

Aircraft registration and Article 83bis of the Chicago Convention: a practical overview

With the recent conclusion of an Article 83bis agreement between Ireland and the Republic of Kazakhstan¹, it is timely to explore briefly the history and usefulness of these arrangements and their growing use in international aircraft leasing and financing. Grace Stobbart and Donal Keane of the Dentons' Aviation Finance team explore the issues that parties should understand and consider when contemplating transactions involving an Article 83bis arrangement. Dentons' multi-jurisdictional team of aviation specialists has the expertise and breadth of worldwide coverage to guide clients through the pitfalls and challenges of leasing into Article 83bis jurisdictions.

A brief history of Article 83bis

The Convention on International Civil Aviation signed in Chicago in 1944 (the **Chicago Convention**) was a transformational and pioneering agreement. Widely regarded as the bedrock of international aviation law and regulation, it established a wide-ranging set of international rules on issues including aircraft airworthiness and operation, licensing and the recognition of each nation's sovereignty over its domestic airspace. The International Civil Aviation Organisation (**ICAO**) is responsible for overseeing and administering the Chicago Convention.

Under the Chicago Convention, the state of operation of an aircraft (the **State of Operator**) regulates commercial operation of aircraft by operators supervised by it, whereas the state of the aircraft's registration (the **State of Registration**) is responsible

for both ensuring that aircraft registered with it comply with Chicago Convention operating rules and operate safely. Before the explosive growth of the international leasing industry since the 1980s, the distinction between the State of Operator and State of Registration was largely irrelevant as they were usually the same country. With the widespread use of international leasing and ownership structures, it is nowadays more common for the State of Registration and State of Operator to be different jurisdictions. This has evolved as aircraft financiers and lessors can be reticent about entering into transactions where the lessee is located in an "unfriendly" jurisdiction, whether due to the legal framework for repossession not being regarded as robust and predictable, or due to political or social instability, which makes financing aircraft difficult for carriers in those jurisdictions.

¹ <https://www.iaa.ie/news/2021/05/19/aviation-regulator-announces-new-partnership-with-kazakhstan>

Article 83bis² was introduced in 1997 as a response to this new dynamic and provides a framework to allow the State of Registration to transfer supervisory responsibilities for an aircraft to the State of Operator. To make a valid transfer of responsibilities under Article 83bis:

- both ICAO member states must have ratified Article 83bis³;
- the member states must enter into an Article 83bis agreement detailing the responsibilities that will be transferred from the State of Registration to the State of Operator; and
- the Article 83bis agreement must be notified to the other ICAO members by depositing the agreement with ICAO (which can be done electronically).

Article 83bis agreements can cover individual aircraft, multiple aircraft or be framework agreements with dynamic schedules specifying the relevant affected aircraft. The Article 83bis agreement between Ireland and the Republic of Kazakhstan is one such framework agreement, and Air Astana and its affiliate FlyArystan have both announced the intention to migrate the registration of their fleets to Ireland over the coming months. It would seem that the majority of Article 83bis agreements provide for one jurisdiction to be the State of Registration and the other the State of Operator, but they can also take a reciprocal approach where either jurisdiction can transfer State of Registration responsibilities to the other⁴.



Figure 1 https://en.wikipedia.org/wiki/Chicago_Convention_on_International_Civil_Aviation#/media/File:Signature-OACI-Max-Hymans.JPG2560px-Signature-OACI-Max-Hymans.jpeg

Benefits of Article 83bis arrangements

Article 83bis arrangements are a “win-win” for all participants. Lessors have comfort that the State of Registration is a stable jurisdiction with a developed, predictable judicial system. This mitigates the risk that, upon a default, the aviation authority in the State of Operator could hamper de-registration (or refuse to de-register altogether), or may entertain spurious objections to de-registration thrown up by an uncooperative lessee. In addition, provided the State of Registration retains responsibility for supervising airworthiness (as is the case with the Ireland-Kazakhstan agreement), the lessor can have some confidence that the aircraft will be maintained to a standard that should permit successful remarketing at lease expiry or termination and that an Export Certificate of Airworthiness will be issued without undue delay or difficulty.

