those costs are borne or shared, to determine their impact on the economics of the deal, before the parties are committed to proceeding with it. In this regard, the reason for the structure (to accommodate the lessor or the lessee) will play a role but, ultimately, the relative bargaining power of the parties will determine.

A useful source of reference in this regard is *Advanced Contract and Opinion Practices under the Cape Town Convention*[45] which assesses the implications of the Cape Town Convention[46] on a hypothetical but realistic transaction, from term sheet to closing.[47]

Having determined the structure of the lease, the parties are then in a position to enter into a letter of intent (which will be examined next) setting out the principal commercial terms of the desired leasing transaction. Alternatively, they may, if they so wish, reverse the order and agree the letter of intent first, leaving the precise structuring of the lease to be determined after the letter of intent is signed but before definitive lease documentation is agreed.

§2.03 THE LETTER OF INTENT

The lease is almost always preceded by a letter of intent[48] which sets out in summary form the principal terms. Legal issues here include the binding versus non-binding letter of credit and the issue of refundability of the deposit which is typically paid upon execution of the letter of intent so that the aircraft will be removed from the market pending negotiation and execution of the definitive lease.

With a non-binding letter of intent, or other letter of intent that does not include a deposit which is forfeitable in certain events, the lessor will have little motivation to remove the aircraft from the market.

The letter of intent is normally signed as soon as commercial agreement is reached in principle between the lessor and the airline with respect to the leasing of the aircraft. It will normally set out[49] the main commercial provisions, such as the parties, the aircraft, the target delivery date and lease term, the rent and other payment provisions (such as security deposit and maintenance reserves), any pre-approved subleasing by the lessee, key insurance requirements (such as stipulated loss value, minimum liability coverage and maximum deductible), and delivery and redelivery locations and (to a greater or lesser degree) conditions.

It is very desirable for a letter of intent to be reviewed by legal counsel to both parties (without slowing down the process unduly) since other matters, such as the governing law and jurisdiction provisions, the timeline for requisite corporate approvals subject to which the letter is signed, and other legal matters such as those identified above should be set out.

45. Legal Advisory Panel of the Aviation Working Group, *Advanced Contract and Opinion Practices under the Cape Town Convention*, Cape Town Paper Series, Volume 2, Unidroit, 2008.
46. Considered at §3.01, §3.10, §3.15[C], et seq., *infra*.
47. *Ibid.*, at vii.
48. Also commonly referred to as a term sheet or memorandum of understanding.
49. See Bunker D.H., *International Aircraft Financing, Volume 2: Specific Documents*, IATA, 2005, at 19–37.

The more detailed the letter of intent, the less negotiation, in theory, there should be when it comes time to negotiate the lease itself and other definitive legal documentation, although this is not always the case. For example, if the lessor has legal, financing or other restrictions on where it can permit the lessee to operate the aircraft, it would be prudent to raise the issue at the letter of intent stage rather than leaving it until the definitive documentation, since such particular requirements could run contrary to the lessee's immediate or potential future plans for the aircraft.

Having agreed the letter of intent, the matter of drafting the lease is then turned to the legal counsel for the parties, with counsel to the lessor normally providing the first draft (after technical and commercial review by his or her colleagues) for review by counsel to the lessee. This author has often noted that the lawyer's task at this point is to say in between 100 and 200 pages what the parties had already agreed to in fewer than 20 pages in the letter of intent – the additional pages being accounted for in no small measure by consideration of the legal considerations which are the subject matter of this work.

For cases where the Cape Town Convention applies,[50] the *Advanced Contract and Opinion Practices under the Cape Town Convention*[51] published by the Legal Advisory Panel of the Aviation Working Group[52] recommends[53] that the letter of intent should be binding in order:

1. to constitute an 'agreement for registration' if the intended nationality registration of the aircraft is to be the connecting factor under Article 3(3);[54] or
2. to create an enforceable obligation to remove prospective registrations[55] if the Transaction does not close or the beneficiary of such registration ceases to have an interest.

That same publication also advises[56] that the letter of intent should make clear which international interests thereunder are to be registered pursuant to the Cape Town Convention but even if this is not done, it should be clear from the interests provided for in letter of intent and the provisions of the Cape Town Convention which interests are registrable thereunder and which are not.

Typically, with a binding letter of intent, the lessee will pay a deposit to the lessor in consideration of lessor's removal of the aircraft from the market.

50. Considered *infra* at §3.01, §3.10, §3.15[C] and elsewhere.
51. *Advanced Contract and Opinion Practices under the Cape Town Convention*, Cape Town Paper Series 2, Volume 2, The Legal Advisory Panel of the Aviation Working Group, 2008.
52. An industry association of leading aircraft and aircraft engine manufacturers, lessor and financiers: see http://www.awg.aero.
53. At 11.
54. This provides for applicability of the Cape Town Convention where the aircraft is registered in the aircraft register of a contracting State or is to be so registered pursuant to an agreement for such registration in addition to Article 3(1) which provides for applicability of the Cape Town Convention where the lessee is situated in a contracting State.
55. Prospective international interests may be registered under the Cape Town Convention pursuant to Article 6 but there should be a mechanism to remove them if the transaction does not close.
56. At 12.

In *JSD Corporation PTE Ltd v. Al Waha Capital PJSC and Second Waha Lease Limited,*[57] before Smith J in the English High Court, the plaintiff sought the return of a deposit paid by it under a letter of intent for the purchase by it of an aircraft where the sale did not proceed.

The letter of intent stated that the deposit was non-refundable except in case of total loss of the aircraft or a default by seller, either of which event would result in the deposit being returned to the buyer.

In its defence, the plaintiff argued that the defendant did not negotiate in good faith to finalize the documentation. Smith J was clear that there is no such obligation under English law. He held, however, that the defendant was in breach of the terms of the letter of intent because, however inadvertently, it continued to advertise the aircraft for sale on Speednews, a trade publication, and thus failed, as agreed, to remove the aircraft from the market.

But for this clause, the plaintiff would not have succeeded – thus, it is imperative that lessors as well as sellers of aircraft ensure that, where a deposit is accepted in consideration for their removal of the aircraft from the market, all marketing efforts immediately cease and all advertisements lined up be cancelled.

Consistent with this approach, in *Tandrin Aviation Holdings Ltd v. Aero Toy Store LLC,*[58] the English Commercial Court upheld a seller's right to keep a deposit under a definitive sale agreement for the sale of an aircraft where a buyer failed to complete the purchase of an aircraft in a depressed market, holding on the facts that the amount of the deposit did not amount to a penalty and should be accepted in the circumstances as a true bargain between the parties as to a pre-estimate of seller's loss if buyer wrongly refused to complete the aircraft purchase.

Finally, if the obligation of either party to proceed is subject to its obtaining the approval of its board of directors, or to a satisfactory inspection of the aircraft by the lessee, or to any other condition or contingency, this should be made clear in the letter of intent, together with a clear deadline by which the conditions must be met, failing which the letter of intent should terminate and the deposit be returned to the lessee.

On the other hand, if the conditions are met, typically, the deposit paid under the letter of intent is applied towards the deposit payable under the lease once definitive lease documentation is signed.

§2.04 THE JURISDICTIONAL QUESTIONNAIRE

The jurisdictional questionnaire is a vital tool to help the lawyer assess the risk of leasing to an airline incorporated in a particular jurisdiction and allowing it to register the aircraft on that country's or another country's register.

Issues here include many of the items that will later be covered in the legal opinion to be given by the airline's lawyers to the leasing company but in general terms

57. [2009] EWHC 583 (Ch).
58. [2010] EWHC 40.

to help to identify jurisdictional risk and to determine any tax or legal issues which might affect the structuring of the deal.

For example, if the English courts are chosen as a forum for settlement of disputes under the lease, will the courts of the airline's jurisdiction enforce such judgment? If not, would they more readily enforce an arbitral award?

The lessor will usually obtain such questionnaire from its local counsel in the jurisdiction in question.

Typical areas covered in a jurisdictional questionnaire given by lessor's counsel include those set out at Annex 5.

§2.05 THE LEGAL OPINION

The legal opinion is typically not obtained until after the lease is signed and is a condition to the lessor's obligation to deliver the aircraft to the lessee. Nevertheless, the likely contents should be discovered beforehand pursuant to a draft opinion so as not to contain any unpleasant surprises. It typically covers many of the matters covered in both the jurisdictional questionnaire (as to which, see §2.04 *supra*) but is more specific, dealing with the lease in hand, rather than leases in general, and also the lessee's representations and warranties in the lease itself (as to which, see §3.04 *infra*).

The legal opinion should be addressed to the lessor and (if any) its financiers,[59] given by counsel to lessee acceptable to the lessor, and can be expected to contain various assumptions and qualifications which should be checked against typical practice for reasonableness.

The legal opinion should reference whether or not the Cape Town Convention is applicable. It is applicable where the lease constitutes an international interest under Article 2 thereof which may be registered if the airframe is registered as part of an aircraft in a contracting State, if the engine is registered as part of an aircraft in a contracting State or otherwise the engine is located in a contracting State[60] or if the lessee is situated in a contracting State.[61]

For transactions to which the Cape Town Convention is applicable, the Legal Advisory Panel of the Aviation Working Group[62] has made certain recommendations as to provisions dealing with the Cape Town Convention as well as assumption and qualifications. Interestingly, a footnote to its recommendation provides that:

> Law firms may give an opinion on the Convention as a matter of international law even though they are not counsel in the jurisdiction of any particular Contracting

59. Lessees may object to extension of the opinion to lessors' financiers with whom they have no direct relationship but lessors may respond that there is no additional cost involved and no additional obligation on the part of the airlines.
60. Article IV(1) of the Aircraft Protocol thereto.
61. Article 3(1) of the Convention.
62. *Advanced Contract and Opinion Practices under the Cape Town Convention*, Cape Town Paper Series 2, Volume 2, The Legal Advisory Panel of the Aviation Working Group, 2008, 25 et seq.

> State. A legal opinion should cover the law of the Contracting State where the aircraft is registered... and also, if not the same, where the debtor[63] is situated...

