

Protecting the Aircraft Lessee's Quiet Possession Right under the Cape Town Convention

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One of the most critical issues faced by an aircraft lessee in structuring and negotiating an aircraft lease is the preservation of the lessee's "quiet enjoyment" rights. "Quiet enjoyment" is the right of the lessee to possess, use and operate the aircraft without any interference from the lessor or the creditors of the lessor—so long as the lessee has not defaulted on its obligations. The lessee's quiet enjoyment rights against parties other than the lessor are not automatic and may need to be bargained for: for example, a lender to a lessor would prefer that the lessee *not* have any quiet enjoyment right against the lender so that, after a default by the lessor, the lender could recover the aircraft and sell or otherwise dispose of it "free and clear" of the lessee's rights.

Historically, United States aircraft lessees relied on a combination of contractual provisions and the constructive notice to third parties provided by recording the lease at the United States Federal Aviation Administration (FAA) in order to protect their quiet enjoyment rights. Things have changed since March 2006, when the Cape Town Convention on International Interests in Mobile Equipment (Cape Town Convention) and the related Protocol on Matters Specific to Aircraft Equipment (Aircraft Protocol, together with the Cape Town Convention, Cape Town Treaty) came into effect in the United States.

The Cape Town Convention was adopted for the purpose of setting up an international legal framework for the asset-based financing and leasing of specific categories of mobile equipment and protecting the interests of the parties to such transactions on an international basis. The Cape Town Convention contemplates the adoption of various "protocols" to the Cape Town Convention that would deal with matters specific to the individual categories of equipment. Aircraft, aircraft engines and helicopters are the first category of equipment to become subject to the Cape Town Convention, through the Aircraft Protocol.¹

Although the Cape Town Treaty strives for uniformity in the treatment of the interests to which it relates, it contemplates that countries may make specific declarations as to the manner in which certain provisions are to apply. For this reason, it is necessary, for purposes of thinking about how the Cape Town Treaty applies to a transaction generally (not just to quiet enjoyment rights), to look at the declarations adopted by the relevant country at the time it adopted the Cape Town Convention or the applicable protocol.

This article discusses how an aircraft lessee located in the United States, operating a United States-registered aircraft, should go about protecting its quiet enjoyment rights in light of the Cape Town Treaty, as adopted by the United States.

Protecting Quiet Enjoyment: United States Practice Before the Cape Town Treaty

In the United States, the Uniform Commercial Code and common law provide a lessee with certain quiet enjoyment protections. However, United States airline lessees typically have negotiated express contractual quiet enjoyment protection. An example follows:

Lessor covenants that, so long as an Event of Default shall not have occurred and be continuing, neither Lessor, nor any Person claiming by, through or in the name of Lessor, shall take or cause any action to be taken contrary to, or

otherwise in any way interfere with, the continued possession, use and operation of, and quiet enjoyment of, the Aircraft during the Term by Lessee.

Lessees want the covenant to apply in the absence of an “Event of Default” under the lease, so quiet enjoyment will not be impaired during any grace period for defaults under the lease. Where the lessor has borrowed money and secured the loan by granting a security interest in the lease, the lessee usually expects a similar quiet enjoyment covenant from the lessor’s lender, although sometimes this is a negotiated issue.

United States airline lessees have traditionally believed that filing and recording their lease contracts with the FAA enhanced their quiet enjoyment protection. The FAA maintains a system for recording title to airframes and leases and liens on airframes and engines. The FAA recording system works very much like a real-estate recording system and involves putting the actual lease document into the public record. Although an aircraft lease is not required, as a strict legal matter, to be recorded on the FAA system in order to protect either the lessor’s or the lessee’s rights, lessees have taken comfort from the notion that recording the lease with the FAA would effectively put third parties on notice of the lessee’s rights in the aircraft. This would bolster lessees’ legal rights by making it easier for them to assert that they should have quiet enjoyment rights against third parties with whom they were not necessarily in contractual privity (such as judgment creditors of the lessor, or lenders to the lessor who advanced credit to the lessor after the lease was in place). Also, lessees have traditionally taken the view that recording the lease with the FAA, purely as a practical matter, should reduce the odds that a third party might be ignorant of the lessee’s rights and take action antithetical to those rights. The FAA system is searchable by aircraft model and serial number, and an FAA search is customarily done by anyone contemplating taking a security interest in, or purchasing, an aircraft, in order to understand who else might have recorded rights in that aircraft. As discussed below, however, the Cape Town Treaty registration and priority scheme has effects that are fundamentally different from the FAA scheme.

