

ภาคผนวก 4

Aircraft Dry Lease Agreement

AIRCRAFT DRY LEASE AGREEMENT

BETWEEN

[_____]

as Lessor

- AND -

[_____]

as Lessee

DATED as of _____

AIRCRAFT:
SERIAL NUMBER:
REGISTRATION MARK:
ENGINES:

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AIRCRAFT REDELIVERY CERTIFICATE221

AIRCRAFT DRY LEASE AGREEMENT

THIS AIRCRAFT DRY LEASE AGREEMENT made as of
[_____]

[DISCUSSION: See: *supra*, Common Provisions in Aviation Financing Documents § 7.1.2(a).]

BY AND BETWEEN: [_____], a limited liability company established under the laws of [_____] as is more fully described in Appendix "D". ("Lessor")

AND: [_____], a limited liability company established under the laws of [_____] as is more fully described in Appendix "D". ("Lessee")

(individually, a "Party" and collectively, the "Parties").

[DISCUSSION: See: *supra*, Common Provisions in Aviation Financing Documents § 7.1.2(b).]

WHEREAS Lessee desires to lease on a dry lease basis from Lessor and Lessor is willing to lease the Aircraft (as defined below) to Lessee on the terms and subject to the conditions set forth herein.

NOW THEREFORE THIS AGREEMENT WITNESSES that for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

[DISCUSSION: See: *supra*, Common Provisions in Aviation Financing Documents § 7.1.2(c).]

ARTICLE 1 – DEFINITIONS AND INTERPRETATION

1.1 Definitions

The following terms (except as otherwise expressly provided or unless the context otherwise requires) for all purposes of this Agreement shall have the respective meanings hereinafter specified:

“Affiliate” means, with respect to any person, any other person directly or indirectly controlling, controlled by, or under common control with such person. For purposes of this definition, “control” shall mean the direct or indirect ownership of a majority of the voting capital stock or other ownership interests in such person and the ability to elect or appoint a majority of the board of directors (if a corporation) and otherwise to direct the management, policies and business affairs of such person.

“Agreed Value” means the amount set forth in Appendix “D”.

[DISCUSSION: The standard aircraft hull insurance policy is issued on what is known as an “incurred value” basis. This is a convenient expression that refers to the underwriters’ option contained in the policy wording to pay for or replace the aircraft in the event of a loss. On this basis, if an aircraft becomes an actual total loss or constructive total loss (i.e. it is not economical for repairs to be affected)¹ the underwriters have the option to either pay the sum assured as stated in the policy or provide the insured with a replacement aircraft provided this could be purchased for a sum not exceeding the insured value. Many insureds, therefore, seek to insure upon an “agreed value” basis, particularly when their aircraft are mortgaged. On this basis the policy is endorsed to the effect that the value stated in the policy is admitted or agreed by the underwriters in advance

¹ The aircraft is so damaged that it is beyond economical repair having regard to its value, whether it is an insured or agreed value. (See: 1 SHAWCROSS AND BEAUMONT, AIR LAW, ISSUE 89, VIII/89 (David McClean et al eds., 4th ed. (reissue), Butterworths, U.K., 2002); See also: *Ranger Insurance Co. v. Lee Kidd, et al.* 12 Avi 17, 471 (1972), where it was held that an aircraft was a total loss when, after it had crashed, there remained no substantial remnant which a reasonably, prudent, uninsured owner, desiring to restore the aircraft to its original condition, could utilize as a basis for such restoration.

and that in the event of total loss they will pay this amount and will forego their option to replace.]

"Agreement" means this Aircraft Dry Lease Agreement incorporating Appendices attached hereto and any future amendments introduced and duly signed on behalf of the Parties by their respective authorized representatives.

"Aircraft" means the aircraft identified and described in Appendix "A", including:

- (a) the Airframe;
- (b) the Engines installed on the Airframe as of the Delivery Date or such other engines as may be installed on or relate to the Airframe in compliance with this Agreement from time to time;
- (c) all Parts installed on or in or attached to the Airframe and/or Engines as of the Delivery Date or such other parts installed on or in or attached to the Airframe and/or Engines in compliance with this Agreement from time to time;
- (d) avionics, instruments, cargo equipment, attachments, Aircraft Documents, books, manuals, handbooks, data, drawings, log books, flight records and historical information pertaining to the Airframe or to any Engine; and

where the context requires, shall be deemed to refer to any one or more of the foregoing only.

[DISCUSSION: The Appendix describing the equipment to be leased is often a very thick document itself. For example, the lease of a new commercial aircraft can involve a schedule containing all of the manufacturer's specifications that could involve several volumes. Often it is more practical and convenient to briefly but accurately describe the equipment in a schedule to the lease agreement by reference to the manufacturer's specification number.]

"Aircraft Acceptance Certificate" means a document in the form set out in Appendix "K".

"Aircraft Documents" means all:

- (a) logbooks, Aircraft records, manuals and other documents provided to Lessee in connection with the Aircraft;
- (b) documents listed in Appendix "C"; and
- (c) any other documents required to be maintained during the Term by the Civil Aviation Authority or the Approved Maintenance Program.

"Aircraft Redelivery Certificate" means a document in the form set out in Appendix "N".

"Airframe" means any airframe described in Appendix "A" together with all Parts relating thereto (excluding Engines or engines and Aircraft Documents).

[DISCUSSION: The Airframe is the structure of an aircraft that does not include the Engine.]

"Approved Maintenance Program" means Lessee's maintenance program as approved by the Civil Aviation Authority or such other maintenance program as Lessor may, in its absolute discretion, approve in writing.

"Basic Rent" means the amount specified in Appendix "D" and payable for the lease of the Aircraft pursuant to Article 6.2.

[DISCUSSION: As opposed to "Supplemental Rent" which is hereinafter discussed.]

"Business Day" means a day other than a Saturday or a Sunday on which the commercial banks in the head office cities of both Parties are open to the public for business.

"Civil Aviation Authority" means the civil aviation authority of the State of Registration or any Government Entity, which under the Laws of the State of Registration from time to time has control over civil aviation or the registration, airworthiness, or operation of aircraft in the State of Registration.

"Damage Notification Threshold" means the amount specified in Appendix "D".

"Default Interest" means interest on any due and unpaid amount payable by Lessee pursuant to this Agreement calculated at the rate of interest specified in Appendix "D".

"Delivery Date" means the date on which delivery of the Aircraft by Lessor to Lessee takes place as specified in Appendix "D".

"Delivery Location" means the location specified in Appendix "D".

[DISCUSSION: See discussion following Article 4.3 below.]

"Dollars", "\$" or "U.S. \$" means the lawful currency of the United States of America.

"Engine" means;

- (a) each of the engines (as more particularly described in Appendix "A") installed on the Airframe as at the Delivery Date and specified in the Aircraft Acceptance Certificate (whether or not from time to time installed on the Airframe);
- (b) any replacement engine title to which is acquired by Lessor and leased to Lessee hereunder; and
- (c) all related Parts installed in or any such engines at the Delivery Date (or substituted, renewed or replacement parts in accordance with this Agreement) so long as title thereto is or remains vested in Lessor in accordance with Article 10.9.

[DISCUSSION: See, supra, Engines § 1.3.2.]

"Engine Manufacturer" means the manufacturer of the Engines as specified in Appendix "D".

"Eurocontrol" means the European Organization for the Safety of Air Navigation or its successor for the time being.

[DISCUSSION: See, supra, European Organization for the Safety of Air Navigation (Eurocontrol) § 6.2.9.]

"Event of Default" means any of the events specified in Article 18.1.

"Expiry Date" means the date specified in Appendix "D" on which Lessee is required to redeliver the Aircraft to Lessor in the condition required by this Agreement.

"Flight" means any flight for the carriage of passengers, baggage, cargo and mail undertaken by Lessee during the Term.

"Flight Hour" means each hour or part thereof elapsing from the moment at which the wheels of the Aircraft leave the ground on the take-off of the Aircraft until the wheels of the Aircraft touch the ground on the landing of the Aircraft following such take-off.

[DISCUSSION: As opposed to "Block Hours" which are defined as "The number of hours incurred by an aircraft from the moment it first moves for a flight until it comes to rest at its intended blocks at the next point of landing, or returns to its departure point prior to takeoff." (Push-out from the gate is considered part of block hours).² Sometimes the following words are added: "For purposes of calculations measured in block hours under this Agreement such hours, including fractions thereof, shall be measured to two decimal points."]

"Force Majeure" means, without limitation, acts of God, loss or damage to the Aircraft in an accident or other calamity, seizure or hijacking, airport closure, quarantine restrictions, fire, flood, explosion, earthquake, riots or civil commotion, strike or labor dispute or labor stoppage, war or hazards or dangers incident to a state of war, any act of government allocation, regulation or order, or any acts, matters or things, whether or not of a similar nature beyond the control of either Party.

[DISCUSSION: Force majeure is an established doctrine in French law which relieves a promisor from responsibility for non-performance in certain circumstances. Although having a close affinity with the common law doctrine of frustration, it is somewhat narrower in its effect. Article 1148 of the French Civil Code provides:

² IATA World Airlines Technical Operations Glossary (WATOG).

"There is no place for any damages when, as a result of force majeure or cas fortuit,³ the debtor has been prevented from conveying or doing that to which he was obliged or has done what was forbidden to him."

To successfully invoke a defence of force majeure the debtor must show that performance has been made impossible and not merely more onerous.⁴ To qualify as force majeure, the event preventing performance must have been unforeseeable and unpreventable. If the event was foreseeable, provision for it should have been made in the contract or the obligation should not have been assumed.^{5]}

"Geneva Convention" means the Geneva Convention on the International Recognition of Rights in the Aircraft signed in Geneva, Switzerland on 19 June 1948 as amended from time to time.

"Governing Law" means the law specified in Appendix "D".

"Government Entity" means and includes any (a) national, state or local government; (b) board, commission, department, division, instrumentality, court, agency or political subdivision thereof; and (c) association, organization or institution of which any of the entities in (a) and (b) is a member or to whose jurisdiction any of such entities is subject or in whose activities any such entity is a participant.

"IATA" means the International Air Transport Association.

"Indemnitees" means the persons mentioned in Appendix "D".

"Insurances" means the insurances contemplated by Article 14 and Appendices "G" and "H".

"Jurisdiction" means the jurisdiction specified in Appendix "D".

³ These terms are used interchangeably.

⁴ French law differs from the English law of frustration in that if the contract is capable of technical performance a defence of force majeure is not available even if the performance is uneconomical.

⁵ See generally: EWAN MCKENDRICK, FORCE MAJEURE AND FRUSTRATION OF CONTRACT, (Lloyds of London Press, London, 2nd ed., 1995).

"Law" means and includes any (a) statute, decree, constitution, regulation, order or any directive of any Government Entity; (b) treaty, pact, compact or other agreement to which any Government Entity is a signatory or party; (c) judicial or administrative interpretation or application of any of the foregoing; and (d) amendment or revision of any of the foregoing.

"Lessor's Account" means the account maintained by Lessor with the bank specified in Appendix "D" or such other bank and account as may be notified by Lessor to Lessee from time to time.

"Lessor's Lender" means any bank or financial institution which may from time to time provide financial facilities to Lessor in relation to the acquisition or continuing ownership of the Aircraft by Lessor.

"Lessor's Lien" means any Security Interest on the Aircraft or any part thereof (i) created by Lessor; and (ii) arising by any act or omission of Lessor which is not required or permitted under the terms of this Agreement.

"LIBOR" means the rate per annum which is the arithmetic mean (rounded upwards, if not already such a multiple, to the nearest whole multiple of one-sixteenth of one per cent) of the offered rates (if any) appearing on the LIBO page of the Reuters screen (or any replacement page) for deposits in Dollars for the period for which such rate is to be determined at 11:00 a.m. (GMT) on the day that is two (2) London business days before the date of such determination, provided that if at 11:00 a.m. (GMT) on the date that is two (2) London business days before the date of such determination no such rate is appearing on the LIBO page of the Reuters screen then "LIBOR" means the offered rate (if any) appearing on page 3750 of the Telerate screen (or any replacement page) which displays British Bankers Association Interest Settlement Rates for deposits in Dollars for the period for which such rate is to be determined at 11:00 a.m. (GMT) on the date that is two (2) London business days before the date of such determination, provided further, that if at 11:00 a.m. on the day that is two (2) London business days before the date of such determination no such rate is appearing on the LIBO page of the Reuters screen or page 3750 of the Telerate screen (or any replacement page, in each case) then "LIBOR" means the rate per annum determined by Lessor to be

equal to the arithmetic mean (rounded upwards, if not already such a multiple, to the nearest whole multiple of one-sixteenth of one per cent) of the rates (as notified to Lessor) at which the Central Bank of England was offering to prime banks in the London Interbank Market deposits in Dollars for such period at or about 11:00 a.m. (GMT) on the day that is two (2) London business days before the date of such determination.

[DISCUSSION: See, supra, Interest § 3.2.5.1.]

