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Aviation Finance & Leasing

2019

Contributing editor**Mark Bisset**

Clyde & Co LLP

Lexology Getting The Deal Through is delighted to publish the sixth edition of *Aviation Finance & Leasing*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Argentina, Latvia, Nigeria, Qatar and Spain.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Mark Bisset of Clyde & Co LLP, for his continued assistance with this volume.



London

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Ukraine

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OVERVIEW

Conventions

1 | To which major air law treaties is your state a party?

Ukraine is a party to the Chicago Convention (1944), the Ottawa Convention (1988), the Cape Town Convention (2001) and the New York Convention (1958).

Domestic legislation

2 | What is the principal domestic legislation applicable to aviation finance and leasing?

The principal domestic legislation is the Civil Code of Ukraine, the Laws on External Economic Activities, the Law on the Procedure to Settle in a Foreign Currency, the Law on International Private Law and the Decree on Currency Regulation and Currency Control.

Governing law

3 | Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

There are no restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft.

TITLE TRANSFER

Transfer of aircraft

4 | How is title in an aircraft transferred?

Ukrainian law has no special provision regarding title transfer of aircraft as they are treated as any other movable asset. In practice, a bill of sale or a purchase contract is used for title transfer.

Transfer document requirements

5 | What are the formalities for creating an enforceable transfer document for an aircraft?

The only requirement of Ukrainian law in regard to a bill of sale or purchase contract is that it is simply written, including in electronic form. Parties to the bill of sale or purchase contract may do it in any language. A notarised and apostilled copy of the bill of sale accompanied by a certified translation into Ukrainian, if made in a foreign language, should be submitted to the State Aviation Service of Ukraine (SAS) in the case of aircraft registration in Ukraine.

SAS is located at:

14 Prospect Peremogy
Kiev 01135
Ukraine
Tel: +380 44 351 54 68

REGISTRATION OF AIRCRAFT OWNERSHIP AND LEASE INTERESTS

Aircraft registry

6 | Identify and describe the aircraft registry.

The Ukrainian Register of Aircraft (the Aircraft Register) is maintained by the SAS pursuant to the Aviation Rules part 147, Rules for the Registration of Civil Aircraft in Ukraine (the Rules), in the name of the owner. The Aircraft Register is operated under the Air Code of Ukraine, which provides for the mandatory registration of aircraft in one country only. The Aircraft Register was established in 1993 and is located in Kiev. It is a computerised register that may be looked through by any interested person at: <https://avia.gov.ua/rejestr-tsvilnih-povitryanih-suden-ukrayini/>. The Aircraft Register has no data on aircraft engines or aircraft mortgages. Under the auspices of The Commonwealth of Independent States, an agreement on practical use of article 83-bis of the Chicago Convention was executed on 9 December 1994. Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Ukraine and Uzbekistan are parties to it. It took effect in Ukraine on 13 May 1996.

Registrability of ownership of aircraft and lease interests

7 | Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

Any civil aircraft owned by either a foreign or national legal or natural person may be registered in Ukraine. There are no limitations on who can be recorded as owner. There are no other registers where ownership interests may be registered. Aircraft owned by foreigners are registered in Ukraine on the basis of the lease. Irrespective of that, it is not treated as registration of the owner's or lessor's interests in or over the aircraft. Aircraft engines are not registered in the Aircraft Registry, thus owners', operators' and lessees' interests are not reflected there.

Registration of ownership interests

8 | Summarise the process to register an ownership interest.