Cape Town Treaty’s Treatment of Quiet Possession and Use

The Cape Town Convention was primarily adopted to create a system for the protection, on an international basis, of “international interests,” which consist of (1) the interest of a secured party under a security agreement, (2) the interest of a conditional seller under a conditional sale agreement and (3) the interest of a lessor under a lease. In addition to international interests, the Cape Town Treaty deals with other interests, such as sales of aircraft and engines and the lessee’s quiet enjoyment rights.

The Cape Town Treaty established the International Registry (IR) as an electronic database in which international interests and other registrable interests in aircraft objects recognized under the Cape Town Treaty are to be registered. Unlike the FAA recording system, the IR does *not* provide for any public filing of the documents that create a registered interest. Instead, the only things that appear on an IR search against an airframe or engine are the date and time of registration, the names of the debtor and creditor, the type of interest involved (*e.g.*, “sale”, “international interest”, “assignment”, “subordination”) and the email addresses of the individuals registered with the IR as the contacts for the parties making the registration. An IR search report does not even characterize what type of international interest is being registered (*i.e.*, secured party’s interest, lessor’s interest or conditional seller’s interest). The idea is that a searching party is supposed to be able to send an email message to the relevant contact person to get the details of the relevant agreements. Of course, the email contact system assumes that the relevant person will always be around to answer questions. That system breaks down if, for example, the contact person is on vacation or has left the company and the company has not designated a new IR contact person.

In the United States, FAA recordings are still required. It is not completely clear what protection, if any, such recordings provide to the financing parties or to the lessee, beyond whatever protection is provided under the Cape Town Treaty, but the FAA recordings may still provide some of the benefits discussed above.

Aircraft Protocol Article XVI(1): Quiet Possession as a Separate Right

A “quiet possession and use” right is contained in Article XVI(1) of the Aircraft Protocol, which states in relevant part:

In the absence of a default within the meaning of Article 11 of the Convention, the debtor shall be entitled to the quiet possession and use of the object in accordance with the agreement as against:

- (a) its creditor and the holder of any interest from which the debtor takes free pursuant to Article 29(4) of the Convention . . . , unless and to the extent that the debtor has otherwise agreed; and
- (b) the holder of any interest to which the debtor’s right or interest is subject pursuant to Article 29(4) of the Convention . . . , but only to the extent, if any, that such holder has agreed.

Article 29(4) of the Cape Town Convention states in relevant part that:

The conditional buyer or lessee acquires its interest in or right over that object:

- (a) subject to an interest registered prior to the registration of the international interest held by its conditional seller or lessor; and
- (b) free from an interest not so registered at that time even if it has actual knowledge of that interest.

When read together with Article 29(4) of the Cape Town Convention, Article XVI(1) of the Aircraft Protocol thus provides that, in “the absence of a default within the meaning of Article 11” a lessee shall be entitled to the “quiet possession and use” of the aircraft “in accordance with the agreement” as against certain enumerated parties. Let’s analyze what this means.