"Location" means the airport specified in Appendix "D" or any other agreed airport where the Aircraft shall be regularly maintained by Lessee as herein stated and where the Aircraft is habitually kept and operated during the Term.

"Losses" means any and all liabilities, claims, demands, suits, judgments, damages and losses including the costs, expenses and reasonable legal fees connected therewith or incident thereto.

"Manufacturer" means the manufacturer of the Airframe as specified in Appendix "D".

"Minimum Liability Coverage" means the amount specified in Appendix "D".

"Month" means a period starting on one day in a calendar month and ending on the numerically corresponding day in the next calendar month save that, where any such period would otherwise end on a non-Business Day, it shall end on the next succeeding Business Day, unless such next Business Day falls in the next calendar month, in which case the relevant period shall end on the immediately preceding Business Day, and further provided that if a period starts on the last Business Day in a calendar month or if there is no numerically corresponding day in the month in which that period ends, that period shall end on the last Business Day in that later month.

"Net Total Loss Proceeds" means an amount equal to the Total Loss Proceeds actually received by Lessor following a Total Loss, less any reasonable legal and other out-of-pocket expenses (including reasonable compensation for Lessor's management, if a significant amount of time was expended), Taxes and duties incurred by Lessor in connection with the collection of such proceeds.

"Part" means, whether or not from the time being installed on the Aircraft or any Engine;

- (a) any part, component, appliance, appurtenance, instrument, accessory, furnishing or item of equipment (other than a complete Engine) furnished with the Aircraft at the Delivery Date; and
- (b) any other part, component, appliance, appurtenance, instrument, accessory, furnishing or item of equipment (other than a complete Engine) title to which has (or should have) passed to Lessor pursuant to this Agreement;

but excludes any such items title to which has (or should have) passed to Lessee pursuant to this Agreement.

"Permitted Liens" means, as of any date, any of the following:

- (a) any Lessor's Liens;
- (b) any lien in respect of Taxes of any kind which are either not yet assessed or, if assessed, are not yet due and payable or are being contested in good faith by appropriate proceedings; and
- (c) any lien of a repairer, mechanic, carrier, hangar-keeper, material man, employee or other similar Security Interest arising by statute or operation of Law after the Delivery Date and in the ordinary course of Lessee's business in respect of obligations which are not overdue or which are being contested in good faith by appropriate proceedings (and for which adequate reserves have been made or, when required in order to pursue such proceedings, an adequate bond has been provided) so long as such proceedings do not involve any danger of sale, forfeiture or loss of the Aircraft.

"Redelivery Location" means the airport specified in Appendix "D".

"Security Deposit" means the amount specified in Appendix "D".

"Security Interest" means any encumbrance or security interest whatsoever, however and wherever created or arising including (without prejudice to the generality of the foregoing) any right of ownership, security, mortgage, pledge, charge, encumbrance, lease, lien, statutory or other right in rem, hypothecation, title retention, attachment, levy, claim or right of possession or detention.

"State of Registration" means the country, state or territory specified in Appendix "D" or such other country or state of registration of the Aircraft as Lessor may, in its absolute discretion, approve in writing.

"Supplemental Rent" means the amounts specified in Appendix "D".

"Taxes" or "taxes" means any and all present and future goods and services, sales, use, personal, property, customs, ad valorem, value added, turnover, stamp, interest equalization, income, gross receipts, franchise or other similar taxes, fees, withholdings, imposts, duties, levies or other charges of any nature, together with any related penalties, fines or interest thereon, imposed, levied, or assessed by or otherwise payable to, any Government Entity the whole as more fully specified in Article 17.

"Term" means the period of leasing commencing on the Delivery Date and terminating on the Expiry Date or Termination Date, as the case may be, in accordance with the provisions of this Agreement and shall include any extensions which may be agreed in writing between the Parties.

"Termination Date" means any date other than the Expiry Date on which the Term may terminate in accordance with the provisions of this Agreement.

"Total Loss" means any of the following in relation to the Aircraft, Airframe or any Engine:

- (a) its actual, constructive or agreed total loss; or
- (b) its destruction, damage beyond repair or being rendered permanently unfit for normal use for any reason whatsoever; or

- (c) its theft, requisition for title, confiscation, sequestration, detention, forfeiture or any compulsory acquisition whatsoever or seizure or requisition for hire (other than a theft or requisition for hire for a temporary period not exceeding one hundred and eighty (180) days); or
- (d) its disappearance, resulting in loss of possession by Lessee (or an approved sublessee for the time being) for a period in excess of thirty (30) consecutive days; or
- (e) its hijacking for a period in excess of ninety (90) consecutive days.

[DISCUSSION: The normal airline insurance policies cover the events set out in the definition of "Total Loss" above but lessors and other financial interests attempt to slip in additional events with the hope that the lessee and the insurance broker issuing the insurance certificates will not realize that such events are not insurable and thus build in a potential hidden technical default or potential grounds for a claim against unsuspecting underwriters. Obviously, anything which potentially triggers an event of Total Loss must be insurable and consequently the insurance underwriters or brokers should approve the wording of this definition together with all other insurance related matters.

The following additional events are typically inserted by lessors and are not normally insured or even insurable:

- *with respect to the aircraft, the operation or the location of such aircraft, while under requisition for use by any government or any agency or instrumentality thereof, in any area excluded from coverage by any insurance policy in effect with respect to the aircraft required by the terms of the lease (other than a requisition of use by the government where the lessee has obtained an indemnity in lieu thereof from the government;*
- *as a result of any rule, regulation, order or other action by any governmental authority of the State of Registration, the use of such property in the normal course of passenger air transportation shall have been prohibited or (in the case of the aircraft) the type certification of such aircraft shall have been terminated, in each case for a period of six consecutive months, unless the lessee, prior to the expiration of such six month period, shall have undertaken and shall be*

diligently carrying forward all steps which in its judgment are necessary or desirable to permit the normal use of such property by the lessee or, in any event, if such use shall have been prohibited for a period of twelve consecutive months;

- *any sale of the aircraft in connection with Eurocontrol charges;*
- *any sale of the aircraft in connection with a lessee bankruptcy, whether by an administrator, trustee or court;*
- *any other occurrence not permitted under the lease which deprives the lessee of the use or possession of the aircraft for a period of sixty consecutive days or longer.]*

"Total Loss Date" means:

- (a) in the case of an actual total loss or destruction, damage beyond repair, or being rendered permanently unfit, the date on which such loss, destruction, damage or rendition occurs (or, if the date of loss or destruction is not known, the date on which the Aircraft, Airframe or Engine was last heard of);
- (b) in the case of a constructive or agreed total loss, whichever shall be the earlier of:
 - (i) the date being ninety (90) days after the date on which notice claiming such total loss is issued to the insurers or broker; or
 - (ii) the date on which such loss is agreed or compromised by the insurers; or
 - (iii) in the case of requisition for title, confiscation, sequestrations, detention, forfeiture, compulsory acquisition or seizure, the date on which the same takes effect; or
 - (iv) in the case of theft or requisition for hire, the date being one hundred and eighty (180) days after the requisition commenced or the theft occurred (or, if earlier, the date on which the insurers make payment of the basis of a total loss) unless the requisition or theft has been terminated and the

Aircraft, Airframe or Engine returned to Lessee or the approved sublessee prior to the earlier to such dates; or

- (v) in the case of disappearance, the date being thirty-one (31) days after the date on which the Lessee (or the approved sublessee for the time being) lost possession of the Aircraft, Airframe or Engine unless the Aircraft, Airframe or Engine has been returned to Lessee or the approved sublessee prior to such date; or
- (vi) in the case of hijacking, the date being ninety-one (91) days after the date on which the hijacking commenced unless the hijacking has been terminated and the Aircraft, Airframe or Engine returned to the Lessee or approved sublessee prior to such date.

"Total Loss Proceeds" means the proceeds of any insurance, or any compensation or similar payment, arising in respect of a Total Loss.

"Warranty" means any and all conditions, warranties, guarantees, representations, service contracts, contracts to stock spare parts or other agreements of any nature whatsoever, verbal or written, express or implied, legal, statutory, conventional, collateral or otherwise, in respect of or that shall in any manner apply to the Airframe, the Engines or any Parts thereof.

1.2 Interpretation

- (a) All of the provisions of this Agreement (other than where expressly stated to be representations or warranties), where the context requires, are to be construed as covenants as though the words importing such covenants were used in each separate Article hereof.
- (b) Except where the context does not so admit, references in this Agreement to:
 - (i) an Event of Default includes a reference to any event which, with the giving of notice or lapse of time, or both, would constitute an Event of Default;

- (ii) Articles and Appendices are, unless otherwise specified, references to Articles of, and Appendices to, this Agreement and references to this Agreement include its Appendices;
 - (iii) any statute or other legislative provision shall be construed as including any statutory or legislative modification or re-enactment thereof, or any substitution therefor;
 - (iv) the word "person" or "persons" or words importing persons include, without limitation, individuals, firms, partnerships, joint ventures, trusts, Government Entities, organizations, associations, corporations, committees, departments, authorities and other bodies, corporate or incorporate, whether having distinct legal personality or not;
 - (v) Lessor and Lessee include any assignee, novatee or successor in title to such person respectively (subject to the provisions of Article 21);
 - (vi) an "agreement" also includes a concession, contract, deed, franchise, license, treaty or undertaking (in each case, whether oral or written);
 - (vii) any agreement or instrument shall include such agreement or instrument as it may from time to time be amended, supplemented, novated or substituted.
- (c) Where the context so admits, words importing the singular number only shall include the plural and vice versa and words importing the neuter gender shall include the masculine or feminine gender.
- (d) Headings in this Agreement are for ease of reference only.

[DISCUSSION: To assist in reading a lease agreement it is helpful to have all of the definitions located in one place, preferably at the front of the document. Each time a defined term is used in the body of the agreement it should be carefully considered whether or not it is appropriate. Altering defined terms late in the negotiations when that term appears in many places throughout the document can easily result

in mistakes. There is no point however in including definitions of terms that are only used in one clause.]

ARTICLE 2 – REPRESENTATIONS AND WARRANTIES

2.1 Lessee's Representations and Warranties

Lessee acknowledges that Lessor has entered into this Agreement in full reliance on the following representations and warranties given by Lessee. Lessee now represents and warrants to Lessor that the following statements are, at the date hereof and on the Delivery Date will be, true and accurate and shall continue until the Expiry Date or the Termination Date, as the case may be:

2.1.1 Corporate Status

Lessee is a corporation duly incorporated with limited liability, validly existing for an unlimited duration and in good standing under the Laws of the jurisdiction of its incorporation and has the corporate power and authority to carry on its business as presently conducted, to own or hold under lease its assets and to perform its obligations under this Agreement.

2.1.2 Governmental Approvals

No authorization, approval, consent, license or order of, or registration with, or the giving of notice to the Civil Aviation Authority or any other Government Entity is required for the valid authorization, execution, delivery and performance by Lessee of its obligations under this Agreement, except as will have been duly effected as of the Delivery Date.

2.1.3 Binding

Lessee's Board of Directors has authorized Lessee to enter into this Agreement and any other documentation in connection with the leasing of the Aircraft from Lessor and perform its obligations under this Agreement or such other documentation. This Agreement has been duly authorized by all necessary corporate action and executed and delivered by Lessee and represents the valid, enforceable and binding obligations of Lessee except

as enforceability may be limited by bankruptcy, insolvency, reorganization or other Laws of general application affecting the enforcement of creditors' rights.

2.1.4 No Breach

Neither the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby nor compliance by Lessee with any terms and provisions hereof will contravene any Law applicable to Lessee or result in any breach of, or constitute any default under or result in the creation of any security interest upon any property of Lessee, pursuant to any indenture, mortgage, chattel mortgage, deed of trust, conditional sales contract, bank loan or credit agreement, corporate charter, by-law, or other agreement or instrument to which Lessee is a party or by which Lessee or its properties or assets may be bound or affected.

2.1.5 Filings

Except for any filing or recording that may be required under the Laws of the State of Registration, no filing or recording of any instrument or document (including the filing of any financial statements) is necessary under any applicable Laws in order for this Agreement to constitute a valid and perfected agreement of record relating to the Aircraft.

2.1.6 Licenses

Lessee is a certificated air carrier and holds all necessary licenses, certificates and permits from applicable Government Entities in the State of Registration to enable Lessee to engage in air transportation and perform and comply with its obligations under this Agreement.

2.1.7 No Suits

There are no suits, arbitrations or legal proceedings (including any administrative proceedings) pending

or threatened against Lessee before any court or administrative agency or affecting Lessee which, if adversely determined, would have a material adverse effect on the financial condition or business of Lessee or its ability to perform this Agreement.

2.1.8 No Withholding

Under the Laws of the State of Registration, Lessee will not be required to deduct any withholding or other Tax from any payment it is required to make under this Agreement.