To register an aircraft at the Aircraft Registry one should submit to the SAS:

- a certified and apostilled copy of the title document for the aircraft (a bill of sale, purchase contract, etc). If they are written in a foreign language they should be accompanied by a certified translation into Ukrainian;
- any lease agreement, if the aircraft is subject to a lease. If it is executed in a foreign language it should be accompanied by a certified translation into Ukrainian;
- a written notification from the owner that he or she does not object to its sublease, in the case of a sublease;
- a document confirming the deregistration of the aircraft from the aircraft register of its previous registration (where applicable). The Rules state that an original of the document should be submitted. However, in practice, a fax message issued by the previous registry will be accepted by the SAS;
- the nationality and registration marks scheme of the aircraft. The nationality mark for Ukraine is 'UR'. The registration mark comprises digits or three Latin letters. Requirements as to the painting and the size of the letters, as well the digits of the marks, are set out in the Rules;
- a document (delivery acceptance certificate) confirming the physical transfer of the aircraft to the lessee (in cases where the aircraft is subject to a lease);
- a document from the SAS confirming receipt of the payment made for the corresponding aircraft registration fees; and
- two colour pictures of the aircraft with nationality and registration marks. The documents are considered within 10 working days. The aircraft is registered at the Aircraft Register if all requested documents are in good order and the aircraft is duly inspected by an SAS inspector.

There is no need for the consent of any government body (including the National Bank) as to the registration of an aircraft on the Aircraft Register. Prior to the registration of the aircraft, the owner or the lessee acting under its written authority (ie, by way of a power of attorney or direct allowance in the lease) must complete an application for the grant of nationality and registration marks for the aircraft. The allocation of these will be confirmed by means of a notification issued by the Aircraft Register. This notification will be valid for six months.

On the registration of the aircraft on the Aircraft Register, the following registration fees are payable:

- on registration – US\$4 per 100kg of maximum take-off weight of the aircraft (but no less than US\$70 and no more than US\$4,000);
- on the submission of an application for the issue of nationality and registration marks and the issue of a corresponding notification – 3.4 hryvnas per month; and
- on the registration of S-mode and the issue of the corresponding certificate – 51 hryvnas per month.

The general rule of the Civil Code is that an object with a destination to service another (main) object with which it is connected by mutual intended use, is an adjunct. This adjunct object follows the main one unless stated otherwise by an agreement. Correspondingly, the holder of the engine title should be decided in the agreement otherwise it will automatically vest in the owner of a host aircraft.

Title and third parties

9 | What is the effect of registration of an ownership interest as to proof of title and third parties?

The Aircraft Registry is the registry of nationality but not ownership. That is why the aircraft certificate that refers to the name and address of the aircraft expressly states that it does not certify the title to the aircraft. Correspondingly, third parties may not rely on the accuracy of the public registration of the ownership interest and the ownership interest is not effective against third parties.

Registration of lease interests

10 | Summarise the process to register a lease interest.

As we stated in question 8, a lease is one of the supporting documents to register an aircraft in Ukraine.

Certificate of registration

11 | What is the regime for certification of registered aviation interests in your jurisdiction?

Certificates or other evidence of registration are issued by the SAS. The certificate of aircraft registration identifies the aircraft, ie, states its nationality and registration marks, model and manufacturer's serial number, name and address of the owner, certificate validity term, lessee's name, date of the certificate issuance and reference that the certificate does not confirm the title to the aircraft. Stated information is bilingual – English and Ukrainian.

Deregistration and export

12 | Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

It should be noted that deregistration and export of the aircraft are two different actions that are carried out with the involvement of different authorities.

Deregistration

As registration with the Aircraft Registry is held in the name of the owner, deregistration of the aircraft may be done only with its consent unless a power of attorney is issued in the name of the lessee with authorisation to register or deregister the aircraft or with irrevocable deregistration and export request authorisation (IDERA). The SAS will seek the mortgagee's consent to deregister the aircraft if a mortgage is registered at the International Registry under the Cape Town Convention. For such registration, the mortgagee records the mortgage with the SAS, which issues the appropriate authorising entry point code. The current Ukrainian Aviation Rules give no clear obligation to the SAS to notify the owner or mortgagee of aircraft deregistration if the owner gave due authorisation for such actions to third parties, including the lessee. The deregistration process includes aircraft inspection, issuance of a certificate of deregistration and an export certificate of airworthiness. A certificate of airworthiness may be issued only to an operator duly certified as an air carrier in Ukraine. So, when an operator wants to block a proposed deregistration it can refuse to communicate with the SAS as to aircraft airworthiness. The Rules allow the receipt of a deregistration certificate without an export certificate of airworthiness. Only the Federal Aviation Administration accepts aircraft for registration without an export certificate of airworthiness.

