

Repossession of aircraft in Russia: practical and legal issues

Introduction

This briefing gives an overview of the main steps involved if seeking to repossess an aircraft (the "**Aircraft**") leased to a Russian operator/airline (the "**Lessee**") and operated from the territory of the Russian Federation with a focus on major issues that are likely to arise in this respect.¹

Where a repossession claim concerns legal entities or individual entrepreneurs, it will be heard by the Russian arbitrazh courts² (the "**Arbitrazh Courts**" or an "**Arbitrazh Court**"), which are state commercial courts with jurisdiction in economic disputes between parties that are Russian or foreign legal entities or individual entrepreneurs.³

Requirements to register the Aircraft operated by the Lessee

In order for the Lessee to be able to use the Aircraft in the Russian airspace, such Aircraft must be registered in the State Register of Civil Aircraft of the Russian Federation or in a relevant register of a foreign state provided that such state has concluded an agreement on maintenance of continuing airworthiness with the Russian Federation.⁴

The majority of the aircraft leased from non-Russian companies (the "**Lessors**") to Lessees and operated in Russian air space are registered outside the Russian Federation as this proves to be more efficient from regulatory, technical, tax and customs purposes.⁵

Current market practice in leasing of the Aircraft registered abroad and financing of such transaction is to govern the Aircraft lease agreement (the "**Lease Agreement**") and other transaction documents by English or New York law. At the same time, disputes arising out of or in connection with the Lease Agreement and other transaction documents (the "**Disputes**") are usually referred to jurisdiction of a certain foreign court (often New York or English courts) or an international arbitration forum.

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¹ This briefing does not purport to give a detailed overview of all issues that may come up during any aircraft repossession. Specific advice should be sought before any actions are taken for the purpose of individual repossession.

² The Russian term "*arbitrazh*" must be distinguished from the English "*arbitration*", as the latter is an independent tribunal whose jurisdiction requires the consent of the parties.

³ In few cases the Arbitrazh Courts have jurisdiction in a dispute even if it involves a private individual.

⁴ Article 33 of the Air Code of the Russian Federation.

⁵ Currently most frequently used jurisdictions for registration are Ireland and Bermuda.

Most Lease Agreements (for operating leases or finance leases) provide that, following a default on the Lessee's part, the Lessee, if the Lessor (or lenders) so requests, shall return the Aircraft to the Lessor, and if the Lessee fails to return the Aircraft, the Lessor has a right to repossess the Aircraft. In fact, however, any self-help remedy in respect of aircraft repossession is impossible in the territory of the Russian Federation, and the assistance of an Arbitrazh Court will be required to repossess the Aircraft.

Choice of law governing the Lease Agreement

The Lessee can agree that the relevant Lease Agreement shall be governed by foreign law (the "**Choice of Law**"), provided that a foreign element (e.g. a foreign entity or a foreign asset) is present in relations between the parties to the Lease Agreement. An Arbitrazh Court shall recognise the Choice of Law unless such Choice of Law contradicts the public policy of the Russian Federation or imperative norms of Russian legislation (that cannot be overcome by different regulation established by the Choice of Law).⁶

The choice of foreign law as governing the Lease Agreement may not contradict public policy per se. However, Russian law provides that a lease agreement in relation to immovable property located in Russia shall be governed by Russian law, and there is a view that an aircraft is immovable property as a matter of Russian law (as explained below), in which case, there is a risk that the Choice of Law may be disregarded, and Russian law may be applied to the Lease Agreement (in which case determination of validity and enforceability of the Lease Agreement will be undertaken in accordance with Russian law).

If an Arbitrazh Court applies Russian law and establishes that the Lease Agreement is invalid as a matter of Russian law, it may dismiss the Contractual Claim (as defined below) based on such Lease Agreement. Following that, the claimant will have to file the Vindictory Claim (as defined below) (which is used when there are no contractual relations between a claimant and a defendant with respect to the aircraft). As a result of having to file a Vindictory Claim, the repossession of the Aircraft will be delayed.

If an Arbitrazh Court applies Russian law and comes to a conclusion that the Lease Agreement is valid and enforceable, it may further apply Russian law to other provisions of the Lease Agreement, including the provisions on termination of the lease and redelivery of the Aircraft.