2.1.9 General Obligations

The obligations of Lessee under this Agreement are direct, general and unconditional obligations of Lessee and rank or will rank at least pari passu with all other present and future unsecured and unsubordinated obligations (including contingent obligations) of Lessee, with the exception of such obligations as are mandatorily preferred by Law and not be virtue of any encumbrance.

2.1.10 No Sovereign Immunity

Under the Laws of the State of Registration or of any other jurisdiction in which Lessee conducts business, Lessee is subject to private commercial Law and suit. Neither Lessee or its properties or assets is entitled to sovereign immunity under any such Laws. Lessee's performance of its obligations hereunder constitute commercial acts done for commercial purposes.

2.1.11 Tax Returns

All necessary returns have been delivered by Lessee to all relevant taxation authorities in the jurisdiction of its incorporation and elsewhere and Lessee is not in default in the payment of any Taxes due and payable to such authorities.

2.1.12 No Material Adverse Effect

Lessee is not in default under any agreement to which it is a party, or by which it may be bound, or in respect of any financial commitment or obligation, which may have, in the reasonable opinion of Lessor, a material adverse effect on Lessee's business, assets or ability of Lessee to perform all or any of its obligations under this Agreement and no material litigation or administrative proceedings before any Government Entity is presently pending or to the knowledge of Lessee threatened against it or its assets which would have a material adverse effect on the business, assets or condition (financial or otherwise) of Lessee.

2.1.13 Notice of Change in Lessee's Condition

Lessee shall promptly give written notice to Lessor of any proceeding before any Government Entity which, if adversely determined, would materially adversely affect Lessee's financial condition, affairs or operations.

2.1.14 Mergers

Lessee shall not sell or convey substantially all of its property and assets or merge or consolidate with or into any other person unless Lessee has obtained Lessor's prior written consent which shall not be unreasonably withheld or delayed.

2.1.15 No Default

At the time of execution of this Agreement, no Event of Default has occurred or is continuing.

2.1.16 Financial Information

The financial and written information furnished by or on behalf of Lessee in connection with this Agreement does not contain any untrue statement or omit to state any fact, the omission of which makes the statements therein, in light of the circumstances under which they were made, misleading, or omit to disclose any material matter and all expressions of expectation,

intention, belief and opinion contained therein were honestly made on reasonable grounds after due and careful inquiry by Lessee.

2.1.17 Authorizations of Payments

Lessee represents and warrants as of the date of execution of this Agreement that under the Laws of the State of Registration there are no present restrictions on Lessee making the payments required by this Agreement. If at any time any such restrictions may be applicable, Lessee shall obtain all certificates, licenses, permits, exemptions and other authorizations which are from time to time required for the making of the payments required by this Agreement on the dates and in the amounts and currency which are stipulated herein, and shall maintain the same, in full force and effect for so long as the same shall be required.

2.2 Repetition and Survival

The representations and warranties contained in Article 2.1 shall be deemed to be repeated by Lessee on and as of the first day of each Month throughout the Term until the Expiry Date or the Termination Date, as the case may be.

2.3 Lessor's Representations and Warranties

Lessor acknowledges that Lessee has entered into this Agreement in full reliance on the following representations and warranties given by Lessor. Lessor now represents and warrants to Lessee that the following statements are, at the date hereof and on the Delivery Date will be, true and accurate and shall continue until the Expiry Date or the Termination Date, as the case may be:

2.3.1 Corporate Status

Lessor is a corporation duly incorporated with limited liability, validly existing for an unlimited duration and in good standing under the Laws of the jurisdiction of its incorporation and has the corporate power and authority to carry on its business as

presently conducted and to perform its obligations under this Agreement.

2.3.2 Governmental Approvals

No authorization, approval, consent, license or order of, or registration with, or the giving of notice to the Civil Aviation Authority or any other Government Entity is required for the valid authorization, execution, delivery and performance by Lessor of its obligations under this Agreement.

2.3.3 Binding

Lessor's Board of Directors has authorized Lessor to enter into this Agreement and any other documentation in connection with the leasing of the Aircraft to Lessee and perform its obligations under this Agreement or such other documentation. This Agreement has been duly authorized by all necessary corporate action and executed and delivered by Lessor and represents the valid, enforceable and binding obligations of Lessor except as enforceability may be limited by bankruptcy, insolvency, reorganization or other Laws of general application affecting the enforcement of creditors' rights.

2.3.4 No Breach

Neither the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby nor compliance by Lessor with any terms and provisions hereof will contravene any Law applicable to Lessor or result in any breach of, or constitute any default under any indenture, mortgage, chattel mortgage, deed of trust, conditional sales contract, bank loan or credit agreement, corporate charter, by-law, or other agreement or instrument to which Lessor is a party or by which Lessor or its properties or assets may be bound or affected;

2.3.5 Title to Aircraft

On the Delivery Date, Lessor shall have good and valid title to the Aircraft.

2.4 No Prejudice

The rights and remedies of each Party in relation to any misrepresentation or breach of warranty by the other Party shall not be prejudiced by any investigation by or on behalf of a Party into the affairs of that other Party, by the performance of this Agreement or by any other act or thing which may be done or omitted to be done by a Party which would or might, but for this Article 2.4, prejudice such rights and remedies.

[DISCUSSION: Representations and warranties are found in most lease agreements and serve a number of purposes. In particular, they set out the information relating to the subject matter of the lease as well as to the parties themselves. Practically, this information provides a checklist of matters to be considered prior to the execution of the transaction documents, and information contained in the early drafts generally gives the parties an opportunity to correct any assumptions or false impressions. The scope and detail of the representations and warranties should cause the parties, particularly the lessee, and their respective professional advisors, to carefully consider the information contained therein with a proper degree of responsibility.

From a legal perspective, representations and warranties are distinguished as follows:

- *a representation is a statement made prior to the execution of an agreement, in reliance upon which the beneficiary of the representation enters into the agreement; and*
- *a warranty is a term of the agreement itself, a breach of which will entitle the beneficiary to damages.*

While the information provided by way of a representation may legally entitle the beneficiary thereof to sue for breach of representation and to recover damages if a representation proves to be false, there are few lessors who actually rely on such representations instead of performing due diligence before entering into a lease.

If the agreement provides that a misrepresentation or breach of warranty will constitute an event of default,⁶ a lessor should exercise caution before invoking such default for the following reasons:

- (i) *the lessor may be deemed to have waived the misrepresentation or breach of warranty (for example, if the*

⁶ See: Default - Article 18.1(e) hereof.

- lessor had prior knowledge of the misrepresentation or breach but nevertheless entered into the lease);
- (ii) if the misrepresentation or breach relates to a matter of law as opposed to a matter of fact, a lessor may not prevail since he is presumed to know his own domestic law. This will probably not apply to foreign law or to a misrepresentation or breach which is a combination of law and fact; and
 - (iii) in exceptional cases, a trivial breach might be refused recognition by a court based on equitable grounds.

Some provisions stipulate that the lessee is "deemed to represent and warrant that all information in any statement or certificate provided in connection with the transaction, whether in writing or otherwise, is true and correct." This is extremely difficult from a lessee's perspective since he can hardly be expected to remember what he might have said during, or prior to, negotiations, not to mention, being aware of what another member of his company might have said and as such I generally classify these types of provisions as "lawyer absurdities."

The deemed repetition of representations and warranties can also be of some concern to a lessee and its legal counsel in that a lessee may be bound to repeat something which may, with the effluxion of time, turn out to be inaccurate. This concern is exactly what a lessor wishes to create and it is expected that a responsible lessee will continue to evaluate the representations and warranties throughout the lease term and bring any changes thereto to the lessor's attention.

Lessees are equally entitled to receive the benefit of representations and warranties from lessors, although for some reason lessors think that they shouldn't have to give them. I have seen many draft leases which omit lessor representations and warranties entirely. I consider this approach quite cheeky and it often reflects the lessor's contemptuous and conceited attitude towards the proposed lessee. The lessor's reluctance to give representations and warranties should be a signal to the lessee to take notice as to how he can expect to be treated throughout the negotiations and during the lease term. As mentioned elsewhere, it is often the lessor who defaults in his obligations under the lease and the lessee should be prudent when entering into any lease agreement.]

ARTICLE 3 - CONDITIONS PRECEDENT**3.1 Conditions Precedent**

Lessor's obligation to deliver and lease the Aircraft to Lessee on the Delivery Date shall be subject to the fulfillment of the following conditions (save to the extent that any of the same are waived or deferred by Lessor in its absolute discretion) to Lessor's complete satisfaction within the timeframes set forth below:

3.1.1 Pre-Delivery Requirements

At least three (3) days prior to the Delivery Date:

- (a) the Parties shall have duly executed this Agreement and such other agreements between Lessor and Lessee as may be necessary to effect the transaction hereby contemplated.
- (b) Lessee shall provide Lessor with the following:
 - (i) a copy of Lessee's Certificate of Incorporation and Memorandum and Articles of Association;
 - (ii) resolutions of the Board of Directors of Lessee or other written evidence of appropriate corporate action, certified by the Secretary of Lessee, duly authorizing the lease of the Aircraft hereunder and the execution, delivery and performance of this Agreement;
 - (iii) certificate of incumbency as to the person or persons authorized to execute and deliver documents on behalf of Lessee;
 - (iv) a statement from Lessee that there has been no material adverse change in Lessee's business or financial condition;

- (v) a legal opinion substantially in the form set out in Appendix "F";
- (vi) such evidence and opinion as to the Tax treatment of the transaction hereby contemplated as Lessor may reasonably require and a statement that there shall have no adverse change in Tax Law enacted or proposed; and
- (vii) the Security Deposit and first monthly installment of Basic Rent in accordance with Articles 6.1 and 6.2 respectively.

3.1.2 Delivery Requirements

On the Delivery Date:

- (a) Lessee shall conduct a physical inspection of the Aircraft in accordance with Article 4.4 and, subject to the terms and conditions of this Agreement, execute and deliver to Lessor an Aircraft Acceptance Certificate.
- (b) Lessee shall provide Lessor with the following:
 - (i) a certificate signed by an officer of Lessee stating that (A) the representations and warranties contemplated in Article 2 are true and accurate on and as of the Delivery Date as though made on and as of such date (except to the extent that such representatives and warranties relate solely to an earlier date); and (B) no default has occurred and is continuing or will result from Lessee's lease of the Aircraft hereunder;
 - (ii) a certificate of insurance and brokers' letter of undertaking substantially in the forms set forth in Appendices "H" and "I" respectively from Lessee's insurance brokers evidencing insurance of the

Aircraft in accordance with this Agreement;

- (iii) such documents reasonably requested by Lessor evidencing that Lessee has obtained any necessary licenses for importation and ferrying of the Aircraft into the State of Registration and that all applicable customs duties and sales taxes in respect of the Aircraft have been discharged by Lessee (or arrangements satisfactory to Lessor have been made for obtaining or paying for the same);
- (iv) such documents reasonably requested by Lessor evidencing the issuance of all necessary approvals, licenses and consents required in connection with the remittance to Lessor of any amount payable under this Agreement or the performance by Lessee of any of its obligations hereunder (including without limitation any exchange control approval);
- (v) a power of attorney empowering Lessee's representatives to execute the documents contemplated in this transaction and accept delivery of the Aircraft on behalf of Lessee;
- (vi) a deregistration undertaking from the Civil Aviation Authority substantially in the form set forth in Appendix "E" and a power of attorney substantially the form set forth in Appendix "J" in relation to the deregistration of the Aircraft from the Civil Aviation Authority and any other consent to the deregistration and exportation of the Aircraft from the State of Registration from the expiration or termination of this Agreement as Lessor may consider desirable; and

- (vii) such other documents as Lessor may reasonably request.
- (c) Lessor shall deliver to Lessee an assignment of Manufacturer and Engine manufacturer's rights and concurrently therewith Lessor, to the extent that it has not previously done so, shall be deemed to have assigned all product assurance, product support and training applicable to the owner or operator of the Aircraft to Lessee during the Term. For the avoidance of doubt, Lessor shall retain for its own account all other allowances and concessions in connection with the Aircraft (whether from Manufacturer, the Engine manufacturer or any vendor).

3.1.3 Post-Delivery Requirements

Within seven (7) days following the Delivery Date, Lessee shall provide the following to Lessor, if not previously provided:

- (a) evidence of registration of the Aircraft in the appropriate registry of the State of Registration showing Lessor as the lessor; and
- (b) such other documents as Lessor may reasonably request.

3.2 Waiver or Deferral of Conditions

3.2.1 Lessor's Waiver or Deferral

The conditions specified in this Article 3 are for the sole benefit of Lessor and may be waived or deferred in whole or in part and Lessor may attach to such waiver or deferral such requirements and further acts or other conditions as it thinks fit, and Lessee shall fulfill, or procure the fulfillment of, all such requirements or other conditions as may be notified to Lessee by Lessor in accordance with the terms of such notification.