Export

As approximately 95 per cent of commercial aircraft registered with the Aircraft Registry are leased, Ukraine legislation gives an incentive to local airlines by exempting them from VAT on aircraft importation. VAT-free import stipulates a temporary regime of import for a period of no more than three years, and issuance by an airline of an obligation to export the aircraft within the time frame stated in the customs clearance declaration. Correspondingly, only the airline may export the aircraft. So, if the operator wants to block aircraft export by an owner or mortgagee it can refuse to carry out the due formalities at customs.

Powers of attorney

13 | What are the principal characteristics of deregistration and export powers of attorney?

The Rules give no special authority to a holder of deregistration and export power of attorney (DPOA). Irrespective of that, an irrevocable DPOA may be issued by the owner in whose name the registration with the Aircraft Registry is held. An operator may also issue a DPOA but, due to peculiarities stated in question 12 above, it may not be used in practice in Ukraine. Usually a DPOA issued by operators may be used by owners or mortgagees abroad when they need access to the aircraft. A DPOA is not subject to registration and may be issued for more than one person. It does not survive the grantor's insolvency.

Cape Town Convention and IDERA

14 | If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Cape Town Convention has been in effect in Ukraine since 2012. To implement it, the SAS issued Instruction No. 16 dated 16 August 2013. According to it, an IDERA issued by a Ukrainian borrower in a form prescribed by the Aviation Protocol should be submitted to the SAS to countersign and register it in duplicate. If an IDERA is issued by an operator in the name of the lessor or owner's financiers, it should be accompanied by due agreements that confirm their interest in the aircraft. An IDERA is registered at the SAS for at least 10 working days, if not longer. One original IDERA is held by the SAS, another one is transferred to either the borrower or an authorised person.

SECURITY

Security document (mortgage) form and content

15 | What is the typical form of a security document over the aircraft and what must it contain?

The Law on Mortgages No. 2654-XII was enacted on 2 October 1992. It makes provision for non-possessory mortgages. The aircraft may be mortgaged by its owner only. The mortgage should contain the essence, amount and term of the secured obligation performance, a description of the aircraft as well as other terms agreed by the borrower and creditor. The Law states that mortgage of the aircraft is made in notarial written form either at the place of the aircraft registration or at the place of incorporation of one of its parties. The Ukrainian notary certifies the mortgage if the aircraft owner provides him or her with the certificate of aircraft registration at the Aircraft Register, and a notarised and apostilled bill of sale (or its notarised and apostilled copy). The mortgage is made in Ukrainian and may be accompanied with a translation into a foreign (English) language. Aircraft mortgages are registered in the Mortgage Register established under Law No. 830 on Security of Creditors' Claims and Encumbering Registration under

Procedure adopted by the Cabinet of Ministers dated 5 July 2004. The Mortgage Register contains information on the borrower and the creditor, a description of the aircraft, reference to the secured obligation, its maximum amount and maturity date.

Security documentary requirements and costs

16 | What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

To execute the mortgage before the Ukrainian notary, stamp duty equal to 0.01 per cent of the value of the aircraft should be paid (the execution fee). A registration fee of 34 hryvnas (corresponding to approximately US\$1.5) (the registration fee) is also payable:

- to register a foreign mortgage; or
- to amend a mortgage registration.

Each representative of the parties to the mortgage should confirm its authority for mortgage execution as well as the party's good standing. Good standing is proved by an extract from a company register. If it is out of a foreign register, it should be apostilled and accompanied by a certified translation into Ukrainian.

Security registration requirements

17 | Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

A security agreement is effective against the debtor if made in a form prescribed by law at the place of its execution. To be effective against third parties the mortgage should be perfected according to the requirements of the law at the place of its execution.

