

Repossession of Aircraft in Russia: Practical and Legal Issues

This briefing gives an overview of the main steps involved if seeking to repossess an aircraft leased to a Russian operator or airline and operated from the territory of the Russian Federation, with a focus on the major issues that are likely to arise.

This briefing does not intend 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.

Requirements to register an aircraft operated by the lessee

In order for the Russian lessee to be able to use the aircraft in Russian airspace, the aircraft must be registered in the State Register of Civil Aircraft of the Russian Federation or in the relevant register of a foreign state, provided such state has concluded an agreement for maintenance of continuing airworthiness with the Russian Federation.¹

The majority of aircraft leased by non-Russian lessors to Russian lessees

and operated in Russian airspace, are registered outside the Russian Federation, as this has proved to be more efficient for regulatory, technical, tax and customs purposes.²

The current market practice in leasing of aircraft registered abroad and the financing of such transactions is to make the aircraft lease agreement and other transaction documents subject to English or New York law. Disputes arising out of or in connection with the lease agreement and other transaction documents are expressed to be submitted to the jurisdiction of a foreign court agreed by the parties (often the English or New York courts) and/or an international arbitration forum.

Most lease agreements (whether operating or finance leases) provide that, following a default by the lessee, the lessee must return the aircraft to the lessor if the lessor (or the lenders to the lessor) so requests, and if the lessee fails to do so, the lessor has a right to repossess the aircraft. However self-help remedies in the case of aircraft repossession are not

Key issues

- Requirements to register aircraft operated by the lessee and choice of law governing the lease agreement
- Choice of an Arbitrazh Court/ international arbitration and procedural matters
- Type of claim and monetary claims available during aircraft repossession
- Set-off of security deposit against amounts owned by the lessee
- Detention/arrest of the aircraft
- Export of a repossessed aircraft

enforceable in the Russian Federation, and the assistance of a Russian Arbitrazh Court will most likely be required to repossess the aircraft.

Russia is a party to the Cape Town Convention (the Cape Town Convention on International Interests in Mobile Equipment) and the related Protocol (the Protocol on Matters specific to Aircraft Equipment) and the Convention entered into force for Russia with effect from 1 September 2011. One of the declarations made by Russia is that any remedy available to a creditor under any provision of the Cape Town Convention, which does not expressly require an application to the court, may be exercised out-of-court. At this stage it is not entirely clear how the Cape Town Convention and the "self-

¹ Article 33 of the Air Code of the Russian Federation.

² Currently most frequently used jurisdictions for registration are Bermuda and Ireland.

help" concept in particular will be applied in practice in Russia.

Choice of law governing the lease agreement

The lessee can agree that the relevant lease agreement will be governed by foreign law, provided that a foreign element (such as a foreign entity or a foreign asset) is present in the relations between the parties to the lease agreement. The Russian Arbitrazh Courts³ will recognise the parties' choice of law unless the law chosen is contrary to the public policy of the Russian Federation or imperative norms of Russian legislation (which cannot be overridden by the rules applicable under the law chosen by the parties).⁴

One of the declarations made by Russia in the Protocol to the Cape Town Convention relates to the free choice by the parties of the law governing the contract between them.

The choice of foreign law as the governing law of the lease agreement should not be considered in itself as contrary to Russian public policy. However Russian law provides that a lease agreement over immovable property located in Russia must be governed by Russian law, and, as a matter of Russian law, the legal regime for immovable property may apply to aircraft, as explained below.

³ State commercial courts with jurisdiction in economic disputes between parties that are Russian or foreign legal entities or individual entrepreneurs. In few cases the Arbitrazh Courts have jurisdiction in a dispute even if it involves an individual.

⁴ 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.

In that case there is a risk that the parties' choice of law may be disregarded, and Russian law may be applied to the lease agreement (in which case the validity and enforceability of the lease agreement will be determined in accordance with Russian law).

If an Arbitrazh Court applies Russian law and determines that the lease agreement is invalid as a matter of Russian law, it may dismiss a contractual claim for repossession under the lease agreement. In that event the lessor will have to file a claim for restitution of the aircraft, and repossession will be delayed.

If an Arbitrazh Court applies Russian law and determines that the lease agreement is valid and enforceable, it may apply Russian law to other provisions of the lease agreement, including those dealing with termination of the lease and redelivery of the aircraft.