First, what does Article XVI(1) mean by “quiet possession and use?” “Quiet possession and use” is not defined in the Cape Town Treaty, but it is probably a safe assumption that it is intended to have essentially the same meaning as a right of quiet enjoyment under United States statutory and common law. The revised Official Commentary to the Cape Town Convention and the Aircraft Protocol acknowledges that the Aircraft Protocol does not define quiet possession or state what constitutes an infringement of the quiet possession right, but it says that “the concept of quiet possession denotes freedom from interference with the debtor’s possession, use or enjoyment of the aircraft object” and goes on to say that “any such act of interference constitutes a breach of the right to quiet possession, whether it takes the form of physical seizure, disablement of the aircraft object, restriction of access to it or otherwise.”

Article XVI(1) provides that a lessee shall be entitled to quiet possession and use of an aircraft object “*in accordance with the agreement*” [emphasis added]. It thus continues to be absolutely essential for a United States aircraft lessee to insist on contractual quiet enjoyment covenants of the kind described above. If the lease agreement is silent, arguably under the Cape Town Treaty, in a change from pre-Cape Town Treaty United States law, the lessee may have no quiet

enjoyment right. As discussed below, the drafting of those covenants must be modified in order to obtain the best results under Article XVI(1).

Second, what does Article XVI(1) mean when it refers to “the absence of a default within the meaning of Article 11 of the Convention?” Article 11 of the Cape Town Convention allows a lessee and its lessor to agree in writing on the events that constitute a default under the relevant lease agreement. Thus, the Cape Town Convention upholds contractual provisions to the effect that only defined “Events of Default” under the lease agreement entitle the lessor to exercise remedies, which would appear to validate a contractual quiet enjoyment provision that would provide that the lessee’s quiet enjoyment cannot be interfered with unless and until an “Event of Default shall have occurred and be continuing.”

Priority of Quiet Possession Rights

Against which parties does an aircraft lessee have “quiet possession and use” rights under Article XVI(1)? Before attempting to answer this question, let us explain briefly the fundamentals of the priority scheme established by the Cape Town Treaty. At the risk of gross over-generalization, essentially, the Cape Town Treaty is based on a “first to register” principle. Assume Party A and Party B each have a consensual security interest in an aircraft. If Party A’s interest in the aircraft is registered on the IR *prior* to the registration of Party B’s interest, Party A has priority over Party B—even if Party B’s interest is created before Party A’s, and even if Party A has actual knowledge of Party B’s rights. Likewise, if Party A registers its interest in the aircraft on the IR, and Party B does not, Party A will have priority over Party B’s unregistered interest, again even if Party A has knowledge of Party B’s rights.²

Turning now to the priority under the Cape Town Treaty of an aircraft lessee’s quiet possession rights, Clause (a) of Article XVI(1) gives the lessee a quiet possession right against:

- its “creditor” (in this case, its lessor); and
- other parties whose registered international interests under the Cape Town Treaty have a priority below that of the lessor, *whether or not the lessee is in contractual privity with those parties*.

Thus, an aircraft lessee has a quiet possession right “in accordance with the agreement” against a lender to its lessor, if the lender’s international interest in the aircraft ranks *behind* the international interest of the lessor, whether or not the lessee has a direct quiet enjoyment agreement from the lender. Examples of how the lender’s international interest could rank behind the international interest of the lessor include (1) the lessor registering its international interest in the lease on the IR *before* the lender registers its international interest in the secured loan to the lessor and (2) the lessor registering its international interest in the lease on the IR and the lender failing to register its international interest in the secured loan to the lessor. In this regard it should be noted that registration by the lessor of “title” to the aircraft (more technically, under the Cape Town Treaty “a contract of sale” in favor of the lessor) is *not* sufficient for this purpose: to reiterate, under the Cape Town Treaty, the lessor has to register its international interest *in the lease* on the IR in order for the lessee to have Article XVI(1) quiet possession rights.

On the other hand, in order for the lessee to have a quiet possession right against a person whose interest ranks *ahead* of that of its lessor, such as a lender whose international interest in the aircraft was registered on the IR *before* the lessor registered its international interest *in the lease*, under clause (b) of Article XVI(1), that person must specifically agree to the lessee’s quiet enjoyment rights. This is so even if that person has actual knowledge of the lease and the lease terms.