If the aircraft is registered in the Aircraft Register, the execution of the mortgage is usually made before the Ukrainian notary who records it in the Mortgage Register. If the aircraft is registered abroad, it is mortgaged abroad as well and, in such case, only an application on foreign executed mortgage is submitted to either a Ukrainian notary who makes the corresponding entry at the Mortgage Register or to the Mortgage Register directly. If a foreign executed mortgage is registered within 30 days of the aircraft import to the Ukrainian territory, the foreign executed mortgage is treated as perfected in Ukraine from the moment of the mortgage execution abroad.

The recordation of the mortgage is made under the application in a prescribed form to be submitted to the Mortgage Register. The mortgage itself is not recorded. In fact, only information about the mortgage is recorded on the Mortgage Register. The application is recorded if submitted by the mortgagee or its representative, who should sign it and identify himself or herself or prove the due authority under which he or she acts. Third parties are treated as notified from the moment of the mortgage recordation in the Mortgage Register on the same day of submission. Registration of the aircraft mortgage is treated as effective for the third parties from the date and time at which the corresponding entry is noted in the Mortgage Register. The effectiveness of this registration will continue up to the time of the satisfaction of the mortgagee.

Amendments to the details contained in the Mortgage Register will be effected by submitting an application (in the prescribed form) to the Mortgage Register. It should contain the following information:

- entry code and controlled sum of the original registration of the mortgage;
- reason for seeking the amendment of the Mortgage Register;
- information on the mortgagor, the mortgagee and the mortgage debt;

- the name, and address, of any assignee – if the mortgage has been assigned; and
- information on the termination or cancellation of the mortgage.

A person who submits the application for the amendment of the registered details of a mortgage must identify him or herself and his or her power to act. The fee to amend the Mortgage Register is indicated in question 16.

The mortgagee has the right to submit to the Mortgage Register an application (in the prescribed form) seeking the cancellation of the mortgage entry at any time. Once the debt secured by the mortgage has been satisfied, the mortgagee must notify the relevant registrar as to the satisfaction of the mortgage and seek its cancellation (deletion) from the Mortgage Register. This notification should be submitted within five days of the satisfaction of the main obligation. The notification should contain details of the original registration entry in respect of the mortgage.

A Ukrainian court under request of the borrower may order the cancellation of an aircraft mortgage from the Mortgage Register, if the mortgagee fails to do this. The judgment will refer to the original registration entry of the mortgage.

The cancellation (deletion) of the aircraft mortgage from the Mortgage Register will be made free of charge. An extract from the Mortgage Register confirms the cancellation.

Registration of security

18 | How is registration of a security interest certified?

The registration of the security interest is certified by an extract from the Mortgage Registry that is issued immediately, or the next day, after an application submission. It contains information on the date and time of the mortgage perfection, names of the mortgagor and mortgagee, a description of the aircraft, maximum secured amount and maturity date. The registration of the aircraft mortgage on the Mortgage Register will accord the mortgagee priority over other creditors over the aircraft. In the case where more than one mortgage over the same aircraft is registered on the Mortgage Register, their order of priority will be determined in accordance with their respective dates and times of registration.

The Law on Mortgages permits the creation of more than one mortgage over the same asset providing any prior registered mortgagees have given their consent, and the terms of the prior registered mortgage permit this.

Effect of registration of a security interest

19 | What is the effect of registration as to third parties?

The effect of the registration of an aircraft mortgage on the Mortgage Register is to accord priority of the creditor over subsequent security interests. Any person may rely on the accuracy of the public registration of the security interest as recorded in the extract from the Mortgage Register.

Security structure and alteration

20 | How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

As Ukrainian tax legislation gives tax incentives to operative leases only, leases are traditionally structured as operative ones. Security over aircraft is given in the form of mortgage that is treated as a right in rem, thus a change of its beneficiaries does not influence the mortgage. Change of the security is possible only with the permission of the creditor. Ukrainian legislation does not know the concept of the trust,

but it is recognised if established abroad over aircraft to be used in Ukraine. The security agent trustee can continue to hold the security for a changing group of beneficiaries (ie, new lenders) without it being necessary to amend the record on the security. In the case of classic novation, the record on security should be amended to the name of the new lender.