It is not clear to what extent termination of the lease and a contractual claim for redelivery is enforceable under Russian law. The most effective way to repossess an aircraft in this case is likely to be by terminating the lease agreement and filing a claim for restitution.

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 rescission if so stipulated by law or by the agreement itself (for example in the case of material breach of obligations by the counterparty).

If the lease agreement provides for unilateral rescission by the lessor and the lessor exercises this right, then lease agreement will be treated as terminated, and the lessor will have a

right to claim possession of the aircraft upon notification to the lessee. However, if the lessee does not return the aircraft voluntarily to the lessor, the lessor will be unable to exercise self-help remedies and will have to seek a judgment from the Arbitrazh Court.

If a lessor wishes to seek termination of a lease agreement through the Arbitrazh Court, then it must first of all put the lessee on notice to perform its obligations and be able to demonstrate that it has done so to the Arbitrazh Court which will otherwise refuse to grant a decision for termination.

Choice of Arbitrazh Court or international arbitration. Jurisdiction of the Arbitrazh Courts in relation to claims under a lease agreement

The lessor should consider which forum would be most convenient for the purpose of repossession of the aircraft.

As mentioned above, parties to lease agreements often refer disputes to international arbitration and/or to the jurisdiction of a foreign court, such as the English courts or the New York courts.

Despite the choice of foreign law to govern the lease agreement, and the

agreement to submit disputes to foreign courts or arbitration, there is a risk that the Arbitrazh Courts may assume exclusive jurisdiction over disputes arising under it.

In practice, the lessor is usually left with three options for dispute resolution:

- (a) An international arbitration tribunal (if envisaged by the lease agreement);
- (b) A foreign court; or
- (c) The Arbitrazh Court.⁵

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

Enforceability of foreign judgments and arbitral awards in Russia

If a foreign arbitral award or court judgment is made or given, entitling the lessor to repossession of an aircraft which is situated in Russia, the award or judgment will need to be recognised and enforced by an Arbitrazh Court.

The procedure for enforcing arbitral awards and judgement differs.

As a general rule, a foreign judgment will only be recognised and enforced in Russia if there is a treaty on mutual recognition and enforcement of court judgements between the state where the foreign judgment was rendered and the Russian Federation. There is a number of states with which the Russian Federation has concluded treaties for recognition and

enforcement of foreign judgments.⁷ If there is no international treaty between Russia and the 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 a judgment rendered by the 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 if there is no international treaty between Russia and the country where such foreign judgment was rendered.

The situation is significantly better in relation to arbitral awards, as Russia is a party to the New York Convention (the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) which establishes grounds for recognition and enforcement of foreign arbitral awards in the Russian Federation. Most of the countries in which frequently used arbitration institutions are located⁸ are parties to the New York Convention, and awards rendered by them are usually recognised and enforced in Russia.

To have a foreign arbitral award or foreign judgment recognised and enforced in Russia, a party to arbitral

proceeding or litigation must file an application for recognition and enforcement of the award or judgment in the Russian Federation with the Arbitrazh Court at the place where the debtor (the lessee in our case) is located⁹, 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 translations¹⁰ into Russian (if necessary):

- an original or a duly certified copy of the award or judgement;
- an original or a duly certified copy of an arbitration agreement (in the case of an arbitral award);
- a document certifying that the award or judgment has come into force, unless it is clear from the award or judgment itself;
- an original or a duly certified copy of a document certifying that the lessee was notified of the arbitral or court proceedings correctly and in a timely manner;
- a power of attorney authorising a signatory to sign an application on recognition and enforcement of the award or judgment.

Arbitrazh Courts tend to enforce foreign arbitral awards. Russian law does not prohibit the enforcement of arbitral awards which grant specific performance (for example which order the lessee to re-deliver the aircraft).

However, there have been cases in which the Arbitrazh Courts have refused to enforce arbitral awards on

⁵ Even if the parties did not submit the Disputes to the jurisdiction of the Arbitrazh Courts.

⁶ 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.

⁷ 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.

⁸ E.g. Sweden, UK, France

⁹ For these purposes, the debtor is presumed to be located at its legal address, which is indicated in its charter documents.

