

UKRAINE

LAW AND PRACTICE:

p.371

Contributed by Jurvneshservice Law Firm

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

Contributed by Jurvneshservice Law Firm

Contents

1. Aircraft and Engine Purchase and Sale	p.4
1.1 Sales Agreements	p.4
1.2 Transfer of Ownership	p.4
2. Aircraft and Engine Leasing	p.5
2.1 Overview	p.5
2.2 Lease Terms	p.6
2.3 Lease Registration	p.6
2.4 Lessor's Liabilities	p.7
2.5 Insurance and Reinsurance	p.7
2.6 Lease Enforcement	p.7
2.7 Lease Assignment / Novation	p.8
2.8 Aircraft Deregistration and Export	p.9
2.9 Insolvency Proceedings	p.10
2.10 Cape Town Convention and Others	p.11
3. Aircraft Debt Finance	p.11
3.1 Structuring	p.11
3.2 Security	p.12
3.3 Liens	p.13
3.4 Enforcement	p.13
4. Other Issues of Note	p.14
4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft	p.14
4.2 Current Legislative Proposals	p.14

Jurvneservice Law Firm was established in 1987. Its main office is located in Kyiv. The firm's main practices are aircraft finance, anti-corruption, bankruptcy, cross-border litigation and debt recovery, enforcement of foreign arbitral awards and judgments, intellectual property, international arbitration and project finance. Jurvneshservice's aviation law clients include Ukrainian airlines, foreign equity investors, aircraft leasing companies and financial institutions, borrowers, financial advisors, and other participants in the

global aviation industry. The firm regularly assist aviation clients and financiers with all forms of debt financing and securitisations, including secured financings of aircraft, engines and spare parts. Jurvneshservice draft and perform appropriate mortgage agreements if aircraft is already registered in the Ukrainian Civil Aircraft Registry. The firm also receives AEP codes at the Ukrainian State Aviation Service to register bills of sales, security agreements and leases at the Cape Town International Registry.

Authors



Ganna Tsirat is a partner at Jurvneshservice. She is an acknowledged expert in the field of aircraft financing and the author of articles on Ukraine in various books and publications, including: Aircraft Liens and Detention Rights; The

Official Guide to Aircraft Registration and Tax 2018; PWSP World Aircraft Repossession Index 2018; Aircraft Financing; Getting the Deal Through – Air Transport 2017; Getting the Deal Through – Aviation Finance & Leasing 2018; the Aviation Law Review. In 2018 she issued a monograph entitled Unification of International Private Air Law. Her areas of specialisation are: aircraft financing (purchase, sale, lease and mortgage of aircraft and engines); international trade; and litigation and dispute resolution. The firm's leading aviation attorney, Ganna has successfully completed nearly 100 aircraft acquisition, financing, leasing and restructuring transactions over the past 15 years; within the last decade she has repossessed at least ten aircraft including those from Aerosvit, Donbassaero, and AirOnix that were insolvent; all these aircraft repossessions have been made without Cape Town instruments.



Kateryna Tsirat is an associate at Jurvneshservice. She advises both international and domestic clients operating in different industry sectors including aviation, with special focus in civil and commercial litigation, contract

law, aircraft financing and enforcement of foreign judgments and arbitral awards. She advises international clients in the aviation sector to recover their debts from Ukrainian airlines – a recent example is Altum Air, Inc. v WindRose Airlines where the latter, as losing party in an international arbitration, initiated a setting aside of an arbitral award as a mean to prevent its enforcement. Kateryna has a PhD in Private International Law and regularly contributes to business and legal publications.

1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

Sale of an asset (an aircraft or engine) physically located in Ukraine by a foreign or domestic party, irrespective of the asset location by a domestic party, results in VAT payment that is 20% over the asset price. Sale of an ownership interest in an entity owning the asset is exempted from VAT.

1.1.2 Enforceability Against Domestic Parties

There is no requirement for a sale agreement to be translated, certified, notarised or legalised to be enforceable against a Ukrainian party. The only requirement for a sale agreement is for it to be in written form. Irrespective of the language, it will be enforceable against a domestic party. However, when payments under agreement are undertaken through a local bank in which employees do not read English, the Ukrainian party usually translates the sale agreement into Ukrainian. If the Ukrainian party plans to register the aircraft in the Ukrainian Civil Aircraft Registry then the translation shall be undertaken by a certified translator whose signature is notarised by a local notary.