Security over spare engines

21 | What form does security over spare engines typically take and how does it operate?

Ukrainian legislation has no special rules on security over spare engines and their treatment as an adjunct or main object. So, the Law on Mortgages should be applied and mortgage is established over the engine if it is in Ukraine. As there is no special rule, the debtor and the creditor should clearly define the destiny of the spare engine if installed on a host aircraft. The general rule of Ukrainian law is that an adjunct follows the destiny of the main object. At the same time, the Cape Town Convention, valid in Ukraine since 2012, treats aircraft engines as separate objects but not adjunct. So, in a transaction with foreign elements the rules of the Cape Town Convention may be applied. We consider that effective security interest created over an engine will survive irrespective of its removal or installation on another aircraft.

ENFORCEMENT MEASURES

Repossession following lease termination

22 | Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

The Civil Code of Ukraine applies in respect of parties' agreements. Thus, the aircraft repossession procedure contained in the lease should be followed. The Cape Town Convention contains self-help remedies for a lessor if a lessee has agreed. They may be enforced by the lessor without a court order. Ukrainian law does not provide any lawful grounds for a lessee to impede the owner's rights to exercise default remedies.

Enforcement of security

23 | Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

Ukrainian law provides that the creditor may enforce a security interest if a secured obligation is not performed in time. There is no any special local law requirement, thus parties may apply those self-help remedies that are provided by the security agreement or by the Cape Town Convention if the debtor has agreed to them. There is no necessity for leave of court. If the debtor is impeded by the creditor's self-help remedies, the latter may receive the right to detain the aircraft by way of an ex parte application. If the creditor lawfully possesses the aircraft while the debtor fails to pay its indebtedness (maintenance, repair, etc), the creditor has right to detain the aircraft, even without a court order, up to the full settlement of its claims. In the case of a debtor's insolvency, the creditor has the right to enforce its security rights irrespective of maturity of the secured obligation. The owner may not lawfully impede the mortgagee's right to enforce.

Priority liens and rights

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Ukrainian law (the Constitution of Ukraine article 41) guarantees the protection of property from expropriation without fair compensation. The laws of Ukraine stipulate cases in which the aircraft may be seized by a government entity subject to payment of fair compensation. The Civil Code of Ukraine (article 353) provides for the possibility of requisition of the property from its owner in emergency circumstances and public needs. Such emergency circumstances may be natural disasters, accidents or catastrophes, epidemics or epizootics that endanger human life or health. Requisition may be carried out by state authorities with full compensation in cases of natural or man-made disasters, epidemics or epizootics.

Confiscation is possible by the decision of a court or another competent body as punishment for an unlawful act of the owner or lessee (article 354 of the Civil Code of Ukraine). In accordance with the Ukrainian Customs Code of 11 July 2002 (with corresponding amendments and additions), the aircraft may be confiscated by the customs authorities in Ukraine under a Ukrainian court judgment in the case of violation of customs rules (drug trafficking).

The liens for repairs have priority over aircraft ownership or an aircraft security interest if the aircraft is detained by the repairer.

The rest of liens and rights (taxes, landing and navigation charges, customs and tax liabilities, employee rights) may not have priority over aircraft ownership or an aircraft security interest.

Enforcement of foreign judgments and arbitral awards

25 How are judgments of foreign courts enforced? Is your jurisdiction party to the 1958 New York Convention?

Any judgment obtained in an English, New York or any other court should be recognised and accepted for execution by the courts of Ukraine without retrial or examination of the merits of the case under the principle of reciprocity.