Typical areas covered in a legal opinion on a lease given by lessee's counsel include those set out at Annex 6.

§2.06 THE LAYOUT OF THE LEASE

Before examining the lease itself in detail, the overall typical layout of the lease will be examined first. Aircraft operating leases are typically fairly long documents, as noted, often between 100 and 200 pages in length, but, even if the order may differ somewhat,[64] typically, they may be seen as narratives with a start, pre-delivery (the period before the leasing of the aircraft begins), a middle, post-delivery (the period when the aircraft is on lease) and an end, post-lease term (the period after the leasing of the aircraft ends).

[A] Pre-delivery

Parties: The lease will, of course, need to state who are the parties to the lease so that the contract parties are clear. Often guarantors will be necessary also where the contract party is of insufficient credit, but the guarantee will normally be set out in a standalone document.[65]

Recitals: Although not essential, it is useful to set out recitals showing the background to the lease as an aid to the reader in reading the substantive provisions of the lease itself.

For example, if the lease is part of a sale and lease back deal whereby the lessor purchases the aircraft from the lessee and then immediately leases it back to the lessee, setting forth this fact in the recitals will make apparent to the reader why, later on in the lease, there are no delivery conditions which must be met before the lessee is obliged to accept the aircraft from the lessor.[66]

Definitions: Rather than setting out what is meant by terms each time they are used, or defining them in different places throughout the document, which may make reference difficult, it is also an aid to the reader to set out in one place, either here or in a schedule to the lease, the agreed meaning of certain terms, such as what is meant by an Engine Shop Visit, or a Business Day, where the meaning may not be completely clear simply by reference to industry usage.[67]

Representations and Warranties: The representations and warranties actually fall both into the start and the middle in this view of the lease as narrative.

63. Under Article 1(r) of the Cape Town Convention, the term 'debtor' where used in the Convention includes 'a lessee under a leasing agreement' *inter alia*.
64. See, for example, Bunker D.H., *International Aircraft Financing, Volume 2: Specific Documents*, IATA (2005) at 47–238.
65. See §3.01 *infra*.
66. See §3.02 *infra*.
67. See §3.03 and Section 1 of the Supplement *infra*.

Although they are set out together, representations are pre-contractual inducements made by each party to the other to enter into the contract in the first place, with remedies for their breach, whereas warranties are part of the contract itself, with legally distinct remedies for their breach.[68]

Conditions Precedent: Conditions precedent are those conditions which must be satisfied by one party before the obligations of the other party take effect. For example, a lessor may not want to be obliged to deliver the aircraft to the lessee until it has been paid the first month's rent and been assured that the aircraft is insured by the lessee. Likewise, a lessee may not want to be obliged to take delivery of the aircraft from the lessor until the lessor has title to that aircraft (a concern particularly for new aircraft orders where the lessor will want to conclude a lease for an aircraft which the manufacturer has not yet delivered to it).[69]

[B] Post-delivery

Having clarified who the parties are, the background to the lease, the meaning of the terms used in it, the inducements each party made to the other to enter into the lease, and the conditions which each party must first satisfy before the aircraft is delivered under the lease, the middle part of the lease in this narrative is next to be examined.

Term and Delivery: This is the core of the lease contract where the lessor and lessee agree that the lessor shall lease the aircraft to the lessee, and the lessee shall lease the aircraft from the lessor, on and subject to the terms set out in the lease agreement. The lease will make clear what the term of the lease is, and any extension options or early termination options to that term. It will also set out the delivery procedures and (although this may also be seen as part of the start) the physical condition required of the aircraft at the time of delivery to the lessee.[70]

Payments: The lease will also make clear what security deposit, if any, must be paid by the lessee to the lessor as security for its obligations, what rent must be paid and when throughout the term of the lease, and what maintenance reserves, if any, must be paid by the lessee to the lessor. The obligation of the lessor to return the security deposit may be set out here or elsewhere, as will the obligation of the lessor to return any maintenance reserves to the lessee (or any third party designated by it) as it performs certain scheduled maintenance work to the aircraft during the term.[71]

Taxes: The lease will set out the respective obligations of the parties for payment of taxes in connection with the leasing of the aircraft and which tax risks are borne by which party.[72]

68. See §3.04 and Section 2 of the Supplement *infra*.
69. See §3.05 and Section 3 of the Supplement *infra*.
70. See §3.06 and Section 4 of the Supplement *infra*.
71. See §3.07 and Section 5 of the Supplement *infra*.
72. See §3.08 and Section 5 of the Supplement *infra*.

that is the doctrine of *renvoi* does not apply'. Gerber[274] has commented that this judgment, harsh in its effect:[275]

> could probably be criticized as focusing overly on the hypothetical problems that might occur while ignoring the reasonable justifications of the particular facts of this case.

In order to overcome differing interpretations of, and problems involving *renvoi*, rules of private international law, and the risk of application of national law to what are inherently internationally moveable assets, the Cape Town Convention 2001 and Aircraft Protocol thereto provided for an 'international interest' in aircraft objects (defined to include (i) airframes which can carry at least eight persons including crew or goods in excess of 2,750 kg, (ii) aircraft engines having at least 1,750 lb of lift for jet engines or otherwise at least 550 rated take off shaft horsepower and (iii) helicopters which can carry at least five persons including crew or goods in excess of 450 kg).

Sir Roy Goode describes the 'international interest' as a creature of the Cape Town Convention which:

> in principle is not dependent on national law. It is therefore irrelevant that the international interest has no counterpart under the otherwise applicable law or that the latter does not recognise non-possessory security at all. Once the conditions of the Convention have been satisfied an international interest comes into existence, even if fulfillment of those conditions would not suffice to create an interest under national law or would require further formalities in order to be effective. In this sense, the international interest is an autonomous interest. However, it is not wholly independent of national law, which continues to govern the question of whether an agreement exists between the parties at all....[276]

Sir Roy continues that the creation of interests under national law is not precluded, and that 'in most cases' an interest arising under national law under a leasing agreement will constitute both an international interest and a domestic interest, but that 'usually' the international interest will give stronger rights than a purely domestic interest, since the former overrides even unregistrable unregistered interests whereas the latter may not.[277]

The Cape Town Convention[278] supersedes, pursuant to Article XXIII of the Protocol, the Geneva Convention for signatories thereto to the extent that the Cape

274. Gerber D.N., *Aircraft Finance Issues: The Blue Sky Ruling; The New ASU and the 'Home Country Rule'; and Recent Developments at the FAA Registry*, a paper presented at the American Bar Association Air and Space Law Forum 2010 Annual Meeting in Seattle, Washington on 26 Oct. 2010.
275. The mortgage had been perfected under the laws of the *lex registri*, which laws, under the private international laws of the *lex situs* applied, but had not been perfected under the laws of the *lex situs*, and thus was held not to have been perfected.
276. Sir Roy Goode, *The International Interest as an Autonomous Property Interest*, European Review of Private Law 1-2004, at 24.
277. *Ibid.*
278. Article XXIII of the Aircraft Protocol.

Town Convention applies.[279] International interests may be registered in respect of aircraft objects if the airframe is registered as part of an aircraft in a contracting State, if the engine is registered as part of an aircraft in a contracting State or otherwise the engine is located in a contracting State[280] or if the debtor (or lessee) is situated in a contracting State.[281]

Once registered, international interests (pursuant to Article 29(1) of the Cape Town Convention), have 'priority over any other interest subsequently registered and over an unregistered interest'. An 'unregistered interest' is defined in Article 1 to include non-consensual rights or interests.

The Geneva Convention does not create any rights or govern matters such as the transfer of title to engines.[282] It is a conflict of laws treaty that deals with recognition of rights, not a substantive treaty that creates rights.

Honnebier's[283] view of the background to this is that, immediately after World War II, a substantive treaty on rights in aircraft was not feasible, so the Geneva Convention was entered into as a provisional body of rules. Likewise, according to Rosales, the drafters of the Geneva Convention initially hoped to establish a substantive treaty mortgage or charge on aircraft, or at least a uniform recordation system, but found that would be too radical a departure in the face of great divergence in national conceptions.[284]

The Geneva Convention only deals with four types of consensually created rights and does not deal with non-consensual rights such as accretion or accession of title to aircraft engines by operation of law at all. Both Honnebier, on the one hand, and Releaux and Tonnaer, on the other hand, agree, albeit for different reasons, as to the inadequacy of the Geneva Convention in this regard and the need for the solution set out in the Cape Town Convention.

The Cape Town Convention creates an international interest which can be registered in respect of aircraft engines over a certain size (see *supra*). This international interest under Article 29(1) has 'priority over any other interest subsequently

279. Article XXIII of the Aircraft Protocol goes on to provide: 'However, with respect to rights or interests not covered or affected by the present Convention, the Geneva Convention shall not be superseded'.
280. Article IV(1) of the Aircraft Protocol.
281. Article 3(1) of the Convention.
282. As Honnebier puts it: 'the Convention takes no account of new developments in international financing practice, such as the fact that at present aircraft engines are financed and registered separately': *The Convention on International Interests in Mobile Equipment and the Aircraft Equipment Protocol will encourage European property law reform*, 1 (2004) Edinburgh Law, *Review* 115.
283. Honnebier B.P., *The European air transport sector requires an international solid regime facilitating aircraft financing: The Cape Town Convention*, Tijdschrift Vervoer + Recht, 2007-5, at 4.2 and 4.3.
284. Rosales R., *Recordation of Rights in Aircraft and International Recognition: A Comparison between the American and Canadian Situations*, Annals of Air and Space Law, Volume XVI, 1991, at 209–210.

registered and over an unregistered interest'.[285] An 'unregistered interest' is defined to include non-consensual rights or interests.

Thus, a duly registered international interest in an aircraft engine under the Cape Town Convention prevails over a non-consensual right or interest such as a transfer of title to an aircraft engine by operation of law by reason of its installation on another aircraft even if, under some applicable national property law, such installation would otherwise vest title to the engine in the owner of the aircraft.