1.2 Transfer of Ownership

1.2.1 Transferring Title

The Ukrainian law does not prescribe any formal requirements to aircraft or engine title transferring agreements and has no list of act(s) that constitute 'transferring title' to an aircraft or engine. In practice, the parties conclude the sale agreement and bill of sale in an FAA form in which the title transferring details are stated. The bill of sale, if there is a sale agreement, may be treated as the document that states the moment when risks of damage and destruction are transferred from seller to buyer. The bill of sale may be also treated as a short form of the sale agreement as the bill of sale states the parties, identifies the aircraft or engine and indicates the time of risk transfer from the seller to the buyer. Unless otherwise stipulated by the title transferring agreement, the transfer includes all parts installed into an aircraft or engine.

The sale of the ownership interest in an entity that owns an aircraft or engine is not recognised as a sale of such aircraft or engine itself but only as the sale of the ownership interest in an entity.

1.2.2 Sales Governed by English or New York Law

Transfer of a title to an aircraft or engine physically delivered in Ukraine under a bill of sale governed by either English or New York law will not be recognised as effective in Ukraine. Under Ukrainian law the rights in rem are defined at the

lex rei situs. Thus, if an aircraft or engine is physically delivered in Ukraine then the bill of sale should be governed by Ukrainian law only.

The Ukrainian law does not prescribe any formal requirements, including minimum substantive ones, to the bill of sale. However, the Ukrainian law prescribes the requirement to a sale agreement; it shall identify seller, buyer, subject of sale and its price. Parties usually use the FAA form of the bill of sale that is accepted by the State Aviation Administration of Ukraine (SAS) as well.

1.2.3 Enforceability Against Domestic Parties

A notarised and apostilled copy of the bill of sale translated into Ukrainian by a certified translator whose signature is certified by the local notary is submitted, among other documents, to the SAS to register the aircraft in Ukraine in the name of its owner. There is no prescription for the original of the bill of sale to be translated, certified, notarised or legalised to be enforceable against a Ukrainian party.

1.2.4 Registration, Filing and/or Consent from, Government Entities

Under the Aircraft Registration Rules, to register an aircraft in the Ukrainian Civil Aircraft Registry a notarised and apostilled copy of the bill of sale shall be submitted to the SAS. Such submission is treated as the bill of sale registration by the SAS. Such registration does not require consent from any government entity.

A notarised and apostilled copy of the bill of sale, together with other prescribed documents, are submitted to the SAS to register the aircraft in the name of its owner. The registration of these documents, and correspondingly the aircraft, is done within ten working days after the aircraft inspection. Submission of the prescribed documents is a pre-requisite to the aircraft inspection.

Neither government applications or consents are required as a pre-requisite to the execution and delivery of a bill of sale in relation to an aircraft to be registered in Ukraine. Engines are not registerable in Ukraine.

1.2.5 Taxes/Duties Payable upon Execution of a Bill of Sale

If the aircraft or engine is located in Ukraine at the moment of the bill of sale execution, the seller's obligation to pay VAT at the rate of 20% arises. To avoid legal payment of this tax, the title to the aircraft is usually transferred while it is over international waters or in transit to/from Ukraine. Besides, income from the sale of an aircraft registered in Ukraine is taxed in Ukraine irrespective of the seller's place of incorporation.

Obligation to pay any tax or duty for executing and/or delivering a bill of sale on an engine, or consummation of the sale of the ownership interest in a foreign entity that owns an air-

craft or engine, is decided by laws of seller's incorporation. If the seller is an entity incorporated in Ukraine then execution of the bill of sale for the engine results in VAT payment. Consummation of sale of the ownership interest in a Ukrainian entity that owns an aircraft or engine is exempted from VAT.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

Operating/wet/finance leases are permissible and recognised in Ukraine. Wet leases for engines and aircraft are allowed for aircraft used for national routes only, as the SAS has no international treaties made under Article 83bis of the Chicago Convention.

2.1.2 Application of Foreign Laws

Ukraine's On International Private Law allows parties to a lease agreement to choose any applicable law including a foreign one.

2.1.3 Restrictions Concerning Payments in US Dollars

There are no material restrictions imposed on Ukrainian lessees making rent payments to foreign lessors in US dollars.

2.1.4 Exchange Controls

There are no exchange control restrictions which could prevent rent payments under a lease or any repatriation of realisation proceeds (if such lease is enforced by a foreign lessor).