¹⁰ 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.

purely formalistic grounds or invoking a broad interpretation of public policy.

There is also risk that an Arbitrazh Court may refuse to recognise and enforce a foreign award or judgement if it finds that the relevant claim falls within the exclusive jurisdiction of Arbitrazh Courts and/or is not "arbitrable".¹¹

In particular, under Russian law, disputes relating to rights to immovable property situated and/or registered in Russia fall within the exclusive jurisdiction of the Arbitrazh Courts. Clarifications from the Supreme Arbitrazh Court ("**SAC RF**") confirm that exclusive jurisdiction means that when such disputes are referred to state courts, they should be settled by Arbitrazh Courts rather than foreign courts. As mentioned above, aircraft are considered to be immovable property under Russian law and there is a view that even if an aircraft is registered outside Russia it should be treated as immovable property under Russian law if it is located¹² in Russia.

Non-recognition of a foreign judgment or arbitral award does not prevent a party from filing a claim with the Arbitrazh Court. In this case, the Arbitrazh Court will not be bound by a foreign judgment or arbitral award and will review the case on its merits.

In conclusion therefore, given the concerns regarding recognition by the Arbitrazh Courts of the jurisdiction of a foreign court or arbitral tribunal, an application to an Arbitrazh Court is the most advisable method of seeking

to repossess an aircraft if it is located in Russia.¹³

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. There is no uniform approach to the determination of the location of an aircraft under Russian law. The aircraft's location may be determined by an Arbitrazh Court at its discretion, in accordance with¹⁴ (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 have found that an aircraft is considered to be in Russia if the lessee is located¹⁵ in the territory of the Russian Federation.¹⁶ In our view the aircraft's location should be determined in accordance with its place of registration.

¹³ 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 the Arbitrazh Court of the Krasnoyarsk Region ruled in favour of our client and ordered Krasnoyarsk Airlines to re-deliver the aircraft.

¹⁴ The same approach to the determination of the Aircraft's location can be applied by other authorities (e.g. customs authorities).

¹⁵ And then, regardless whether the Aircraft is grounded outside Russia, the Arbitrazh Court may assume its jurisdictions over the Dispute.

¹⁶ We are aware of 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 ("**FAC**") for West-Siberian District in case No. F04-786/2006(20237-A45-17) dated 9 March 2006; similar considerations are noted in the Decree of the FAC for Far East District dated 14 February 2006 in case No. F03-A59/05-1/4118. We represented the lessor repossessing an aircraft registered in Ireland from KrasAir in a Russian arbitrazh court.

¹¹ Meaning that only state courts have a right to hear certain disputes.

¹² "location" definition will be considered further.

Probable timing of proceedings before the Arbitrazh Courts

Under the Arbitrazh Procedure Code, a judgment is to be rendered within three months of receipt of a claim by an Arbitrazh Court. In practice, this requirement is sometimes ignored. As a practical matter, the Arbitrazh Courts tend to pass judgment on the first date of the hearing on the merits (unless the issues raised in a claim are sufficiently complex to require adjournment).

As a general rule, a judgment enters into force one month after the date it is rendered in full. If appealed, a judgment does not enter into 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.

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

- The remedy which the claimant is seeking (if there are several defendants, then, the remedy a claimant is seeking against each of the defendants must 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 must cite the 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);
- a 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 the claimant as a legal entity or an individual entrepreneur or any other document confirming that the claimant was established as a legal entity;
- if a claim is based on foreign law, a legal opinion from a lawyer authorised to practise in the jurisdiction where such foreign law is used, or a law professor specialising in the law of that jurisdiction, as well as any relevant statutes which such legal opinion cites;¹⁷

- documents evidencing that the copies of the statement of claim with the documents attached to it were sent to all parties to the case;
- documents evidencing that the statutory fees for filing the claim have been paid;
- documents authorising the signatory of the statement of claim to sign it; this includes 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 to secure a claim or to secure the property of a claimant or other participants in the proceedings after the statement of the lessee's claim has been filed with an Arbitrazh Court:

1. attachment of the property or money of the lessee that is either in its 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 matter of a dispute,
3. compelling the lessee to take certain actions to prevent damage to or depreciation of the disputed property;
4. transfer 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 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. An application for interim measures may be filed with the 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 granting 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.¹⁸

An 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 are two possible ways of repossessing an aircraft through the Arbitrazh Court:

- The lessor may file a contractual claim requiring the lessee to return the aircraft in accordance

¹⁷ In the case of repossession of an aircraft 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.

