Aircraft Operating Leasing: A Legal and Practical Analysis in the Context of Public and Private International Air Law

ANNEXES
Annex 1

Typical Operating Lease Structure

Annex 2

Typical Leasing Structure for Japanese Registered Aircraft

OWNER

Stock

MANAGER

Conditional
Sale

LESSOR

Trust

BENEFICIARY

Stock

SERVICER

Lessee
Typical New Aircraft Operating Lease Financing

MANUFACTURER
Sale Agreement

LENDERS
Loan Agreement

SECURITY TRUSTEE
Mortgage

SPECIAL PURPOSE VEHICLE OWNER
Finance Lease
Operating Lease Assignment

OPERATING LESSOR
Operating Lease

OPERATING LESSEE

Security Assignment of Sale Agreement, Finance Lease and Operating Lease Assignment, etc.

Ditto.
Annex 4

Typical New Aircraft Operating Lease Financing
For Japanese Registered Aircraft881

<table>
<thead>
<tr>
<th>OWNER</th>
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<tr>
<th>LESSEE</th>
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881 Ditto.
Annex 5

Typical Jurisdictional Questionnaire Provisions

(a) Description of property rights in aircraft.
(b) Description of results of previous attempts to repossess aircraft.
(c) Judicial attitudes towards foreign lessors and financiers.
(d) Summary of aircraft registration laws and regulations.
(e) Documents and procedures required for aircraft registration.
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(h) Registration in name of owner or operator.
(i) If operator registration, noting of interests of owner and lenders.
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(o) Details of operation of any aircraft mortgage registry.
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(q) Details of formalities of execution of mortgage and security assignments.

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(z) Enforceability of operator deregistration irrevocable power of attorney.

(aa) Possibility of undertaking from aviation authority not to deregister without owner consent.

(bb) Possibility of undertaking form government not to expropriate and to co-operate with repossession.

(cc) Taxes or filing fees for aircraft registration or filing of mortgage or other agreements.

(dd) Taxes to reposess, deregister, export aircraft or exercise remedies under mortgage, security assignments or lease.

(ee) Withholding or income taxes on payments under lease.

(ff) Stamp duty or other tax on execution, enforcement or bringing into jurisdiction of any documents.

(gg) Will owner or lender be required to file tax returns or have liability to tax simply due to their involvement in lease.

(hh) Is airline subject to government control.

(ii) Can airline assert sovereign immunity.
(jj) Enforceability of submission to foreign jurisdiction.

(kk) Will foreign judgment be enforced without review of merits.

(ll) Adherence to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

(mm) Will choice of governing law be upheld?

(nn) Procedures for appointing agent for service of process.

(oo) Is owner or are lenders subject to suit locally.

(pp) Necessity of permit to import or export aircraft under lease.

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(rr) Any other necessary permits, consents, registrations or filings.

(ss) Requirement for local insurance.

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883 Vide 2.5 and 3.5.1.5 supra and also Bunker D H, International Aircraft Financing, Volume 2: Specific Documents, IATA, 2005, at 399-400.
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(c) Valid execution and delivery of lease and related documents.
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(f) All necessary authorizations, consents and registrations being in place for lessee to discharge its obligations.
(g) No Immunity with respect to lessee’s lease obligations.
(h) Most Financial Statements being accurate.
(i) No obligation to operate the aircraft to countries subject to United Nations Security Council sanctions.
(j) Lease obligations ranking pari passu with lessee’s other unsecured and unsubordinated obligations.
(k) Choice of law and submission by the Lessee to jurisdiction set out in the lease are being valid and binding.
(l) No Default (as defined in the lease) has occurred and is continuing.
(m) Listing of any necessary filings and registrations to perfect interest of lessor and financing.
(n) No litigation or arbitration which could have a material adverse effect upon lessee.
(o) All necessary tax returns and payments having been made.
(p) No material adverse change in the financial condition of lessee has occurred since the date of its most recent financial statements to date

(q) No default in the payment of any sums due by lessee to any air traffic control or airport authority.
Annex 8

Typical Conditions Precedent to be satisfied by Lessee885

(a) Copy of constitutional documents of lessee to be delivered to lessor.886

(b) Copy of board resolution approving transaction to be delivered to lessor together with power of attorney and certified specimen signature of those signing lease and acceptance certificate on behalf of lessee.887

(c) Lease and related documents to have been duly executed by lessee and delivered to lessor.