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

There are no taxes/duties payable for executing a lease physically in Ukraine and/or by/to a domestic party, or as a consequence of an original or copy of a lease being brought into Ukraine, either physically or electronically.

2.1.6 Licensing/Qualification of Lessors

There is no requirement for the lessor to be licensed or otherwise qualified in Ukraine to do business with a domestic lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

There are no mandatory terms required to be in a lease (or ancillary documents thereto) governed by either English or New York law that would not typically be already included.

2.2.2 Tax and Withholding Gross-up Provisions

Gross-up provisions are not permissible and enforceable in Ukraine.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease can cover parts that are installed or replaced on an aircraft or engine after its execution. The list of steps to be taken to ensure that such parts are captured under the lease are agreed and performed by the parties, not by any governmental bodies.

2.2.4 Risk of Title Annexation

Aircraft engines will be treated as annexation to the aircraft unless otherwise stipulated by appropriate agreement (sale or lease, as the case may be).

2.2.5 Recognition of the Concepts of Trust/Trustee

The concept of trust is unknown in Ukrainian law, but the role of an owner trustee under a lease is recognised in Ukraine.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The interest of the owner is registered in the Ukrainian Civil Aircraft Registry that is held in the owner's name. Such registration reflects an aircraft's nationality only.

2.3.2 Registration if Owner is Different from Operator

Irrespective of the parties' functions, the aircraft is registered in the owner name only.

2.3.3 Aircraft/Engine-specific Registers

There is no specific register for leases concerning aircraft or engines, but the aircraft lease is among the documents on which basis the aircraft is registered in Ukraine.

2.3.4 Registration of Leases with Domestic Aircraft Registry

An aircraft owned by a foreign company may be registered in the Ukrainian Civil Aircraft Registry only under executed lease. If the lease is not among the documents submitted for registration then the aircraft will not be registered. The Rules on Certification of Operators (paragraph 8.1.4) state that any lease agreement between Ukrainian and foreign parties should be agreed with the SAS; however, in practice, such agreement from the SAS is not obtained.

Only aircraft leases are subject to registration. Engine leases are not registered. The lease is registered in ten working days if the rest of documents are duly submitted and the aircraft is inspected by SAS.

There are no government applications or consents required as a pre-requisite to the execution and delivery of an aircraft and/or engine lease in relation to an aircraft registered in Ukraine.

2.3.5 Requirements for a Lease to be Valid and Registrable

To be registerable in the aircraft registry, the lease executed in a foreign language shall be translated into Ukrainian. There are no special requirements as to lease validity in addition to those applied to any other kind of contract.

2.3.6 Taxes/Duties Payable for Registering a Lease

There is a duty paid for an aircraft registration. The fee is USD4 per 100 kilograms of the maximum flight weight of the aircraft, but not less than USD70 and not more than USD4,000.

2.3.7 Registration of Aircraft in Alternative Countries

Under Ukrainian law, an aircraft registered in Ukraine shall be based in Ukraine.

2.3.8 Requirements for Documents Concerning Registration

The SAS requires a notarised and apostilled copy of the bill of sale and the original of the lease to be submitted for an aircraft to be registered in the Ukrainian Civil Aircraft Registry.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A foreign lessor shall not be required to pay any income or capital gains or other taxes upon leasing an aircraft to a domestic lessee in Ukraine as treaties on avoidance of double taxation provide such payment at the foreign lessor's place of incorporation. Besides, the Tax Code of Ukraine does not provide for the lessor's obligation to pay tax instead of the lessee.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor is not deemed to be resident, domiciled, carrying on business or subject to any taxes as a result of its being a party to the lease or its enforcement.

2.4.3 Engine Maintenance and Operations

Neither liabilities in respect of aircraft or engine maintenance and operations may be imposed on a foreign lessor under a lease as a result of its being a party to such lease.

2.4.4 Damage or Loss Caused by an Asset

Neither the owner nor the lessor of the aircraft or engine, nor the financier financing the asset on lease, will be liable under the doctrine of fault or strict liability as a result of damage or a loss caused by the asset.

2.4.5 Attachment by Creditors

Creditors of a Ukrainian lessee may not attach an aircraft leased to it as it is owned by a different entity.

2.4.6 Priority of Third Parties' Rights

Third parties' rights may not take priority over a lessor's rights under an aircraft or engine lease, irrespective of lease registration in the Ukrainian Civil Aircraft Register.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

It is mandatory to place the insurances with a domestic insurance company registered with the SAS.