It is likely that termination of the lease and claiming a Contractual Claim for redelivery of the Aircraft may not be effective under Russian law. The most likely way to

repossess the Aircraft in this case will be to terminate the Lease Agreement itself and to file the Vindictory Claim by the owner of the Aircraft.

Under Russian law, termination of an agreement in the absence of the mutual consent of the parties is possible upon an Arbitrazh Court's decision or by way of unilateral refusal by the terminating party to perform an agreement in the cases where such refusal is stipulated by law or permitted by the agreement itself (e.g. in the case of material breach of contractual obligations by the counterparty).

If the Lease Agreement allows unilateral refusal to perform obligations by the Lessor and the Lessor exercises this, such Lease Agreement shall be considered terminated, and the Lessor will have a right to claim possession of the Aircraft from the moment of notification to the Lessee. However, if the Lessee does not voluntarily return the Aircraft to the Lessor, no self-help remedies are permitted, and an Arbitrazh Court's judgment will still have to be obtained.

If a Lease Agreement is to be terminated upon on Arbitrazh Court's decision, then before claiming to terminate the Lease Agreement in an Arbitrazh Court, a lessor shall demand that a lessee duly perform its obligations thereunder in a timely manner. If an Arbitrazh Court is not provided with evidence of such demand to the Lessee, then an Arbitrazh Court will refuse to terminate the Lease Agreement.

Choice of an Arbitrazh Court/ international arbitration. Jurisdiction of the Arbitrazh Courts in relation to the Claims.

The Lessor should consider which forum would be most convenient for the purpose of the Aircraft repossession.

As we mentioned above, parties to Lease Agreements often refer Disputes to international arbitration or to jurisdiction of a foreign court, such as English courts or New York courts.

Despite the choice of foreign law to govern the Lease Agreement, and the choice of submitting Disputes to foreign courts/arbitration, there is a risk that the Arbitrazh Courts may assume their exclusive jurisdiction over the Disputes.

In the end, the Lessor is usually left with three "options" for dispute resolution:

- (a) International arbitration tribunal (if it is envisaged by the Lease Agreement);
- (b) Foreign court; or
- (c) Arbitrazh Court.⁷

⁶ In some cases, parties to the agreement cannot choose foreign law as governing. For example, agreements in relation to land plots located in Russia shall be governed by Russian law.

⁷ Even if the parties did not submit the Disputes to the jurisdiction of the Arbitrazh Courts.

In deciding which option to follow, the Lessor should take into account the following.

Enforceability of foreign judgments and arbitral awards in Russia

If an arbitral award (the "**Arbitral Award**")/ a court judgment (the "**Foreign Judgment**") on repossession of the Aircraft is delivered abroad but the Aircraft is grounded in Russia, the Arbitral Award or the Foreign Judgment will need to be recognised and enforced by an Arbitrazh Court.

The procedure for enforcing the Arbitral Award and Foreign Judgment differs.

As a general rule, the Foreign Judgment can be recognised and enforced in Russia only if there is a treaty on mutual recognition and enforcement of court judgements between a state where the Foreign Judgment was rendered and the Russian Federation. There are very few states with which the Russian Federation has concluded treaties for recognition and enforcement of Foreign Judgments.⁸ If there is no international treaty between Russia and a state where the Foreign Judgment was rendered, theoretically, such Foreign Judgment can still be recognised and enforced in Russia based on the principle of reciprocity. There were a few instances in which the Foreign Judgment rendered by English courts was recognised and enforced in Russia on the basis of a combination of the principle of reciprocity and the existence of a number of other bilateral and multilateral treaties to which Russia and the United Kingdom were both parties. In the absence of established court practice, however, there is a substantial risk that a Foreign Judgment will not be recognised and enforced in Russia where there is no international treaty between Russia and a country where such Foreign Judgment was rendered.

The situation is significantly better in relation to the Arbitral Award, as Russia is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**1958 New York Convention**"), which establishes grounds for recognition and enforcement of the Arbitral Award in the Russian Federation. Most of the countries where the frequently used arbitration institutions are located⁹ are parties to the 1958 New York Convention, and Arbitral Awards rendered by such institutions are usually recognised and enforced in Russia.