(d) Legal opinions to have been delivered to lessor.888

(e) Copies of necessary approvals, license, consents and registrations to have been delivered to lessor.889

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(j) All payments required to be made under the lease prior to delivery having been made.894

886 Vide 3.5.1.2 supra.
887 Vide 3.5.1.3 supra.
888 Vide 3.5.1.5 supra.
889 Vide 3.5.1.4 supra.
890 Vide 3.5.2.1 supra.
891 Vide 3.5.2.7 supra.
892 Vide 3.5.1.7 and 3.15.9 supra.
893 Vide 3.18.1 supra.
894 Vide 3.7.1 and 3.7.2 supra.
(k) No default or event of default under the lease having occurred which default or event of default is still continuing.\(^895\)

(l) All representation and warranties made by lessee under the lease being correct by reference to facts and circumstances existing as of the proposed delivery date.\(^896\)

\(^895\) Vide 3.14 supra.

\(^896\) Vide 3.4 supra.
Annex 9

Typical Operational Covenants of Lessee

(a) Provide information regarding aircraft
(b) Operate aircraft lawfully
(c) Pay taxes and other charges in respect of aircraft
(d) Only sublease aircraft or part with possession as permitted by lease or otherwise by lessor (typically such sub-lessee to be approved by lessor for a term not to exceed lease term, for no less a rent, and sublease either to be subordinate to lease or lessee (as sub-lessee) to assign its rights under sub-lease to lessor as security for performance by it of its obligations under lease)
(e) Allow lessor inspection rights as agreed (usually without interference to commercial operation, and limited in number per year as long as there is no default; cost of inspection may be borne by lessor or lessee depending on whether inspection show compliance or non-compliance with lease)
(f) Protect lessor’s title to the aircraft and allow only permitted liens (as defined in the lease) over the aircraft
(g) Preserve its corporate existence and remain in business as an airline
(h) Keep aircraft records as required by the lease
(i) Maintain aircraft registration and other filings as required by lease
(j) Maintain and repair the aircraft as required by lease
(k) Only remove engines and parts from aircraft as permitted by lease
(l) Only install removed engines and parts on other aircraft as permitted by lease

898 Vide 3.8 supra.
899 Vide 3.10.12.4.1 supra.
900 Vide 3.10.2.2 supra.
901 Vide 3.13.5 supra.
902 Vide 3.10.2.3 supra.
903 Vide 3.10.2.3 supra.
904 Vide 3.10.2.4.2 and 310.2.4.3 supra.
905 Ditto.
(m) Only install other engines and parts on aircraft as permitted by lease\footnotemark[906]

(n) Not discriminate against aircraft as compared with other aircraft in lessee’s fleet

(o) Not operate the aircraft for training purposes

\footnotetext[906]{\textit{Ditto}.}
Annex 10

Typical Events of Default

(a) Failure to pay any amount due within applicable grace period (a longer grace period may be allowed for unscheduled payments than for scheduled payments; although remedies will not be exercisable until end of grace period, default interest typically applies as soon as payment is late without a grace period)\(^{908}\)

(b) Failure to insure or to return the aircraft in time in required condition or other breach of material covenant as stated (certainly no grace period is allowed in respect of breach of insurance obligations)\(^{909}\)

(c) Failure to remedy breach of any obligation other than as referred to in (a) or (b) within applicable grace period\(^{910}\)

(d) Any representation or warranty proving untrue\(^{911}\)

(e) Any cross default under other agreements as specified (this is negotiable and may be distinguished as to other agreements with lessor and other agreements with third parties)

(f) Any necessary approvals or consents not being obtained, or lapsing or being revoked\(^{912}\)

(g) Any insolvency event as stated in the lease\(^{913}\)

(h) Any bankruptcy event as stated in the lease\(^{914}\)

(i) Lease or lessee’s obligations thereunder becoming unlawful or unenforceable

(j) Suspension or cessation of business by lessee

(k) Denial of rights of lessor by lessee

(l) Change of ownership or control of lessee


\(^{908}\) Vide 3.14.1 *supra*.

\(^{909}\) Vide 3.14.3 *supra*.

\(^{910}\) Vide 3.14.21 *supra*.

\(^{911}\) Vide 3.4 *supra*.

\(^{912}\) Vide 3.5.2 *supra*.

\(^{913}\) Vide 3.14.4 *supra*.

