

**WORLDWIDE AIR TRANSPORT CONFERENCE: CHALLENGES AND
OPPORTUNITIES OF LIBERALIZATION**

Montreal, 24 to 29 March 2003

**Agenda Item 2: Examination of key regulatory issues in liberalization
2.2: Market access**

**AIRCRAFT LEASING IN INTERNATIONAL AIR TRANSPORT AND
JURISDICTIONAL ISSUES ASSOCIATED WITH THE NATIONALITY
OF AIRCRAFT REGISTRATION**

(Presented by International Transport Workers' Federation (ITF))

SUMMARY

This paper highlights further factors, in addition to the safety and economic aspects described in ATConf/5-WP/9, which States should take into account when considering policies or agreements on the leasing of aircraft. In cases of both dry and wet leasing this paper describes issues which impact on aircraft occupants, whether crew or passengers, and other users of air transport services, relating to unlawful interference, insurance, applicability of employment legislation, and the legal jurisdiction applicable. This paper recommends that States adopt a restrictive approach to leases except in cases where such issues are fully resolved in a manner that affords the highest level of safety and security, prohibits the exercise of traffic rights where these have not been designated or authorized, and affords the highest level of protection to aircraft occupants, both crew and passengers.

Action by the Conference is in paragraph 6.1.

¹ French and Spanish versions provided by the International Transport Workers' Federation (ITF).

1. INTRODUCTION

1.1 The leasing of aircraft raises potential problems in regard to both safety and economic issues where the leased aircraft used for international air transport services is registered in a State other than that of the operator.

2. ECONOMIC ASPECTS OF LEASING

2.1 With regard to the economic dimension, the ITF concurs with the general approach adopted by States in requiring that the lending airlines either have the necessary traffic rights or prohibiting leases where such airlines do not have such rights. The ITF therefore supports the two options in article 2 of the draft model clause set out in paragraph 6.4 of ATConf/5-WP9

3. SAFETY AND SECURITY ASPECTS OF LEASING

3.1 The ITF notes that safety (and security) concerns arise in international leasing due to the need to define the respective safety responsibilities of the State of Registry (lessee) or State of Operation (lessor). The Chicago Convention assigns the task of compliance with applicable safety standards primarily to the State of Registry of the aircraft, but for some aspects to the State of Operation. Where these States are both party to an air service agreement, this assignation of safety responsibility is typically addressed through safety clauses contained within the agreement. However, such clauses do not, in general, address a number of additional jurisdictional and regulatory factors that can impact on both safety and security or on the economic behaviour of international airlines.

3.2 In particular, the ITF is concerned about three issues related to leasing:

- a) The potential for “social dumping”, “safety dumping” and “security dumping” arising when applicable standards and requirements of the State of Registry are lower than those of the State of Operation;
- b) The legal jurisdiction in relation to employment rights (including insurance and occupational safety) as well as consumer and passenger rights; and
- c) Jurisdictional problems associated with unlawful acts on board aircraft by disruptive passengers (air rage).

3.3 To the extent that the nationality of registration of the aircraft may impact on all three of these domains there is the potential for leasing to become a means of avoidance of regulatory standards that would otherwise be applicable to the operator.

3.4 For example, where wet leasing occurs, problems can arise through differences in regulations on minimum crew complements, in flight and duty times, in minimum training standards. These differences can have a significant impact of the cost of operation and could act as an incentive for operators to lease aircraft with crew that are subject to lower standards.

3.5 If, standards and requirements in these areas are lower in the lessee State than in the lessor State then there is a real risk of social dumping through the substitution of higher cost crew by “leased” crew who will be required to conform to the standards of the State or Registry.

3.6 If, on the other hand, responsibility in these areas is transferred to a State of operation (whether through a safety clause or an agreement concluded under article 83 *bis*) with lower standards than those applicable in the State of Registry, then the crew concerned may lose regulatory protection that might otherwise apply.

3.7 Where a dry leased aircraft is not registered in the State of operation, the converse issue arises. Article 32 (a) of the Chicago Convention requires that “The pilot of every aircraft and the other members of the operating crew of every aircraft engaged in international navigation shall be provided with certificates of competence and licenses issued or rendered valid by the State in which the aircraft is registered”. This could result in the personnel of the operating airline who are working on the leased aircraft becoming subject to crew competence requirements that differ from those otherwise applicable in their employment. Unless the duties and functions of this article are transferred to the State of operation the capacity for social and safety dumping arises.