To obtain an allowance to recognise and enforce the judgment an interested party shall submit to an appropriate court at the place debtor's location the following documents:

- plea to fulfil the judgment;
- copy of the judgment, confirmed by the court, and official document that the judgment took effect, in case it is not arisen out of the judgment;
- document which proves that the respondent was duly served with summons. Ukraine is a party to the Hague Convention On The Service Abroad Of Judicial And Extrajudicial Documents In Civil Or Commercial Matters of 1965. Within its ratification Ukraine has refused to apply article 10 of the Convention that allows to use process Agent Service and stated that due notification is made through the Ministry of Justice of Ukraine only. So, the due notification shall be made according to the form found at www.hcch.net/upload/act_form14efu.pdf; and
- certified translation of the documents mentioned above in subparagraphs 2 and 3.

The recognition and enforcement may be refused on the following grounds:

- a debtor (respondent) did not represent its case as he or she was not duly served with a summons;
- if a judgment between the same persons and on the same matter has been already issued on the territory of Ukraine and took effect,

or if corresponding body of Ukraine initiated the proceedings between the same persons and on the same matter earlier; or

- if a matter in which the judgment to be recognised and enforced shall be exclusively decided by the Ukrainian courts.

The foreign arbitral awards will be recognised and accepted for execution by the courts of Ukraine as it has been a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1960. Thus, any award received at arbitration tribunal will be enforced in Ukraine without the need to reconsider the case on the merits.

Recognition and enforcement of an arbitral award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
- the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case; the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, if such agreement does not exist, was not in accordance with the law of the country where the arbitration took place; or
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- the subject matter of the dispute is not capable of settlement by arbitration under the laws of Ukraine; or
- the recognition or enforcement of the award would be contrary to the public policy of Ukraine.

TAXES AND PAYMENT RESTRICTIONS

Taxes

26 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

The seller should pay income tax at the rate of 15 per cent and VAT at the rate of 20 per cent if the sale or transfer of title to aircraft on the ground or in the airspace of the jurisdiction has occurred. To avoid this taxation, usually the closing is made when the aircraft is in international airspace or another jurisdiction.

The lessee or debtor is pays repatriation tax at the rate of 15 per cent for the account of rent or accrued interests unless otherwise stipulated by the international treaties on avoidance of double taxation concluded by Ukraine (the double tax treaties).

Double tax treaties usually stipulate a zero per cent rate of withholding tax (WHT) in the case of aircraft lease payments made under aircraft leases if the aircraft is used on international routes. Ukraine has concluded a number of double tax treaties with Austria, Belgium, Bulgaria, Canada, China, Cyprus, the United Kingdom, Greece, the Czech Republic, Denmark, Egypt, India, Indonesia, Iran, Italy, Germany, Hungary, France, Finland, Lebanon, Macedonia, Malaysia, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Switzerland, Sweden, Turkey, the United States and Vietnam. To receive the benefits under a double tax treaty the lessee, when transmitting rental payment, must have evidence that the lessor does not have a residence in Ukraine and that it has a permanent residence in the foreign country in question according to the terms of the corresponding double tax treaty. A certificate of residency issued by the Ministry of Finance (or another authorised body referred to in the appropriate double tax treaty) will be treated as the necessary evidence. The Tax Code (article 103.3) provides that provisions of the double tax treaty may be applied only if the lessor is a beneficial recipient of the lease payments. As aircraft financing may stipulate usage of a special purpose vehicle (SPV), and the lease is structured as a head lease and a sublease, it is desirable to incorporate an SPV in a country with which Ukraine has a double tax treaty and to state in the sublease that the sub-lessor is the beneficial owner of the lease payments.

There is no VAT on lease payments.

Though each double tax treaty has some peculiarities as to payment of WHT on accrued interest, usually it is not higher than 10 per cent.

Gross-up provisions may be used as Ukrainian Tax Code are prohibited by the Tax Code.

Exchange control

27 | Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There are no restrictions on international payments and exchange controls in effect in Ukraine. Any payment is made if supported by duly executed transaction documents.