\(^{914}\) Ditto.
(m) Failure by lessee to accept delivery of aircraft when properly tendered by lessor
(n) Material adverse change in condition of lessee
Annex 11

OECD Sector Understanding on Export Credits for Civil Aircraft,

Annex I (Qualifying Declarations)

1. For the purpose of Section 2 of Appendix II, the term “qualifying declarations”, and all other references thereto in this Sector Understanding, means that a Contracting party to the Cape Town Convention (Contracting Party):
   a) Has made the declarations in Article 2 of this Annex, and
   b) Has not made the declarations in Article 3 of this Annex.

2. The declarations for the purpose of Article 1 a) of this Annex are:
   a) Insolvency: State Party declares that it will apply the entirety of Alternative A under Article XI of the Aircraft Protocol to all types of insolvency proceeding and that the waiting period for the purposes of Article XI (3) of that Alternative shall be no more than 60 calendar days.
   b) Deregistration: State Party declares that it will apply Article XIII of the Aircraft Protocol.
   c) Choice of Law: State Party declares that it will apply Article VIII of the Aircraft Protocol.

And at least one of the following (though both are encouraged):
   a) Method for Exercising Remedies: State Party declares under Convention Article 54 (2) that any remedies available to the creditor under any provision of the Convention which are not expressed under the relevant provisions thereof to require application to a court may be exercised without leave of the court (the insertion “without court action and” to be recommended (but not required) before the words “leave of the court”);
   b) Timely Remedies: State Party declares that it will apply Article X of the Aircraft Protocol in its entirety (though clause 5 thereof, which is to be encouraged, is not required) and that the number of working days to be used for the purposes of the time-limit laid down in Article X (2) of the Aircraft Protocol shall be in respect of:
      1) The remedies specified in Articles 13 (1) (a), (b) and (c) of the Convention (preservation of the aircraft objects and their value; possession, control or custody of the aircraft objects; and immobilisation of the aircraft objects), not more than that equal to ten calendar days, and
2) The remedies specified in Articles 13 (1) (d) and (e) of the Convention (lease or management of the aircraft objects and the income thereof and sale and application of proceeds from the aircraft equipment), not more than that equal to 30 calendar days.

3. The declarations referred to in Article 1 b) of this Annex are the following:

   a) Relief Pending Final Determination: State Party shall not have made a declaration under Article 55 of the Convention opting out of Article 13 or Article 43 of the Convention; provided, however, that, if State Party made the declarations set out under Article 2 d) of this Annex, the making of a declaration under Article 55 of the Convention shall not prevent application of the Cape Town Convention discount.

   b) Rome Convention: State Party shall not have made a declaration under Article XXXII of the Aircraft Protocol opting out of Article XXIV of the Aircraft Protocol; and

   c) Lease Remedy: State Party shall not have made a declaration under Article 54 (1) of the Convention preventing lease as a remedy.

4. Regarding Article XI of the Aircraft Protocol, for Member States of the European Union, the qualifying declaration set out in Article 2 a) of this Annex shall be deemed made by a Member State, for purposes hereof, if the national law of such Member State was amended to reflect the terms of Alternative A under Article XI of the Aircraft Protocol (with a maximum 60 calendar days waiting period). As regards the qualifying declarations set out in Article 2 c) and e) of this Annex, these shall be deemed satisfied, for the purpose of this Sector Understanding, if the laws of the European Union or the relevant Member States are substantially similar to that set out in such Articles of this Annex. In the case of Article 2 c) of this Annex, the laws of the European Union (EC Regulation 593/2008 on the Law Applicable to Contractual Obligations) are agreed to be substantially similar to Article VIII of the Aircraft Protocol.
Annex 12
Model Agreement between [State 1] and [State 2] on the Implementation of Article 83 bis of the Convention915

WHEREAS the Protocol relating to Article 83 bis of the Convention on International Civil Aviation (Chicago, 1944) (hereinafter referred to as "the Convention"), to which [State 1] and [State 2] are parties, entered into force on 20 June 1997;

WHEREAS Article 83 bis, with a view to enhanced safety, provides for the possibility of transferring to the State of the Operator all or part of the State of Registry's functions and duties pertaining to Articles 12, 30, 31 and 32 a) of the Convention;

