# AIRCRAFT REPOSSESSION – TIPS FOR LESSORS AND FINANCIERS

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**Rarely, if ever, are two aircraft repossessions the same. Whilst there is no "one size fits all" approach or solution to repossession, in this article we highlight certain matters that should be considered in any contentious or potentially contentious situation, wherever in the world it may arise. The primary focus is on repossessions under an aircraft operating lease, although many of the points are relevant in other scenarios where possession of an asset is sought.**

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Every repossession presents its own challenges. These may include the need to take time-critical action, sometimes within a very short window, to avoid losing the opportunity – quite possibly for a long time – to recover the asset; the location and/or jurisdiction where the asset is situated may be a "difficult" one; the need to engage with multiple parties, such as airports and government authorities and agencies, to gain access to and recover the asset and, if necessary, remove it from the territory where the repossession occurs; the specific legal requirements which must be satisfied may vary significantly from one jurisdiction to another; and important tactical and commercial considerations that need to be factored into the overall strategy that is to be adopted in order to achieve the quickest and most cost effective recovery.

## IS A CONSENSUAL RETURN POSSIBLE?

It is stating the obvious but, if one can be achieved, a consensual return is the best outcome for all parties in a repossession situation:

- it avoids them becoming involved in at least one potentially complex legal process with uncertainty of outcome and, depending on the jurisdiction(s) involved, a range of hurdles that need to be overcome;
- the cost and time burden on the parties, including management and other personnel time, will be much greater in a contentious repossession than if an amicable resolution can be achieved; and
- it may help to preserve the relationship between the parties and/or avoid their reputation in the industry suffering serious damage, particularly if they are seen to be involved in a public spat.

In short, it is worth exhausting all avenues which could result in an agreed return before going down the contentious route. Assuming that it is possible to do so under the applicable laws, appropriate use of discussions or communications which are not permitted to be referred to in any dispute resolution process that ensues if no resolution can be reached (referred to as the without prejudice rule in certain jurisdictions) may help.

## PREPARATION IS KEY

Timing issues may mean that it is not feasible to address all the things that ideally should be considered prior to a repossession. However, repossessing parties should always:

- Comply with all requirements that must be met in order to exercise the right to repossess:

  - details of the circumstances in which the ability to repossess the asset is available and the requirements that have to be satisfied (usually described as events of default) are of course likely to be set out in the relevant transaction documentation. It is essential to ensure that all those criteria have been satisfied. For example, has any applicable grace period relating to non-payment expired, or has any notice which is required been issued? Particular care is required if there is a need to rely on insolvency-related defaults, defaults which are triggered by a party suspending payments and clauses which entitle a party to call a default if there has been an adverse change in the other party's position or circumstances. These types of events of default tend to be those that are most susceptible to challenge (and indeed are unenforceable in some jurisdictions) and so careful consideration is required as to precisely what they mean and cover; and
  - if it is necessary to give notice of the exercise of a right or remedy, ensure that all requirements that apply to such notices – including any about content as well as the method of service – are met. This ought to be a simple exercise of tracking the language of the relevant clause(s) of the document under which the notice is being issued. Great care should be exercised to avoid a situation where the notice is invalid, or technically insufficient, which could impact on the ability to exercise a right or remedy and, in the worst-case scenario, might result in the party which sought to issue the notice being in breach of the agreement in question. The applicable law may step in to save a minor breach of a notice requirement from rendering the notice invalid, but why take the risk? If in doubt, serve a further notice, while maintaining that the prior one was valid.

> "Establish at the outset whether the Cape Town Convention (CTC) applies."

- identify any particular features of the jurisdiction(s) involved in the repossession which need to be addressed. For example:

- establish at the outset whether the Cape Town Convention ("CTC") applies. Whether or not it applies could have a significant impact on the remedies that are available to the party seeking repossession, such as the provisions under the CTC relating to advance court relief pending final determination of a claim and those governing deregistration and export of aircraft and the time periods by which such relief/remedies should be granted. If the CTC does apply, it is important to consider any declarations that have been made by the relevant contracting state concerning the remedy provisions. If the CTC does not apply, the outcome may be much more influenced by relevant local laws, rules and procedures;
- have there been instances where parties have found it difficult, or impossible, to obtain remedies which, according to the relevant transaction documentation and/or the applicable laws and procedural rules, ought to be available? Where the CTC applies, have there been any precedents where a party has been denied a remedy under the CTC to which it should have been entitled, or the availability of the remedy was subject to terms that were not compliant with the CTC? Examples include advance relief remedies not being granted within the "speedy relief" period specified in a declaration made by a contracting state – resulting in the party seeking repossession having to wait longer, sometimes a lot longer, than was to be expected – and the lack of regulations relating to IDERA recordation and enforcement – which may hinder the deregistration and export process once physical possession of an aircraft has been recovered;
- even if "self-help" remedies are available, is it preferable to obtain relief from a court? Given the various practical and other steps which are typically involved when attempting to obtain possession of an asset, having the benefit of a court order may be the better option and may help to smooth the repossession process;
- bear in mind the possibility that action may be required in more than one jurisdiction. Unless there is a real problem in doing so, the initial action of obtaining or order for possession of the asset is always best taken in the jurisdiction in which the asset is located because it may not be possible, or may take time, to enforce in that jurisdiction an order for possession which has been obtained in another jurisdiction. Further, there may be reasons (including contractual requirements) to bring an action for the substantive claims in a jurisdiction other than where the asset is located, such as a final declaration that the leasing of the asset has been terminated and a damages or debt action for sums owed under the relevant transaction documents. Sometimes it is necessary for such actions to be brought very promptly in order to maintain any interim relief that has been obtained; and
- particularly in situations where the CTC does not apply, be aware of any requirements that must be complied with in order to deregister and export an aircraft.

## FURTHER CONSIDERATIONS

There are various other points worth considering, some of which are legal, others of a more practical nature. Not all of them will apply in all repossession situations but the following is a non-exhaustive list of things to have in mind:

- whilst past performance may not be a guide to future performance, monitor the activity of the asset, not just in the period immediately prior to the time when you wish to try to recover it, and use the best resources available to track what it has been doing;
- promptly complete any applicable procedural requirements regarding the instruction of counsel. For example, in some jurisdictions it is necessary to grant a power of attorney in their favour (which may need to be legalised and/or notarised) before they can represent you. Do not allow such matters to delay things at the outset and risk losing the opportunity to repossess;

- check that adequate insurance arrangements will be in place during the course of the repossession process and once physical possession has been obtained. If the situation ever arises where any AVN67B cover that was in place ceases, it will be necessary to establish if alternative cover will be immediately available;
- aircraft records and maintenance and repair logs are critical both during repossession and in post-repossession remarketing. The absence of some or all aircraft records and logs can affect the ability to insure and re-lease an aircraft. Any consensual repossession should include an undertaking to ensure that all aircraft records and maintenance and repair logs are delivered on or with the aircraft. For non-consensual repossession, orders and judgments should expressly address and include the return of all aircraft records and maintenance and repair logs;
- particular considerations apply in relation to engines. If you are looking to recover an engine which is installed on someone else's airframe, or another party is looking to recover their engine which is installed on your airframe, check what documentation/provisions are in place which govern the parties' rights in relation to such engines. Ideally, establish a constructive dialogue between the engine and airframe owners; and
- be alive to the possibility of liens and/or detention rights being asserted over the asset which may hinder the repossession process. The nature of such liens/rights and the circumstances in which they arise depend on the jurisdictions involved, but examples include unpaid airport or navigation charges (including the well-known "fleet lien" under English law whereby, in essence, an aircraft may be detained by a UK airport or the UK Civil Aviation Authority for amounts owed by the operator of that aircraft at the time when the detention begins even if no amount was owed in relation to the detained aircraft); liens in favour of airline employees for unpaid wages; or liens for unpaid taxes. It may not be possible to avoid them, in which case they will simply have to be paid off in order to recover the asset, although it is always worth exploring the possibility of reaching a settlement with the party who has the benefit of the lien or detention right.

## FURTHER READING AND INFORMATION

Data for repossession and deregistration rights, as well as restructuring procedures, for 100+ jurisdictions globally can be found in the **Global Aviation Resource Index ("GARI")**, an invaluable tool not just for the immediate consideration of any aircraft and engine repossession and restructuring matters, but also in the planning of new aircraft and engine finance and leasing transactions. Click here to learn more about GARI.


Another extremely useful resource is the Cape Town Convention Compliance Index, established and maintained by the Aviation Working Group, which monitors and assesses the implementation and application of the CTC in countries that have ratified it.

Should you wish to discuss any of the matters addressed in this article, or if you have any questions about aircraft or engine repossessions, please speak with a member of our global aviation dispute resolution team, or your regular contact at WFW.

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