There is some difference of legal opinion as to whether, for example, under the law of the Kingdom of the Netherlands[286] title to engines passes to the airframe owner upon installation thereon. Honnebier[287] argues that under such law there is no accession of title engines to the title of the aircraft on which it is installed. He cites two cases which decided against such accession: *AAR Aircraft & Engine Group v. Aerowings*[288] and *Volvo Aero Leasing v. AVIA Air*,[289] decided on the basis of the prevailing industry view.

The argument in favour of engine accession is based on Article 8:3a(2) of the Civil Code of the Netherlands, which provides that:

> [t]he airframe, engines, propellers, radio apparatus, and all other goods intended for use in or on the machine '(toestel)', regardless whether installed therein or temporarily separated there from, are a component part '(bestanddeel)' of the aircraft.[290]

Nevertheless, even those who argue that it does agree that this will no longer be the case once the Netherlands ratifies the Cape Town Convention. [291]

Finally, in this regard, it should be noted that the Cape Town Convention[292] has not yet been as widely adopted as the Geneva Convention[293] even though, for those States bound by it, the Cape Town Convention supersedes[294] the Geneva Convention to the extent of rights or interests covered by the Cape Town Convention. As noted above, the Geneva Convention was only intended as provisional in nature given the inability

285. Registration ensures that application of the principle of title preservation and overrides any contrary local law of contracting States. See French D., *Legal considerations for aircraft engine financiers*, Airfinance Journal, Jul. 2008 Supplement, at 23.
286. Bearing in mind that within the Kingdom of the Netherlands there are three separate jurisdictions, the Netherlands, the Netherlands Antilles and Aruba, each with its own Civil Code and that, accordingly, jurisprudential results in one jurisdiction may not necessarily be followed in the others.
287. Honnebier B.P., *Clarifying the Alleged Issues Concerning the Financing of Aircraft Engines: Some Comments to the Alleged Pitfalls Arising Under Dutch, German and International Law as Proposed*, ZLW 3/2007, at 33–44.
288. Court of Appeal, Den Bosch, The Netherlands, 15 Aug. 2002.
289. Summary Proceedings, Court of First Instance of Aruba, 25 Jun. 2003.
290. http://lincolngomez.com/2010/02/11/aviation-engines-doctrine-accession-gomez-bikker-arub on 18 Apr. 2011.
291. See *e.g.* Crans B., *Aircraft finance below sea level*, Airfinance Journal Supplement, Jul. 2008, at 39.
292. At the time of writing, 36 States are party thereto – see http://www2.icao.int/en/leb/List%20of%20Parties/capetown-prot_en.pdf on 6 Apr. 2011.
293. At the time of writing, 89 States are party thereto – see http://www2.icao.int/en/leb/List%20of%20Parties/Genev_en.pdf on 6 Apr. 2011.
294. Pursuant to Article XXIII of the Aircraft Protocol.

of States to agree substantive rules at that time. The Cape Town Convention is proof that agreement on substantive rules could be reached, thus obviating the need for the provisional solution set out in the Geneva Convention.

In summary, it could be said that neither the Cape Town Convention nor the Geneva Convention deals explicitly with transfer of title to engines by operation of law but that the Geneva Convention had no effect on such transfer whereas the provisions of the Cape Town Convention, which is growing in importance as it is increasingly adopted by more and more States, take precedence over any such transfer under national property law rules so long as the proper registration in respect of the international interest in the engine is made.

As a contractual matter *inter partes*, engine lessors commonly ask aircraft lessors to sign recognition of rights agreements (RORA), particularly as aircraft engine leasing increasingly develops as a commercial field alongside aircraft leasing. The idea behind the RORA is that, if an aircraft lessor repossesses its aircraft at a time when the airline has installed on that aircraft an engine belonging to the engine lessor, the aircraft lessor agrees not to make any ownership claim against the engine even if by operation of law title to the engine automatically passes to the aircraft lessor.

Usually this is not a contentious request, but disagreements over the extent of a RORA can occur where the engine lessor seeks to extend its terms beyond those originally contemplated.

For example, the engine lessor may ask that the provisions of its lease prevail over those of the aircraft lease, or it may ask that the aircraft lessor not take any action with respect to its engine without the engine lessor's consent.

These are unrealistic requests: an airframe lessor has no reason to agree that the engine lease will prevail over the aircraft lease. Further, if it needs to act quickly to repossess its aircraft and remove it to a different jurisdiction, it cannot lose valuable time obtaining consent and negotiating terms for it with the engine lessor.

The most the aircraft lessor can agree to do is to notify the engine lessor where its engine is after an aircraft repossession and invite the engine lessor to collect its engine.

Engine lessors may argue that they may be in breach of their covenant of quiet enjoyment to the airline if the aircraft lessor repossesses their engine while the airline is still complying with the engine lease. Such argument is specious, as the interference in quiet enjoyment would not have been caused by or through the engine lessor.

They may alternatively argue that commercially they may not wish or be able to terminate their engine lease: that is reasonable enough but they must accept and understand that if they allow their engine to be installed on somebody else's aircraft, they must expect that it is subject to being repossessed along with the aircraft by the aircraft owner. If they wish to continue their engine lease, they can collect it from the engine owner and ship it back to the airline. In most if not all cases, however, the engine lessor will be grateful that its engine was safely removed from the jurisdiction in the event of a major default or collapse on the part of the airline.

[C] Conclusions

The lessee's covenant's examined in §3.10[B] *supra* show a great interplay between, on the one hand, public and private international law as well as of national law (both law of the jurisdiction of the airline and law of the State of registration) and, on the other hand, aircraft operating leases, something reflect in the lengthy of §3.10[B] itself.

Many areas of public international law and national law, in particular involved, covering maintenance (where the lease requires, as seen, compliance as a contractual matter with legal requirements as to maintenance, and indeed imposes higher requirements), liens (which may take the form of an in rem lien under the Eurocontrol convention or even result in personal liability on the part of the lessor in the case of breach by the lessee of its obligations), registration (where, as foreseen by the Chicago Convention, registration may take various forms depending on national law), and replacement of parts and engines (where the Geneva Convention and the Cape Town Convention are discussed).

What has to be borne in mind throughout is that the provisions of the law as they apply to third parties apply without reference to the provisions of the lease, which only apply *inter partes*, and yet are most likely to become an issue for the lessor precisely because the lessee is in breach of its covenants under the lease (as well as its obligations at law).

Of course, the lessor will insist on an indemnity claim against the lessee, examined next at §3.11 but the lessee, if it is in breach of its covenants, may well be in breach because it is insolvent and thus in no more a position to indemnify the lessor for the consequences of its breach than it was in a position to avoid the breach in the first place.

§3.11 INDEMNITIES

These are some of the most closely negotiated parts of the lease for the lawyers if not for the non-lawyers. Since the lessor will not want to take the credit risk of the lessee in respect of its indemnity obligations, the lessor will insist that such indemnity obligations[295] be covered, insofar as that is possible,[296] by insurance, as discussed further at §3.12 *infra*.

[A] Damage to Aircraft or Other Loss to Lessor

The indemnity provisions will require the lessee to indemnify the lessor for damage to or loss of the aircraft and for loss which the lessor suffers as a result of any breach by the lessee of its obligations under the lease.[297] Of course, the lessor can sue the lessee

295. See Section 10 of the Supplement *infra*.
296. For example, neither hull nor liability insurances will cover the lessor in case an in rem lien is imposed against its aircraft in the circumstances discussed at §3.10 *supra*.
297. Clark T (editor), *Leasing Finance*, Euromoney, 1985, at 55, and Bunker D.H., *International Aircraft Financing, Volume 1: Specific Documents*, IATA, 2005, at 158–163.

for breach of contract in accordance with applicable law and the dispute settlement provisions of the lease.

This is, however, at heart, a risk assignment among the parties whereby the lessee undertakes such risk, and insures against it.[298] The hull insurances[299] should, subject to deductibles, cover loss or damage to the aircraft.

[B] Liability for Damage to Third Parties

[1] Liability to Non-passengers

Under the Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface signed at Rome on 7 October 1952 (Rome Convention 1952), the operator shall, pursuant to Articles 1 and 2, be liable for damage to any person on the surface 'upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom'. Under Article 2(3) thereof:

> the registered owner of the aircraft shall be presumed to be the operator and shall be liable as such unless, in the proceedings for the determination of his liability, he proves that some other person was the operator and, in so far as legal procedures permit, takes appropriate measures to make that other person a party in the proceedings.

The problem with this provision is that the Chicago Convention, at Article 17, refers, in fact, to the registration of aircraft, not to the registration of owners.

Article 19 of the Chicago Convention leaves it to the contracting States to determine what laws and regulations apply. As we have seen at §3.10[B][3] *supra*, not all contracting States have an ownership-based register, although some may do. As discussed there, in the case of a Japanese registered aircraft financed by the Export Import Bank of the United States, there may be four different legal entities which may be considered the owner.

In such an instance, it may not be entirely clear which is the owner for the purposes of Article 2(3) of the Rome Convention 1952 if the aircraft registration system concerned does not provide for an ownership-based register. It is conjectured that a court may look to the State of registration and apply the laws of such jurisdiction to determine who is the owner but that party may not be the 'registered owner' as required by the words of Article 2(3) of the Rome Convention 1952.

Article 9 of the Rome Convention 1952 goes on to provide:

> Neither the operator, the owner,... nor their respective servants or agents, shall be liable for damage on the surface caused by an aircraft in flight or any person or thing falling therefrom otherwise than as expressly provided in this Convention. This rule shall not apply to any such person who is guilty of a deliberate act or omission done with intent to cause damage.