3.2.2 Lessee's Fulfillment of Waived or Deferred Condition

If any of the said conditions are not satisfied on the Delivery Date and Lessor nevertheless (in its absolute discretion) agrees to deliver the Aircraft to Lessee, Lessee shall (unless Lessor shall have expressly agreed otherwise in writing) procure that such condition is fulfilled within five (5) Business Days after the Delivery Date, failing which Lessor shall be entitled to treat any failure by Lessee as an Event of Default.

3.2.3 Relocation of the Aircraft

Subject to the provisions of this Article 3, if the conditions precedent are not fulfilled by Lessee within a maximum of ten (10) days from the Delivery Date, then Lessor may, at its sole option, starting with the eleventh day from the Delivery Date, relocate the Aircraft for other operations of its own simultaneously with the termination of this Agreement without any further liability or obligation on the part of Lessor to Lessee or any third parties except that Lessor shall return the Security Deposit to Lessee in accordance with Article 19.3.

[DISCUSSION: Most lease agreements provide that a lessor's obligation to deliver the aircraft to the lessee is conditional upon the satisfaction of specified requirements known as conditions precedent ("CPs"). Furthermore, since preparing an aircraft for delivery involves planning and expense, a lessor usually wants to be assured that the delivery will take place on a predetermined date and consequently requires that some of the more fundamental CPs are delivered several days in advance of such date. For example, as contemplated in Article 3.1.1, the lease agreement should be executed and delivered together with documents such as constating documents, resolutions, certificates of incumbency and the security deposit if any.

CPs are particularly relevant where there is a delay between the date of execution of the lease agreement and the delivery date. In such instances, documentary and other evidence required by the lessor may not be available or capable of being delivered until immediately prior to the delivery date. For example, the delivery of the aircraft from the manufacturer to the lessor may only take place on the lease delivery date which precludes the precise determination of the aircraft price upon

which the lease rate may depend. Accordingly, the operative date for the funding of the lessor may be postponed to the date on which the rate is fixed or even the delivery date itself. In these cases, a new set of lease payment schedules is usually provided by the lessor on the delivery date and attached to the lease agreement in place of any preliminary schedules.⁷

In more complicated transactions, the parties normally conduct a pre-closing during which the majority of the documents are placed into escrow the day before the actual closing. This gives the parties' representatives an opportunity to more carefully review the documents and make any necessary last minute changes and also avoids prolonging the closing on the delivery date when the senior executives execute the key documents - in a transaction involving over two hundred different documents it is unnecessary to have the main actors wasting their time.

Notwithstanding the best intentions and preparations, closings don't always proceed without problems. Occasionally, a document or other CP is either missing or has not been properly executed. Article 3.2 enables the lessor to waive or defer the delivery of any CP to avoid a delay in the scheduled delivery but if the unsatisfied CP is a major element of the transaction (such as a guarantee), then the lessor may insist that the transaction be delayed until the CP is satisfied - I have seen transactions in which the closing documents have been executed and held in escrow until the missing CP was satisfied. This, of course, means that the physical delivery of the aircraft is also delayed and the offending party is generally responsible for the cost of any funding obligations incurred during such delay.]

⁷ These procedures are more common in capital leases but may also occur with respect to operating leases where the lease rate relates to a predetermined implicit interest rate.

ARTICLE 4 – LEASE, TERM AND DELIVERY

4.1 Agreement to Lease

Subject to the conditions and pursuant to the terms of this Agreement and subject to any necessary regulatory approvals, Lessor hereby agrees to lease the Aircraft to Lessee hereunder and Lessee hereby agrees to lease the Aircraft from Lessor for the Term.

[DISCUSSION: This provision sets out the principal purpose of the lease between the parties and speaks for itself. In some jurisdictions certain lessors such as banks, bank holding companies and bank subsidiaries may only lease personal property which it acquires at the request of a lessee and cannot stockpile equipment or maintain an equipment leasing inventory.⁸ In such cases the provision might read as follows:

“Subject to the conditions and pursuant to the terms of this Agreement and subject to any regulatory approvals, Lessor hereby agrees [to acquire and] lease the Aircraft to Lessee hereunder and Lessee hereby agrees to lease the Aircraft from Lessor for the Term.”

In either case, the lessor may acquire and take title to the aircraft directly from a third party vendor or from the lessee in a sale and lease-back transaction. In the latter case, caution must be exercised to avoid a double sales or use tax.]

4.2 Term

The Term of the lease of the Aircraft shall commence on the Delivery Date and shall continue thereafter up to and including the Expiry Date or the Termination Date, as the case may be. Provided that no Event of Default has occurred or is continuing Lessor may, upon written request from Lessee, agree to extend the Term upon terms and conditions to be agreed between the Parties.

[DISCUSSION: The provision with respect to “Term” is self-explanatory. In virtually all cases, the commencement of the term takes place on the date on which the subject aircraft is

⁸ For example, in the U.S., pursuant to the Comptroller’s Ruling 7.3400 and Regulation Y of the Board of Governors of the Federal Reserve System.

delivered to, and accepted by, the lessee. The lease agreement may however be signed either on the delivery date or prior thereto.]

4.3 Delivery of the Aircraft

Subject to Lessee having performed all of the conditions precedent to delivery of the Aircraft as required by Article 3, the Aircraft shall be delivered by Lessor, at its sole cost and expense, to Lessee at the Delivery Location (or such other place as the Parties shall agree) on the Delivery Date. Upon delivery, the Aircraft shall conform to the specifications set forth in Appendix "A" and be in the delivery condition specified in Appendix "B".

Simultaneous with delivery of the Aircraft, Lessor shall deliver to Lessee the Aircraft Documents and any other relevant information including but not limited to, data and inspection, modification, maintenance and overhaul records and historical records necessary to prove parts traceability, current and updated as applicable.

[DISCUSSION: The delivery location is usually a place nominated by the lessor which is convenient to it (often the place of return required of a previous lessee), the point of delivery pursuant to the acquisition of the aircraft by the lessor or the lessor's habitual base. Obviously, the place of delivery most beneficial to the lessee is at his own base. This provision can often be negotiated to the parties' mutual advantage where there is a prior lessee with an obligation to deliver the aircraft upon the termination of the lease to a location nominated by the lessor. This will save the lessee the cost of a ferry flight and could save the lessor a day or two of rental.

Regardless of the delivery location ultimately selected, it is important for the lessee to ensure that there are no taxes for which it is liable to pay at the agreed delivery location and that the aircraft is registered in the lessee's own jurisdiction while it is at the delivery location to enable the lessee's crew to fly the aircraft to its habitual base if different from the delivery location. Permission to fly the aircraft out of the jurisdiction of the delivery location should be obtained from the relevant authorities prior to the delivery date to ensure a smooth exit. In some cases, particularly with aged aircraft, permission may not be granted to overfly the delivery location because of noise or other restrictions. This is easier to negotiate before the closing

when the lessor still has a vested interest in assisting the lessee than after delivery has already occurred and the lessor is less motivated.

Minimum Aircraft Documents are as follows: [TO COME]]

4.4 Lessee's Inspection of the Aircraft upon Delivery

Lessee shall have the right to review all maintenance reports, pilot reports and systems functional check reports to ensure full serviceability status of each component. Any defects or deficiencies noted shall be rectified at Lessor's sole cost and expense prior to the Delivery Date, or after the Delivery Date if Lessor and Lessee mutually agree.

[DISCUSSION: In cases where a lessor is leasing an aircraft which was leased to a prior lessee, such lessor will try to avoid any implication that it had anything to do with the operation or maintenance of the aircraft prior to delivering it to the new lessee. A provision such as the following is often used to address with this concern:

"Lessee represents and undertakes that with regard to the delivery of the Aircraft by the Prior Lessee to the Lessor, it will, if it deems necessary, have its own representative at the Delivery Location to supervise and inspect the Aircraft to ensure its airworthiness status and its conformity with the requirements of this Agreement. Lessee represents and acknowledges that it is relying on its own inspection and knowledge of the Aircraft and that it will accept the Aircraft when tendered for delivery if bearing a Certificate of Airworthiness for Export and being otherwise in the condition required by this Agreement. IT IS EXPRESSLY AGREED THAT THE AIRCRAFT HAS BEEN USED BY THE PRIOR LESSEE AND HAS NOT BEEN IN LESSOR'S POSSESSION AND THAT LESSOR SHALL NOT BE DEEMED TO HAVE MADE OR GIVEN ANY WARRANTY OR REPRESENTATION OF ANY KIND WITH RESPECT TO, OR IN RESPECT OF, THE AIRCRAFT AS TO AIRWORTHINESS, DESCRIPTION, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, VALUE, CONDITION, DESIGN OR OPERATION OF ANY

KIND OR NATURE AND ALL CONDITIONS, WARRANTIES OR REPRESENTATIONS EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE IN RESPECT THEREOF ARE EXPRESSLY EXCLUDED. Notwithstanding anything contained above, nothing contained therein is intended to obviate, remove or waive any rights of warranty or other claims relating thereto which Lessee or Lessor may have against the Prior Lessee or the manufacturer of the Aircraft or any other third party.”]

4.5 Acceptance of the Aircraft

The delivery of the Aircraft and commencement of the Term shall be evidenced by the Aircraft Acceptance Certificate executed by Lessee at the time of delivery. Such Aircraft Acceptance Certificate shall be conclusive proof that Lessee has fully inspected the Aircraft and is relying on such inspection and knowledge of the Aircraft in determining whether the Aircraft meets the requirements of this Agreement and has unconditionally accepted the Aircraft for lease under this Agreement without any reservations whatsoever and conclusive proof as between the Parties.

4.6 Lessee’s Failure to take Delivery

If Lessee fails to comply with the conditions contained in Articles 3 and 4 so as to allow delivery to take place or take delivery of the Aircraft when properly tendered for delivery by Lessor in the condition required in this Agreement, Lessee shall indemnify Lessor for all costs and expenses incurred by Lessor as a result thereof including (but without limitation) any payments which Lessor becomes obliged to make to any third party in connection with the Aircraft.

4.7 No Lessor Liability

If Lessor delays in the delivery of, or fails to deliver, the Aircraft to the Lessee as a result of any delay or non-performance due to or arising out of Force Majeure or a Total Loss of the Aircraft then in any such case, Lessor shall not be responsible for any loss, including loss of profit, costs or expenses arising from or in connection with the delay or failure suffered or incurred by

Lessee unless such delay or failure arises as a direct consequence of the willful misconduct of Lessor.

4.8 Termination for Delayed Delivery

Immediately, upon Lessor becoming aware of a delay in delivery of, or a cause for failure to deliver, the Aircraft, Lessor shall so notify Lessee. Within ten (10) Business Days after Lessee's receipt of such Lessor notice, either Party may, by written notice to the other Party, terminate this Agreement and this Agreement shall terminate on the date of receipt of such later notice. In the event of such termination, neither Party shall have any further liability or obligation to the other Party, except Lessor shall return the Security Deposit in accordance with Article 19.3 and any prepaid Basic Rent, without interest, to Lessee. If neither Party gives notice of termination within the above specified period, both Parties lose all right to terminate this Agreement under this Article 4 unless otherwise agreed in writing by the Parties.

[DISCUSSION: In transactions where the signing of the lease agreement takes place on the delivery date with all the benefits of escrow arrangements, there need not be any provisions with respect to delay. The closing takes place between the parties' representatives, conditions precedent are delivered, the acceptance certificate setting out the lessee's acceptance of the aircraft is signed and the lease commences. In transactions where the lease agreement is signed prior to the delivery date, the matter becomes more complicated. Generally, this is done to facilitate more sophisticated financing transactions where certain registrations and approvals must be obtained prior to delivery or to assure the lessor that the lessee is committed to the transaction. In such circumstances, provision must be made to cover the event where the aircraft is not presented to the lessee for acceptance as scheduled for reasons other than a default by the lessee. Many events can occur between the dates of signing the lease agreement and delivery of the aircraft that may have an adverse effect on the transaction such as:

- *the equipment is damaged or destroyed or subject to any other event of force majeure;*
- *the lessor becomes insolvent;*
- *the lessor is, for any reason other than force majeure, unable to obtain possession of the aircraft. For example, where the prior lessee has failed to return the aircraft to the lessor on*

- time or delivers the aircraft without adequately complying with the return conditions;
- the lessor finds a better deal and leases the aircraft to another lessee; or
 - the required type certification or other licensing to be provided by the lessor is not received prior to the delivery date or is denied altogether.

Most lease agreements provide that upon the occurrence of an event of force majeure or a total loss of the aircraft prior to the delivery, the lease agreement may be terminated by either party and thereafter neither party has any further obligation or liability to the other in respect of such terminated lease agreement.

