

CHOICE OF LAW CONSIDERATIONS IN AVIATION FINANCE TRANSACTIONS

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Those involved in aviation finance transactions know that the choice of governing law specified in mortgages, leases and other operative documents is an extremely important decision. The jurisdiction is negotiated by the parties and can vary depending on each party's country of origin, the location of asset (which, in aviation transactions, are moveable) and the requirements of the lenders who want a level of certainty in taking a security interest in the aircraft assets in the event of default. New York and English law are often common choices due to each jurisdiction's recognized body of commercial law and established precedent in large financial transactions. The choice of either New York or English law in aviation financing transactions can provide a degree of predictability, fairness, neutrality and justice for the resolution of any potential dispute.

When the parties to the transaction do not have a presence in the desired jurisdiction, **a process agent** (also referred to as agent for service or contract agent) can be appointed to serve as a point of contact so that legal process arising out of the transaction's operative agreements may be served. Often, the appointment of a process agent is a condition precedent to closing an aviation finance deal.

In addition to the considerations included in **Consenting to Jurisdiction: Forum Selection Clauses and Fulfillment of the 'Minimum Contacts' Requirement**, additional factors that are taken into account when selecting the jurisdiction for choice of law in global aviation transactions include:

CAPE TOWN TREATY PARTICIPATION

The Cape Town Treaty is an international treaty intended to standardize transactions involving movable property. The treaty creates international standards for registration of contracts of sale (including dedicated registration agencies), security interests (liens), leases and conditional sales contracts and various legal remedies for default in financing agreements, including repossession and the effect of particular states' bankruptcy laws.¹

Parties to aircraft finance transactions in countries that have ratified the choice of law declarations of the Cape Town Treaty may choose the governing law of the transaction irrespective of the location/registration of the aircraft in question. The United States is a signatory to the treaty, which is one of the reasons why New York law has emerged as favorite among contracting parties.

MONETARY VALUE OF THE AIRCRAFT AT THE TIME OF TRANSACTION:

Section 5-1401 of New York's General Obligations Law² provides that the parties to any contract or agreement covering not less than \$250,000 "may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state."

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Therefore, under New York law, a mortgage for an aircraft exceeding the monetary threshold will create a valid security interest regardless of aircraft location. This provision enables parties to an aircraft finance transaction to choose New York law even if they are not signatories to the Cape Town Treaty.

PHYSICAL LOCATION OF THE AIRCRAFT ON THE DATE OF CLOSING:

The physical location of the aircraft on the date of closing is an important consideration when determining whether or not English law can be used as the governing law for an aviation transaction securing a mortgage on the aircraft. One principle of the applicability of English law in a mortgage transaction is *Lex Situs i.e.*, the laws of the jurisdiction where the relevant asset is situated at the time that the interest is created. This determines whether a property interest, such as a mortgage, is effectively created over that asset. Therefore, in order for the English mortgage to be effective, the asset must be situated in England at the date of closing. This has been upheld by the English High Court in the recent case *Blue Sky One Limited and Others -v-Mahan Air and Another 2010*.³

We invite our readers to share their experiences in choosing the governing law for aviation finance transactions and share any additional considerations that go into the decision.

Finally, once the jurisdictions for your transaction are determined, it is helpful to work with a reputable process agent as a single point of contact who can streamline and expedite the appointment process for all of the required locations. [\(See Top 5 Criteria for Selecting a Process Agent\)](#). A good process agent understands the complexity of aviation transactions and can help ensure a smooth closing and proper communication of any subsequent legal process.

This article is provided for informational purposes only and should not be considered, or relied upon, as legal advice.

1 http://en.wikipedia.org/wiki/Cape_Town_Treaty

2 N.Y. Consolidated Laws, Gen. Oblig. § 5-1401 - Choice of Law

3 *Blue Sky One Limited & O'rs v. Mahan Air & Ano'r* [2010] EWHC 631 (Comm).

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