Differences between Cape Town Treaty Priority Scheme for Lessee's Quiet Possession Right and Pre-Cape Town Treaty Scheme under United States Law

The critical point is that the Cape Town Treaty quiet possession scheme is inherently problematic for an aircraft lessee because the Cape Town Treaty does not confer direct rights on the lessee. The lessee's quiet possession right is not itself a registrable interest under the Cape Town Treaty, and the lessee's priority against a party other than the lessor (the lessee's "creditor") that has an interest registered on the IR is entirely dependent on whether the lessor—and not the lessee—has properly (and timely) registered the lessor's international interest in the lease on the IR.

An important corollary is that a lessee can lose the benefits of its Article XVI(1) quiet possession rights through no fault of its own: if the lessor subsequently loses its priority against a third party, for example by discharging its registration of the lease on the IR, the lessee loses its Article XVI(1) quiet possession right against that party as well.

The notion that the loss of the lessor's priority against third parties could cause the lessee to lose its quiet enjoyment rights against third parties *who have notice, or even actual knowledge, of the lessee's interest* is a new concept created by the Cape Town Treaty. This is completely different from the FAA recording scheme, under which a recorded lease may not be taken off the record without the consent of both the lessor and the lessee unless the lessee is in default under the lease. The remainder of this article will discuss possible ways in which a lessee can lose its Article XVI(1) quiet possession right against a third party and the means by which the lessee can protect itself against loss of that right.

Protecting Quiet Enjoyment After the Cape Town Treaty

Drafting the Covenant

In view of the Cape Town Treaty, the quiet enjoyment covenant in the aircraft lease should be drafted in such a way to make it absolutely clear that it is intended that the lessee have quiet enjoyment rights not only as against the lessor, but also against any "and all persons claiming by, through or under lessor". As noted above, arguably there is no quiet enjoyment under the Cape Town Treaty unless it is expressly provided for "in the agreement". While there is a good argument under the wording of the Cape Town Treaty that a quiet enjoyment undertaking from the lessor alone should be sufficient to protect against the creditors of the lessor, in the absence of conclusive authority, it would be better for the drafting to clearly indicate that the lessee is supposed to have quiet enjoyment against not only the lessor, but also the lessor's lenders and other creditors to the lessor.

Order of Registration and "Subordination"

Because the general priority of rights under the Cape Town Treaty is established by the temporal order of registrations on the IR, it is crucial to get the order of registration right. In the case of a lease transaction involving a secured loan to the lessor, from the lessee's perspective, the preferred order of registration would be: (1) the sale of the aircraft to the lessor, (2) the lessor's international interest under the lease, (3) the secured lender's (or trustee's or agent's) international interest under the aircraft mortgage between the lessor and the lessor's secured lender (or such trustee or agent) and (4) any assignment of the lease as security for the lessor's debt. If any of these registrations are not done in the proper order, the ones that are out of order should be discharged and re-registered. If the parties are unwilling to discharge and re-register their existing interests, the holders of any IR registered interests that have IR priority over the lessee's quiet possession rights should agree in writing to the lessee's quiet enjoyment. In order to make that agreement fully binding on third parties, those parties should register

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“subordinations” to the lessor’s international interest under the lease, as contemplated by Article 29(5) of the Cape Town Convention, of their relevant interests in order to put the priority of registrations on the IR in the order described above.

Article 29 of the Cape Town Convention deals generally with the priority of competing interests. Article 29(5) of the Cape Town Convention provides:

The priority of competing interests or rights under this Article may be varied by agreement between the holders of those interests, but an assignee of a subordinated interest is not bound by an agreement to subordinate that interest unless at the time of the assignment a subordination had been registered [on the IR] relating to that agreement.