Default interest

28 | Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

There are no clear limitations on the amount of default interest that can be charged on the lease. The National Bank of Ukraine restricts the amount of interest accrued on a foreign loan. We consider that this rule may be applied to default interest. These limitations are 9.8 per cent for the one-year loan, 10 per cent for loans for two and three years and 11 per cent for loans longer than three years.

Customs, import and export

29 | Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Ukrainian law imposes import duty on aircraft imported into Ukraine at the rate of 20 per cent of its declared customs value. However, the Customs Tariffs of Ukraine stipulates that, in the case of an aircraft imported from a country (or an economic union) that operates a regime of 'best economic assistance' with Ukraine, import duty will be 0 per cent. Ukraine has such a regime with all the countries manufacturing aircraft, including the United States, France, Brazil, etc. As a result, import duty at zero per cent shall apply to the aircraft imported to Ukraine.

VAT at the rate of 20 per cent is chargeable on goods and services imported into Ukraine, including import on the basis of a lease. VAT

will be paid by the lessee. The aircraft is exempt from VAT of 20 per cent, pursuant to article 206.7.1 of the Tax Code and article 105 of the Customs Code, provided that the aircraft is imported under an operative lease agreement by a local airline that has a licence for passenger transport. From the beginning of 2021 this exemption will not cover aircraft with a weight up to 30,000kg and passenger capacity 44 to 110 seats. The aircraft is imported in a temporary regime for a period of no more than three years and should be exported before the expiry of such period. To benefit from this exemption, the lessee may re-import the aircraft after the expiration of the first three-year period or request the customs authorities to extend such temporary regime for another three years. Such reimportation can be satisfied by flying the aircraft on an international route any time within such period. Because of this special regime, the owner or mortgagee may have significant problems with aircraft export if the lessee is not cooperative and even an IDERA will not assist them.

INSURANCE AND REINSURANCE

Captive insurance

30 | Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Ukrainian law requires that insurance for aircraft registered at the Aircraft Registry shall be placed in Ukraine with an insurance company accredited by the SAS. Usually, risks insured in Ukraine are reinsured abroad on a London market and there is no requirement as to a minimum or maximum percentage of the insurance that must be retained. Though it is not forbidden to pool insurance it is not used on the local market.

Cut-through clauses

31 | Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Cut-through clauses under the insurance and reinsurance documentation are legally effective.

Reinsurance

32 | Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance (by domestic or captive insurers) are legally effective and typically provided on aviation leasing and finance transactions.

Liability

33 | Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

No. Neither the owner, lessor nor financier is liable for the operation of the aircraft or the activities of the operator. It is clearly provided by the Civil Code of Ukraine.

Strict liability

34 | Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

No. A regime of strict liability is applied only to the aircraft operator.

Third-party liability insurance

35 | Are there minimum requirements for the amount of third-party liability cover that must be in place?

Third-party liability cover is calculated depending on the total flight weight of the aircraft. It shall be no less than 4.2 million special drawing rights (SDR) for aircraft weighing up to 49,999 kg; 14 million SDR for aircraft between 50,000kg and 199,999 kg; and, 33.4 million SDR for aircraft heavier than 200,000kg.

UPDATE AND TRENDS

Current developments

36 | Are there any emerging trends or hot topics in aviation finance and leasing in your jurisdiction?

Ukrainian legislation in the aviation field is under permanent development. The main tendency is to adapt the Ukrainian laws to the European ones or to create new ones being guided by European norms. In mid 2018, the Ukrainian government approved National Transport Strategy up to 2030 that provides reconstruction and building of new aerodromes as well as creation of favourable climate for air companies to increase further the passenger turnover. Such policy undoubtedly will lead to necessity for local airlines to increase their fleet, which is usually done through operative lease of aircraft. As airport reconstruction is directed, among other things, to accept heavy aircraft, the necessity to pay VAT on importing aircraft with a weight up to 30,000kg and an annual increase in passenger turnover in Ukraine, we expect local airlines will be more active in leasing Airbus 380 and Boeing 757.



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