3.8 The ITF believes that the following three principles should apply and be incorporated as appropriate within international air service agreements in regard to crew (flight deck and cabin):

- a) Where an aircraft is wet leased from a State other than the State of operation, the State of operation shall assume responsibility and require full compliance with all its applicable crew standards;
- b) Where an aircraft is dry leased, crew requirements, including those contained in Article 32 (a) of the Chicago Convention, shall be transferred to the State of operation; and
- c) In all cases, States shall apply the highest safety and crew regulatory standards, where those of the State of Registration vary from those of the State of operation.

4. OTHER JURISDICTIONAL ISSUES OF AIRCRAFT LEASING

4.1 ICAO, of course, is primarily concerned with those elements of crew conditions and competence that relate to safety. However, aircraft leasing also raises implications for contractual employment conditions and can thus impact on the economic behaviour of carriers. For example, rates of pay or holidays may differ for crew on a leased aircraft compared to those contractually applicable to the personnel of the leasing airline. In such circumstances, the ITF believes that the highest standards should apply in order both to protect personnel in the airline of operation from being substituted by lower-cost “leased” personnel, and at the same time to preserve the prevailing employment terms of the crew who are leased by their airline to another operator. It should be noted that these differences could arise even where leasing occurs between operators in the same State. This is just one reason why the ITF believes that leasing arrangements should be subject to consultation with employee trade unions of both the lessor and lessee airlines.

4.2 In regard to statutory employment rights the question of jurisdiction also potentially arises. We are aware of one example where a United States operator sought to define the place of work of over 1,000 United Kingdom-based crew employees as the aircraft (registered in the United States) for the purpose of avoiding an obligation to provide statutory United Kingdom maternity rights. We can also cite an instance in which a European Union operator sought to carry out a paper exercise to transfer contracts of employment for its pilot workforce to another European Union State in order to reduce its social insurance costs. In one case we are aware of, Belgian-based ground employees were working with Irish contracts of employment that offer much lower legal protection. These considerations may be outside the scope of action of ICAO, but we present them to highlight both the importance placed by crew organizations on the question of applicable

jurisdiction, and as examples of the willingness of some operators to selectively escape regulatory control where it suits them. Should it be the case that employment jurisdiction becomes defined as the State of Registration, this would raise significant issues for future leasing arrangements.

4.3 Similar questions arise in relation to the applicable jurisdiction in regard to industrial injuries, workers compensation or insurance claims arising from accidents or incidents affecting aircraft occupants (crew or passengers) occurring on board aircraft. In the maritime sector, the ITF has considerable experience of the problems that can arise in identifying the competent authority in such cases.

4.4 We also note as an aside that many States exclude aircraft and crew (cockpit and cabin) from the scope of occupational and workplace health and safety requirements and protections that are otherwise applicable to the great majority of citizens.

4.5 The problem of unlawful acts on board aircraft is a particular case in point. At the moment, the legal responsibility lies with the State of Registry of the aircraft. This can present insurmountable problems in the prosecution of violent passengers, and the growing number of leased aircraft operating international services further complicates such cases. It cannot be right that access to a fundamental legal right of redress depends so often on the coincidental circumstances of an aircraft registration. For this reason, the ITF has pressed ICAO to adopt an international instrument, or amend an existing instrument, to allow the transfer of jurisdiction to the State of landing following such incidents. We will continue to press for this change, but in the absence of such a provision, we strongly urge States to adopt the recommendations contained in Assembly Resolution A33-4 as an interim measure.

4.6 These potential problems of jurisdiction also affect the legal standing and rights of aircraft passengers. Therefore, as a matter of principle, we support the ECAC Recommendation ECAC/21-1, paragraph 4.h) which states that “Consumers should be informed, as soon as practicable and in any event prior to boarding, of the actual operator if a flight is to be operated with a wet-leased aircraft”.

5. **RECOMMENDATIONS**

5.1 States should adopt a restrictive approach to leases except where they are able to ensure that the highest level of safety and security, prohibit the exercise of traffic rights where these have not been designated or authorized, and can afford the highest level of protection to aircraft occupants, both crew and passengers.

5.2 States should give consideration to the employment, fiscal and other jurisdictional aspects that may arise in the leasing of aircraft.

5.3 States are strongly encouraged to adopt the measures proposed in Assembly Resolution A33-4 concerning jurisdictional action relating to disruptive passengers.

6. **ACTION BY THE CONFERENCE**

6.1 The Conference is invited to:

- a) note the paper; and
- b) adopt the recommendations in paragraph 10.

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