¹⁸ 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.

with the terms of the lease agreement (if the lease agreement is effective and contains such a provision); or

- The lessor (or aircraft owner as well in this case) may file a claim for restitution of the aircraft (which is considered to be a non-contractual claim *in rem*).

A contractual claim for repossession has advantages during enforcement against a lessee in bankruptcy proceedings (described below), and provides more flexibility for novating the lease agreement to a new lessee (if one is available).

A claim in restitution 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 (which would be the case if the lease agreement has not been terminated). Thus a claim for restitution may not be a solution where the lessor at the same time wants to transfer the lease to a new lessee or wants to rely on contractual remedies under the lease agreement (and therefore is unable to terminate it).

The best type of claim to make for should be considered on a case-by-case basis, as each of them has its advantages and disadvantages.

Monetary claims available during aircraft repossession

If the lessor is entitled to repossess an aircraft due to a default by the lessee under the lease agreement,

the lessee is also likely to owe rent under the lease agreement as well as costs and damages to the lessor.

If the aircraft is repossessed pursuant to a contractual claim under the lease agreement, and the Arbitrazh Court recognises the parties' choice of law, then the amounts owed by the lessee (including any liquidated damages under the lease agreement) should be awarded in full. However, if an Arbitrazh Court applies Russian law to the lease agreement,¹⁹ then it is likely that liquidated damages will be treated as a penalty as a matter of Russian law and may be reduced by an Arbitrazh Court if the defendant objects and the court concludes that their amount is not commensurate with the consequences of the lessee's breach under the lease agreement.²⁰

If the lease agreement is terminated and the aircraft is repossessed pursuant to a claim in restitution, the claimant²¹ may demand that the amounts owed to it by the lessee be calculated according to the provisions of the lease agreement up until the moment when the lease agreement was terminated, and following termination according to the rules on unjust enrichment.²²

If the lease agreement is found to be invalid, and following that, a claim in restitution is filed, the rules on unjust enrichment will be applied from the moment when the aircraft was delivered to the Lessee at the start of the lease.

In such cases, the amounts owed to the lessor under the provisions on

¹⁹ I.e. not recognising the Choice of Law.

²⁰ On the grounds that they contradict imperative provisions of Russian law. Article 333 of the Civil Code of the Russian Federation.

²¹ According to the prevailing court practice.

²² Decree of the Presidium of SAC RF dated 25 May 1999 No. 6222/98.

unjust enrichment will be calculated based on the usual rates of rent of an aircraft in Russia.²³ If the lease agreement is concluded on arm's-length terms, we believe that the amount of rent payable under 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 actually payable under each of the claims remains open to the discretion of the Arbitrazh Court.

As a matter of Russian law if a finance lease terminates and the leased property (such as an aircraft) is repossessed, under certain circumstances the lessee will be entitled to recover part of the lease payments that were paid towards the purchase price of the leased property.²⁴ The lessor is thus regarded as both creditor and debtor of the lessee. Consequently, the lessor may be required to refund to the lessee some of those payments. There is a view that this principle is considered to be imperative norm of Russian law and as such should apply regardless of the law chosen by the parties to the lease agreement.

Set-off of security deposit against

²³ 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 East District dated 11 July 2006 in case No. F03-A24/06-1/2033; Decree of the Federal Arbitrazh Court of the East Siberia District dated 17 March 2015 in case No. A33-13747/2014.

²⁴ Decree of the Plenum of the SAC RF No. 17 dated 14 March 2014 "On Certain Questions Related to a Finance Lease Agreement".

amounts owed by the lessee

Performance of the lessee's obligations under a lease agreement is often secured by a security deposit. When amounts are due from the lessee, the lessor may want to apply or set-off such amounts against the security deposit, as this may prove more effective than claiming such amounts as part of a contractual claim or claim in restitution.

Although the lease agreement, if governed by foreign law, may determine when set-off can be used, if an Arbitrazh Court applies Russian law to the lease agreement, it is important to comply with certain mandatory provisions of Russian law to make the set-off effective.

