



THE POTENTIAL IMPACT OF BREXIT ON CROSS-BORDER AIRCRAFT FINANCINGS

Given the continued uncertainty surrounding the terms of Brexit, we consider the possible impact on cross-border aircraft financings.

IMMEDIATE AND SHORT TERM IMPACT

No change in law

Since the referendum, nothing has changed legally. Any contractual provision in your existing lease or loan agreement which relies on a "change in law" trigger should not have been activated by the result (for example, an increased cost clause or an illegality event). The position may evolve once the UK commences the formal process of withdrawal from the EU.

Market volatility

Market volatility and the consequences (e.g. reduced liquidity of affected banks) may trigger other clauses, such as market disruption provisions in facility agreements or "Market MAC" clauses in term sheets or as conditions precedent to funding and/or asset delivery. However, currently, we see no evidence of this and as the market stabilises, it will become less relevant.

Longer term, the adverse effect on certain borrowers and other obligors' businesses of the negative market reaction to the referendum outcome may prejudice their ability to perform under lease or loan documentation, including any payment obligations, and/or may potentially trigger any "Obligor/Business MAC" clause, e.g. in a term sheet/mandate letter, and/or may test their compliance with financial covenants.

REGULATED FINANCIAL SERVICES

One of the key concerns surrounding Brexit for any bank or other financial services provider is the UK's potential loss of EU passporting rights.

Asset financiers operating in the UK, especially those operating as a UK branch of an EU bank, a UK bank or a UK branch of a non-EU bank, will be affected to varying degrees, depending on a multitude of factors, including the scope of the institution's existing regulated financial services, its ability to transfer business and/or to re-locate to other jurisdictions and the ultimate agreement between the UK and the remaining EU as to whether the current (mutual) passporting regime is preserved or replaced by an existing alternative or a new regime altogether.

ENGLISH LAW AND ENGLISH COURTS

Our briefing "[Brexit and jurisdiction clauses: post-referendum considerations](#)" examines the impact of UK withdrawal on recognition of parties' chosen governing law and jurisdiction in contracts, including considering the factors

determining choice of dispute resolution methods and potential solutions if continued EU enforceability is sought.

Governing law

In many cross-border aircraft financings, there is no UK nexus other than that the parties have chosen English law as the governing law of the transaction. This choice is driven by the clear, robust security and other property laws applicable to movable assets, including the remedies available to owners and creditors of such assets. While English law includes applicable EU law (to the extent implemented or directly effective) and the Brexit process will require an untangling of such laws, we would expect transitional legislation to be passed to preserve or otherwise protect the rights and obligations of parties. It is eminently foreseeable that the common law (based on judicial precedent) will play a greater part in any post-Brexit English legal system.

The application and advantages of English law will not fall away upon the UK's withdrawal from the EU and parties should remain comfortable selecting English law, whether or not their transaction involves a UK incorporated party or a UK registered/located asset. As stated in our above-mentioned briefing, the substance of English contract law will not be affected by Brexit. Further, EU courts are required under the Rome I Regulation to uphold the parties' choice of law for contractual obligations; this should not change if the UK leaves.

Choice of jurisdiction

Similarly, the continued primacy of English courts as the parties' choice of jurisdiction in cross-border aircraft transactions should not be dismissed. From the perspective of a secured asset financier or lessor, clearly, while the state of incorporation and/or COMI of the operator are crucial factors, the location of the aircraft (starting with its state of registration) is equally important. As previously noted, many cross-border deals have no UK party or asset. In particular, as the growth of the aviation industry extends beyond Europe towards Asia and Africa, lenders and leasing companies are focusing on operators and assets outside of the EU.

Consequently, while the advantages of the Brussels I Regulation (recast) regime (which provides that EU courts shall uphold the parties' choice of jurisdiction and that the judgments of a Member State's courts shall be enforced by the courts of the other Member States) are clear, increasingly, lenders and lessors are more interested in the recognition and enforcement of English court judgments (or of arbitral awards) in non-EU countries where the operator in use and possession of the aircraft is based and where the aircraft is registered or based.

For example, an operating lessor leasing an aircraft to a regional Asian airline is likely to be most concerned with whether it can repossess its aircraft outside of the EU, as well as its ability to claim against the airline in its home jurisdiction. The extent of the UK's net of bilateral treaties on enforcement of judgments with non-EU countries, including the Commonwealth countries, is far-reaching and may continue to be relied upon in a post-Brexit world.

Typically, asset financiers and owners also assess the availability and scope of interim relief measures, such as grounding, custody and preservation of an aircraft, in their chosen forum. The jurisdiction of the English court to grant such relief is well-tested.

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Cape Town Convention

The EU has ratified the Cape Town Convention, including the Aircraft Protocol, to the extent it deals with matters over which the EU has competence. The UK Government has also ratified the Cape Town Convention and designated it as an EU Treaty pursuant to the European Communities Act 1972. On this basis, secondary legislation implementing the UK's relevant treaty obligations under the Cape Town Convention has been passed.

It remains to be seen how the ongoing legal effect of the UK's EU treaty obligations generally will be addressed in the Brexit arrangements.

TAX AND TRADE

Our briefing "[The tax impact of Brexit](#)" summarises steps UK and EU businesses should consider. In terms of transactions, parties should monitor any post-Brexit changes to the VAT treatment of sales, leases and other supplies of aircraft or engines and any associated services in the UK and in other EU Member States, given that VAT is an EU-wide tax.

The post-Brexit terms of the UK's access to the EU single market and its trading arrangements with other countries are unknown. Clearly, from an industry perspective, the potential imposition of tariffs on imports, that is, parts/components and manufactured goods, including within a supply chain, will be of most concern to aviation manufacturers and service providers, such as repairers and maintenance facilities.

ECA SUPPORTED FINANCINGS; UK SOVEREIGN CREDIT RATING

Lenders in UKEF supported aircraft financings, including financings which are fronted by another European ECA and co-insured by UKEF, typically treat their participations as sovereign exposures for regulatory capital purposes, including in terms of credit risk mitigation. The latest rating downgrade by Standard & Poor's of the UK's sovereign credit rating from AAA to AA may impact on their regulatory capital requirements and may also affect the position of investors in UKEF supported aircraft bond financings.

The export credit terms under the OECD Aircraft Sector Understanding will continue to apply.

EU DERIVED LEGISLATION AND SELECTED EU RELATED REGIMES

As a member state, the UK is subject to EU-wide legislation, including, for example, the EU Insolvency Regulation ("EUIR") and the Bank Recovery and Resolution Directive ("BRRD"). The unravelling of UK domestic laws and EU laws will be a significant and challenging aspect of Brexit. For now, parties should retain references to such legislation in their English law governed agreements, as applicable.

Parties should continue to address EU regulation of the aviation industry in their commercial arrangements, including retaining relevant provisions in lease and loan documentation dealing with specific regimes, such as the EU Emissions Trading Scheme ("EU ETS"), Eurocontrol, EASA and the Cape Town Convention.

As a member state, the UK is required to implement and enforce any EU sanctions (including export controls) and UK residents and entities are subject

to EU sanctions-related obligations. Parties will need to undertake separate assessments of the application of EU and UK sanctions to their transactions, depending on how these are addressed under Brexit.

FURTHER RESOURCES

Clifford Chance Brexit Guide:

<https://financialmarketstoolkit.cliffordchance.com/en/topic-guides/brexit.html>

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