2.5.2 Mandatory Insurance Coverage Requirements

Insurance coverage should be at least equal to the balanced value of the aircraft.

2.5.3 Placement of Insurances Outside of Jurisdiction

Reinsurances can be placed outside of Ukraine up to 100% coverage.

2.5.4 Enforceability of 'Cut-through' Clauses

'Cut-through' clauses in the insurance/reinsurance documents are enforceable in Ukraine.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurances/reinsurances are permitted in Ukraine.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

There are no restrictions on a lessor's ability to (i) terminate an aircraft lease, (ii) re-export the aircraft and/or (iii) sell the aircraft following such termination. There is no requirement for the aircraft to be physically located in Ukraine at the time of any such action(s).

2.6.2 Lessor Taking Possession of Aircraft

Theoretically, the lessor takes physical possession of the aircraft without the lessee's consent to enforce the lease if such enforcement is expressly stated in the lease. In practice, the lessor may encounter a number of obstacles to physical possession, such as not having access to a parking place or hangar. To overcome these obstacles the lessor will need to obtain a court order.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts that are competent to decide aviation disputes – such disputes are solved at commercial courts.

2.6.4 Summary Judgment or Other Relief

The lessor may not receive summary judgment but may obtain injunctive relief pending final resolution of the judicial proceedings to enforce an aircraft lease. As the lessor is a foreign party it has to provide a security deposit in cash in

an amount sufficient to compensate the possible losses of the defendant, which may be caused by the provision of a claim in case of its refusal. The amount shall be defined by a court.

If the plaintiff for valid reasons is not able to deposit the prescribed amount, the counter-guarantee may either be (i) carried out by a bank guarantee, suretyship or other financial security instrument in the amount determined by the court issued by a person agreed by the court, whose financial capacity is not doubted by the court, or (ii) by commission of other actions determined by the court to eliminate the potential losses and other risks of the defendant. A plea as to injunctive relief pending final resolution shall be considered by the court within two working days *ex parte*. A court order to secure a claim is an enforceable instrument that corresponds to an executive document (ie, a writ). The order is subject to immediate execution, regardless of its appeal by the defendant. A copy of the enforcement order is serviced to the applicant and all persons concerned. The commercial procedural code has no special provisions as to aircraft arrest in opposition to those that concern a vessel, but the court may apply them by analogy (service of the order to a captain, to an airport where the aircraft is parking and/or based, Border Guard Service of Ukraine and fiscal bodies) to prevent the aircraft's flight out from its location.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

The Ukrainian courts will uphold (i) a foreign law as the governing law of an aircraft lease, (ii) the submission to a foreign jurisdiction and (iii) a waiver of immunity by the parties of such lease.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

A foreign court judgment will be enforced under the principle of reciprocity that is assumed to exist. If a party against which the judgment is enforced considers otherwise it shall prove that Ukrainian judgments are not recognised and enforced in the foreign country. An arbitral award will be recognised and enforced under the New York Convention 1958.

2.6.7 Judgments in Foreign Currencies

The judgment will be issued in foreign and local currencies.

2.6.8 Limitations on Lessors' Actions Following Termination

There are no limitations on a lessor's ability to recover default interest (or the compounding thereof) or to charge additional rent following termination of the lease for default, including where the lessee fails to return the aircraft.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

Under an aircraft lease, the lessor is not required to pay taxes or fees in any amount in connection with the enforcement of the lease in Ukraine.

2.6.10 Mandatory Notice Periods

There is no mandatory notice periods on aircraft lease termination, irrespective of territorial operation of the aircraft or operator nationality.

2.6.11 Lessees' Entitlement to Claim Immunity

The lessee is not entitled to claim sovereign or other immunity from suit.

2.6.12 Enforcement of Foreign Arbitral Decisions

Ukraine adopted the New York Convention and local courts recognise and enforce arbitral awards.

2.6.13 Other Relevant Issues

Ukrainian common courts have no practice as to injunctive relief pending final resolution in aircraft lease cases, which means that any pioneering process in this respect will take considerably more time.

2.7 Lease Assignment / Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Ukrainian law recognises the concepts of contractual assignment and novation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Any assignment or novation does not need the lessee's consent. It is held to be valid by the Ukrainian courts.