To have an Arbitral Award/Foreign Judgment recognised and enforced in Russia, a party to arbitral proceedings/ litigation must file an application for recognition and enforcement of an Arbitral Award/

Foreign Judgment in the Russian Federation with a relevant Arbitrazh Court at the place where the relevant debtor is located¹⁰ (i.e. the Lessee), or, if its place is unknown, at the location of the Lessee's assets.

The applicant must submit the following documents, among other things, to an Arbitrazh Court, with translations¹¹ into Russian (if necessary):

- an original or a duly certified copy of an Arbitral Award/a Foreign Judgment;
- an original or a duly certified copy of an arbitration agreement (in case recognition and enforcement of an Arbitral Award is sought);
- a document certifying that an Arbitral Award/ a Foreign Judgment has come into force, unless it is clear from an Arbitral Award/ a Foreign Judgment itself;
- an original or a duly certified copy of a document certifying that the Lessee was notified of the arbitral¹² proceedings/litigation correctly and in a timely manner;
- a power of attorney authorising a signatory to sign an application on recognition and enforcement of an Arbitral Award/ a Foreign Judgment.

Arbitrazh Courts tend to enforce Arbitral Awards. Russian law does not prohibit the enforcement of Arbitral Awards which grant specific performance (e.g. which order the Lessee to re-deliver the Aircraft).

However, there is a substantial risk that an Arbitrazh Court may refuse to recognise and enforce an Arbitral Award on repossession if it finds that the repossession claims fall within the exclusive jurisdiction of Arbitrazh Courts and/or are not "arbitrable".¹³

In particular, under Russian law, disputes relating to rights to immovable property situated and/or registered in Russia are considered to be not arbitrable and are within the exclusive jurisdiction of the Arbitrazh Courts. Aircraft are considered to be immovable property under Russian law and there is a strong view that even if the Aircraft is registered outside of Russia it should be treated as immovable property under Russian law if it is physically located¹⁴ in Russia.

¹⁰ For these purposes, the debtor is presumed to be located at its legal address, which is indicated in its charter documents.

¹¹ If an Arbitrazh Court requires that a document is translated into Russian language, it will only accept translations performed by a certified translator whose signature is evidenced by a Russian notary.

¹² The Russian term "*arbitrazh*" must be distinguished from the English "*arbitration*", as the latter is an independent tribunal whose jurisdiction requires the consent of the parties.

¹³ Meaning that only state courts have a right to hear certain disputes.

¹⁴ "location" definition will be considered further.

⁸ For instance, the Russian Federation has such treaties with Cyprus, Spain, Italy, but does not have such treaties with the United Kingdom and the United States of America, jurisdictions to which Disputes are often referred to.

⁹ E.g. Sweden, UK, France

Moreover, there have been cases in which the Arbitrazh Courts have shown an "anti-arbitration" approach, refusing to enforce Arbitral Awards on purely formalistic grounds or invoking a broad interpretation of public policy.

Non-recognition of a Foreign Judgment and an Arbitral Award does not prevent a party from filing a Claim (as defined below) to an Arbitrazh Court. In this case, an Arbitrazh Court will not be bound by a Foreign Judgment or an Arbitral Award and will review the case on its merits.

Therefore, on the basis that there may exist certain concerns regarding recognition by Arbitrazh Courts of a foreign court/international arbitration jurisdiction over any Disputes, it may be that an application to an Arbitrazh Court is the most advisable method of seeking to repossess the Aircraft if it is physically located in Russia.¹⁵

Jurisdiction of Arbitrazh Courts

Depending on the circumstances of a particular case, a Claim may be heard by an Arbitrazh Court at the location of a Lessee's headquarters or at the "location" of the Aircraft. A uniform approach to the determination of the "location" of the Aircraft under Russian law does not exist. The Aircraft's "location" may be determined by an Arbitrazh Court at its discretion, in accordance with¹⁶ (i) its place of registration; (ii) its base aerodrome in the territory of the Russian Federation or (iii) its physical location. In some cases the Arbitrazh Courts found that the Aircraft is considered to be in Russia if the Lessee is located¹⁷ in the territory of the Russian Federation.¹⁸

Likely timing of the proceedings before the Arbitrazh Courts

Under the Arbitrazh Procedure Code, a judgment is to be rendered within three months following the receipt of a Claim by an Arbitrazh Court. In practice, this

requirement is sometimes ignored, and there is no legal recourse against a delaying Arbitrazh Court for non-compliance. As a practical matter, Arbitrazh Courts tend to pass judgments on the first date of the hearing on the merits (unless the issues raised in a claim are sufficiently complex to require postponing).