298. See Bunker, *supra*.
299. See §3.12[B] *infra*.

The basic premise under the Rome Convention 1952 of holding the operator liable but assuming the owner is the operator unless the owner can rebut this assumption is echoed in various national laws, many of which provide for liability for damage on the part of the owner in the first instance and then go on to provide that, where the owner has leased the aircraft to an operator other than itself, such liability provisions shall be construed as if they referred to that operator rather than to the owner.[300]

The Rome Convention has been reviewed by an ICAO Council Special Group on the Modernization of the Rome Convention particularly in light of the risk of terrorist attacks using aircraft and the AWG has made submissions with regard thereto to the effect that the sole remedy of a person suffering damage should be to the operator given that lessors are essentially financial service providers, providing aircraft possession to airlines in return for a use fee without access costs where all operational risk is borne by the airlines.[301]

Arising out of such review, the Unlawful Interference Compensation Convention 2009 was negotiated,[302] the rules of which, under Article 44 thereof, prevail over those of the Rome Convention 1952, has not yet come into effect.[303] It provides simply for liability on the part of the operator.[304] Article 27 explicitly provides:

> No right of recourse shall lie against an owner, lessor, or financier retaining title of or holding security in an aircraft, not being an operator, or against a manufacturer if that manufacturer proves that it has complied with the mandatory requirements in respect of the design of the aircraft, its engines or components.[305]

Further, Article 29.1 sets out an exclusive remedy:

> Without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights, any action for compensation for damage to a third party due to an act of unlawful interference, however founded, whether under this Convention or in tort or otherwise, can only be brought against the operator and, if need be, against the International Fund and subject to the

300. See for example, Section 97(7) of the New Zealand Civil Aviation Act 1990 (which requires a hiring out essentially on a dry lease basis of greater than 28 days); Section 64 of the United Kingdom Civil Aviation Act 1982 (which provides in much the same terms except that the period should be greater than 14 days), and Section 10(a) of the Australian Damage by Aircraft Act 1999 (which also provides in much the same terms but does not have any minimum term requirement for a lease).
301. http://www.awg.aero/pdf/WP%204.pdf on 4 May 2009.
302. Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft, signed at Montréal on 2 May 2009.
303. Eight countries have signed so far at the time of writing – see http://www2.icao.int/en/leb/List%20of%20Parties/2009_UICC_en.pdf on 6 Apr. 2011.
304. Article 3.
305. Thus effectively resolving the lack of clarity as to the owner is for the purposes of Article 2(3) of the Rome Convention. An earlier draft had provided that claims against the operator would be an exclusive remedy and shielded all other entities. Germany expressed concerns about exonerating entities involved in the operational process – see International Conference on Air Law (Montreal, 20 Apr. to 2 May 2009), *Draft Convention on Compensation for damage to Third Parties, resulting from Acts of Unlawful interference involving Aircraft*, presented by Germany, ICAO DCCD Doc. No. 7, 13/03/09, at 4.2 and 4.3. Also, see §3.11[B][2] *infra*.

> conditions and limits of liability set out in this Convention. No claim by a third party shall lie against any other person for compensation for such damage.

Wool[306] writes that with this approach:

> for the first time, a major international air law instrument recognizes and advances the integrated industry principle. Previous air law instruments have equated airlines with the industry as a whole. The liability of others was beyond the scope of such instruments, meaning that they were left to applicable law.[307]

Abeyratne agrees with Wool that:

> [a] special and unique feature of the Convention is ….that…any action…can only be brought against the operator….[308]

Similarly, the related General Risks Convention 2009,[309] the rules of which, under Article 25 thereof also prevail over those of the Rome Convention 1952, has not yet come into effect.[310] It likewise provides simply for liability on the part of the operator.[311] Article 13 explicitly provides:

> Neither the owner, lessor or financier retaining title or holding security of an aircraft, not being an operator, nor their servants or agents, shall be liable for damages under this Convention or the law of any State Party relating to third party damage.

A previous submission by the AWG to ICAO[312] sets out a very useful comparative overview of liability *régimes* under various national laws, dividing them into three groups:

(1) liability only where there is fault on the part of the owner;[313]
(2) strict liability on the part of the owner, except where it was not in possession or control of the aircraft (this exception is often by way of subsequent amendment to a strict liability régime which did not recognize the difference between owners and operators), and

306. Wool J., *Lessor, Financier, and Manufacturer Perspectives on the New Third-Party Liability Conventions*, The Air & Space Lawyer, Volume 22, Number 4, 2010.
307. See also the discussion at §3.11[B][2] *infra*.
308. Abeyratne R.I.R., *The Unlawful Interference Compensation Convention of 2009 and principles of state responsibility*, Annals of Air and Space Law, Volume XXXV, Part I, 2010, 177–211, at 186.
309. Convention on Compensation for Damage Caused by Aircraft to Third Parties, signed at Montréal on 2 May 2009.
310. Ten countries have signed so far at the time of writing – see http://www2.icao.int/en/leb/List%20of%20Parties/2009_GRC_en.pdf on 6 Apr. 2011.
311. Article 3.
312. http://www.awg.aero/pdf/SPECIAL%20GROUP%20ON%20THE%20MODERNIZATION%20OF%20THE%20ROME%20CONVENTION%20OF%201952.pdf on 4 May 2009.
313. See for example, Section 146 paragraph 1 of the Austrian Aviation Act 1946.

possession granted to the lessor – this still did not resolve payment of the unpaid rent and other amounts or deregistration of the aircraft.[582]

[C] Cape Town Convention

The Rome Convention is superseded by the Cape Town Convention pursuant to Article XXIII of the Aircraft Protocol thereto insofar as aircraft as defined in the Aircraft Protocol[583] are concerned and States are party thereto, except for States which make a declaration to the contrary pursuant to Article 24 of the Aircraft Protocol.

If the Cape Town Convention and Aircraft Protocol apply, then, so long as the lessor acts in a commercially reasonable manner,[584] it may, if the lessee has agreed to it, take possession of the aircraft or apply for a court order authorizing it to take possession or control of the aircraft. Under Article 54(2) of the Cape Town Convention, a State may require leave of the court for such taking of repossession or control.

Under Article 13 of the Cape Town Convention, a contracting State shall ensure that a lessor may, pending final determination of a claim, and if the lessee has so agreed, obtain speedy relief as to possession, control and custody of the aircraft, subject to such terms as the court thinks necessary to protect the lessee or other interested parties.

It remains to be seen how the provisions of the Cape Town Convention and the Aircraft Protocol will be interpreted by the courts.

[D] Geneva Convention

The Convention on the International Recognition of Rights in Aircraft, signed at Geneva on 19 June 1948 (Geneva Convention), has already been discussed at §3.10[B][4][c] *supra* in the context of engines. Under the Geneva Convention, which has been ratified by 89 States,[585] the contracting States undertake to recognize property rights in aircraft provided that such rights have been constituted in accordance with the laws of the State of registration of the aircraft applicable at the time of their creation and are recorded in a public record of such State of registration[586] and include the right to possess an aircraft under a lease of six months or more.[587]

The remainder of the Geneva Convention largely deals with the rights of secured creditors and is of little practical use to operating lessors. Honnebier has commented that the Geneva Convention is merely a conflict of laws treaty rather than a substantive

582. As to which, see §3.15[F] *infra*.
583. As to which, see Article 1(2) of the Aircraft Protocol.
584. Article 9(3) of the Aircraft Protocol.
585. http://www2.icao.int/en/leb/Lists/Current%20lists%20of%20parties/AllItems.aspx on 20 Jun. 2011.
586. Article 1(a).
587. Article 1(c).

law treaty, and from the outset has been simply regarded as a 'provisional body of rules'.[588]

Pursuant to Article 23 of the Aircraft Protocol to the Cape Town Convention, the Geneva Convention is superseded by the Cape Town Convention and the Aircraft Protocol as it relates to aircraft as defined in the Aircraft Protocol except in relation to parties thereto which make a declaration to the contrary.

[E] Subleasing

Finally, in the context of repossession, a lessor should be careful in consenting[589] to any proposed subleasing by its lessee of its aircraft.[590] The sublease term should not extend beyond the term of the head lease and the rent thereunder should not be less than that under the head lease. Most importantly in the context of repossession, however, is that the lessor should be clear up front as to what will happen to the sublease should the head lease terminate.

Either the sublease should be explicitly stated to be subordinate to the head lease (such that, should the head lease terminate, the sublease automatically terminates too, thus entitling the lessor to repossession from the sub-lessee) or the head lessee[591] should assign its rights, but not its obligations, to the lessor as security for the performance by the lessee of its obligations under the head lease.

The effect of this will be that, if the lessee defaults, the lessor can terminate the head lease, but can take over the sublease so as to enjoy the rights of the sub-lessor thereunder. Notice of the assignment should be given to the sub-lessee and an acknowledgment thereof and consent thereto obtained from the sub-lessee.

In return for this, the lessor normally grants a letter of quiet enjoyment to the sub-lessee confirming that, so long as the sub-lessee performs under the sublease in favour of the lessor (pursuant to the assignment), the lessor will not interfere with the sub-lessee's quiet enjoyment of the aircraft for the term of the sublease.

Annex 1 sets out the interplay of the assignment by way of security and the letter of quiet enjoyment in a typical operating lease structure.

588. Honnebier B.P., *Clarifying the Alleged Issues Concerning the Financing of Aircraft Engines: Some Comments to the Alleged Pitfalls Arising under Dutch, German and International Law, as Proposed*, ZLW 3/2007 at 33–44. See §3.10[B][4][c] *supra*.
589. Whether such consent is a general subleasing right set out in the lease or a specific consent to a specific subleasing request by the lessee.
590. Indeed, a prudent lessor should carefully review which subleases by the lessee will require its prior consent since this will involve the lessee parting with possession of the lessor's property to a third party. This will vary by case: a lessor may require its specific prior consent to any sublease, or a lessee may negotiate for such consent to be dispensed with for subleases to other airlines within its corporate group or to certain specified other airlines acceptable to the lessor.
591. This is also the sub-lessor under the sublease.

[F] Deregistration

Simply obtaining possession of the aircraft alone may not of itself by a sufficient remedy for the lessor in respect of the aircraft itself.

The aircraft must be registered pursuant to Article 17 of the Chicago Convention. Under Article 19 of the Chicago Convention, however, it is up to each contracting State to decide what laws and regulations will govern registration of aircraft. See the discussion at §3.10[B][3] *supra*.