2.7.3 Enforceability of Lease Assignments/Novations

An aircraft novation agreement shall be translated into Ukrainian only if it states a change of owner; consequently, it must be registered with the SAS.

2.7.4 Filing/Registration of Lease Assignments/Novations

An aircraft novation agreement stating a change of owner shall be registered at the SAS to reflect the new owner name at the Ukrainian Civil Aircraft Registry. Failure of such registration means the absence of the new owner name at the Ukrainian Civil Aircraft Registry and AOC. Government consent is not required.

An aircraft novation agreement executed in a foreign language shall be translated into Ukrainian by a certified interpreter. A new AOC is issued in ten working days after the aircraft novation agreement submission, accompanied with payment of the re-registration fee.

An aircraft novation agreement stating a change of lessor shall not be registered at the SAS.

No government application or consent is required as a pre-requisite to the execution and delivery of an aircraft and/or engine lease assignment and assumption/novation in relation to an aircraft registered in Ukraine.

2.7.5 Taxes/Duties Payable on Assignment/Novation

No duty or tax is paid on the execution of a novation agreement under which the lessor is changed. When a novation agreement concerns a change of the name of the owner in the Ukrainian Civil Aircraft Register and for there to be a new AOC issuance, then an aircraft re-registration fee is payable.

2.7.6 Recognition of Transfer of Ownership Interests

Transfer of the ownership interest of the entity will not be registered or reflected in any register in Ukraine.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in this Jurisdiction

The owner (or person empowered by the owner, including the lessee) may deregister the aircraft. The deregistration actions are started by an application submitted to the SAS in the prescribed form accompanied with the original of the AOC, with due payment of the deregistration fee (200% of the registration fee). The SAS inspector inspects the aircraft at its return location, which is usually somewhere outside Ukraine. Correspondingly, the applicant pays the inspector's subsequent travel, accommodation and per diem expenses. The inspector checks that the Ukrainian registration mark has been removed from the aircraft surface and the S-mode deleted. This formal procedure shall be confirmed by appropriate pictorial documentation and an invoice as to works on the S-mode deletion.

Ten days after the inspection is completed, a deregistration certificate is issued. In addition, the lessor usually prefers to have an airworthiness export certificate as this is required for the registration of the aircraft at civil aircraft registries of other countries (excluding the USA). Typically, these two certificates are issued in two different parallel procedures which are undertaken by different inspectors, though it is possible to choose an inspector who is allowed to undertake both procedures. An airworthiness export certificate may be issued only under a local lessee's request as it submits to the SAS different technical details from aircraft logs. Such details may be accepted by the SAS only from a Ukrainian operator, not from any other person (including the owner) holding the logs.

2.8.2 Lessee's/Operator's Consent

The owner and mortgagee, if either of them is the IDERA holder, may apply for the deregistration of the aircraft without the lessee's or operator's consent.

2.8.3 Required Documentation

If deregistration is undertaken due to the lessee's or operator's default, a lease termination notice – together with a deregistration application – is submitted.

2.8.4 Duration of Deregistration Process

Typically, the deregistration process takes two to three weeks.

2.8.5 Aviation Authority's Assurances

The SAS does not provide advance assurances to an aircraft owner, mortgagee or lessor as to the prompt deregistration of the aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

The deregistration fee is 200% of the registration fee paid; the maximum amount is USD8,000.

2.8.7 Deregistration Power of Attorney

Deregistration power of attorney will be recognised. It may be issued on a letterhead of the owner, signed and sealed. In such case, the SAS will request a notarised and legalised corporate document confirming powers of signatory – this could be an extract from the company register. If deregistration power of attorney is notarised and apostilled then there is no necessity to submit an extract from the company register.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

If deregistration power of attorney is notarised and apostilled then there is no necessity to provide any supporting corporate documentation. The simple form of the deregistration power of attorney requires only confirmation of the signatory's powers, which may be an extract from the company register or charter or minutes of a relevant company meeting.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

The deregistration power of attorney has to be governed by the laws of its place of issuance.

2.8.10 Revocation of Deregistration Power of Attorney

The deregistration power of attorney shall be expressed to be irrevocable – otherwise it may be revoked.