As a general rule, a judgment gains legal force one month after the date it is rendered in full. If appealed, a judgment does not gain legal force until the date when an Arbitrazh Court resolves the appeal.

Documents to be filed at the Arbitrazh Courts together with the Claim

Proceedings before the Arbitrazh Courts are commenced by filing a statement of claim (the "Statement of Claim").

Unlike many other jurisdictions, the Arbitrazh Procedure Code requires that the Statement of Claim is very detailed and specific, inter alia, the following:

- remedy which a claimant is seeking (if there are several defendants, then, the remedy a claimant is seeking against each of the defendants, shall be separately identified);
- rule(s) of law on which a claimant relies. If a Claim is based on a foreign law, the Statement of Claim shall cite rule(s) of that foreign law which a claimant is referring to;
- the circumstances on which a Claim is based with reference to particular pieces of evidence;
- the amount of the Claim (it is possible to change the amount of the Claim at a later stage of the proceedings but a claimant cannot claim an unspecified amount to be determined later);
- calculation of the amount of the Claim (the basis of this amount must be explained).

The following documents should be submitted to an Arbitrazh Court together with a Statement of Claim with a translation into Russian (if necessary):

- copies of the documents which are referred to in the Statement of Claim and on which the claim is based (including the Lease Agreement, and the acceptance certificate confirming that the Aircraft has indeed been transferred to the Lessee's possession);
- copies of a certificate of state registration of a claimant as a legal entity or an individual entrepreneur or any other document confirming that a claimant was established as a legal entity;
- if a Claim is based on foreign law, a legal opinion from a lawyer authorised to practice in the jurisdiction where such foreign law is used, or a law professor specializing in the law of that jurisdiction,

¹⁵ We represented Embarcadero Aircraft Securitization Trust Ireland Limited (an SPV serviced by Macquarie Aircraft Leasing Services (Ireland) Ltd.) in repossession proceedings against "Krasnoyarsk Airlines" relating to an aircraft registered in Ireland. On 2 March 2009 Arbitrage Court of Krasnoyarsk Krai granted the claim of our client and ordered Krasnoyarsk Airlines to re-deliver the aircraft.

¹⁶ The same approaches to the determination of the Aircraft's location can be applied by other authorities (e.g. customs authorities).

¹⁷ And then, regardless whether the Aircraft is grounded outside Russia, the Arbitrazh Court may assume its jurisdictions over the Dispute.

¹⁸ We are aware about one case where the Arbitrazh Court found itself competent to consider a claim relating to an aircraft registered in Belarus (decree of the Federal Arbitrazh Court for West-Siberian District in case No. F04-786/2006(20237-A45-17) dated 9 March 2006; similar considerations in the Decree of the Federal Arbitrazh Court for Far-Eastern District dated 14 February 2006 in case No. F03-A59/05-1/4118 in a dispute concerning a vessel). We represented the lessor repossessing an aircraft registered in Ireland from KrasAir in a Russian arbitrazh court.

as well as relevant statutes which such legal opinion cites;¹⁹

- documents evidencing that the copies of the Statement of Claim with documents attached to it were sent to all parties to the case;
- documents evidencing that the statutory fees for filing the Claim were paid;
- documents authorising the signatory of the Statement of Claim to sign it, for example the power of attorney or the documents confirming powers of the director to represent the claimant in the Arbitrazh Courts.

Other documents, which may need to be presented to an Arbitrazh Court, will depend on the nature of the Claim and will be confirmed on a case-by-case basis.