Where the aircraft is registered in the name of the owner, the owner[592] will control deregistration and thus should not face any difficulty in this regard.

Where the aircraft is, however, registered in the name of the lessee as operator, and the lessee refuses to deregister the aircraft, the lessor will be unable to deliver the aircraft to another lessee on terms whereby that lessee can operate the aircraft. To deal with the likelihood of such a refusal on the part of the lessee, the lessor may demand a deregistration power of attorney, which is next examined.

[G] Deregistration Power of Attorney

In cases where the aircraft is registered in the name of the lessee as operator of the aircraft, in order to protect the lessor in the case where the lessee is in breach of the lease and refuses to deregister the aircraft despite being required to do so under the lease, the lessor frequently demands a deregistration power of attorney to be executed by the lessee in favour of the lessor authorizing the lessor to deregister the aircraft from the aircraft register.

In practice, such powers of attorney are of limited practical use. Notwithstanding any language therein to the effect that they are irrevocable, under many legal systems they are irrevocable at any time and aviation authorities are loath to rely on them alone to deregister an aircraft in the face of opposition from the local operator.

Further, under English law, powers of attorney must be executed as a deed. This fact is frequently forgotten, especially where the power[593] is granted in the body of the lease itself. English law regarding due execution of a deed must be followed carefully.

In a recent English High Court case,[594] a document purporting to be executed as a deed was disallowed since, following common practice, the signature pages thereto had been pre-placed and the final text added later, in breach of the requirement that the signature and attestation form part of the same physical document such that the deed was signed in its final form.

592. Assuming it is, or is related to, the lessor – see §2.02 *supra*.
593. This may take the form of a specific power of attorney to deregister or the form of a broader power of attorney to take all steps necessary to allow the lessor to exercise its remedies thereunder.
594. *R. (on the application by Mercury Tax Group and another)* v *HMRC* [2008] EWHC 2721.

[H] Article 83*bis* Transfer

One possible step which may be open to a lessor who is wary of leasing to an operator based on a country with an operator only registration system for aircraft may be to effect a transfer under the widely adopted Article 83*bis*[595] of the Chicago Convention which provides that:

> when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease... of the aircraft... by an operator who has his principal place of business... in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties as State of registry in respect of that aircraft....[596]

This is also popularly referred to as an Annex 6 delegation or transfer since what are transferred are the obligations of the State of registration under Annex 6 of the Chicago Convention, dealing with International Standards and Recommended Practices relating to the operation of aircraft. Areas which may be covered by such a transfer are rules of the air,[597] aircraft radio equipment,[598] certificates of airworthiness[599] and licenses of personnel.[600]

If it is possible to achieve such a transfer, then the risk of the lessee's wrongly refusing to deregister the aircraft can be managed but it should be borne in mind that such transfers are done between States and thus require two willing States, either of which can refuse the transfer or impose such conditions as it may see fit.

For example, the United Kingdom will not normally agree to such a transfer for a period exceeding six months in duration.[601] Such a period would not be long enough for most operating leases and is more often availed of in practice where a lessee itself wishes to sublease an aircraft for a summer or winter season.

Dempsey[602] gives the hypothetical example that Ireland could delegate to Germany the responsibility to oversee the airworthiness of aircraft owned by Irish leasing companies but operated by Lufthansa. Although Dempsey indeed gives a good example, in fact, there is no such delegation between Ireland and Germany. One reason

595. Article 83*bis* has been adopted by 157 of the 190 contracting States of the Chicago Convention – see http://www2.icao.int/en/leb/List%20of%20Parties/83bis_en.pdf and http://www2.icao.int/en/leb/List%20of%20Parties/chicago_en.pdf on 7 Apr. 2011.
596. Leloudas and Haeck express concern that the reference to the principal place of business rather than to the place of incorporation of the operator 'means that the State of the operator is unable to maintain control of the airline and the aircraft': Leloudas G. and Haeck L., *Legal Aspects of Aviation Risk Management*, Annals of Air and Space Law, Volume XXVII, 2002, 149–169, at 163. This author, however, sees no reason why an operator having its principal place of business in a State would not be subject to the jurisdiction of that State, and has seen no evidence of this issue causing any problem in practice.
597. Article 12 of the Chicago Convention.
598. Article 30 of the Chicago Convention.
599. Article 31 of the Chicago Convention.
600. Article 32(a) of the Chicago Convention.
601. United Kingdom Civil Aviation Authority Official record Series 4, Air Navigation Order 2005 General Exemption, 30 Sep. 2005.
602. Dempsey P.S., *Public International Air Law*, McGill University, 2008, 118.

why Article 83*bis* is not more widely availed of[603] may be that the state of the aircraft operator has no motivation to accept such responsibility, even though it would have no ability to avoid such responsibility if, in this example, the lessor and Lufthansa agreed that the aircraft should be registered in Germany rather than Ireland for the term of the lease.

Although Ireland and Germany have not entered into any such agreements, there is no reason, in principle, why they should not as, for example, Ireland and Italy have entered into such agreements and also Italy and Germany have likewise entered into such agreements. It is a matter of both States being willing: no State can be forced into such an agreement.

ICAO[604] has made clear that the concept of registration implies responsibility of the State of registration for safety of aircraft registered with it, wherever they may be operated.[605] Article 83*bis* was developed in response to safety concerns arising out of the growing trend for aircraft leasing. The aim is to offer:

> a solution under public international law that aims at facilitating safety oversight, taking into account the need of airlines for flexible commercial arrangements in the use of their aircraft.[606]

As at 20 November 2002, 25 transfer agreements had been registered with ICAO, twelve of them by Italy (and six of those to Germany) and eight of them by Ireland.[607] Thus, the take up rate has not, apparently, been very high.[608]

A note of diffidence to such arrangements may, perhaps, be noted in recital 8 to EC Regulation 1008/2008,[609] which provides:

> In order to avoid excessive recourse to lease agreements of aircraft registered in third countries, especially wet lease,[610] these possibilities should only be allowed in exceptional circumstances, such as a lack of adequate aircraft on the Community market, and they should be strictly limited in time and fulfil safety standards equivalent to the safety rules of Community and national legislation.

Certainly, this shows a greater concern with wet leasing than with dry leasing but the regulation does not discuss what greater comfort, if any, may be taken in the case of dry

603. A full list of Article 83*bis* agreements registered with ICAO may be found at http://www.icao.int/applications/dagmar/main.cfm?UserLang= (as of 16 Nov. 2010).
604. *Guidance on the Implementation of article 83bis of the Convention on International Civil Aviation*, ICAO, 2003. More recent agreements can be looked up at http://www.icao.int/applications/dagmar/main.cfm?UserLang= but no overall list or number of agreements is available there.
605. *Ibid.*, at 4-5.
606. *Ibid.*, at 5.
607. *Ibid.*, at 23.
608. That said, although the website does not disclose precisely how many have been registered with ICAO, the ICAO website shows at least 100 having been registered. See http://www.icao.int/applications/dagmar/main.cfm?UserLang= on 8 Apr. 2011.
609. Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 Sep. 2008 on common rules for the operation of air services in the Community.
610. *Sic.*

leases of aircraft registered in third countries where there is a transfer of oversight pursuant to Article 83*bis*.[611]

The model transfer agreement[612] and sample transfer agreements set out by ICAO refer to Annexes to, rather than to Articles of, the Chicago Convention, but generally show full transfer of oversight in respect of Annex 1 (personnel licensing), Annex 2 (rules of the air), Annex 6 (operation of aircraft), as referred to above, but reserving oversight or having only a limited transfer in respect of Annex 8 (airworthiness).

In this context, according to Abeyratne:[613]

> [t]echnically, Article 83 *bis* is calculated to tighten and ensure the more efficient operation of aircraft in terms both of safety and of commercial expediency....

It is not, therefore, a case of having to choose between one and the other. He helpfully goes on to point out[614] that an incentive to a State considering whether or not to conclude an agreement under Article 83*bis* is the assurance that the State to which safety oversight is delegated has the capability of fulfilling its responsibilities in respect of the aircraft involved: such State has access to the results of audits carried out under the ICAO Safety Oversight Audit Programme.

Although there is no reason under the terms of Article 83*bis* why a delegation under Article 83*bis* need be limited to specific aircraft, in practice, they are: see for example, the Memorandum of Understanding (with two Schedules) between the Irish Aviation Authority (Ireland) and the Ente Nazionale per l'Aviazione (Italy) on the Implementation of Article 83*bis* of the Convention on International Civil Aviation for the Transfer of Surveillance Responsibilities (Operations, Maintenance and Continuing Airworthiness) of Aircraft Operated under Dry Lease Contract[615] dated 14 October 2000.

It is specific to 53 aircraft listed by aircraft type, registration mark and manufacturer's serial number and Italian operator. Under its terms,[616] consistent with the ICAO model transfer agreement referred to above, there is full transfer, in respect of the aircraft covered by the agreement, of oversight in respect of Annex 1 (personnel licensing), Annex 2 (rules of the air), and Annex 6 (operation of aircraft), but only a limited transfer in respect of Annex 8 (airworthiness): oversight is retained by the State of registration except for maintenance surveillance in respect of leased aircraft. Further, each party agrees[617] to the other only to authorize leasing contracts of aircraft which are in compliance with the terms of the agreement.

Even before Article 83*bis* took effect, on 20 June 1997, ICAO urged States of registration unable adequately to fulfil their responsibilities adequately in instances

611. It should be noted here that a party to the Chicago Convention which is nevertheless not a party to Article 83*bis* is not bound by any such delegation among States.
612. Set out as Annex 12 hereto.
613. Abeyratne R.I.R, Aviation Trends in the New Millenium, Ashgate, 2001, 25.
614. *Supra*, 27.
615. http://www.icao.int/applications/dagmar/agr_details.cfm?UserLang=&icaoregno=4276%2E0 on 7 Apr. 2011.
616. At Part IV (Transferred Responsibilities) thereof.
617. Under Part VI (Lease Authorisation) thereof.

responsibility under Article 10 of the thereof, a lessor[31] should not have to show that the aircraft commander whose acts are the subject of proceedings acted on reasonable grounds under Article 6(1). That said, he recognizes that, as noted at §3.11[B][4][a] *supra*, a previous attempt to amend the Tokyo Convention failed but he proposes that, if and when the Tokyo Convention is amended anyway, this point be taken into consideration.