WHEREAS, in line with Doc 9760 (Airworthiness Manual), Volume II, Part B, Chapter 10, and in light of Doc 8335 (Manual of Procedures for Operations Inspection, Certification and Continued Surveillance), Chapter 10, it is necessary to establish precisely the international obligations and responsibilities of [State 1] (State of Registry) and [State 2] (State of the Operator) in accordance with the Convention;

WHEREAS, with reference to the relevant Annexes to the Convention, this Agreement organizes the transfer from [State 1] to [State 2] of responsibilities normally carried out by the State of Registry, as set out in Sections 3 and 4 below;

The Government of [State 1], represented by its [Civil Aviation Authority], and The Government of [State 2], represented by its [Civil Aviation Authority],

Hereinafter referred to as "the Parties", have agreed as follows on the basis of Articles 33 and 83 bis of the Convention:

ARTICLE I - SCOPE

Section 1. [State 1] shall be relieved of responsibility in respect of the functions and duties transferred to [State 2], upon due publicity or notification of this Agreement as determined in paragraph b) of Article 83 bis.

Section 2. The scope of this Agreement shall be limited to [types of aircraft] on the register of civil aircraft of [State 1] and operated under leasing arrangement by [operator], whose principal place of business is in [State 2]. The list of aircraft concerned, identified by type, registration number and serial number, is reproduced in Attachment 1, which also indicates the term of each leasing arrangement.

ARTICLE II - TRANSFERRED RESPONSIBILITIES

Section 3. Under this Agreement, the Parties agree that [State 1] transfers to [State 2] the following functions and duties, including oversight and control of relevant items contained in the respective Annexes to the Convention:

Annex 1 - Personnel Licensing, issuance and validation of licences.

Annex 2 - Rules of the Air, enforcement of compliance with applicable rules and regulations relating to the flight and manoeuvre of aircraft.

Annex 6 - Operation of Aircraft (Part I - International Commercial Air Transport - Aeroplanes), all responsibilities which are normally incumbent on the State of Registry. Where responsibilities in Annex 6, Part I, may conflict with responsibilities in Annex 8 - Airworthiness of Aircraft, allocation of specific responsibilities is defined in Attachment 2.

Section 4. Under this Agreement, while [State 1] will retain full responsibility under the Convention for the regulatory oversight and control of Annex 8 - Airworthiness of Aircraft, the responsibility for the approval of line stations used by the [operator], which are located away from its main base, is transferred to [State 2]. The procedures related to the continuing airworthiness of aircraft to be followed by the [operator] will be contained in the operator's maintenance control manual (MCM). Attachment 2 hereunder describes the responsibilities of the Parties regarding the continuing airworthiness of aircraft.

ARTICLE III - NOTIFICATION

Section 5. Responsibility for notifying directly any States concerned of the existence and contents of this Agreement pursuant to Article 83 bis b) rests with [State 2] as the State of the Operator, as needed. This Agreement, as well as any amendments to it, shall also be registered with ICAO by [State 1] as the State of Registry or [State 2] as the State of the Operator, as required by Article 83 of the Convention and in accordance with the Rules for Registration with ICAO of Aeronautical Agreements and Arrangements (Doc 6685).

Section 6. A certified true copy [in each language] of this Agreement shall be placed on board each aircraft to which this Agreement applies.

Section 7. A certified true copy of the air operator certificate (AOC) issued to [operator] by [State 2], in which the aircraft concerned will be duly listed and properly identified, will also be carried on board each aircraft.
ARTICLE IV - COORDINATION

Section 8. Meetings between [State 1-CAA] and [State 2-CAA] will be held at [three]-month intervals to discuss both operations and airworthiness matters resulting from inspections that have been conducted by respective inspectors. For the sake of enhanced safety, these meetings will take place for the purpose of resolving any discrepancies found as a result of the inspections and in order to ensure that all parties are fully informed about the [operator's] operations. The following subjects will be among those reviewed during these meetings:

- Flight operations
- Continuing airworthiness and aircraft maintenance
- Operator's MCM procedures, if applicable
- Flight and cabin crew training and checking
- Any other significant matters arising from inspections

Section 9. Subject to reasonable notice, [State 1-CAA] will be permitted access to [State 2-CAA] documentation concerning [operator] in order to verify that [State 2] is fulfilling its safety oversight obligations as transferred from [State 1].

Section 10. During the implementation of this Agreement, and prior to any aircraft subject to it being made the object of a sub-lease, [State 2], remaining the State of the Operator, shall inform [State 1]. None of the duties and functions transferred from [State 1] to [State 2] may be carried out under the authority of a third State without the express written agreement of [State 1].