In this respect, Article 83bis arrangements have been a hugely successful tool in de-escalating risk in certain jurisdictions, which some lessors and financiers may otherwise avoid or in which they are unable to conduct their business. Russia is an excellent example of this success, where the Article 83bis arrangements concluded with Bermuda in 1999 and Ireland in 2002 have enabled Russian operators to finance and lease large fleets of aircraft registered in those jurisdictions successfully.

From an airline perspective, being able to register its aircraft on a foreign register subject to an Article 83bis arrangement can mean:

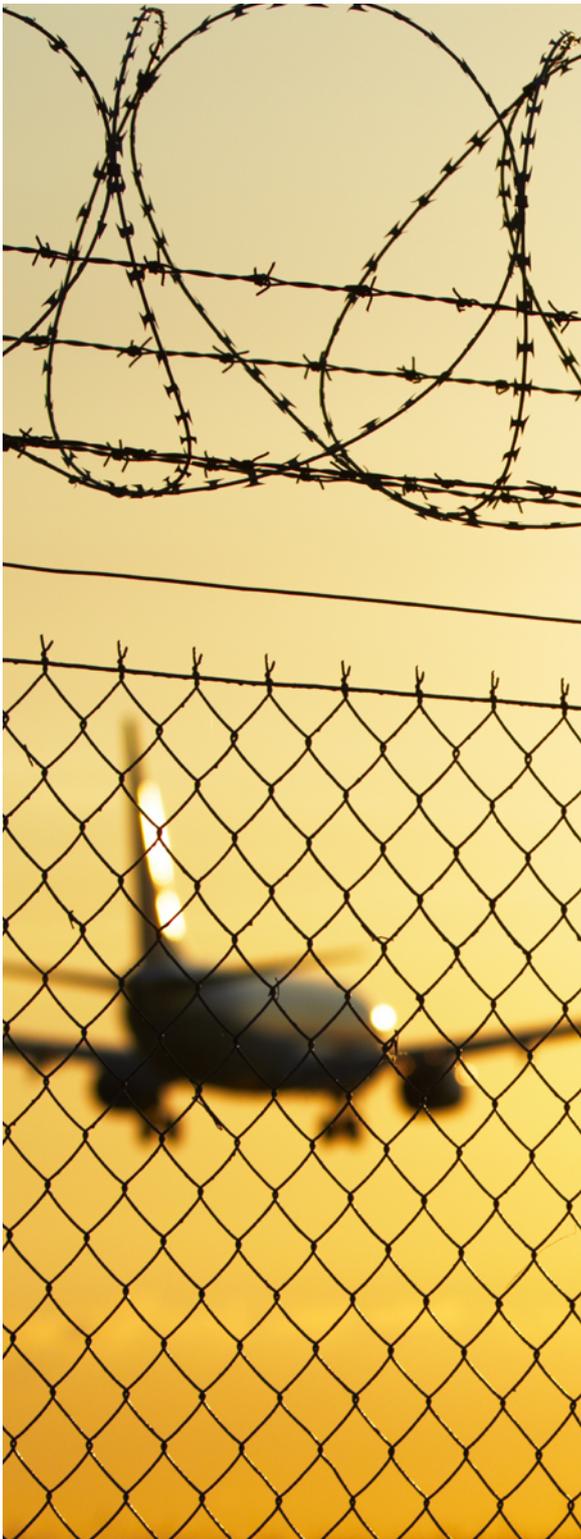
- access to a wider pool of international financing and leasing options resulting in more competitive lease rates and cheaper financing; and
- efficient fleet management, as maintaining a fleet of aircraft on a single registry in accordance with a unified set of standards eliminates an otherwise burdensome and expensive compliance challenge.