Regarding the failed proposal to amend Article 3 of the Tokyo Convention to provide that, in the case of an aircraft leased without crew to a lessee having its principal place of business in a State other than the State of registration of the aircraft, that other State should 'also be competent to exercise jurisdiction',[32] this author believes that such an amendment would be consistent with Article 83*bis* of the Chicago Convention. Why should criminal jurisdiction depend on the nature of the airline's possession of the aircraft? If a passenger commits a crime aboard a flight operated on board an aircraft operated by Alitalia, owned by Alitalia and registered in Italy, the Italian authorities have jurisdiction. Why should they not have jurisdiction simply because the same passenger commits the same crime on board the same aircraft operated by the same airline on the same route simply because Alitalia leases the aircraft instead of owns it, and the aircraft is registered in Ireland, pursuant to Article 83*bis* delegation? To make a distinction here is to allow a private commercial transaction to determine criminal jurisdiction.

[G] Hell or High Water

The 'hell or high water' clause, discussed at §3.07[A] *supra*, has been criticized[33] in the context of the operating lease. Absent any legal or policy consideration to the contrary, and he has not encountered any, this author believes that this is a matter of negotiation among then parties to the contract. If the parties agree to it, it should, in such instance, be enforced. However, there seems no reason why, at least in a market where airlines have the upper hand, concessions could not be obtained from lessor, provided always that the lessor's financiers are still willing to provide the financing necessary to the lessor to fund the transaction.

[H] Conclusivity of Acceptance

As discussed in §3.06[B][3], the lease provides for acceptance of the aircraft by the airline, as evidenced by its execution of the certificate of acceptance to be conclusive that the aircraft is satisfactory in all respect to the lessee. Coupled with limits on

31. Or any other party not having operational control of the aircraft or being vicariously liable for the acts of the operating airline's employees.
32. Fitzgerald G.F., *The Lease, Charter and Interchange of Aircraft in International Relations: Amendments to the Chicago and Rome Conventions*, Annals of Air and Space Law, Volume II, 1977, 103–137, at 120.
33. See §3.07[A] *supra*.

inspection rights and exclusions of warranties by then lessor, the idea is to place the entire risk on the lessee.

To the extent that airlines dispute this after delivery, and especially to the extent that they are successful in defeating their own lease provisions, freely negotiated by them with the benefit of professional legal representation, the airlines should be at least aware of one unintended consequence of success in overturning such provisions. In arguing against the enforceability of the conclusivity language in the acceptance certificate provided for in the lease, the airline not only sets itself up for the possibility that the similar conclusivity language in the redelivery certificate given to it by the lessor upon completion of its corresponding redelivery inspection at the end of the lease may not be upheld but also to the possibility that the lessor will not be bound be limits on inspection on redelivery if the lessee is not bound by limits on inspection on delivery.

Success on this point might be welcome to an airline in a given case but such success would have implications for all airlines under all leases going forward, truly a case of being careful for what ones wishes. This author's recommendation would be that, in their own interest, airlines not push for any change in this regard.

§4.03 CLOSING WORDS

Aircraft leasing is assuming an ever increasing importance in international aviation to the point where it cannot be presumed that the operator of the aircraft is the owner. Recent public and private air law instruments show an emerging awareness of this importance but there remain areas of policy to be considered before aircraft leasing can be said to be systematically integrated into the systems of public and private international air law.

Public private international air law is of most relevance to aircraft operating leasing in its desire to protect third parties, whether in the air or on the ground, from injury or damage by means of safety, which finds its connection with such leasing most clearly in the area of maintenance. There is no tension here between public good and private interest as it is in all the parties interests to ensure high maintenance standards for aircraft: the former acting in order to avoid accidents, the latter acting in order to maximize the residual value of the aircraft at the end of the lease.

Private international air law is of most relevance to aircraft operating leasing in its desire to provide for recourse to adequate compensation for third parties for injury or damage if, God forbid, despite all safety efforts, an accident occurs. There is an apparent tension here between some of the private air law instruments and the allocation of risk as between lessor and lessee in the aircraft operating lease. Nevertheless, this author asserts that the public benefit is always met by providing full recourse to the operator, requiring the operator to carry ample liability insurance. This is without limitation to the operator's right of recourse against the lessor, which should be governed by the terms of the lease. The tension is largely only apparent as the lessor requires in the lease that the lessee procure liability insurance in excess of the

Lessee to the non-exclusive jurisdiction of the courts as set out in Section 15.2 are valid and binding.

(l) Allowances: Lessee has not claimed and will not claim any capital or depreciation allowances in respect of the Aircraft.

2.2 Lessee's Further Representations and Warranties

Lessee further represents and warrants to Lessor that:

(a) No Default:
  (i) No Event of Default has occurred and is continuing or might reasonably be expected to result from the entry into or performance of any of the Operative Documents.
  (ii) No event has occurred and is continuing that constitutes, or with the giving of notice, lapse of time, determination of materiality or fulfillment of any other applicable condition, or any combination of the foregoing, might constitute, a material default under any document that is binding on Lessee or any assets of Lessee.

(b) Registration:
  (i) It is not necessary or advisable under the laws of the State of Organization, the State of Registration or the Habitual Base in order to ensure the validity, effectiveness and enforceability of the Operative Documents or to establish, perfect or protect the property rights of Lessor or any Financing Party in the Leased Property that any instrument relating to the Operative Documents, other than *[to be supplied by Lessee]*, be filed, registered or recorded or that any other action be taken or, if any such filings, registrations, recordings or other actions are necessary, the same have been effected or will have been effected on or before Delivery.
  (ii) Under all Applicable Laws, including the laws of the State of Organization, the State of Registration and the Habitual Base, the property rights of Lessor and any Financing Parties notified to Lessee in the Leased Property have been fully established, perfected and protected and this Agreement will have priority in all respects over the claims of all creditors of Lessee, with the exception of such claims as are mandatorily preferred by law and not by virtue of any contract.

(c) Litigation: No litigation, arbitration or administrative proceedings are pending or, to Lessee's knowledge, threatened against Lessee that, if adversely determined, would have a material adverse effect upon its financial condition or business or its ability to perform its obligations under the Operative Documents.

(d) Taxes: Lessee has delivered all necessary returns and payments due to all tax authorities having jurisdiction over Lessee, including those in the State of Organization, the State of Registration and the Habitual Base, and Lessee is

not required by law to deduct or withhold any Taxes from any payments under this Agreement. The execution, delivery or performance by Lessee or Lessor of the Operative Documents will not result in the Lessor (i) having any liability in respect of Taxes in the State of Organization, State of Registration or Habitual Base or (ii) having or being deemed to have a place of business in the State of Organization, State of Registration or Habitual Base.

(e) Material Adverse Change: No material adverse change in the financial condition of Lessee has occurred since the date of the financial statements most recently provided to Lessor on or before the Delivery Date.

(f) Information: The financial and other information furnished by Lessee in connection with the Operative Documents does not contain any untrue statement of material fact or omit to state any fact the omission of which makes the statements therein, in light of the circumstances under which they were made, materially misleading, and does not omit to disclose any material matter. All forecasts and opinions contained in the financial and other information furnished by Lessee in connection with the Operative Documents were honestly made on reasonable grounds after due and careful inquiry by Lessee.

(g) Air Traffic Control: Lessee is not in default in the payment of any sums due by Lessee to any ATC/Airport Authority in respect of any aircraft operated by Lessee.

(h) Insurances: On the Delivery Date, the Insurances will not be subject to any Security Interest except as may be created pursuant to the Operative Documents.

2.3 Repetition

The representations and warranties in Section 2.1 and Section 2.2 will survive the execution of this Agreement. The representations and warranties contained in Section 2.1 and Section 2.2 will be deemed to be repeated by Lessee on Delivery with reference to the facts and circumstances then existing. The representations and warranties contained in Section 2.1 will be deemed to be repeated by Lessee on each Rent Date as if made with reference to the facts and circumstances then existing.

2.4 Lessor's Representations and Warranties

Lessor represents and warrants to Lessee that:

(a) Status: Lessor is duly formed and validly existing under the laws of the place of its organization. Lessor has the power to own the Leased Property and carry on the business contemplated of Lessor under the Operative Documents.

(b) Power and Authority: Lessor has the power and authority to enter into and perform, and has taken all necessary action to authorize the entry into, performance and delivery of, the Operative Documents and the transactions contemplated by the Operative Documents.

(c) Enforceability: Each of the Operative Documents constitutes Lessor's legal, valid and binding agreement, enforceable against Lessor in accordance with its terms.

(d) Non-conflict: The entry into and performance by Lessor of, and the transactions contemplated by, the Operative Documents do not and will not:
  (i) conflict with any Applicable Laws binding on Lessor;
  (ii) conflict with the organizational documents of Lessor; or
  (iii) conflict with or result in a default under any document that is binding upon Lessor or any of its assets.

(e) Authorization: So far as concerns the obligations of Lessor, all authorizations, consents, registrations and notifications required in connection with the entry into, performance, validity and enforceability of, and the transactions contemplated by, the Operative Documents by Lessor have been (or will on or before Delivery have been) obtained or effected (as appropriate) and are (or will on their being obtained or effected be) in full force and effect.

(f) No Immunity:
  (i) Lessor is subject to civil and commercial law with respect to its obligations under the Operative Documents.
  (ii) Neither Lessor nor any of its assets is entitled to any right of immunity and the entry into and performance of the Operative Documents by Lessor constitute private and commercial acts.

(g) Right to Lease: On the Delivery Date, Lessor shall have the right to lease the Aircraft to Lessee under this Agreement.