Interim measures

The following actions are available for securing a claim or for securing property interests of a claimant or other claim participants in the proceedings after the statement of the Lessee's is filed with an Arbitrazh Court:

- (1) attachment of the property or money of the Lessee that is either in possession or in a third party's possession,
- (2) prohibiting the Lessee and/or third parties from performing specific actions in respect of the subject of a dispute,
- (3) compelling the Lessee to perform actions to prevent damage to or depreciation of the disputed property;
- (4) assignment of the disputed property to the claimant or a third party;
- (5) halting the sale of property or the execution of an award;
- (6) other measures as found appropriate by an Arbitrazh Court.

Each of the above measures may be applied separately, or in combination. If requested and awarded, interim measures should correspond to a claimant's demands. The application for interim measures may be filed with an Arbitrazh Court together with the Statement of Claim (or indicated in the Statement of Claim itself) or later, once the proceedings have commenced, but in any case prior to issue of a judgment on the merits of the case by an Arbitrazh Court.

In order for interim measures to be introduced by an Arbitrazh Court, the claimant must prove that there is a risk that, if interim measures are not applied, it may be

difficult or impossible to enforce a future judgment. An Arbitrazh Court may also, at its own initiative, or upon the application of a respondent, demand counter-security.²⁰

The application for interim measures should be considered by an Arbitrazh Court no later than the day after it was filed, unless an Arbitrazh Court demands counter-security from a claimant. In this case the application should be reviewed no later than the day after the counter-security is provided by the claimant.

Type of claim

Subject to the provisions of the Lease Agreement and the actual termination of the Lease Agreement, there may be two possible ways of repossessing the Aircraft through an Arbitrazh Court:

- Lessor may file a claim requesting the Lessee to return the Aircraft in accordance with the terms of the Lease Agreement (if the Lease Agreement is effective and contains such provision) (the "**Contractual Claim**") (which is considered to be a contractual claim in kind); or
- Lessor/Aircraft owner may file a vindicatory claim with respect to the Aircraft (the "**Vindicatory Claim**") (which is considered to be a non-contractual claim *in rem*),

(together the "**Claims**", and a "**Claim**" means any of them).

The Contractual Claim gives advantages during enforcement under bankruptcy proceedings (described below), and gives more flexibility for novating the Lease Agreement to a new lessee (if there is such an option).

The Vindicatory Claim has a more narrow application, and most Arbitrazh Courts believe that it is not available if contractual relations exist between the owner and the possessor of the property (i.e. if the Lease Agreement is not terminated). Thus, the Vindicatory Claim may not be a solution, where the Lessor in parallel tries to novate the Lease Agreement (and, therefore, cannot terminate it).

Choice of the Claim should be considered on a case-by-case basis, as each of them has its advantages and disadvantages.

Monetary claims available during the Aircraft repossession

If the Lessor is entitled to repossess the Aircraft due to a default on the Lessee's side under the Lease Agreement, the Lessee is likely to also owe certain

¹⁹ An opinion usually covers the rights and obligations of the parties when the Lessee is in default, concentrating on a right of the Lessor to serve a termination notice and demand that the Lessee shall re-deliver the Aircraft.

²⁰ Counter-security is security provided by a claimant for the compensation of possible losses of the Lessee arising from the application for interim measures. The amount of counter-security shall not be less than one half of a claimant's property demands.

amounts of lease payments, as well as fines and damages to the Lessor.

If the Aircraft is repossessed pursuant to a Contractual Claim, and the Arbitrazh Court recognises the Choice of Law, then the amounts owed by the Lessee (including any liquidated damages under the Lease Agreement) shall be rewarded in full. However, if an Arbitrazh Court applies Russian law to the Lease Agreement,²¹ then it is likely that liquidated damages may be recognised as a penalty as a matter of Russian law and be reduced by an Arbitrazh Court if it comes to a conclusion that their amount does not commensurate with the consequences of the Lessee's breach of the Lease Agreement.²²

If the Lease Agreement is terminated and the Aircraft is repossessed pursuant to a Vindictory Claim, the claimant²³ shall demand that the amounts owed to it by the Lessee shall be calculated according to the provisions of the Lease Agreement up until the moment when the Lease Agreement was terminated, and from the moment of its termination, based on the rules on unjust enrichment.²⁴

If the Lease Agreement is recognised to be invalid, and following that, the Vindictory Claim is filed, the rules on unjust enrichment will be applied from the moment when the Aircraft was delivered to the possession of the Lessee at the outset of the lease.