The term “subordination” is not defined in the Cape Town Treaty. In the context of the quiet possession right, a subordination of the international interest of a lender to the lessor to the lessee’s quiet possession right should be interpreted to mean only that the lender, as the holder of the “subordinated” interest, must respect the lessee’s rights to quiet possession and use of the aircraft under the relevant lease documents. This does nothing more than give effect to the quiet possession right given under Article XVI(1) of the Aircraft Protocol; in other words, the lender would be “subordinated” only to the extent of the lessee’s quiet possession right. In this regard, the use of the term “subordination” in the Cape Town Treaty is unfortunate, as it may suggest to the uninitiated that a lessee may somehow obtain superior rights as a general matter to those of the lender to the lessor if that lender enters into such a subordination agreement. This is an area in which the IR registration system is not helpful. If a subordination is registered on the IR, an IR search will only show that a subordination was registered, the date and time of registration and the names and email contact details for the party giving the subordination and the party benefiting from the subordination. No information is provided about what kind of interest is being subordinated to what other kind of interest. A searching party is supposed to track the deal parties down through the email addresses supplied on the search to obtain the relevant information.

The foregoing examples illustrate the critical importance to an aircraft lessee of conducting a search of the IR before entering into a lease in order to ascertain if there are any holders of interests registered on the IR who may not owe quiet possession rights to the lessee. This is true whether or not the lessee believes that the Cape Town Treaty would apply to the lease: as discussed above, the critical question under the Cape Town Treaty is whether or not there are IR registered interests against the lessor or the aircraft that pre-date the IR registration of the lessor’s interest in the lease. Ideally, this search should be broader than an IR search. For example, Article 60 of the Cape Town Convention provides that pre-Cape Town Treaty interests (for example, a mortgage that the lessor entered into in 2005 that remains in effect when the lease is entered into in 2009) retain their priority without being registered at the IR, so it is also important to find out, at the time of entering into a lease, what pre-Cape Town Treaty interests still exist. In the United States, this can be done through a search of the FAA records.

In the best of all worlds, the lessor would agree to make a registration on the IR that would recognize and validate the lessee’s quiet possession rights. Technically speaking, to use the terminology of the Cape Town Treaty, this would be accomplished by the lessor “subordinating” its international interest to the lessee’s quiet possession rights and registering on the IR a “subordination” of the lessor’s international interest in the lease in favor of the lessee’s “unregistered” —because unregistrable—quiet possession rights. In addition, any secured party of the lessor’s holding a lien on the aircraft would register a similar subordination to the lessee’s quiet possession right. The Cape Town Treaty and the related Regulations and Procedures clearly contemplate that such registrations should be able to be made, but because of certain

problems with the way the IR website is set up, such registrations cannot be made at the present time. We understand that the IR staff is working on fixing these problems. Even if the IR staff corrects the system to allow such a registration, though, the hesitation of financing parties to register something called a “subordination” remains an issue, as indicated above. This concern is exacerbated by the fact that an IR search gives no details as to the nature of the underlying interests involved.

Discharge of Registration

The regulations of the International Registry provide that a lessor or lender may discharge the registration on the IR of its international interest unilaterally. As the regulations currently exist, literally read, a lessor could discharge the registration of its international interest under an aircraft lease and sell or lease the aircraft to another person, free and clear of the lessee’s interest under the lease, *even if the lessee is not in default under the lease, and even if the new buyer or lessee has actual knowledge of the lessee’s leasehold rights*. In such a case, the lessee might have the right to sue the lessor who had made the improper transfer for breach of contract, but, if the Cape Town Treaty is to be taken literally, the lessee would have no right to have the sale or the new lease rescinded and to get the use of the aircraft back. (This seems to us to be a major departure from existing United States law.) For this reason, it is appropriate to insert a clause along the following lines in an aircraft lease:

So long as an Event of Default shall not have occurred and be continuing, neither Lessor, nor any Person claiming by, through or in the name of Lessor, shall discharge the registration with the International Registry of the International Interest arising with respect to this Lease.