2.5 Repetition

The representations and warranties in Section 2.4 will survive the execution of this Agreement. The representations and warranties contained in Section 2.4 will be deemed to be repeated by Lessor on Delivery as if made with reference to the facts and circumstances then existing.

3. CONDITIONS PRECEDENT[3]

3.1 Lessor's Documentary Conditions Precedent

Lessor's obligation to lease the Leased Property to Lessee under this Agreement is subject to the receipt of the following by Lessor from Lessee no less than three Business

3. See §3.05 and Annex 8 of the text *supra*.

Days before Delivery in form and substance satisfactory to Lessor, provided, that it shall not be a condition precedent to the obligations of Lessor that any document be produced, or action taken, which is to be produced or taken by Lessor or any Person within its control:

(a) Constitutional Documents: a copy of the constitutional documents of Lessee[, together with an English translation thereof];

(b) Resolutions: a true copy of a resolution of the board of directors (or the equivalent) of Lessee approving the terms of, and the transactions contemplated by, the Operative Documents to which it is a party, resolving that it enter into the Operative Documents to which it is a party, and authorizing a specified individual or individuals to execute the Operative Documents to which it is a party and accept delivery of the Leased Property on its behalf;

(c) Operative Documents: a copy of each of the Operative Documents, duly executed and, if necessary, notarized by Lessee, including the chattel paper original counterpart of this Agreement;

(d) Opinions: (i) an opinion, in form and substance satisfactory to Lessor, in respect of Lessee's obligations under the Operative Documents issued by independent legal counsel to Lessee acceptable to Lessor, and (ii) an opinion from Lessor's Counsel as to such matters as Lessor may reasonably request;

(e) Approvals: evidence of the issuance of each approval, license and consent which may be required in relation to, or in connection with, the performance by Lessee of its obligations under the Operative Documents;

(f) Filings and Registrations: evidence that the Aircraft has been validly registered under the laws of the State of Registration and that all filings, registrations, recordings and other actions have been taken or made that are necessary or advisable to ensure the validity, effectiveness and enforceability of the Operative Documents and to protect the property rights of Lessor in the Leased Property;

(g) Licenses: copies of Lessee's air transport license, air operator's certificate and all other licenses, certificates and permits required by Lessee in relation to, or in connection with, the operation of the Aircraft;

(h) Certificate: a certificate of a duly authorized officer of Lessee:
  (i) setting out a specimen of each signature of an officer of Lessee referred to in Section 3.1(b); and
  (ii) certifying that each copy of a document specified in Section 3.1(a) and (b) is correct, complete and in full force and effect;

(i) Insurances: certificates of insurance, certificates of reinsurance, insurance brokers' undertakings, reinsurance broker's undertakings and other evidence satisfactory to Lessor that Lessee is and will be in compliance with the provisions of this Agreement as to insurances on and after Delivery;

(j) ATC/Airport Authority: letters from Lessee addressed to any ATC/Airport Authority designated by Lessor pursuant to which Lessee authorizes such authority to issue to Lessor, upon Lessor's request from time to time, a

statement of account of all sums due by Lessee to such authority in respect of all aircraft (including the Aircraft) operated by Lessee;

(k) Acceptance by Process Agent: a letter from the process agent appointed by Lessee pursuant to Section 15.4(a) accepting its appointment;

(l) Aviation Authority Letter: to the extent available, a letter from the appropriate Aviation Authority confirming that, upon the occurrence of an Event of Default under this Agreement and a request for deregistration by Lessor, the Aviation Authority will deregister the Aircraft and authorize the export of the Aircraft from the State of Registration; and

(m) General: such other documents as Lessor may reasonably request.

3.2 Lessor's Other Conditions Precedent

The obligation of Lessor to deliver and lease the Leased Property under this Agreement is also subject to the following additional conditions precedent:

(a) Representations and Warranties: the representations and warranties of Lessee under Sections 2.1 and 2.2 are correct and would be correct if repeated on Delivery; and

(b) Payments: all payments due to Lessor under this Agreement on or before Delivery, including the Basic Rent due on the Delivery Date and the Commitment Fee, shall have been received by Lessor.

3.3 Lessor's Waiver

The conditions specified in Sections 3.1 and 3.2 are for the sole benefit of Lessor and may be waived or deferred in whole or in part and with or without conditions by Lessor. If any of those conditions are not satisfied and Lessor (in its absolute discretion) nonetheless agrees to deliver the Leased Property to Lessee, then Lessee will ensure that those conditions are fulfilled within one month after the Delivery Date and Lessor may treat as an Event of Default the failure of Lessee to do so.

3.4 Lessee's Conditions Precedent

Lessee's obligation to accept the Leased Property on lease from Lessor under this Agreement is subject to the satisfaction by Lessor of the following conditions precedent:

(a) Representations and Warranties: the representations and warranties of Lessor under Section 2.4 are correct and would be correct if repeated on Delivery; and

(b) Delivery Condition: the Aircraft shall be in the condition set forth in Schedule 2.

3.5 Lessee's Waiver

The conditions specified in Section 3.4 are for the sole benefit of Lessee and may be waived or deferred in whole or in part and with or without conditions by Lessee. If any of those conditions are not satisfied on or before Delivery and Lessee (in its absolute discretion) nonetheless agrees to lease the Leased Property from Lessor, then Lessor will ensure that those conditions are fulfilled within one month after the Delivery Date.

3.6 Indemnity for Non-Occurrence of or Delay in Delivery

Lessee shall hold harmless and indemnify Lessor, without prejudice to any of Lessor's other rights under the Operative Documents, from and against all costs, expenses, liabilities, break funding costs and losses incurred by Lessor as a result of or arising out of or directly connected with a delay in or the non-occurrence of Delivery by reason of the failure of Lessee to satisfy all or any of the conditions set out in Sections 3.1 and/or 3.2 within the time set out therein for satisfaction of such conditions.

4. COMMENCEMENT[4]

4.1 Agreement to Lease

(a) Lessor will lease the Leased Property to Lessee and Lessee will take the Leased Property on lease at the Delivery Location on the Delivery Date in accordance with the Operative Documents for the duration of the Term.

(b) Lessor and Lessee intend that this Agreement constitute a "true lease" and a lease for all United States federal income tax purposes.

4.2 Delivery

(a) Delivery Condition: Lessor shall deliver the Aircraft and the Aircraft Documents to Lessee at the Delivery Location in a condition complying with Schedule 2 except for any items mutually agreed between Lessor and Lessee which are set forth on Annex 2 to the Certificate of Delivery Condition.

(b) Correction of Discrepancies: The obligation of Lessee to lease the Leased Property from Lessor is subject to Lessor delivering the Leased Property to Lessee in compliance with the conditions set forth on Schedule 2. If Lessor corrects all material discrepancies from the conditions set forth on Schedule 2 before Delivery, or if Lessor and Lessee agree that Lessor will correct or pay for their correction as set forth on Annex 2 to the Certificate of Delivery Condition, then Lessee shall accept the Leased Property. If, on the Scheduled

4. See §3.06 of the text *supra*.

Lessor being reasonably satisfied that the repairs or replacement have been effected in accordance with this Agreement. Insurance proceeds in amounts less than the Damage Notification Threshold may be paid by the insurer directly to Lessee. Any balance remaining shall be paid to or may be retained by Lessee.

(c) All insurance proceeds in respect of third party liability will be paid to the relevant third party.

(d) Notwithstanding Sections 9.7(a) and (b), if at the time of the payment of any such insurance proceeds a Default has occurred and is continuing, all such proceeds will be paid to or retained by Lessor (unless or until Lessor notifies Lessee that said payments should be made to a Financing Party) to be applied toward payment of any amounts that may be or become payable by Lessee in such order as Lessor sees fit or as Lessor may elect. In the event that Lessee remedies any such Default to the reasonable satisfaction of Lessor, then Lessor shall procure that all such insurance proceeds then held by Lessor or any Financing Party, as the case may be, in excess of the amounts (if any) applied by Lessor or any Financing Party, as the case may be, in accordance with this Section 9.7(d) shall be paid promptly to Lessee.

9.8 Aggregate Limits

If any of the Insurances is subject to an annual aggregate yearly or other periodic limit, and, by reason of any claims made thereunder during the course of a year or other period in respect of any property subject to such policy, the aggregate amount of coverage available thereunder in respect of the balance of such year or other period shall have been reduced:

(a) Lessee shall forthwith notify Lessor of the amount of any such claim; and

(b) Lessee shall not operate the Aircraft during the balance of such year or other period either (i) without the prior written consent of Lessor or (ii) until Lessee has increased forthwith upon request of Lessor the aggregate limit under the relevant policy for such year or other period to such amount as Lessor may reasonably require.

9.9 Form LSW555D Exclusions

In this Section 9.9, the term "**Uninsured Risks**" shall mean the matters set out in the exclusions to form LSW555D (or any successor provision approved by Lessor) for chemical or biological weapons, so called "dirty bombs" and electromagnetic pulse weapons. Lessee undertakes that if cover in respect of the Uninsured Risks is, or becomes, available in the London insurance markets or elsewhere at commercially reasonable rates (having reference to the extent to which such cover is commonly taken by first class international airlines) it shall, if requested by Lessor, obtain and

maintain, or cause to be obtained and maintained, insurance cover for the Uninsured Risks to the fullest extent available in the leading international insurance markets.

10. INDEMNITY[10]

10.1 General

(a) Lessee shall defend, indemnify and hold harmless each of the Indemnitees for, from and against any and all claims, proceedings, losses, liabilities, suits, judgments, costs, expenses, penalties or fines (each a "Claim") regardless of when the same is made or incurred, whether during or after the Term (but not before):

(i) that may at any time be suffered or incurred directly or indirectly as a result of or connected with possession, repossession, delivery, performance, management, registration, deregistration, control, maintenance, condition, service, repair, overhaul, leasing, subleasing, use, operation or return of the Aircraft, any Engine or Part (either in the air or on the ground) whether or not the Claim may be attributable to any defect in the Aircraft, any Engine or any Part or to its design, testing, use or otherwise, and regardless of when the same arises or whether it arises out of or is attributable to any act or omission, negligent or otherwise, of any Indemnitee;

(ii) that arise out of any act or omission that invalidates or that renders voidable any of the Insurances; or

(iii) that may at any time be suffered or incurred as a consequence of any design, article or material in the Aircraft, any Engine or any Part or its operation or use constituting an infringement of patent, copyright, trademark, design or other proprietary right or a breach of any obligation of confidentiality owed to any Person.

