

# **Flying in crisis areas – legal aspects Protecting the lessor's and financier's interests**

gbf Aviation Law Afternoon Workshop

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## Overview

- Key considerations before transaction
- Key contractual issues
- Conclusion

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# Key considerations before transaction



- Customer with high probability to fly in crisis areas.
- Problem: Increased risk of total loss of aircraft and total insurance coverage failure.
- Pre-transactional analysis concerning specific risks:
  - Assessment of Counterparty
  - Security Package
  - Jurisdictional Questionnaire

# Key considerations before transaction



- Who will be the Owner/Lessee?
  - Solvency
  - Corporation/SPV
  - Domicile/Assets (enforceability)
  - **Result: Evaluation of probability to get money back.**

# Key considerations before transaction



- Security Package to get maximum security in the transaction:
  - **Asset related securities (Compensation of loss)**
    - **Aircraft Mortgage:** Right to sell aircraft on default.
  - **Third party securities (Compensation of loss)**
    - **Guarantee:** Additional security of a third party.
    - **Joint and Several Contractual Liability:** Several obligors declare that they are liable to the obligee jointly and severally for the performance of the whole obligation.
    - **Letter of Credit:** Engagement by a bank or other person, at the request of a customer, that issuer will honor drafts or other demands for payment, upon compliance with the conditions specified in the LC.
    - **Letter of Comfort:** Weak subsidiary of another company. Written assurance from parent company.
    - **Share Pledge:** Pledge of shares of counterparty and/or a third party security giver. Control over counterparty in case of default.
    - **IMPORTANT:** Solvency Check

# Key considerations before transaction



- **Insurance (Compensation of loss)**
  - **Full insurance coverage must be in place.** Beware where the a/c is being flown and whether these areas are covered as per the policy.
  - **Letter of Undertaking** from insurers that any changes to the coverage, unpaid premiums, events of termination will be notified to the lessor/financier directly and immediately should be sought.
  - **Assignment of insurances:** For financier/lessor desirable to be additional named insured. Direct contractual relationship. If not possible: assignment of insurance with notice to insurers to give binding legal effect to the „loss payee“. Moreover an Undertaking from the insurers not to raise any objections based on conduct of policyholder against financier/lessor.
- **Control-related securities (Avoidance of loss)**
  - **Tri-party Agreement:** Agreement between financier/lessor, borrower/lessee and operator. Essential elements: operator undertakes to act in accordance with the financier's/lessor's instructions in case of event of default; provide information concerning the whereabouts of aircraft, monitors protection and operation.
  - Use of **automatic Aircraft Monitoring/tracking System.** Real time information. Avoid flights in crisis areas.
- **Result: Adequate Security Package must be put together.**

# Key considerations before transaction



- Jurisdictional questionnaire
  - Tool to identify jurisdictional risk and determine legal issues.
  - Most important areas with regard to flights in crisis areas:
    - Summary of aircraft mortgage laws and regulations
    - Enforceability of additional securities and lease remedies, including repossession in case of default or bankruptcy
    - Enforceability of submission to foreign jurisdiction and of foreign judgements
  - Draft legal opinions of lessor's/lender's counsel based on jurisdictional questionnaire should be sought.
  - Track record of the courts and their level of expertise and experience in determining complex cross-border litigation involving high value assets such as commercial aircraft should be considered.
  - **Result: Enforceability of the contract and the securities is guaranteed.**



# Overview

- Key considerations before transaction
- **Key contractual issues**
- Conclusion

# Key contractual issues

- Drafting of transaction docs based on findings of pre-transactional analysis.
- Essential provisions with regard to flights in crisis areas:
  - In terms of Conditions precedent: **Securities/Tri-Party agreements/Systems** established/executed/installed; **insurances** required are in place.
  - Covenants on the **provision of information** on the status, use, location of the aircraft, further on damages and claims and events of default.
  - Obligation to procure that accurate, complete and current **records of all flights** are kept and may be inspected at any time.
  - Provisions regarding the use of **automatic flight reporting/tracking systems**.
  - Obligations to **use the aircraft** only in accordance with the insurance policies.
  - **Indemnity provisions**, in particular with regard to damages occurring during flights not covered by the insurance.

# Key contractual issues

- **Insurance provisions:**
  - Areas where the aircraft is being flown are covered.
  - Specific excluded areas written back into the policy.
  - In case of a loss or damage outside the geographical limits, Lessee/Borrower shall pay to lessor/financier insured value of the aircraft.
- **Terminate the contract** before a loss incurred: Failure to insure the aircraft and the use of aircraft not covered by the insurance established as **events of default**.
- **Governing Law provisions** making clear that the courts of the jurisdiction will enforce a choice of governing law.
- **Dispute resolution clause** providing for exclusive or non-exclusive jurisdiction to be granted to stated courts, or providing instead for settlement of disputes by arbitration.

# Overview

- Key considerations before starting transaction
- Key contractual issues
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## Conclusion

- Know your Counterparties with regards to their solvency.
- Establish additional securities, if needed.
- Ensure permanent and full insurance coverage in all areas the aircraft is operated in and corresponding behaviour.
- Make sure that your rights and possible judgements with regard to the transaction documents are enforceable.
- Get as much and as prompt information on the operation of the aircraft and the business conduct and financial status of the counterparty as possible.
- Ensure that you can terminate the contract if the aircraft is not used in accordance with insurance coverage.

Thank you for your attention!

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