In some cases however, the lessor tries to expand the definition of force majeure so that there is virtually no risk of the aircraft not being delivered. The following is an extract of a force majeure provision contained in an extremely onerous, one-sided lease agreement in favor of the lessor without any concept or appreciation of fairness. Ultimately, this provision and indeed the entire lease agreement, was negotiated to present a more balanced arrangement, but not without a great deal of pain, suffering and rancor:

"Lessor shall have no responsibility or liability for any failure to deliver the Aircraft on Estimated Delivery Date or thereafter due to the occurrence of any act of God or public enemy, civil war, insurrection or riot, fire, flood, explosion, prevailing winds, earthquake, accident, epidemic, quarantine restriction, law, governmental priority, allocation, regulation or order affecting materials, facilities or any part of the Aircraft, any strike or labor dispute causing cessation, slowdown or interruption of work; inability after due and timely diligence to procure any type certification (or validation thereof), Supplemental Type Certificate ("STC") required to accomplish the Delivery Requirements for the Aircraft or to procure equipment, data and materials from suppliers; the late delivery of the Aircraft by a previous operator; delay due to the requirement to comply with directives or modifications issued by any governmental authority under applicable law or any other cause beyond the control of Lessor, including, without limitation, any failure of any

Financing Party of Lessor to observe or perform any of its respective obligations under any other Financing Document provided that such failure is not attributable to any corresponding act or omission of Lessor under any part thereof (any such event herein referred to as "Excusable Delay").

Upon the occurrence of an Excusable Delay, the Lessor's obligations shall be deferred for such period or periods as may be necessary to perform such obligations and Lessor shall promptly notify Lessee of the circumstance thereof and shall use reasonable endeavors to avoid the consequences of such event of Excusable Delay.

In the event that any Excusable Delay or any combination of Excusable Delays shall result in the Inspection Date being delayed for more than ninety (90) days beyond the Estimated Delivery Date for the Aircraft, then Lessor, or absent any Event of Default hereunder or under other agreement between Lessee and Lessor, either party, in its respective sole discretion, may terminate this Agreement in respect of the Aircraft by giving fifteen (15) days irrevocable written notice to the other party. Any notice given pursuant to this Clause may be given at any time provided that it shall only become effective upon the expiration of the ninety (90) day period or upon expiration of the fifteen (15) day notice period, if later. Lessor shall refund to Lessee the Reservation Fee in respect of the Aircraft terminated by Lessor or Lessee pursuant to this Clause. Upon refund of the Reservation Fee, each of Lessor and Lessee shall be released from any liability under this Agreement or under applicable law with respect to the Aircraft so terminated."

The following is a provision used by various operating lessors to avoid liability if the prior lessee fails to return the aircraft in accordance with the applicable return conditions. Obviously the lessor does not wish to assume any risk vis-à-vis the new lessee if the prior lessee is in default but, on the other hand, the new lessee has a schedule to fulfill and should, in the absence of a genuine event of force majeure, be able to rely on a predetermined delivery date. Such a situation tests the negotiating skills of the parties but is generally determined by the intensity of a party's desire to consummate a transaction:

"The Prior Lease Agreement terminates on [date] with no options to extend the Prior Lease Term.

As of the date of this Agreement, delivery of the Aircraft from the Prior Lessee to Lessor is scheduled to occur on [date]. Lessor will notify Lessee from time to time and in a timely manner of the exact date on which the Lessor expects delivery to take place and Lessor undertakes to use its best efforts to ensure that delivery takes place by [date]. The parties expressly acknowledge that delivery of the Aircraft to Lessee is subject to and conditional upon redelivery of the Aircraft by the Prior Lessee to Lessor in accordance with the terms of the Prior Lease Agreement and Lessor shall not be liable for any loss or expense, or any loss of profits, arising from any delay or failure in delivery of the Aircraft to Lessee unless such delay or failure arises as a direct consequence of the willful misconduct of Lessor."

The following provision is an example of another attempt by a lessor to be totally unreasonable with respect to its obligation to deliver an aircraft in the agreed condition on the delivery date. Failure to deliver a serviceable aircraft under this provision results in the lessor having no risk. In effect, by being less than honest, a lessor - having an obligation to deliver five aircraft can renege on any number of them under the pretext of its inability to present them in a serviceable condition with impunity. On the other hand, a lessee who has planned to have five sister ships in its fleet may be forced to accept less than this number at the lessor's discretion and a business plan based on five aircraft might not work for less than that number:

"Subject to the conditions specified herein to the satisfaction of Lessor, each Aircraft shall be delivered by Lessor in accordance with the Delivery Requirements for acceptance by Lessee under the applicable Lease at the Delivery Location as designated by Lessor and generally to the scheduled delivery dates set forth in Exhibit D (such schedule the "Estimated Delivery Schedule" and each such date set forth in the Delivery Schedule, the "Estimated Delivery Date").

In the event that either (x) Lessor fails to offer an Aircraft for technical acceptance pursuant to this Agreement within sixty (60) days of its Estimated

Delivery Date as may be extended by any period or periods of Excusable Delay or (y) any Aircraft offered by Lessor to Lessee for technical acceptance fails to meet the requirements hereunder as to the condition of the Aircraft within sixty (60) days of the date of Lessee's written notice to Lessor with respect thereto, then, provided that no Event of Default has occurred hereunder or under any other agreement between Lessee and Lessor, Lessee, in its sole discretion, shall have the right to terminate this Agreement with respect to such Aircraft by giving fifteen (15) days irrevocable written notice of its intention to so terminate to Lessor. Notices given pursuant to this Clause may be given at any time provided that they shall only become effective upon the expiration of the sixty (60) day period or upon expiration of the fifteen (15) day notice period, if later. In the event of any termination of this Agreement pursuant to this Clause, Lessor shall return to Lessee one fifth of any remaining Reservation Fee theretofore paid by Lessee with respect to any Aircraft that is so terminated. Upon refund of the applicable portion of the Reservation Fee, both Lessor and Lessee shall be released from any liability under this Agreement and under applicable law with respect to the Aircraft in respect of which such refund was made."

The following provision is an attempt by a lessor to preserve a deal by substituting another aircraft in the event that the nominated aircraft becomes unavailable for any reason. This situation may be highly unsatisfactory to a lessee who may have paid to have the aircraft inspected or whose aviation authority has already approved the original aircraft type. On the other hand, if the delay between the signing of the agreement and the delivery date is extensive, a lessor would want to have its aircraft working as soon as it becomes available. Consequently, an aircraft substitution clause may be reasonable:

"Lessor shall have the right to substitute another aircraft for the Aircraft prior to the Delivery Date, provided however that such substitute aircraft shall be in similar condition to the Aircraft."]

4.9 Licenses

Lessee shall, at its sole cost and expense, obtain all licenses, permits and approvals necessary to transport the Aircraft from the Delivery Location.

4.10 Risk

Throughout the Term and until redelivery of the Aircraft in accordance with Article 20, Lessee shall bear all risks of loss, theft, damage, destruction and inoperability of or to the Aircraft and every part thereof, and no such loss, theft, damage, destruction or inoperability nor any other event, circumstance or change in Law shall impair, discharge or frustrate any obligation of Lessee under this Agreement including, but not limited to payment of Basic Rent and Supplemental Rent, so that all such obligations shall, save as expressly provided in Article 15, continue in full force and effect.

4.11 Quiet Enjoyment

Provided no Event of Default has occurred and is continuing hereunder, Lessor covenants that neither Lessor nor any person lawfully claiming through Lessor will disturb the quiet use, possession and enjoyment of the Aircraft by Lessee throughout the Term. For the avoidance of doubt, the exercise by Lessor of its rights in accordance with this Agreement shall not constitute such a disturbance.

*[DISCUSSION: Provided that the lessee is not in default of its obligations under the agreement, the lessor should not interfere with the lessee's quiet use and enjoyment of the aircraft. To this effect, a quiet enjoyment covenant similar to the above should be included in the agreement. This concept is, of course, subject to the lessor's right to periodically inspect the aircraft and the aircraft documents to ensure that the lessee is complying with its obligations.]*⁹

In addition to interference by the lessor, if the lessor has financed the aircraft the lessee should also be concerned about interference by the lessor's creditors who may attempt to seize the aircraft upon the occurrence of an event of default by the lessor under its financing arrangements. The above quiet

⁹ See: Lessor's Rights of Inspection - Article 8.18 hereof.

enjoyment covenant will not entirely protect the lessee where there are creditors involved since it is merely a covenant given by the lessor which is not binding on its creditors. Consequently, in such circumstances it may be prudent for the lessee to require that the lessor obtain a letter of quiet enjoyment, addressed to the lessee, from each of the lessor's creditors covenanting that they will respect the terms of the lease in the event of a lessor event of default under any financing arrangements, subject, of course, to the continued performance by the lessee of its obligations under the present agreement.¹⁰ Even a letter of quiet enjoyment from the lessor's creditors is not entirely foolproof since it will not be effective against the rights of a trustee in bankruptcy who might successfully acquire possession of the aircraft from the creditors where, for example, the lessor has accumulated substantial equity in the aircraft and the trustee in bankruptcy opts to pay out the creditors.

Further examples of quiet enjoyment clauses are as follows:

- (i) "Provided that no Event of Default has occurred and is continuing hereunder, and subject to and without prejudice to the terms of this Agreement, Lessor covenants that it will not disturb the quiet use, possession and enjoyment of the Aircraft by Lessee" [If Lessor shall assign its rights under Article 21 hereof, Lessor shall obtain and deliver to Lessee a written undertaking addressed to Lessee confirming Lessee's right to quiet use, possession and enjoyment of the Aircraft as aforesaid from any assignee, transferee, buyer or mortgagee of the Aircraft.]; or
- (ii) "Provided that no Event of Default has occurred and is continuing hereunder, and subject to and without prejudice to the terms of this Agreement, Lessor covenants that it will not, and shall use its best commercial efforts to ensure that any third party claiming through Lessor will not,

¹⁰ See: *infra*, Ancillary Transaction Documents, § 7.1.6.7, for an example of a quiet enjoyment letter.

disturb the quiet use, possession and enjoyment of the Aircraft by Lessee”.

A proposed U.C.C. Section 2A-211 might result in the imposition of liability on a lessor for a lessee’s loss of quiet enjoyment resulting from a third party’s acts or omissions, even if the lessor is not at fault.^{11]}

4.12 Lessor’s Security Interests

Lessee acknowledges that Lessor may at any time before or during the Term grant Security Interests over the Aircraft as security for Lessor’s obligations to Lessor’s Lenders. Lessee undertakes to provide, at its sole cost and expense, all reasonable assistance and co-operation to Lessor and Lessor’s Lenders and their respective representatives and advisors in connection with the perfection and maintenance of such Security Interests including, but not limited to, the effecting of all necessary filings and registrations in the State of Registration and the signature of any necessary consents and acknowledgements.

[DISCUSSION: As described in Section 7.1, lessors tend to confuse, innocently or otherwise, the attributes of operating leases and capital leases. A capital lease should really be treated as a loan wherein the financiers of the aircraft, either as lenders or head lessors, are normally completely indemnified by the lessee and any sub-lessees. On the other hand, a lessee under an operating lease should not be expected to indemnify anyone other than its own lessor. Consequently, any provision which requires the lessee’s cooperation with respect to the lessor’s creditors under an operating lease should clearly provide that all such requirements should be at the lessor’s cost.^{12]}

Article 4.12 is very broad in scope and in effect provides that the lessee may be required to perform its contemplated obligations outside, as well as inside, the State of Registration. This provision is potentially very onerous and a lessee should, even in the case of a capital lease, restrict its application to the State of Registration and such other specific jurisdictions as may be agreed at the inception of the lease otherwise, a lessor or

¹¹ U.C.C. § 2A-211(1)(a) (Proposed Official Draft, Aug. 2001).

¹² See also: Lessee’s Cooperation - Article 21.4 hereof with respect to an assignment by the lessor.

creditor could demand impractical or expensive registrations at any time during the lease term.]

ARTICLE 5 - DISCLAIMERS

5.1 General

LESSOR AND LESSEE AGREE THAT THE DISCLAIMERS, WAIVERS AND CONFIRMATIONS SET FORTH IN THIS ARTICLE 5 SHALL APPLY AT ALL TIMES THROUGHOUT AND AFTER THE TERM WITH EFFECT FROM LESSEE'S ACCEPTANCE OF THE AIRCRAFT BY EXECUTION OF THE AIRCRAFT ACCEPTANCE CERTIFICATE.