Of course, even this would not protect against a willful breach by the lessor, but it does bolster the lessee’s contractual claims, and it does serve as a reminder to the lessor. Also, it provides some protection for the lessee in the event a creditor of the lessor forecloses on, and “steps in the shoes” of, the lessor.

Transfer by Lessor

Does a sale of an aircraft by the lessor or an assignment of the lease deprive the lessee of its Article XVI(1) quiet possession right? In order to ensure that the transferee lessor would become the lessee’s “creditor” for purposes of Article XVI(1), and therefore subject to the lessee’s Article XVI(1) quiet possession right, the transferee should expressly assume or otherwise agree to be bound by the applicable lease. Airlines should revise the assignment provisions in their standard form lease documents to require such express assumptions if such an assignment is to be allowed. If the lessor is a trust or other “pass-through” entity, the lease documents should also require the ultimate holders of interests in the lessor (such as an owner participant) to cause their assignees to agree to be bound by similar provisions.

In addition, depending on the nature of an assignment of the lease by the lessor or the law governing the lease, an assignment by the lessor may be treated as a novation of the lease contract under applicable non-Cape Town Treaty law. The Cape Town Treaty regards a novation of a lease as, in effect, a cancellation of the old lease and the creation of a new lease requiring a new registration of an international interest. There seems to be a significant risk that the new lease’s international interest would be subordinated to any international interest that had been registered after the initial lease registration but before the new one (for example, a registration with respect to any loan taken out by the old lessor after entering into the original lease). Since the lessee’s quiet possession right is only derivative from the international interest of the lessor, the lessee would not have a quiet possession right against the lender for such a secured loan

under the Cape Town Treaty if the registration of the lender's security agreement jumped ahead of the registration of the lease in priority. Accordingly, at the time of any lease assignment by the lessor, it is necessary to examine whether the assignment is regarded as an assignment or a novation under applicable non-Cape Town Treaty law and to determine what effect, if any, the characterization of the lease assignment under non-Cape Town Treaty law has on the order of priority of registrations under the Cape Town Treaty.

Use an Owner Trust as Lessor

The situations discussed above are additional reasons why, in United States financings, it is a good idea for the lessee to insist that the lessor be an owner trust with a bank owner trustee, with the real party in interest acting as owner participant. Ideally, the owner trustee/lessor would not be allowed to transfer its interest in the aircraft or the lease without the lessee's consent, and transfers by the real party in interest would be dealt with as owner participant transfers that do not require any registration on the IR. Although there are circumstances in which title to the aircraft would have to pass from one bank trustee to another, requiring registrations on the IR and raising many of the priority issues discussed above, in the more typical case title to the aircraft would remain with the same owner trustee bank/lessor, regardless of any owner participant transfer, and there should be little risk of a novation of the lease as a result of any owner participant transfer.

Back-Leveraging

In the simplest case, when a lessor decides to incur debt secured by an aircraft that is already subject to a lease, the lessor's interest in the lease will already be registered on the IR, and the subsequently registered lease assignment and the security agreement will automatically have the "right" junior level of priority, although the lessee will still want an express quiet enjoyment covenant from the lender. That covenant should include an agreement to obtain a similar quiet enjoyment covenant from any transferee of the lender. Back-leveraging transactions often are more complicated, however. For example, the rating agencies sometimes require an assignment or novation of a lease in connection with a securitization of a lease portfolio. As noted above, a novation creates a new international interest and requires the parties to think about how to adjust existing registrations so that the relative priorities will be in the "right" order. Since the lessee's quiet possession rights under the Cape Town Treaty only exist, with respect to parties other than its lessor, against interests that rank behind that of the lessor, the lessee will be concerned with the order of registrations, and the documents should require that the parties will agree to subordinations, or to discharge registrations and re-register them as necessary to preserve the "right" order of priorities. As a drafting matter, this should not be handled merely as a closing condition to the subsequent transfer: if the parties effect the transfer without regard to the closing condition, the lessee may be left with no remedy.