2.8.11 Owner's/Lessor's Consent

The owner may export the aircraft without the lessee's consent if there is a lessee's default. The mortgagee may export the aircraft without the owner's or lessor's consent if it is the IDERA holder. Within exportation, the exporter (either the owner or mortgagee or lessor) shall close the temporary regime of the aircraft importation. This closure procedure may encounter some practical difficulties as Ukrainian regulation does not presuppose it to be undertaken by a foreign company. Usually the aircraft is exported from the Ukraine

and after that it is deregistered. In other words, at the time of deregistration it is desirable to have the aircraft outside Ukraine.

2.8.12 Aircraft Export Permits/Licences

There are no aircraft export permits/licences.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

Within the export procedure, an export declaration shall be filled in. Usually this is undertaken by a customs broker whose work shall be paid. There are no other costs/fees/taxes at the aircraft export.

2.8.14 Practical Issues Related to Deregistration of Aircraft

The deregistration actions are started by an application to the SAS submitted in the prescribed form, accompanied with the original of the AOC and payment of the deregistration fee (200% of the registration fee). The SAS inspector inspects the aircraft at its return location, which is usually somewhere outside Ukraine. Correspondingly, the applicant pays for the inspector's travel, accommodation and per diem expenses. The inspector checks the removal of a Ukrainian registration mark from the aircraft surface and S-mode deletion.

2.9 Insolvency Proceedings

2.9.1 Effect of Lessee's Insolvency on Deregistration Power of Attorney

Liquidation of the lessee terminates the IDERA. Liquidation is completed at the moment when the record is entered into the Unified State Register of Legal Entities and Individuals – Entrepreneurs.

2.9.2 Other Effects of Lessee's Insolvency

The lease may be set aside if a liquidator considers that it is the main reason for the lessee's insolvency. The lessor will not be prevented or delayed from repossessing the aircraft on termination of the lease as the aircraft will not be deemed part of the lessee's property. The liquidator/administrator will impose the rights of secured creditors in priority to the lessor's.

2.9.3 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The only risk is that security value will not cover all claims of the lender.

2.9.4 Imposition of Moratoria in Connection with Insolvency Proceedings

A moratorium is imposed since the bankruptcy procedure opened and finished with its closure.

2.9.5 Liquidation of Domestic Lessees

The local lessee may be placed in a bankruptcy procedure by a creditor to which the lessee that has an outstanding indebtedness. The new Codes On Bankruptcy Procedures that took

effect on 21 April 2019 does not limit the amount of indebtedness. The local lessee is obliged to apply to the commercial court with a statement on the opening of a bankruptcy case if satisfaction of claims of one or more creditors will lead to the impossibility of it fulfilling its monetary obligations in full against other creditors (the threat of insolvency).

2.9.6 Ipso Facto Defaults

Ipso facto defaults are recognised during a lessee insolvency proceeding.

2.9.7 Impact of Domestic Lessees' Winding-up

If a domestic lessee is wound up then the aircraft shall be returned to its owner, accrued lease rentals shall be paid (if the lessee has enough monetary means to cover this), the lease security deposit shall be returned to the lessee or settled against its accrued lease rentals, and the maintenance reserves shall be applied according to the lease provisions.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

Ukraine has been a party to the Convention and related Protocol since 2012. It is necessary to obtain AEP at the SAS to register international interests if the aircraft is registered in Ukraine. The process takes 30 working days if all required documents are submitted to the SAS. The lessor may apply for AEP by itself.

2.10.2 Declarations Made Concerning Conventions Ukraine Declaration on the Convention

On Article 50: this Convention shall not apply to a transaction which is an internal transaction in relation to Ukraine with regard to all types of objects.

On Article 53: for the purposes of Article 1 and Chapter XII of this Convention the relevant 'courts' are the courts of general jurisdiction.

On Paragraph 2 of Article 54: any remedy available to the creditor under any provision of this Convention which is not there expressed to require application to court may be exercised without leave of court.

Ukraine Declaration on the Protocol

On Articles VIII and XIII: pursuant to Article XXX (1) of the Protocol, Ukraine declares that it shall apply articles VIII and XIII of the Protocol.

On Article XI: pursuant to Article XXX (3) of the Protocol Ukraine declares that it shall apply the Alternative A of Article XI of the Protocol in general to all insolvency proceedings and that the 'waiting period' for the purposes of the Alternative A of Article XI of the Protocol shall be no later than 60 calendar days.