5.2 Exclusion

LESSEE UNCONDITIONALLY AGREES THAT AS BETWEEN LESSOR AND LESSEE, THE AIRCRAFT AND EACH PART THEREOF ARE TO BE LEASED AND DELIVERED HEREUNDER "AS IS, WHERE IS", AND LESSEE AGREES AND ACKNOWLEDGES THAT, SAVE AS EXPRESSLY STATED IN THIS AGREEMENT:

- (A) FOR THE PURPOSES OF THIS AGREEMENT, LESSOR IS NOT THE MANUFACTURER OF THE AIRCRAFT OR A DEALER;
- (B) NEITHER LESSOR NOR ANY OF ITS OFFICERS, DIRECTORS, EMPLOYEES OR REPRESENTATIVES WILL HAVE ANY LIABILITY IN RELATION TO, AND NEITHER LESSOR NOR ANY OF ITS OFFICERS, DIRECTORS, EMPLOYEES OR REPRESENTATIVES HAS OR WILL BE DEEMED TO HAVE MADE OR GIVEN (WHETHER BY VIRTURE OF HAVING DONE OR FAILED TO DO ANY ACT, OR HAVING ACQUIRED OR FAILED TO ACQUIRE ANY STATUS UNDER OR IN RELATION TO THIS AGREEMENT OR OTHERWISE), ANY TERMS, CONDITIONS, COVENANTS, WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED (WHETHER STATUTORY OR OTHERWISE), WITH RESPECT TO THE DESCRIPTION, AIRWORTHINESS, COMPLIANCE WITH SPECIFICATIONS, OPERATION, PERFORMANCE, MERCHANTABILITY, FREEDOM FROM INFRINGEMENT OF PATENT OR OTHER PROPRIETARY RIGHTS, FITNESS FOR A PARTICULAR USE OR PURPOSE (INCLUDING THE ABILITY TO

OPERATE OR REGISTER THE AIRCRAFT OR USE THE AIRCRAFT DOCUMENTS IN ANY OR ALL JURISDICTIONS), VALUE, DURABILITY, CONDITION, OR DESIGN, OR AS TO THE QUALITY OF THE MATERIAL OR WORKMANSHIP OR SUITABILITY OF THE AIRCRAFT, ENGINES OR ANY PARTS THEREOF OR THE AIRCRAFT DOCUMENTS, THE ABSENCE OF LATENT OR OTHER DEFECTS, WHETHER OR NOT DISCOVERABLE, KNOWN OR UNKNOWN, APPARENT OR CONCEALED, EXTERIOR OR INTERIOR, OR AS TO ANY OTHER MATTER WHATSOEVER, EXPRESS OR IMPLIED (INCLUDING ANY IMPLIED WARRANTY ARISING FROM A COURSE OF PERFORMANCE OR DEALING OR USEAGE OF TRADE) WITH RESPECT TO THE AIRCRAFT, ANY ENGINE OR ANY PART OR THE AIRCRAFT DOCUMENTS.

5.3 No Lessor Liability for Losses

LESSOR SHALL NOT HAVE ANY OBLIGATION OR LIABILITY WHATSOEVER TO LESSEE, ANY SUBLESSEE OR ANY PERSON (WHETHER ARISING IN CONTRACT OR IN TORT, AND WHETHER ARISING BY REFERENCE TO NEGLIGENCE OR STRICT LIABILITY OF LESSOR OR OTHERWISE) FOR:

- (A) ANY LIABILITY, CLAIM, PROCEEDING, LOSS OR DAMAGE, COST OR EXPENSE OF ANY KIND CAUSED BY OR ALLEGED TO BE CAUSED DIRECTLY OR INDIRECTLY BY, OR ASSOCIATED WITH, THE AIRCRAFT OR ANY ENGINE OR PART OR THE AIRCRAFT DOCUMENTS OR BY ANY INADEQUACY THEREOF OR DEFICIENCY OR DEFECT THEREIN OR BY ANY OTHER CIRCUMSTANCE IN CONNECTION THEREWITH;
- (B) THE USE, OPERATION OR PERFORMANCE OF THE AIRCRAFT OR ANY RISKS RELATING THERETO;
- (C) ANY INTERRUPTION OF SERVICE, LOSS OF BUSINESS OR ANTICIPATED PROFITS OR ANY OTHER DIRECT, INDIRECT OR CONSEQUENTIAL LOSS OR DAMAGES; OR

(D) THE DELIVERY, OPERATION, SERVICING, MAINTENANCE, REPAIR, IMPROVEMENT, MODIFICATION OR REPLACEMENT OF THE AIRCRAFT, ANY ENGINE OR ANY PART OR THE AIRCRAFT DOCUMENTS.

5.4 Waiver of Warranty Description

IN CONSIDERATION OF LESSEE'S RIGHTS HEREUNDER TO INSPECT THE AIRCRAFT AND LESSOR'S ASSIGNMENT TO LESSEE OF ANY EXISTING AND ASSIGNABLE WARRANTIES OF MANUFACTURER, LESSEE HEREBY AGREES THAT ITS ACCEPTANCE OF THE AIRCRAFT AT DELIVERY AND ITS EXECUTION AND DELIVERY OF THE AIRCRAFT ACCEPTANCE RECEIPT CONSTITUTES LESSEE'S WAIVER OF THE WARRANTY DESCRIPTION, ANY CLAIMS LESSEE MAY HAVE AGAINST LESSOR BASED UPON THE FAILURE OF THE AIRCRAFT TO CONFORM WITH SUCH DESCRIPTION AND ANY AND ALL RIGHTS IT MAY HAVE TO THE REMEDIES AVAILABLE UNDER APPLICABLE LAW. EVEN IF AT THE TIME THE FAILURE OF THE AIRCRAFT TO CONFORM TO SUCH DESCRIPTION SUBSTANTIALLY IMPAIRS THE VALUE AND UTILITY OF THE AIRCRAFT AND EITHER (I) LESSEE ACCEPTED THE AIRCRAFT BASED ON A REASONABLE ASSUMPTION THAT THE NONCONFORMITY WOULD BE CURED AND IT WAS NOT REASONABLY CURED OR (II) LESSEE ACCEPTED THE AIRCRAFT WITHOUT DISCOVERING THE NONCONFORMITY BUT LESSEE'S ACCEPTANCE OF THE AIRCRAFT WAS REASONABLY INDUCED EITHER BY LESSOR'S ASSURANCES OR BY THE DIFFICULTY OF DISCOVERING ANY DEFECT PRIOR TO ACCEPTANCE, LESSEE AGREES NOT TO LOOK TO LESSOR FOR DAMAGES OR RELIEF ARISING OUT OF THE FAILURE OF THE AIRCRAFT TO CONFORM TO SUCH DESCRIPTION.

5.5 Conclusive Proof

DELIVERY BY LESSEE TO LESSOR OF THE AIRCRAFT ACCEPTANCE CERTIFICATE SHALL BE CONCLUSIVE PROOF AS BETWEEN LESSOR AND LESSEE THAT LESSEE'S TECHNICAL EXPERTS HAVE FULLY INSPECTED THE AIRCRAFT, ENGINES, PARTS AND THE AIRCRAFT DOCUMENTS AND EACH COMPLIES WITH THE

REQUIREMENTS OF THIS AGREEMENT AND IS IN EVERY WAY SATISFACTORY TO LESSEE.

5.6 Waiver

LESSEE HEREBY WAIVES AS BETWEEN ITSELF AND LESSOR, ALL ITS RIGHTS IN RESPECT OF ANY WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED (WHETHER STATUTORY OR OTHERWISE), ON THE PART OF LESSOR AND ALL CLAIMS AGAINST LESSOR OR THE AIRCRAFT HOWSOEVER AND WHENEVER ARISING AT ANY TIME IN RESPECT OF OR OUT OF THE MATTERS REFERRED TO IN THIS ARTICLE 5 OR THE LEASING OF THE AIRCRAFT BY LESSOR TO LESSEE.

5.7 No Liability to Repair or Replace

Lessor shall not be liable for any expense in repairing or replacing any item of the Aircraft or be liable to supply another aircraft or any item in lieu of the Aircraft or any part thereof if the same is lost, confiscated, damaged, destroyed or otherwise rendered unfit for use.

[DISCUSSION - Article 5 in essence provides that:

- (i) lessor makes absolutely no representations or warranties of any kind with respect to the aircraft;*
- (ii) any warranties received by the lessor to the extent they exist, are assigned to the lessee; and*
- (iii) lessor accepts no responsibility whatsoever with respect to the condition or performance of the aircraft.*

In most lease transactions, the lessor is not the vendor or manufacturer of the aircraft being leased, but rather is generally an independent third-party lessor providing a facility to the lessee to lease rather than to purchase an aircraft or to finance its eventual purchase. The choice of the aircraft type and its condition almost always rests with the lessee and in many cases, particularly those involving financial institutions, the lessors probably don't know one aircraft type from another. Consequently, all lessors require that the lessee acknowledge that the lessor had no involvement with the selection of the aircraft and has made no representations or warranties to the effect that the aircraft may be merchantable or fit for any particular purpose. This acknowledgement or disclaimer must be clear and conspicuous, in type

of a different size or in bold face print, (or both), so that it stands out from the other provisions in the agreement.¹³

In the United States, in the absence of such an acknowledgement or disclaimer, the implied warranty provisions of Sections 212 and 213 of Article 2A of the United States Uniform Commercial Code (1994) UCC may be held to apply notwithstanding that such provisions are only supposed to be applicable to a merchant lessor when the lease is in the nature of a security interest rather than a true lease. [DHB TO REVIEW CASES].

Whether the warranty section is written as an acknowledgement of the lessee or as a disclaimer by the lessor is a point to be negotiated. Lessees sometimes prefer to have the language of this section written as a disclaimer as they may not wish to make any general statement as to whether or not the lessor is a manufacturer or a dealer in the type of equipment leased and may be concerned that an acknowledgement might have an adverse effect on their ability to proceed against the vendor on its warranties.

Some lessees are happy to accept the insertion of language such as "agree for purposes of this lease" before the words "Lessor is not the manufacturer of the aircraft or a dealer" as a solution to the first problem, and to insert the words "as between lessor and lessee" as a satisfactory solution to the second.

Legislation with respect to the duty to supply goods of the right quantity and exemptions thereof in some of the principal contracting jurisdictions are as follows:

United States

1. Implied Warranty

Sections 212 and 213 of Article 2A of the UCC are as follows:

"§ 2A-212. Implied Warranty of Merchantability

- (1) Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.
- (2) Goods to be merchantable must be at least such as
 - (a) pass without objection in the trade under the description in the lease agreement;

¹³ In the U.S., see: U.C.C. § 2A-214 (1994).

- (b) *in the case of fungible goods, are of fair average quality within the description;*
 - (c) *are fit for the ordinary purposes for which goods of that type are used;*
 - (d) *run, within the variation permitted by the lease agreement, of even kind, quality, and quantity within each unit and among all units involved;*
 - (e) *are adequately contained, packaged, and labeled as the lease agreement may require; and*
 - (f) *conform to any promises or affirmations of fact made on the container or label.*
- (3) *Other implied warranties may arise from course of dealing or usage of trade."*

"§ 2A-213. Implied Warranty of Fitness for Particular Purpose.

Except in a finance lease, if the lessor at the time the lease contract is made has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor's skill or judgment to select or furnish suitable goods, there is in the lease contract an implied warranty that the goods will be fit for that purpose."

2. Exclusions

Section 214 of Article 2A of the UCC is as follows:

"§ 2A-214. Exclusion or Modification of Warranties.

(1) *Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed wherever reasonable as consistent with each other; but, subject to the provisions of Section 2A-202 on parol or extrinsic evidence, negation or limitation is inoperative to the extent that the construction is unreasonable.*

(2) *Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention "merchantability", be*

by a writing, and be conspicuous. Subject to subsection (3), to exclude or modify any implied warranty of fitness the exclusion must be by a writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, "There is no warranty that the goods will be fit for a particular purpose".

(3) Notwithstanding subsection (2), but subject to subsection (4),

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," or "with all faults," or by other language that in common understanding calls the lessee's attention to the exclusion of warranties and makes plain that there is no implied warranty, if in writing and conspicuous;

(b) if the lessee before entering into the lease contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed; and

(c) an implied warranty may also be excluded or modified by course of dealing, course of performance, or usage of trade .

(4) To exclude or modify a warranty against interference or against infringement (Section 2A-211) or any part of it, the language must be specific, be by a writing, and be conspicuous, unless the circumstances, including course of performance, course of dealing, or usage or trade, give the lessee reason to know that the goods are being leased subject to a claim or interest of any person."

[DHB TO CHECK OUT FRENCH PROVISIONS]

[CLAUSE RE: INSURANCE TO COME]

United Kingdom

1. Duty to Supply Goods of the Right Quality

Sections 13 and 14 (1), (2), (3) and (6) of the Sale of Goods Act 1979 set out below, in the aggregate give buyers a substantial degree of protection against the risk of goods proving to have defects of quality or fitness for purpose.¹⁴

"13.- (1) Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description.

(2) If the sale is by sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(3) A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.

14.- (1) Except as provided by this section and section 15 below and subject to any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract of sale.

(2) Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition-

(a) as regards, defects specifically drawn to the buyer's attention before the contract is made; or

(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

¹⁴ See: P.S. ATTIYAH, THE SALE OF GOODS, 111 (John Adams ed., Pitman Publishing 9th ed. 1995).

(3) *Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known-*

(a) *to the seller, or*

(b) *where the purchase price or part of it is payable by installments and the goods were previously sold by a credit-broker to the seller, to that credit broker,*

any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker.

(4) *Goods of any kind are of merchantable quality within the meaning of such subsection (2) above if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances."*

Exemption clauses¹⁵ excluding liability under the implied terms of the Sale of Goods Act 1979 are subject to the requirement of reasonableness by sections 2 and 3 of the Unfair Contracts Terms Act 1977 set out below:

"2. (1) *A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.*

(2) *In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.*

¹⁵ *Id.* at 188.