In such cases, the amounts owed to the Lessor under the provisions on unjust enrichment will be calculated based on the usual rates of rent of an aircraft in Russia.²⁵ If the Lease Agreement is concluded on arm's-length terms, we believe that the amount of rent indicated in the Lease Agreement will be taken into account by an Arbitrazh Court when calculating such amounts.

Thus, the type of monetary claim available to the Lessor will depend on the type of Claim filed, but the total amount of actual receivables under each of the Claims remains open to an Arbitrazh Court's discretion.

Set-off of security deposit against the amounts owed by the Lessee

²¹ I.e. not recognising the Choice of Law.

²² On the grounds that they contradict imperative provisions of Russian law. Article 333 of the Civil Code of the Russian Federation.

²³ According to the prevailing court practice.

²⁴ Decree of the Presidium of the SAC RF dated 25 May 1999 No. 6222/98.

²⁵ Decree of the SAC RF dated 8 April 2008 No. 1051/08; Decree of the Federal Arbitrazh Court of the Urals District dated 14 April 2005 in case No. F09-858/05-GK; Decree of the Federal Arbitrazh Court of the Far-Eastern District dated 11 July 2006 in case No. F03-A24/06-1/2033.

Performance of the Lessee's obligations under the Lease Agreement is often secured by a security deposit (the "**Security Deposit**"). When certain amounts are due from the Lessee, the Lessor may want to set-off (the "**Set-Off**") the said amounts against the Security Deposit held by it, as this may prove more effective than claiming such amounts as part of a Contractual or Vindictory Claim.

Although the Lease Agreement if governed by foreign law may determine the conditions under which a Set-Off is effective, in the situation where an Arbitrazh Court may apply Russian law to the Lease Agreement, it is important to comply with certain mandatory provisions as of Russian law to make the Set-Off effective as a matter of Russian law.

Russian law provides that a Set-Off is effective from the moment when a debtor was notified about the Set-Off. Thus, it is important that the Lessee is duly notified in a timely manner about exercising the Set-Off, regardless of the provisions of the Lease Agreement and/ or law governing the Lease Agreement to the contrary.

Under Russian law, a Set-Off is treated as a transaction, and on that ground it can be challenged by a bankruptcy administrator of the Lessee if the Set-Off was made after a petition on the Lessee's bankruptcy was filed, or within one (1) month – three (3) years before such petition was filed,²⁶ if the Set-Off leads to preferential satisfaction of demands of one creditor and violates the rights of other creditors of the Lessee.

In bankruptcy proceedings, the Lessor is a third priority²⁷ creditor, and there is a substantial risk that the Set-Off will violate preferential creditors' rights, and thus can be challenged during the relevant hardening period.

Once supervision (one of the earliest bankruptcy stages) has commenced with respect to the Lessee, the Set-Off is prohibited if it leads to the preferential satisfaction of demands of one creditor and violates the rights of other creditors of the Lessee.

Bankruptcy of the Lessee

If bankruptcy proceedings have commenced with respect to the Lessee, and the Lease Agreement has not been terminated either by the Lessee or its bankruptcy administrator²⁸ or the Lessor, then the rights of the Lessor under the Lease Agreement will continue as against the Lessee's estate in bankruptcy. The

²⁶ Hardening period depend on the ground for challenging of the particular transaction.

²⁷ Claims of employees, tax and other duties due to the Government, claims under copyright agreements, compensation of moral harm, claims secured by mortgages and pledges and certain other claims will have priority over the claim of the Lessor.

²⁸ External administrator has a power to terminate transactions of the Lessee within three months since the external administration has been commenced in relation to the Lessee.

Aircraft itself, not being the Lessee's property,²⁹ shall not be included to the Lessee's bankruptcy estate.

Bankruptcy proceedings have several stages under the Federal Law on Insolvency dated 26 October 2002 (the "**Insolvency Law**"), and starting from supervision,³⁰ writs of execution with respect to the Vindictory Claims can only be enforced if they have come into force before commencement of a relevant stage of bankruptcy.³¹

The Insolvency Law does not specify if enforcement of a writ of execution in relation to a Contractual Claim should be suspended for the duration of the bankruptcy proceedings or until the relevant stage has been commenced. We are aware of an approach of the Arbitrazh Courts that no such suspension should take place, since suspension is provided only in respect of judgments concerning property owned by the debtor, whereas the Contractual Claim relates to the Aircraft that does not belong to the debtor (the Lessee).