For the participating aviation authorities, there is revenue generation from the growth of the State of Registration’s registry, and the obvious benefit of the market perception of that registry representing a “gold standard” in aircraft registration and

2 Article 83bis, the first substantive amendment to the Chicago Convention, was unanimously approved by the ICAO Assembly on 6 October 1980. The corresponding Protocol Relating to an Amendment to the Convention on International Civil Aviation (i.e. Article 83bis itself) has been in force with respect to the states which have ratified it since 20 June 1997.

3 To date, 176 of 193 member states have ratified Article 83bis: https://www.icao.int/secretariat/legal/Documents/83bis_EN.pdf

4 Note, however, that State of Operator responsibilities cannot be transferred under the Chicago Convention.



maintenance standards. As for the State of Operator, its aviation authority can collaborate and learn from a best-in-class registry, in turn improving its own standing and recognition.

What should parties consider?

When an aircraft will be registered subject to an Article 83bis arrangement, a lessor will need to carry out a risk analysis for both the State of Registration and State of Operator. This can form part of the usual jurisdictional analysis undertaken for an unfamiliar jurisdiction, but the existence of the Article 83bis arrangement necessitates splitting that analysis between the two jurisdictions and will feed into elements of the drafting of the lease agreement:



Details of the Article 83bis agreement

The Chicago Convention does not provide a standard form Article 83bis agreement and it is for the jurisdictions concerned to agree the responsibilities to be transferred and retained by the State of Registration. Only certain responsibilities relating to rules of the air, radio licensing, certificates of airworthiness and personnel licences are transferable. Each Article 83bis regime must therefore be reviewed on its own terms.

Parties should also be aware that ICAO has discovered issues with a number of Article 83bis arrangements in existence. ICAO has noted firstly that many Article 83bis agreements do not meet the formal requirements of the Chicago Convention and also that some contracting states' national rules have not been sufficiently modified to take account of the Article 83bis arrangements they have entered into, whether as State of Registration or State of Operator. In all circumstances, a case-by-case analysis is essential.

By way of example, in the Ireland-Kazakhstan Article 83bis agreement, the split of responsibilities is as follows:

Ireland
State of Registration

1. Article 31, Annex 8– Airworthiness of Aircraft

>
Article 83bis
agreement

Kazakhstan
State of Operator

1. Article 12, Annex 2– Rules of the Air
 2. Articles 30(b) and 32(a)
 • Annex 1 – Personnel Licensing
 • Annex 6 – Radio Operator License
 3. Articles 31, Annex 6 – Operator of Aircraft

Repossession and de-registration risk analysis

It is important for lessors to remember that, while extremely helpful, Article 83*bis* arrangements do not fully mitigate repossession risk. This risk is multi-factorial and, while de-registration is an essential element of a successful repossession⁵, the jurisdiction of the State of Operator will invariably have a significant role and so difficulties with repossessing an aircraft from a lessee's jurisdiction can still arise.

The table below sets out some of the issues to consider in both the State of Registration and the State of Operator when analysing the repossession risk in a transaction involving an Article 83*bis* arrangement. The table assumes that the aircraft is physically located in the State of Operator at the time of a proposed repossession – if the aircraft is located in a third state, local legal analysis for that third country will be required.

For a high-level, multi-jurisdictional overview of airline insolvencies and repossession issues, please click [here](#).