Russian law provides that a set-off is effective from the moment when a debtor was notified of the set-off. It is therefore important for the lessee to be notified in a timely manner of the exercise of set-off, regardless of any provisions of the lease agreement and/or the 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 effected after a petition on the lessee's bankruptcy was filed, or within a period varying from one (1) month to three (3) years before such petition was filed,²⁵ if the set-off leads to preferential satisfaction of the claims of one creditor and prejudices the rights of other creditors of the lessee.

²⁵ Hardening period depends on the ground for challenging of the particular transaction.

In bankruptcy proceedings, the lessor claims have third priority²⁶, and there is a substantial risk that the set-off will prejudice the rights of preferred creditors, 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, set-off is prohibited if it leads to the preferential satisfaction of the claims of one creditor and prejudices 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 administrator²⁷ or the lessor, then the rights of the lessor under the lease agreement will continue as against the lessee's estate in bankruptcy. The aircraft itself, not being the lessee's property,²⁸ is included in the lessee's bankruptcy estate.

Bankruptcy proceedings have several stages under the Insolvency Law (the Federal Law on Insolvency dated 26 October 2002) and starting from supervision,²⁹ writs of execution with respect to claims in restitution can

²⁶ Current payments, claims of employees, 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.

²⁷ 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.

²⁸ 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.

²⁹ Which is followed by financial rehabilitation, external management and receivership.

only be enforced if the related judgments have come into force before commencement of the relevant stage of bankruptcy.

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. The Arbitrazh Courts have taken the view that no such suspension should take place, since suspension is applicable only in respect of judgments over property owned by the debtor, whereas the contractual claim in this case relates to an aircraft that does not belong to the debtor (the lessee).

Russia has made a declaration to the Protocol of the Cape Town Convention to the effect that the whole of Alternative A of article XI of the Protocol be applied in the course of all stages of insolvency proceeding to assets registered in accordance with the Cape Town Convention. This means that a bankruptcy administrator must return the asset to the creditor within 60 calendar days.

Detention/arrest of an aircraft on the ground of the lessee's liabilities to third parties

If the lessee's creditors other than the lessor have claims against it, they may attempt to force the lessee to perform those obligations by detaining an aircraft that should be available to the lessee or another person specified by the lessee. Detention of an asset as a security is legal and

valid only if the debtor has willingly and legally passed such property to the detaining creditor. If the lessee has not transferred the aircraft to the possession of a detaining creditor willingly and legally, and the lessee's possession of the aircraft is exclusively based on the lease agreement, the detention of the aircraft by a creditor may be challenged.

Customs authorities are entitled to arrest an aircraft for breach of the customs procedures by the lessee. The arrest is a precautionary measure designed to prevent further breach by the lessee of the customs legislation.³⁰

Export of a repossessed aircraft

After an aircraft has been repossessed the lessor or 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 and customs clearance.

A deregistration power of attorney from the lessee allowing the lessor to de-register the aircraft (which is standard practice for aircraft repossession outside the Russian Federation) may not be a reliable instrument in Russia, as it is not clear whether the Russian authorities and the Arbitrazh Courts will recognise such a power of attorney.

To export an aircraft, the lessor will have to file a customs declaration and

supplementary documents³¹ to the relevant local division of the FCS (Federal Customs Service) before the aircraft crosses the Russian 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 or the Customs Union.³²

It may be useful for the lessor simultaneously with repossession to consider, at the same time as repossession, the possibility of leasing the aircraft to another lessee in the territory of the Russian Federation, rather than exporting it. If the defaulting lessee is cooperative, the aircraft together with the lease agreement may be transferred to the new lessee. 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 transfer and the risks related thereto should be considered separately in each case.

³¹ 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 customs value and the method of its determination.

³² 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.

³⁰ We are not aware of recent practice where customs authorities applied arrest against the leased Aircraft.

Authors



Timur Aitkulov
Partner

T: +7 495 797 9892
E: timur.aitkulov
@cliffordchance.com



Victoria Bortkevicha
Office Managing Partner

T: +7 495 725 6406
E: victoria.bortkevicha
@cliffordchance.com



Julia Popelysheva
Counsel

T: +7 495 725 6444
E: julia.popelysheva
@cliffordchance.com

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