On Article XIX: the State Aviation Administration of Ukraine is designated as the entry point for information.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Article XIII of the Protocol applies domestically. IDERA issued either by the owner in favour of its creditors or by the lessee in favour of the lessor is registered with the SAS. Two originals are submitted to the SAS. After due recordation, one original is returned to an applicant. In case of necessity to apply IDERA – ie, to deregister and export the aircraft – that original is returned to the SAS with a request to deregister and export the aircraft.

2.10.4 Enforcement of Conventions

Ukrainian courts have no experience in Convention or Protocol enforcement.

2.10.5 Other Conventions

Ukraine is not a party to any other relevant aircraft-related conventions.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

There are no restrictions on foreign lenders financing an aircraft locally or on borrowers using the loan proceeds.

3.1.2 Effect of Exchange Controls or Government Consents

There are no exchange controls or government consents that would be material to any financing or repatriation of realisation proceeds under a loan, guarantee or security document.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-stream Guarantees

Downstream, upstream and/or cross-stream guarantees in favour of lenders are permitted. There are no registration requirements. Ukrainian law does not define any corporate benefit in case of issuance of listed guarantees.

3.1.5 Lenders' Share in Security over Domestic SPVs

The lender may take share security. Pledge of shares is recognised in Ukraine.

3.1.6 Negative Pledges

Negative pledge is not prohibited in Ukraine.

3.1.7 Intercreditor Arrangements

There are no material restrictions or requirements imposed on intercreditor arrangements.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent (such as the facility agent) under a syndicated loan is recognised in Ukraine.

3.1.9 Debt Subordination

The issues of debt subordination are not regulated by Ukrainian law.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of all or part of an outstanding debt under an English or New York law governed loan is permissible and recognised in Ukraine.

3.1.11 Usury/Interest-limitation Laws

There is no usury or interest limitation laws in Ukraine.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

The typical form of security in Ukraine is a mortgage over the aircraft.

3.2.2 Types of Security Not Available

There are no types of security which cannot be taken over an aircraft or related collateral such as engines, warranties or insurances.

3.2.3 Trust/Trustee Concepts

Although Ukrainian law does not include the concept of a trust, the role of a security trustee is recognised.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

The borrower may assign to a security trustee, pursuant to a security assignment or a mortgage, its rights to the aircraft or under an aircraft lease (including in relation to insurances).

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

The Ukrainian law does not prescribe a prohibition as to assignment of the rights and benefits only – the correspondingly lessor may assign the rights and benefits only without assigning its attendant obligations under the aircraft lease.

3.2.6 Choice of Foreign Law

A security assignment or a guarantee may be governed by English or New York law.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

The only requirement is to create the security assignment in written form. There are no requirements as to perfection. It is not advisable for a security assignment to be translated, certified, notarised or legalised to be enforceable against a domestic party.

3.2.8 Domestic-law Security Instruments

A financier may take a local mortgage over the aircraft. There are no domestic law security instruments or local law filings to be made in order to make Cape Town filings.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

Both English/New York governed assignments and domestic security instruments may be registered in Ukraine.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests over an aircraft and/or engines is recognised as Ukraine is a party to the Cape Town Convention.

3.2.11 Effect of Changes in the Identity of Secured Parties

The security interests are not jeopardised in case of substitution of one creditor with another.

3.2.12 'Parallel Debt' Structures

'Parallel debt' structures are not known and used domestically.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

The secured party under a security assignment will not be deemed to be resident, domiciled, carrying on business or subject to any taxes as a result of its being a party to, or its enforcement of, such security assignment.

3.2.14 Perfection of Domestic-law Mortgages

A domestic law mortgage shall be made in written form, notarised and registered at the State Registry of Movable Assets.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

A spare engines mortgage is made in written form but should not be notarised. It shall be registered at the State Registry of Movable Assets. Mortgage over aircraft shall be executed before the notary with further registration at the State Registry of Movable Assets.

3.2.16 Form and Perfection of Security Over Bank Accounts

Security over a bank account (such as a lease receivables account) is not used in Ukraine, although there is no prohibition in the law for such a form of security.

3.3 Liens

3.3.1 Third-party Liens

A third party may take and register a lien over an aircraft in relation to unpaid airport fees, navigation charges, customs duties, repairers' costs, and crews' salaries.

There are no special provisions in the law that allow or prohibit fleet liens. Irrespective of that, a fleet lien may arise under a contract only – it may not arise as a non-consensual obligation.

A third party that legally possesses a secured asset may sell it at public auction and take the amounts due to it; the rest of proceeds shall be paid to the debtor.