- (3) *Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it not of itself to be taken as indicating his voluntary acceptance of any risk.*
3. (1) *This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.*
- (2) *As against that party, the other cannot by reference to any contract term-*
- (a) *when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or*
- (b) *claim to be entitled-*
- (i) *to render a contractual performance substantially different from that which was reasonably expected of him, or*
- (ii) *in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness."*

However, by Section 26 of the Unfair Contract Terms Act 1977 the limits imposed by the Act on the extent to which a person may exclude or restrict liability by reference to a contract term do not apply to liability arising under an international supply contract nor are the terms of such contract subject to any requirement of reasonableness. It seems strange that the United Kingdom would discriminate against foreigners in such a manner - England, when it was flourishing, used to be called the "entrepôt of the world," but no longer!]

ARTICLE 6 – PAYMENT OBLIGATIONS

The amount of the Basic Rent and other payments contained herein are in consideration of Lessee's waiver of warranties and indemnities set forth in Articles 5, 16 and 17 respectively, and the other provisions of this Agreement. Lessee undertakes to perform its payment obligations to Lessor strictly in accordance with the terms provided herein.

6.1 Security Deposit

6.1.1 Security for Performance of Lessee's Obligations

Lessee shall pay the Security Deposit to Lessor as security for the performance by Lessee of its obligations under this Agreement and under any other agreements between Lessor and Lessee relating to aircraft, engines, aircraft equipment or the extension of financial accommodations and may be applied by Lessor upon the occurrence of an Event of Default or a default by Lessee and the expiration of any applicable remedy periods under such other agreements.

6.1.2 Restoration of the Security Deposit

The Security Deposit is for Lessor's complete and unrestricted use and Lessor shall be entitled to set-off any payment due under this Agreement, at any time, against the Security Deposit. Whenever the balance of the amount of the Security Deposit becomes less than the initial amount specified therefor in Appendix "D", Lessee shall make a further payment to Lessor sufficient to restore such amount. Failure by Lessee to restore the Security Deposit to the initial amount within three (3) Business Days from notification by Lessor shall entitle Lessor to treat such failure as an Event of Default.

6.1.3 Interest

Any interest earned on the Security Deposit shall be for Lessor's account.

6.1.4 Refund of Security Deposit

Subject to the terms of this Agreement and subsequent to payment by Lessee of all amounts due to Lessor hereunder, Lessor shall refund the Security Deposit to Lessee upon expiration or termination of this Agreement in accordance with Article 19.3.

[DISCUSSION: [See: Security Deposits -- Section 4.3.5.] It would be very difficult to argue that a lessor should not ask for and receive a reasonable amount of collateral to secure the lessee's performance of its obligations under a lease agreement in light of the lessor's potentially substantial risk. Aside from the value of the aircraft itself, which can be many millions of dollars, the lessee's obligations under a lease normally include:

- *payment of lease rentals;*
- *payment of supplemental rentals (e.g. maintenance reserves);*
- *performance of maintenance;*
- *payment of insurance premium;*
- *compliance with return conditions including the performance of a ferry flight to the redelivery location upon the termination of the lease;*
- *discharge of liens created by the lessee (e.g. navigation charges); and*
- *over-holding (i.e. late redelivery).*

Throughout the lease term and upon any termination thereof, the lessor wants to be assured, to the maximum extent possible, that the lessee's obligations will be performed or that there will be sufficient funds available for the lessor to perform such obligations, without incurring any cost, upon any default by the lessee.

Security deposits for lease obligations can vary in form and amount. They can be provided as cash, letters of credit, bank or third party guarantees or a combination thereof.¹⁶ The normal cash amount is three months' rental, but a good negotiation can often reduce this amount to one month. Factors used to determine the amount of the security deposit can include among other things, the creditworthiness of the lessee, the lessee's prior dealings with the lessor (if any), the lessee's reputation in the marketplace generally and the ownership of the lessee. For

¹⁶ Additional security can be obtained through the assignment of receivables and the pledging of IATA Clearing House revenues.

example, a national carrier might enjoy more lenient terms than a private carrier.

The parties may also agree to an initial deposit of three or four months' rental which reduces after a certain period of time provided that no lessee event of default has occurred under the lease. In such circumstances, a schedule may be established where, for example, a deposit of four months' rental is held for six months after which time, in the absence of a lessee event of default, the deposit is reduced by a predetermined amount on each rental payment date until a pre-agreed minimum amount is held by the lessor. If a lessee event of default were to occur, the lessee would be required to reinstate the full amount of the initial deposit and the process would start all over again.

Regardless of the amount of the deposit, it should be understood that the deposit belongs to the lessee and, as mentioned above, is merely held as collateral security by the lessor for the performance of the lessee's obligations under the lease agreement. This fact presents a number of problems, namely:

(a) Who is entitled to the interest on the deposit?

Clearly, interest should belong to the lessee but more often than not it doesn't happen that way. During the negotiations, the lessor generally argues that the interest is for its account on the basis that the calculation of the amount of lease rental took interest on the deposit into consideration. In a sophisticated capital lease where the transaction is really a financing and the lessee has been quoted a definitive implicit interest rate, this might be true, but in most operating leases this is not the case. Indeed, sometimes, late in the negotiations, the parties will agree to substitute cash deposits for bank guarantees or letters of credit but the amount of the lease rental is seldom, if ever, adjusted to reflect the lessor's loss of interest on the cash deposit. To be fair to the lessor, an argument which does have some merit is that the lessor will invest the lessee's deposit with other funds to achieve a maximum rate of return and the treasury operation of isolating the amount of the lessee's deposit from such other funds is an additional bother and expense. While this may be true, a reasonable compromise is that the funds be invested with the lessor's other funds at a rate satisfactory to the lessor and a simple calculation can be made periodically to determine the actual amount of interest accruing on the lessee's deposit only.

A reasonable solution that I have always considered fair is that the interest should follow the money. If the deposit is returned to the lessee on the termination of the lease agreement, the lessee should also receive the interest. If there is a lessee event of default and the lessor must use the deposit to satisfy such default, he should be entitled to retain the interest on the deposit.

It should be noted, however, that terms with respect to security deposits and interest must be established at the out-set (e.g. the letter of intent stage)¹⁷ when each party is anxious to make a deal. Once the letter of intent has been signed and the parties start negotiating the details, the negotiating advantage shifts from the lessee to the lessor.

(b) *In which jurisdiction will the deposit be held?*

A problem for the lessor which is generally not appreciated or considered, is that in some jurisdictions, the deposit, by law, remains the lessee's property and in the event of bankruptcy, the lessor may, in such circumstances, be forced to return the deposit notwithstanding the terms of the agreement. [MORE TO COME]

(c) *[Deposit in the form of an up-front fee]*

(d) *Should an escrow arrangement be put into place?*

Security deposits and maintenance reserves with respect to leases should always be placed in escrow accounts whenever there is any doubt as to the creditworthiness or veracity of the lessor.¹⁸

6.2 Basic Rent

6.2.1 Payment in Advance

Lessee shall pay Lessor the Basic Rent Monthly in advance as rent for the Aircraft.

[DISCUSSION: Payment "in advance" means that the first months' lease rental is payable on the first date of the commencement of the term and monthly thereafter as opposed to

¹⁷ See: *supra*, Letters of Intent § 3.3.5 and 7.1.3.

¹⁸ See: *supra*, Escrow Arrangements § 4.3.5.2.

the last day of the month. From the lessor's perspective this gives him additional security, extra interest on the advance lease rental payment and some level of comfort that the last months' rental will be paid. From the lessee's perspective, the advance lease rental payment may be an additional risk in the event of the lessor's bankruptcy.]

6.2.2 Date for Payment

The first payment of Basic Rent shall be paid no later than three (3) Business Days prior to the Delivery Date. Each subsequent payment of Basic Rent shall be due Monthly in advance and no later than the numerically corresponding day of the Month as the Delivery Date except that, if such day is not a Business Day, the Basic Rent shall be due on the immediately preceding Business Day.

[DISCUSSION: Occasionally the lessor will ask for the first rental payment to be made up to two weeks prior to the actual payment date to give assurance that the lessee will not be in default on the commencement date. Payment on the immediately preceding business day is to accommodate the lessor's cash flow by ensuring that he will have the amount necessary to meet his payment obligations to his own lenders if the aircraft is subject to financing.]

6.3 Supplemental Rent

6.3.1 Payment of Supplemental Rent

Lessee shall pay Supplemental Rent to Lessor, in the form of Airframe, Engine Auxiliary Power Unit and landing gear maintenance reserves per Flight Hour based on Lessee's use of the Aircraft during the Term.

[DISCUSSION: Some jurisdictions grant a preference to rent as opposed to other indebtedness under a lease agreement in the event of lessee's insolvency. By referring to maintenance reserves¹⁹ as "Supplemental Rent", the lessor is attempting to facilitate special treatment of such reserves in the event of the lessee's insolvency or bankruptcy. This is not absolutely

¹⁹ See: *supra*, Maintenance Reserves § 5.1.2.8.

"fireproof" but it shifts the burden of proof from the lessor to the trustee, receiver or other contesting creditor.]

6.3.2 Date of Payment

The Supplemental Rent shall be paid on or before the tenth (10th) day of the Month next following the Month in which the Delivery Date occurs and on or before the tenth (10th) day of each succeeding Month for Flight Hours performed during the Month prior to payment. All Supplemental Rent for Flight Hours performed during the Month in which the Expiry Date or Termination Date occurs will be paid on the Expiry Date or Termination Date, as the case may be, unless otherwise agreed by the Parties.

[DISCUSSION: The following is a form of a Monthly Maintenance Reserves (Supplemental Rent) Certificate:

"MONTHLY MAINTENANCE RESERVES CERTIFICATE

Aircraft Lease Agreement dated [month/day/year] between [Name of Lessor] and [Name of Lessee].

Aircraft Type: [Make][Model]

Aircraft Serial No.: [MSN]

Aircraft Registration No: [Registration Mark]

For period commencing [] through and including []

Block Hours at End of Term: []

Less: Block Hours at Beginning of Term: []

Equals: Total Block Hours used during Term: []

[Total Block Hours] x US \$ [] = US \$ []

The following hours have been utilized on the Engines:

Posn 1 [MSN] _____: hours mins

Posn 2 [MSN] _____: hours mins

The Aircraft and the Engines have been maintained in accordance with the Agreement.

The following Airworthiness Directives and Service Bulletins have been terminated/complied with: [list ADs and SBs]

The foregoing is certified to be true and correct.

[Name of Lessee]

By: _____
 Title: _____
 Date: _____"]

6.3.3 Interest

Any interest earned on the Supplemental Rent shall be for Lessor's account, subject to Lessor's obligations under Article 11.1, Lessor shall have complete and unrestricted use of the Supplemental Rent and may co-mingle the Supplemental Rent with Lessor's general funds.

[DISCUSSION: There is a very valid argument that any interest accruing on the Supplemental Rent, as with any security deposit, should accrue for the benefit of the person who receives the funds. In essence, the maintenance reserves (e.g. Supplemental Rent) are paid by the lessee as security for the performance of its maintenance obligations and to assure the lessor that funds will be available when needed to pay for scheduled heavy maintenance or, upon the lease termination prior to the next scheduled heavy maintenance, the funds will be available for the next operator when he is obliged to pay for scheduled heavy maintenance. Most lessors tend to ignore this reality and consider the funds to be available for their own general purposes. Indeed, if a lessor becomes insolvent during the lease term, unless the maintenance reserves are held in escrow by a third party, they are usually lost to the other creditors generally. For the lessee, this can be a case of double jeopardy if the lessor has assigned the lease to a third party who demands that the lessee performs the maintenance obligations notwithstanding the loss of the maintenance revenues. During the lease term, large amounts of maintenance reserves can accumulate prior to

disbursement and as such can represent a significant loss to the lessee.]

6.4 Absolute Obligation

6.4.1 Net Lease

This Agreement is a net lease and Lessee's obligation to pay the Basic Rent, Supplemental Rent and make other payments in accordance with this Agreement is absolute and unconditional under any and all circumstances and irrespective of any contingency whatsoever including, but not limited to:

- (a) any right of set-off, counterclaim, recoupment, defense or other right (including any right of reimbursement) which Lessee may have against Lessor, Manufacturer, the Engine Manufacturer or any other person for any reason whatsoever;
- (b) any unavailability or interruption in use of the Aircraft for any reason including, but not limited to, a requisition thereof not constituting a Total Loss or any prohibition or interference with or other restriction against Lessee's use, operation or possession of the Aircraft (whether by Law or otherwise), any lack or invalidity of title or any other defect in title, airworthiness, merchantability, fitness for any purpose, condition, design, specification or operation of any kind or nature of the Aircraft or the ineligibility of the Aircraft for any particular use or trade or for registration or documentation under the Laws of any relevant jurisdiction or the Total Loss of, or any damage (not constituting a Total Loss) to the Aircraft;
- (c) any insolvency, bankruptcy, reorganization, arrangement, readjustment of debt, dissolution, liquidation, receivership, administration or similar proceedings by or against Lessor or Lessee or any other person;

- (d) any invalidity or unenforceability or lack of due authorization of or other defect in this Agreement;
- (e) any failure or delay on the part of any Party to perform its obligations under this Agreement; and
- (f) any other cause or circumstance which, but for this provision, would or might have the effect of terminating or in any other way affecting any obligation of Lessee hereunder.