Lease Termination	Repossession	De-registration	Export
<p>State of Operator</p> <p>Will the choice of English or New York law as the governing law of the lease agreement be recognised?</p> <p>Can the leasing of the aircraft be terminated, particularly on lessee insolvency?</p> <p>Has the Cape Town Convention⁶ been ratified?</p>	<p>State of Operator</p> <p>Can “self-help” remedies be pursued – noting that it is likely that a court order or other official authorisation will be needed to access secure locations in airports?</p> <p>Subject to local counsel's advice, it may be helpful to have a “de-registration power of attorney” (DPOA) governed by the law of the State of Operator. DPOAs invariably cover more than just de-registration and may assist in the State of Operator. Will such a DPOA be recognised and enforceable and will it survive the lessee's insolvency?</p> <p>Does the jurisdiction recognise English or New York judgments?</p> <p>Has the Cape Town declaration for speedy relief been made or is local interim relief available to allow grounding and preservation of the aircraft?</p> <p>Does the jurisdiction exercise fleet liens?</p>	<p>State of Registration</p> <p>If the State of Registration is an owner register, de-registration is within the control of the lessor/creditor.</p> <p>For owner registries, DPOAs are still advisable to mitigate any concerns around a lessee's consent to de-registration being required. Is a DPOA recognised and enforceable and will it survive the lessee's insolvency?</p> <p>If the State of Registration has enacted the Cape Town Convention, has it made the relevant IDERA declaration and will an IDERA in practice be recognised by the aviation authority?</p>	<p>State of Registration and State of Operator</p> <p>Which aviation authority is responsible for supervising airworthiness? If the State of Registration, it should be easier to obtain an Export Certificate of Airworthiness. If the State of Operator, there is a greater risk that an Export Certificate of Airworthiness will not be issued, which will significantly increase the cost and difficulty of registering the aircraft in a new jurisdiction.</p> <p>If both states have ratified the Cape Town Convention, this should assist, as the IDERA should be binding on the State of Operator and require it to assist in the efforts to export the aircraft. Consider whether a DPOA will assist with export matters, as it will typically cover export of the aircraft.</p>

⁵ As aircraft may not be registered on more than one register at any time (Article 18 of the Chicago Convention).

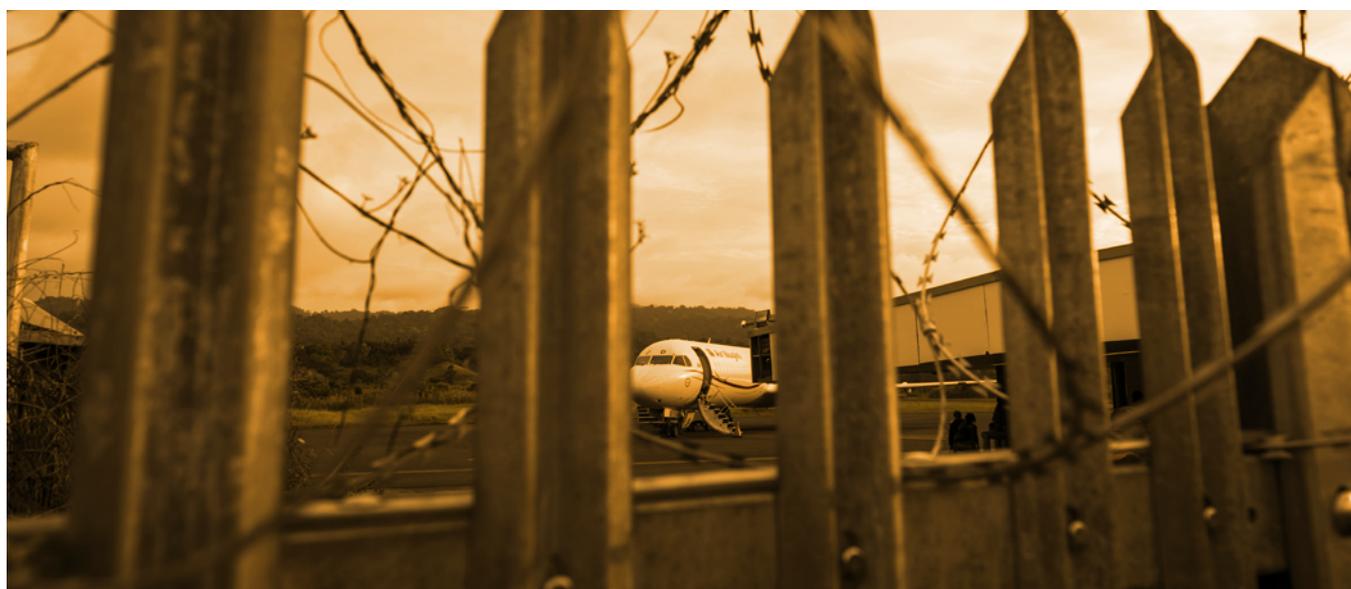
⁶ For further information on the Cape Town Convention, please click [here](#).