A Lessee's Checklist

The following is a list of basic steps that a prospective aircraft lessee should take to ensure that its quiet possession rights are protected:

Lien searches.

- Before entering into the lease, obtain a "Priority Search Certificate" from the IR, which will list all interests registered against the airframe and engines on the IR.
- Also do an FAA lien search. As indicated above, title transfers for United States-registered airframes and leases and liens affecting airframes and engines are still required to be recorded with the FAA. In addition, leases and liens recorded before the

Cape Town Treaty came into effect in the United States retain their priority against interests registered on the IR after the Cape Town Treaty came into effect.

- If the IR and FAA searches show priorities other than what is expected, consider what steps should be taken to restore the correct priorities or otherwise to protect the quiet enjoyment right against the lessor and any creditor of the lessor.

Insist that the lessor use a bank owner trustee as the lessor and that the owner trustee not be allowed to transfer its interest in the aircraft without the lessee's consent.

Covenants.

- Make sure the quiet enjoyment covenant in the lease covers the lessor's lenders and other creditors of the lessor and their respective assignees, not just the lessor itself. If the lease allows the lessor to transfer its interest in the aircraft or the lease, make sure the lease also requires the assignee to assume expressly the lessor's obligations under the lease and the related documents.
- Make sure the quiet enjoyment covenant provides that, in the absence of an Event of Default, neither the lessor nor any person claiming by, through or in the name of the lessor may discharge the lessor's international interest with respect to the lease.
- Make sure any provisions of the lease allowing the lessor to incur debt secured by the aircraft or the lease requires the lender (and any separate party acting as trustee or security agent for the lender) to provide a quiet enjoyment covenant similar to the lessor's covenant. If there is lessor debt secured by the aircraft or the lease at the time of entering into the lease, make sure that obtaining such a covenant from the lender and any such secured party and any re-registrations or subordinations necessary to put the priority of IR registrations in the desired order are conditions to closing.
- Make sure any provisions of the lease that allow the lessor to incur debt secured by the aircraft or the lease provide a mechanism for ensuring the desired priorities of the interests of the parties at the time the debt is incurred.
- If the lessor is an owner trustee or similar "pass-through" entity, make sure the owner participant (or other real party in interest) and its assignees are bound by provisions similar to the lessor's quiet enjoyment covenant.
- Make sure the documents include a further assurances covenant under which the financing parties agree that, if the priority of IR registrations ever becomes something other than the desired priority, they will either discharge registrations and re-register them in the correct order or register subordinations to correct the priority.

If the lessor must transfer title to the aircraft, consider whether the assignment would be treated as an assignment or a novation under non-Cape Town Treaty law and consider what steps are required to ensure that the IR registrations in connection with the assignment are consistent with that treatment and preserve the desired IR registration priorities.

This list does not purport to be a complete list of all issues that could conceivably relate to the lessee's quiet enjoyment rights. The circumstances of the particular deal should be evaluated, and the parties will have to negotiate provisions that are appropriate for the particular deal.

Conclusion

For a United States aircraft lessee, the quiet possession right under the Cape Town Treaty is a benefit, since it protects the lessee's rights not only in the country in which it is located but also in other countries that have adopted the Cape Town Treaty. The critical thing to keep in mind, though, is that the fact that third parties may be on notice of the existence of the lessee's interests is not enough to protect those interests. Protecting the lessee's quiet possession right under the

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Cape Town Treaty requires a combination of artful drafting and careful evaluation of the priority of registrations on the IR at the time the lessee acquires its interests and potentially re-thinking the priority of registrations on the IR after the lessee acquires its interest in the event of a transfer, novation or back-leveraging.

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¹ A protocol applicable to railway rolling stock is currently in the ratification stage, and a protocol applicable to space assets is in the drafting and comment stage.

² The situation is much more complicated for unregistered, non-consensual interests that are awarded priority under local law even in the absence of filing or recording, such as certain tax liens or possessory mechanics liens; also, the priority scheme can vary from country to country.