(b) Notwithstanding the provisions of Section 10.1(a), Lessee shall not have to indemnify an Indemnitee for any Claim to the extent that:

(i) it arises directly as a result of the willful misconduct or gross negligence of that Indemnitee;

(ii) it arises directly as a result of a breach by Lessor of its express obligations under this Agreement or as a result of a representation or warranty given by Lessor in this Agreement not being true and correct at the date when, or when deemed to have been, given or made;

(iii) it constitutes a Non-Indemnified Tax or Lessor Lien;

(iv) it represents a Tax or loss of tax benefits (Lessee's liabilities for which, including exclusions, are set out in Sections 5.7, 5.8, 5.9 and 5.11);

(v) it constitutes a cost or expense that is required to be borne by Lessor in accordance with another provision of this Agreement;

10. See §3.11 of the text *supra*.

(vi) it results from any disposition not caused by Lessee of all or any part of Lessor's rights, title or interest in or to the Aircraft or under this Agreement, unless such disposition occurs as a consequence of an Event of Default;

(vii) it is attributable to an event occurring after the Term unless the Claim results from or arises out of an act or omission by Lessee, or any circumstance existing, during the Term; or

(viii) it is brought after the Term and relates to a claimed patent infringement by the applicable Manufacturer.

10.2 Mitigation

(a) Lessor agrees that it shall notify Lessee in writing as soon as reasonably practicable after it becomes aware of any circumstances that would, or would reasonably be expected to, become the subject of a claim for indemnification pursuant to Section 10.1. Lessor (and any other Indemnitee seeking indemnification, as the case may be) and Lessee shall then consult with one another in good faith in order to determine what action (if any) may reasonably be taken to avoid or mitigate such Claim. Lessee shall have the right to take all reasonable action (on behalf and, if necessary, in the name of Lessor or such other Indemnitee) in order to resist, defend or settle (provided such settlement is accompanied by payment) any claims by third parties giving rise to such Claim, provided always that Lessee shall not be entitled to take any such action unless adequate provision, reasonably satisfactory to Lessor and such other Indemnitee, shall have been made in respect of the third party claim and the costs thereof. Lessee or, if the Claim is covered by Lessee's Insurances, Lessee's insurers shall be entitled to select any counsel to represent it or them, Lessor and such other Indemnitee in connection with any such action, subject in the case of Lessee to the approval of Lessor and such other Indemnitee (such approval not to be unreasonably withheld) and any action taken by Lessee shall be on a full indemnity basis in respect of Lessor and such other Indemnitee.

(b) Any sums paid by Lessee to Lessor or any Indemnitee in respect of any Claim pursuant to Section 10.1 shall be paid subject to the condition that, in the event that Lessor or such Indemnitee is subsequently reimbursed in respect of that Claim by any other Person, Lessor or such Indemnitee shall, provided no Default shall have occurred and be continuing, promptly pay to Lessee an amount equal to the sum paid to it by Lessee, including any interest on such amount to the extent attributable thereto and received by Lessor or such Indemnitee, less any Tax payable by Lessor or such Indemnitee in respect of such reimbursement.

10.3 Duration

The indemnities contained in this Agreement will survive and continue in full force after the Expiry Date.

11. EVENTS OF LOSS[11]

11.1 Total Loss Before Delivery

If a Total Loss occurs before Delivery, this Agreement will immediately terminate and neither party will have any further obligation or liability under this Agreement except as expressly stated herein.

11.2 Total Loss After Delivery

(a) If a Total Loss occurs after Delivery, Lessee will pay the Agreed Value to Lessor (or any Financing Party designated by Lessor) on the earlier of:

(i) the date of receipt of the insurance proceeds payable as a result of the Total Loss, or

(ii) the 30th day after the Total Loss Date (the "Settlement Date"),

in either case unless the Aircraft is restored to Lessor or Lessee within that period (or, in the case of a Total Loss coming within paragraph (c) of the definition of Total Loss and involving the loss of Lessor's title to the Aircraft, if both the Aircraft and Lessor's title thereto are restored to Lessor or, in the case of the Aircraft, to Lessee).

(b) The receipt by Lessor or any Financing Party (on behalf of Lessor) of the insurance proceeds in respect of the Total Loss on or prior to the Settlement Date shall discharge Lessee from its obligation to pay the Agreed Value to Lessor pursuant to this Section 11.2, provided such proceeds are not less than the Agreed Value. In the event that the insurance proceeds are paid initially to Lessee and not to Lessor or any Financing Party designated by Lessor, they may be retained by Lessee if Lessee shall have paid the Agreed Value to Lessor or any Financing Party (on behalf of Lessor); otherwise Lessee shall pay the Agreed Value to Lessor or any Financing Party (on behalf of Lessor) not later than the next Business Day following receipt by Lessee of such proceeds. In the event that Lessee pays the Agreed Value to Lessor or any Financing Party (on behalf of Lessor) in accordance with this Section 11.2, Lessor shall promptly assign to Lessee its rights under the Insurances to receive the insurance proceeds in respect of the Total Loss to the extent that such proceeds shall not have been paid to Lessee.

(c) Subject to the rights of any insurers or other third parties, upon irrevocable payment in full to Lessor or any Financing Party (on behalf of Lessor) of the

11. See §3.11 and §3.12 of the text *supra*.

Agreed Value and all other amounts that are payable to Lessor under the Operative Documents, Lessor shall without recourse or warranty (except as to the absence of Lessor Liens), and without further act, be deemed to have transferred to Lessee all of Lessor's rights to any Engines or Parts not installed when the Total Loss occurred, all on an "as-is where is" basis, and shall, at Lessee's expense, execute and deliver such bills of sale and other documents and instruments as Lessee may reasonably request to evidence (on the public record or otherwise) the transfer and the vesting of Lessor's rights in such Engines and Parts in Lessee, free and clear of all rights of Lessor and any Lessor Liens.

11.3 Engine Loss

(a) Upon the occurrence of an Engine Loss in circumstances in which there has not also occurred a Total Loss (including, for the avoidance of doubt, at a time when the Engine is not installed on the Airframe), Lessee shall give Lessor written notice promptly upon becoming aware of the same and shall, within 60 days after the Engine Loss Date, convey or cause to be conveyed to Lessor, as replacement for such Engine, title to a replacement engine that is in the same or better operating condition, and has the same or greater value and utility, as the lost Engine (assuming the lost Engine was, immediately before the Engine Loss, in the condition required by this Agreement) and that complies with the conditions set out in Section 8.13(a).

(b) Lessee will at its own expense take all such steps and execute, and procure the execution of, a full warranty bill of sale covering such replacement engine, a supplement to this Agreement adding such replacement engine to the Leased Property and all such other agreements and instruments that are necessary to ensure that title to such Engine passes to Lessor and is subject to the Security Interest created by any Financing Security Document and such replacement engine becomes an "Engine", all according to Applicable Laws. At any time when requested by Lessor, Lessee will provide evidence to Lessor's reasonable satisfaction (including the provision, if required, to Lessor of one of more legal opinions) that title has so passed to Lessor and is subject to the Security Interest created by any Financing Security Document.

(c) Upon compliance with the foregoing title transfer provisions, the leasing of the replaced Engine that suffered the Engine Loss shall cease and title to such replaced Engine shall (subject to any salvage rights of insurers) vest in Lessee free of Lessor Liens. If Lessor or any Financing Party subsequently receives any insurance proceeds relating to such Engine Loss, Lessor shall promptly remit such proceeds, or cause such proceeds to be remitted, to Lessee.

(d) No Engine Loss with respect to any Engine that is replaced in accordance with the provisions of this Section 11.3 shall result in any increase or decrease in Basic Rent, Additional Rent or the Agreed Value.

11.4 Damage or Incident Not Constituting a Total Loss

Following the occurrence of any damage to the Aircraft, any Engine or any Part that does not constitute a Total Loss or an Engine Loss and where either (i) the potential cost of repair may reasonably be expected to exceed the Damage Notification Threshold or (ii) Lessor notifies Lessee in writing that Lessor reasonably believes the damage will permanently affect the value of the Aircraft, Lessee shall take the following actions:

(a) Lessee shall consult with, and comply with, all reasonable instructions of Lessor with respect to the accomplishment of repairs;
(b) Lessee shall obtain Lessor's consent prior to agreeing any repair workscope or seeking Manufacturer approval in connection with any such repairs; and
(c) Lessee shall obtain a written certification satisfactory to Lessor from all relevant Manufacturers as to the accomplishment of repairs.

11.5 Requisition

During any requisition for use or hire of the Aircraft, any Engine or Part that does not constitute a Total Loss:

(a) the Basic Rent, Additional Rent and Supplemental Rent payable under this Agreement will not be suspended or abated either in whole or in part, and Lessee will not be released from any of its other obligations under this Agreement (other than operational obligations with which Lessee is unable to comply solely by virtue of the requisition);
(b) so long as no Default has occurred and is continuing, Lessee will be entitled to any compensation payable by the requisitioning authority in respect of the Term;
(c) Lessee will, as soon as practicable after the end of any such requisition (with the Term being extended if and to the extent that the period of requisition continues beyond the Scheduled Expiry Date), cause the Aircraft to be put into the condition required by this Agreement; and
(d) Lessor will be entitled to all compensation payable by the requisitioning authority in respect of any change in the structure, state or condition of the Aircraft arising during the period of requisition, and Lessor will apply such compensation in reimbursing Lessee for the cost of complying with its obligations under this Agreement in respect of any such change; provided, that, if any Default has occurred and is continuing, Lessor may apply the compensation in or towards settlement of any amounts owing by Lessee under this Agreement.