3.3.2 Timeframe to Discharge a Lien or Mortgage

Discharge is made through submission of an appropriate application in the prescribed form to the State Registry of Movable Assets.

3.3.3 Register of Mortgages and Charges

The State Registry of Movable Assets is a register of mortgages and charges. It is open to the public. The interests of an aircraft mortgagee or security trustee are not noted on the aircraft register, although they notified to the SAS.

3.3.4 Statutory Rights of Detention or Non-consensual Preferential Liens

Statutory rights of detention may arise over an aircraft only.

3.3.5 Verification of an Aircraft's Freedom from Encumbrances

A potential purchaser of an aircraft may search the State Registry of Movable Assets and the Cape Town International Register.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

There are no relevant differences in enforcing a security assignment as opposed to a loan or a guarantee.

3.4.2 Security Trustees' Enforcement of their Rights

A security trustee may enforce its rights under the security assignment pursuant only to a notice and acknowledgement executed by both the lessor and the relevant lessee, respectively, in connection with such a security assignment.

3.4.3 Application of Foreign Laws

The Ukrainian courts will uphold (i) a foreign law as the governing law of a finance or security document, and (ii) the submission to a foreign jurisdiction.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

The Ukrainian courts will recognise and enforce a final judgment of a foreign court under the principal of reciprocity that is assumed as existing unless a party against which the judgment is enforced proved otherwise. An arbitral award under the New York Convention is recognised and enforced without re-examination of the matter.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

A secured party may take physical possession of the aircraft to enforce a security agreement/aircraft mortgage without the lessee's or operator's consent under a court order.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

Commercial courts are competent to decide enforcement actions under a security agreement/aircraft mortgage. An appropriate application may be submitted either to the Commercial Court of Kyiv as the place where the Ukrainian Civil Aircraft Registry is situated, or to a commercial court at the aircraft base. There is no court practice on enforcement actions under a security agreement/aircraft mortgage.

3.4.7 Summary Judgments or Other Relief

A secured party may not receive summary judgment as it is not provided by the Ukrainian law, but it may obtain injunctive relief pending final resolution of judicial proceedings to enforce a security agreement/aircraft mortgage. If the secured party is a foreign one then it has to provide a security deposit in cash in an amount sufficient to compensate possible losses of the defendant, which may be caused by the provision of a claim in case of its refusal. The amount of the deposit shall be defined by a court. If the plaintiff for valid reasons is not able to deposit the prescribed amount, the counter-guarantee may also be carried out: (i) in the form of a bank guarantee, suretyship or other financial security instrument in the amount determined by the court issued by a person agreed by the court, whose financial capacity is not doubted by the court; or (ii) by commission of other actions determined by the court to eliminate the potential losses and other risks of the defendant.

A plea as to injunctive relief pending final resolution shall be considered by the court within two working days ex parte. A court order to secure a claim is an enforceable instrument that corresponds to an executive document (ie, a writ). The

order is subject to immediate execution, regardless of its appeal by the defendant. A copy of the enforcement order is serviced to the applicant and all persons concerned. The commercial procedural code has no special provisions as to aircraft arrest in opposition to those that concern a vessel, but the court may apply them by analogy (service of the order to a captain, to an airport where the aircraft is parking and/or based, Border Guard Service of Ukraine and fiscal bodies) to prevent the aircraft's flight out from its location.

3.4.8 Judgments in Foreign Currencies

A secured party under a security agreement/aircraft mortgage will receive a judgment in foreign and local currencies.

3.4.9 Taxes/Fees Payable

A secured party is not required to pay taxes or fees in a non-nominal amount in connection with the enforcement of a security agreement/aircraft mortgage.

3.4.10 Other Relevant Issues

There are no other relevant issues that a lender should be aware of in relation to the enforcement of its rights.

4. Other Issues of Note**4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft**

There are no other material issues relevant to the purchase, sale, lease or debt finance of an aircraft.

4.2 Current Legislative Proposals

There is no court practice connected with injunctive relief pending final resolution to enforce a security agreement/aircraft mortgage. Thus, it is unclear whether procedural code provisions as to executive order issuance and service in prescribed terms will be complied with.

Jurvneservice Law Firm

46/11 Turgenevskaya Str.
Suite 2
Kiev 01054
Ukraine

Tel: +380 44 239 23 90
Fax: N/A
Email: a.tsirat@jvs.law
Web: www.jvs.law

