airlines, as a practical matter, they will find ways to manage the risk, primarily by way of insurance, but also by way of leasing via non-United States jurisdictions such as Ireland, using a head lease-sub-lease structure or even by way of placing ownership into a subsidiary incorporated outside the United States.

4.2.6 Lessor's liability for acts of the airline (Tokyo Convention)

Following the same line of logic as in 4.2.5 *supra*, this author proposes that the Tokyo Convention be amended so as to make clear that, in order to be relieved of responsibility under Article 10 of the thereof, a lessor⁸⁷⁵ should not have to show that the aircraft commander whose acts are the subject of proceedings acted on reasonable grounds under Article 6(1). That said, he recognizes that, as noted at 3.11.2.4.1 *supra*, a previous attempt to amend the Tokyo Convention failed but he proposes that, if and when the Tokyo Convention is amended anyway, this point be taken into consideration.

Regarding the failed proposal to amend Article 3 of the Tokyo Convention to provide that, in the case of an aircraft leased without crew to a lessee having its principal place of business in a state other than the state of registration of the aircraft, that other state should “also be competent to exercise jurisdiction.”⁸⁷⁶, this author believes that such an amendment would be consistent with Article 83 *bis* of the Chicago Convention. Why should criminal jurisdiction depend on the nature of the airline's possession of the aircraft? If a passenger commits a crime aboard a flight operated on board an aircraft operated by Alitalia, owned by Alitalia and registered in Italy, the Italian authorities have jurisdiction. Why should they not have jurisdiction simply because the same passenger commits the same crime on board the same aircraft operated by the same airline on the same route simply because Alitalia leases the aircraft instead of owns it, and the aircraft is registered in Ireland, pursuant to Article 83 *bis* delegation? To make a distinction here is to allow a private commercial transaction to determine criminal jurisdiction.

4.2.7 Hell or high water

The “hell or high water” clause, discussed at 3.7.1 *supra*, has been criticised⁸⁷⁷ in the context of the operating lease. Absent any legal or policy consideration to the contrary, and he has not encountered any, this author believes that this is a matter of negotiation among then parties to the contract. If the parties agree to it, it should, in such instance, be enforced. However, there seems no reason why, at least in a market where airlines have the upper hand, concessions could not be obtained from lessor, provided always that the lessor's financiers are still willing to provide the financing necessary to the lessor to fund the transaction.

4.2.8 Conclusivity of acceptance

As discussed in 3.6.2.3, the lease provides for acceptance of the aircraft by the airline, as evidenced by its execution of the certificate of acceptance to be conclusive that the aircraft

⁸⁷⁵ Or any other party not having operational control of the aircraft or being vicariously liable for the acts of the operating airline's employees.

⁸⁷⁶ Fitzgerald G F, *The Lease, Charter and Interchange of Aircraft in International Relations: Amendments to the Chicago and Rome Conventions*, Annals of Air and Space Law, Volume II, 1977, 103-137, at 120.

⁸⁷⁷ *Vide* 3.7.1 *supra*.

is satisfactory in all respect to the lessee. Coupled with limits on inspection rights and exclusions of warranties by then lessor, the idea is to place the entire risk on the lessee.

To the extent that airlines dispute this after delivery, and especially to the extent that they are successful in defeating their own lease provisions, freely negotiated by them with the benefit of professional legal representation, the airlines should be at least aware of one unintended consequence of success in overturning such provisions. In arguing against the enforceability of the conclusivity language in the acceptance certificate provided for in the lease, the airline not only sets itself up for the possibility that the similar conclusivity language in the redelivery certificate given to it by the lessor upon completion of its corresponding redelivery inspection at the end of the lease may not be upheld but also to the possibility that the lessor will not be bound by limits on inspection on redelivery if the lessee is not bound by limits on inspection on delivery.

Success on this point might be welcome to an airline in a given case but such success would have implications for all airlines under all leases going forward, truly a case of being careful for what one wishes. This author's recommendation would be that, in their own interest, airlines not push for any change in this regard.

4.3 Closing Words

Aircraft leasing is assuming an ever increasing importance in international aviation to the point where it cannot be presumed that the operator of the aircraft is the owner. Recent public and private air law instruments show an emerging awareness of this importance but there remain areas of policy to be considered before aircraft leasing can be said to be systematically integrated into the systems of public and private international air law.

Public private international air law is of most relevance to aircraft operating leasing in its desire to protect third parties, whether in the air or on the ground, from injury or damage by means of safety, which finds its connection with such leasing most clearly in the area of maintenance. There is no tension here between public good and private interest as it is in all the parties interests to ensure high maintenance standards for aircraft: the former acting in order to avoid accidents, the latter acting in order to maximize the residual value of the aircraft at the end of the lease.

Private international air law is of most relevance to aircraft operating leasing in its desire to provide for recourse to adequate compensation for third parties for injury or damage if, despite all safety efforts, an accident occurs. There is an apparent tension here in some of the private air law instruments and the allocation of risk as between lessor and lessee in the aircraft operating lease. Nevertheless, this author proposes that the public benefit is always met by providing full recourse to the operator, requiring the operator to carry ample liability insurance. This is without limitation to the operator's right of recourse against the lessor, which should be governed by the terms of the lease. The tension is only apparent as the lessor, if anything, requires in that lease liability insurance in excess of the minimum coverage legally required. This benefits both the public good and private interest.

The area where the tension is real and not apparent is in the area of liens: the lessor cannot cover this by insurance, and yet is increasingly at risk in the case of lessee default. If it is to discourage such default, with the public good that Eurocontrol debts are paid and emissions limits met, it must be allowed to make use of the enforcement tools set out in the lease.

In closing, it is to be hoped that those involved with policy matters in this area will consider the issue of leased aircraft in an integrated rather than a piecemeal manner and that those practitioners in the area of aircraft operated leases will be aware of how the current public and private air law instruments may affect the interpretation and enforcement of the leases which they negotiate. This will be not only for the benefit of private interests but for the public good.