ARTICLE V - FINAL CLAUSES

Section 11. This Agreement will enter into force on its date of signature, and come to an end for aircraft listed in Attachment 1 at the completion of the respective leasing arrangements under which they are operated. Any modification to the Agreement shall be agreed by the patties thereto in writing.

Section 12. Any disagreement concerning the interpretation or application of this Agreement shall be resolved by consultation between the Parties.

Section 13. In witness thereof, the undersigned directors of civil aviation of [State 1] and [State 2] have signed this Agreement.

For the Government of [State 1]
[Signature]
[Name, title, place and date]

For the Government of [State 2]
[Signature]
[Name, title, place and date]
Attachments: Attachment 1 - Aircraft Affected by this Agreement
Attachment 2 - Responsibilities of [State 1] and [State 2] Regarding Airworthiness
### Attachment 1

**AIRCRAFT AFFECTED BY THIS AGREEMENT**

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<th>Aircraft type</th>
<th>Registration number</th>
<th>Serial number</th>
<th>Leasing term</th>
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<tr>
<td>[B737]</td>
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<td>[IL62]</td>
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<td>[date]</td>
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<td>ICAO Doc</td>
<td>Subject</td>
<td>Responsibilities of the State of Registry ([State 1])</td>
<td>Responsibilities of the State of the Operator ([State 2])</td>
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</tr>
<tr>
<td>Annex 8, Part II, Doc 9760, Volume II, Part B, Chapter 8</td>
<td>Mandatory continuing airworthiness information</td>
<td>Ensure that [State 2-CAA] and the [operator] receive all applicable mandatory continuing airworthiness information</td>
<td>Ensure that the [operator] complies with mandatory continuing airworthiness information transmitted by [State 1-CAA].</td>
</tr>
<tr>
<td>Annex 6, Part I, 5.2.4</td>
<td>Operation of aircraft in compliance with its Certificate of Airworthiness (C of A)</td>
<td>Assume State of Registry’s responsibility as defined in 5.2.4 of Annex 6, Part I.</td>
<td></td>
</tr>
<tr>
<td>Annex 6, Part I, 8.1.2</td>
<td>Operator’s maintenance responsibilities</td>
<td>Approve maintenance organizations used by [operator], except for line stations away from operator’s main base.</td>
<td>Approve line stations away from the [operator’s] main base.</td>
</tr>
<tr>
<td>Annex 6, Part I, 8.2.1 to 8.2.4</td>
<td>Operator’s maintenance control manual (MCM)</td>
<td></td>
<td>Ensure that guidance is contained in the MCM, approve the MCM and transmit a copy to [State 1-CAA].</td>
</tr>
<tr>
<td>Annex 6, Part I, 8.4.1 to 8.4.3</td>
<td>Maintenance records</td>
<td>Inspect maintenance records and documents every six months</td>
<td>Ensure that records are kept in accordance with 8.4.1 to 8.4.3 of Annex 6, Part I, and inspect in accordance with the requirements of the AOC.</td>
</tr>
<tr>
<td>Annex 6, Part I, 8.5.1 and 8.5.2</td>
<td>Continuing airworthiness information</td>
<td>Ensure that the airworthiness requirements of [State 1] are known to both [State 2-CAA] and [operator].</td>
<td>Ensure that the airworthiness requirements of [State 1] and [State 2] are complied with and adequate procedures are incorporated in the MCM.</td>
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**Attachment 2**

**RESPONSIBILITIES OF [STATE 1] AND [STATE 2] REGARDING AIRWORTHINESS**
| Annex 6, Part I, 8.6; Doc 9760, Volume II, Part B, Chapter 10, Attachment 10-A | Modifications and repairs | Ensure that they have been previously approved by the States of Design and of Manufacture. | Ensure that the requirements are contained in the MCM and approve the MCM. |
| Annex 6, Part I, 8.7 and 8.8 | Approved maintenance organization and maintenance release. | Approval of the [operator’s] base maintenance organization and procedures in accordance with 8.7 and 8.8 of Annex 9, Part I, and communication to [State 2-CAA] of related procedures to be included in the MCM. | Approval of the [operator’s] line maintenance arrangements away from base. Ensure that procedures are contained in the MCM and approve the MCM. |