Lease agreement drafting

While the majority of the drafting in a typical aircraft lease should work (or mostly work) with few changes, there will in most cases be a degree of factual updating needed to reflect the split between the State of Registration and the State of Operator. In a well-drafted lease, all registration risk will lie with the lessee, who will generally be required to do

all things necessary in the state of registration and the habitual base to ensure the aircraft is properly registered for commercial operations. Where Article 83bis applies, it may be necessary to further specify a lessee's obligations, particularly if the jurisdictional due diligence has identified issues either in the Article 83bis agreement itself or in its implementation.

Lease provision	Comments
Definitions "Aviation Authority", "De-registration Power of Attorney", "State of Operator"/"Lessee's Jurisdiction", "State of Registration"	Check that the key definitions refer to the aviation authority in both the State of Registration and the State of Operator, whether expressly or using appropriate generic language. Remember that references to flight charges (such as in a definition of Aviation Authority Letter, or similar) should be linked to authorities in the State of Operator where the relevant flight charges will be incurred, and not the State of Registration. It may be useful to introduce a definition of "State of Operator"/"Lessee's Jurisdiction", if the lease does not already contain one.
Legal opinions	Consider whether legal opinions on both the State of Registration and State of Operator are required (often leases will only refer to the lessee's jurisdiction).
Operation, maintenance, registration	It is a requirement that a summary of the relevant Article 83bis agreement is carried onboard the aircraft and that the relevant aircraft is identified as being subject to the Article 83bis agreement. Lessors may consider adding an express reference to this obligation.
Cape Town Convention	Check that the provisions requiring the lessee to register any international interests constituted by the lease or other transaction documents refer to the State of Registration and State of Operator.
Subleasing	Any subleasing may require approval of both aviation authorities but this will depend on the responsibilities transferred under the specific Article 83bis agreement.
Governing law and jurisdiction, arbitration	As described above in the repossession risk analysis, these clauses will primarily be relevant for enforcement in the State of Operator and should reflect advice of local counsel.



Conclusion

Article 83bis agreements have been highly successful in opening up new markets to lessors and new financing and leasing opportunities to lessees. When analysing the aviation authority that will be responsible for supervising its aircraft, a lessor is ultimately concerned that the aircraft will be properly maintained during the lease term and that it can be efficiently repossessed on a lessee default. Article 83bis is a useful tool that can allow a lessor to do business with a lessee that might otherwise be prohibited by the lessor's risk controls.

However, for the reasons we have discussed in this article, Article 83bis arrangements are not a panacea. Parties must make sure they understand the specifics of the relevant arrangement, and lessors should not assume that the fact that an aircraft is registered outside the State of Operator will solve all of their repossession concerns. These arrangements do not lessen the need for the lessor to maintain a regular reporting and inspection schedule and proactively and diligently to manage its asset.



KEY CONTACTS



Nick Chandler
Partner, London
D +44 20 7246 7059
nick.chandler@dentons.com



Maireadh Dale
Partner, Dublin
D +353 1 5828123
maireadh.dale@dentons.com



Donal Keane
Senior Associate, Dublin
D +353 1 5828126
donal.keane@dentons.com



Grace Stobbart
Senior Associate, London
D +44 207 246 7391
grace.stobbart@dentons.com

© 2021 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. This publication is not designed to provide legal or other advice and you should not take, or refrain from taking, action based on its content. Please see [dentons.com](https://www.dentons.com) for Legal Notices.

CSBrand-63592-Aircraft registration and Article 83bis-02 — 15/07/2021