Detention/arrest of the Aircraft on the ground of the Lessee's liabilities before third parties

If the Lessee's creditors other than the Lessor have claims against it, they may attempt to facilitate the performance of certain of the Lessee's obligations by detaining the Aircraft that should be passed to the Lessee or a person indicated by the Lessee. Detention of an asset as a security is recognised as legal and valid only if the debtor has willingly and on the legal grounds passed such property to the detaining creditor. Provided that the Lessee has not transferred the Aircraft to the possession of a detaining creditor willingly, and the Aircraft is possessed by the Lessee only on the basis of the Lease Agreement (rather than having ownership title to it), actions of a detaining creditor may be challenged.

Customs authorities are entitled to arrest the Aircraft for breach of the custom procedure by the Lessee. The arrest will be considered as a precautionary measure that is supposed to prevent the Lessee from further breach of the customs legislation.³²

Export of repossessed Aircraft

After the Aircraft is repossessed the Lessor/Aircraft owner will have to deal with export of the Aircraft,

obtaining permission to use Russian air space to be able to fly the Aircraft out of Russia and tax/customs clearance.

A deregistration power of attorney from the Lessee allowing the Lessor to de-register the Aircraft (a "**DPoA**") (being a standard device utilised in aircraft repossession outside the Russian Federation,) may not be a reliable instrument in Russia, as it is not clear whether Russian authorities and the Arbitrazh Courts will recognise such DPoA.

If a DPoA governed by English law was issued in the territory of the Russian Federation, then the provisions of Russian law on its term and grounds for termination will apply.

If a DPoA does not specify for what period it is effective, then it is effective for one year from its issuance, or, if it is issued for actions to be performed outside Russia and it notarised, then it will be effective until it is revoked by the issuer. Also, an issuer can always revoke a power of attorney despite any provisions to the contrary in its text.

To export the Aircraft, the Lessor will have to file a customs declaration and supplementary documents³³ to the relevant local division of the Federal Customs Service (the "**FCS**") before the Aircraft crosses the Russian Federation border. As a matter of practice, it may take a substantial period of time to liaise with the FCS. Other questions of customs clearance will depend on the circumstances of the Aircraft's import procedure and the effective customs procedure applied to the Aircraft on the territory of the Russian Federation/the Customs Union.³⁴

It may be useful for the Lessor simultaneously with repossession to consider the possibility of leasing the Aircraft to another lessee in the territory of the Russian Federation, rather than to export the Aircraft. If the defaulting Lessee is cooperative, such transfer of the Aircraft may be possible by way of novation of the Lease Agreement. However, this may be done only before termination of the Lease Agreement and entry into force of any Arbitrazh Court decision on repossession of the Aircraft. The possibility of such

²⁹ Under an operative Lease Agreement, title to the Aircraft is never transferred to the Lessee, and under a financing Lease Agreement, once title is transferred to the Lessee, then, the Lessor will not be able to repossess the Aircraft.

³⁰ Which is followed by financial rehabilitation, external management and bankruptcy management.

³¹ I.e. if a writ of execution came into force during supervision, it can only be enforced during the next stage (e.g. financial rehabilitation).

³² We are not aware of recent practice where customs authorities applied arrest against the leased aircraft.

³³ Documents confirming the information containing in the declaration, for instance, the sale-purchase contracts and other agreements, commercial documents available, transportation documents, payment and accounting documents, documents confirming the information about the person making the declaration, documents confirming the stated custom value and the method of its determination.

³⁴ Aircraft leased to Russian operators are usually transported to the Russian Federation/the Customs Union as basic production assets under the customs procedure for temporary import. This procedure which is available to a Lessee, subject to permission of the customs authority, gives an opportunity to import the Aircraft without customs duty and import VAT for a period not exceeding thirty four (34) months and ends with transfer into the procedure of internal use with payment of the outstanding amounts of customs duty and import VAT or re-export of the Aircraft.

transfer and risks related thereto should be considered separately in each case.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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