6.4.2 Lessee's Waiver

Lessee hereby waives, to the extent permitted by applicable Law, any and all rights which it may have or which at any time hereafter may be conferred upon Lessee, by statute or otherwise, to terminate or cancel, quit or surrender this Agreement, except termination in accordance with the express provisions hereof. If for any reason whatsoever this Agreement shall be terminated in whole or in part by operation of Law or otherwise (other than as a result of any act or failure to act by Lessor) except as specifically provided herein, Lessee nevertheless agrees to pay Lessor an amount equal to each Basic Rent, Supplemental Rent and other payments in accordance with this Agreement at the time such payment would have become due in accordance with this Agreement as if this Agreement not been terminated in whole or in part. Each such payment made by Lessee shall be final and Lessee will not seek to recover all or any part of such payment from Lessor (with the exception of Supplemental Rent, which Lessee shall be entitled to recover as set forth in Article 11) for any reason whatsoever except for inadvertent overpayment by Lessee.

6.4.3 Non-waiver of Quiet Enjoyment

Nothing in this Article 6.4 shall be construed to limit Lessee's rights and remedies in the event of Lessor's breach of its covenant of quiet enjoyment set forth in

Article 4.11 or to limit Lessee's rights and remedies to pursue in a court of Law any claim it may have against Lessor or any other person.

[DISCUSSION: Article 6.4 is clearly drafted in favor of the lessor and particularly a capital lease lessor. A capital lease is essentially a financing, the main purpose of which (other than for tax benefits) is to provide security for the lender. Consequently, the lender expects to receive lease rental payments come "hell or high water" without interruption of any nature.²⁰ Many lessees consider the language of this provision to be unfair but if they were to consider that the rights of the lessor should be no less than those of a lender then the language may be more acceptable.

On the other hand, such a provision is not appropriate in the case of an operating lease.²¹ The operating lessee should be entitled to set-off, counterclaim and such other defenses as are afforded to any other contracting party but this is rarely the case. Operating lessors consistently insist on the above language to enhance their own position thereby taking away some of the lessee's reasons for entering into the operating lease in the first place. This is an important negotiating point but may be an up-hill battle for any lessee facing an operating lessor who is imposing the rigorous requirements of his own head-lessee or lender on the operating lessee.

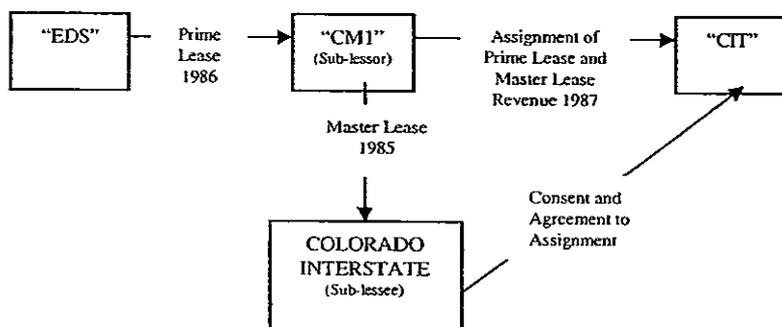
In 1993, the U.S. Court of Appeals for the 10th Circuit upheld a decision of a lower court that demonstrates how onerous a "hell or high water" clause in a lease agreement can be - the facts of the case are briefly as follows:

- (i) A Sublessee entered into a Sublease (the "Master Lease") with a Sublessor for certain equipment which had been leased by the Sublessor from a Lessor under a Headlease.*
- (ii) The Master Lease and the rentals thereunder were assigned by the Sublessor to a financial institution with the written consent of the Sublessee (the "Assignment").*
- (iii) The Master Lease contained a "hell or high water" clause.*

²⁰ See: Edwin E. Huddleson, III, Barry A. Graynor, Lawrence F. Flick, II and Stephen T. Whelan, *Leases*, THE BUSINESS LAWYER, vol. 58, Aug. 2003, at 1567, 1571.

²¹ See: *supra*, Operating Leases § 3.2.4.3(a)(ii).

- (iv) *The Sublessor subsequently declared bankruptcy and ceased making lease payment to the Lessor under the Headlease.*
- (v) *The Sublessee continued making payment to the financial institution as required by the Assignment.*
- (vi) *The Sublessee also made the lease payments due by the Sublessor to the Lessor under the Headlease under reservation of its right to peaceful enjoyment of the equipment under the Master Lease, without which payments the Lessor would have repossessed the equipment.*
- (vii) *Upon fulfillment of all payment obligations under the Master Lease, the Sublessee sued the financial institution for compensation alleging breach of its obligation to provide peaceful enjoyment of the equipment.*
- (viii) *The court ruled against the Sublessee resulting in it having to pay both the Lessor and the financial institution if it wanted to retain the equipment because of the effect of the "hell or high water" provision.²²*



*CMI ceased making payments to EDS in November 1988;
 CMI declared bankruptcy Chapter 11 in 1989;
 CMI/EDS terminated the Prime Lease as of November 1988;
 Colorado Interstate continued making payments to CIT under protest; and
 Colorado Interstate sued CIT in May 1991 for rents paid.*

²² See: *Colorado Interstate Corporation; Colorado Interstate Gas Company v. The CIT Group Equipment Financing, Inc.*, United States Court of Appeals Tenth Circuit, Nos. 91-1406 and 92-1226.

*In the case of First Bank National Association v. Scripps Howard, Inc.*²³, a lessee entered into a forty-eight month lease agreement with a computer company who assigned the agreement to a bank. The assigned lease contained a "hell or high water" clause obliging the lessee to pay all rent notwithstanding any defenses that the lessee may have against the lessor. Contemporaneously with the execution of the agreement, but unknown to the bank, the parties signed an ancillary document allowing the lessee to terminate the agreement at any time without penalty. The court upheld the "hell or high water" clause and refused to allow the lessee to terminate the agreement.

In the case of Leasetec v. Orient Systems, Inc.,²⁴ a federal court in Florida upheld a "hell or high water" clause even though the lessee had never received the leased equipment. The lessee executed Delivery and Acceptance Certificates representing to the lessor that the equipment had been received and accepted even though they had not received it. The lessor, in reliance on the Delivery and Acceptance Certificates, paid the equipment supplier who was merely providing lease financing and whose role in that regard was made clear by a warranty disclaimer in the lease agreement between the lessor and lessee.

The foregoing cases demonstrate the strictness with which "hell or high water" clauses are interpreted in various circumstances and consequently lessees should be very wary when agreeing to assignments of their obligations.

On the lighter side, the following are suggested model contractual provisions which may be used to ensure that every eventuality is covered-off in credit agreements:

End of the World (when acting for the Lender)

"Upon the occurrence of the end of the world before full payment and performance of the Secured Obligations, the Secured Obligations, at the option of the Agent, shall be immediately due and payable in full and may be enforced against the Borrower by any available procedure. For remedial purposes, the Lender will be deemed aligned with the forces of light and the Borrower with the forces of darkness, regardless of the actual ultimate destinations of any particular

²³ No. 94 CIV. 3186, 1995 WL 548845 (S.D.N.Y. September 15, 1995).

²⁴ 85F. Suppl. 2d 1310 (S.D. Fla. 1999).

officer or attorney of any party, unless and until the Lender elects otherwise in writing."

End of the World (when acting for the Borrower)

"If, notwithstanding any other provisions of this agreement to the contrary, the world, as the Borrower knows it, should come to an end on or before full payment and performance of the Secured Obligations, the Secured Obligations then outstanding shall be forgiven in their entirety and the Lender shall have no recourse, whether in the afterworld or otherwise, to the Borrower for any deficiency then existing; provided, however, that the Borrower shall not be deemed to have waived any right of action which it may have against the Lender arising out of the end of the world, whether the same is caused directly or indirectly by the actions or policies of the Lender. For remedial purposes, the Borrower will be deemed aligned with the forces of light and the Lender with the forces of darkness, regardless of the actual ultimate destinations of any particular officer or attorney of any party provided, however, that the Borrower reserves the right to align itself with such of the forces as shall prove to be ultimately victorious or most pleasurable, in the Borrower's sole discretion."

6.5 Currency of Payment

6.5.1 Currency

All payments hereunder, whether of Basic Rent, Supplemental Rent or otherwise shall (except in any case where Lessee is obliged to pay any amount to Lessor or any other Indemnitee or indemnify or reimburse Lessor or any other Indemnitee in respect of any amount, such amount is denominated in another currency, in which case Lessee shall pay such amount in such other currency) be made in Dollars by telegraphic bank transfer of immediately available

Dollars to Lessor's Account and shall be net of bank charges or other bank deductions.

6.5.2 Notice of Transfer

Lessee shall simultaneously fax to Lessor the details of such transfer pursuant to the notice provisions at Articles 22.9.

6.5.3 Receipt of Funds

Payments under this Agreement shall be deemed by Lessor to have been made only when actually credited to Lessor's Account. Receipt of funds to Lessor's Account before 12:00 (local time) on the date due shall constitute discharge in respect of such payment by Lessee and receipt of funds after such time on the date due shall be deemed received on the Business Day following the due date for payment.

[DISCUSSION: The reason for this provision is that the lessor is generally unable to obtain credit for funds deposited with its bank after a particular time of the day – usually around 1:00 to 2:00 PM. Consequently, to avoid losing the benefit of the day, the lessor must be in funds by that time even though most banks will accommodate the receipt of large amounts of funds for credit the same day even after the cut-off time.]

6.6 Non-Business Day

If any payment would otherwise be due on a day which is not a Business Day, it shall be due on the Business Date immediately preceding the date for payment.

6.7 Currency Indemnity

If, under any applicable Law, whether as a result of judgment against Lessee or the liquidation of Lessee or for any other reason, any payment hereunder is made or recovered in a currency other than Dollars then, to the extent that the payment (when converted into Dollars at the "rate of exchange" on the date for payment or, in the case of liquidation, the latest date for the determination of liabilities permitted by applicable Law) falls short of the amount of the payment required by this Agreement,

Lessee shall as a separate and independent obligation, fully indemnify Lessor against the amount of the shortfall. If the amount of the payment converted into Dollars exceeds the amount unpaid under this Agreement, Lessor shall remit such excess to Lessee. For the purposes of this Article 6.7, "rate of exchange" means the rate reasonably selected by Lessor to enable it on the relevant date to purchase Dollars in New York or London (at Lessor's option) with such other currency. Lessee irrevocably waives any right it may have in any jurisdiction to pay any amount under this Agreement in a currency other than that in which such amount is expressed to be payable.

6.8 Default Interest

6.8.1 Default Interest

In reliance on the prompt payment by Lessee of Basic Rent, Supplemental Rent and other payments due hereunder, Lessor has made or will make certain financial commitments. If Lessee fails to pay the Basic Rent, Supplemental Rent or any other amount payable under this Agreement on the due date, Lessor shall suffer loss and damage the exact nature and amount of which are difficult or impossible to ascertain. Lessee shall pay to Lessor on demand from time to time (by way of agreed compensation and not as a penalty) Default Interest on any due and unpaid amounts payable by Lessee under this Agreement.

6.8.2 Application and Accrual of Default Interest

Such Default Interest shall be applied to the amount due and unpaid from the date the amount was due to the actual date of payment (after as well as before judgment) by Lessee to Lessor. Default Interest will accrue on a daily basis and be compounded Monthly and shall be calculated on the basis of the actual number of days elapsed and a 360 day year.

6.9 No Deductions or Withholdings

All payments made by Lessee under this Agreement including but not limited to the Security Deposit, Basic Rent, Supplemental Rent, Default Interest, fees, indemnities and any other payments

shall be made in full without any deduction or withholding whether in respect of set-off, counterclaim, duties or Taxes imposed by the State of Registration or any jurisdiction from which such payments are made unless Lessee is prohibited by Law from doing so, in which event Lessee shall gross up the payment amount such that the net payment received by Lessor after any deduction or withholding equals the amount required under this Agreement. Lessee will also do all of the following:

- (a) ensure that the deduction or withholding does not exceed the minimum amount legally required;
- (b) pay to the relevant Government Entity within the period for payment permitted by applicable Law the full amount of the deduction or withholding (including the full amount of any deduction or withholding from any additional amount paid pursuant hereto); and
- (c) furnish to Lessor within thirty (30) days after each payment an official receipt of the relevant Government Entity involved for all amounts so deducted or withheld.

[DISCUSSION: In circumstances where a taxing authority imposes a withholding tax with respect to amounts paid by the lessee pursuant to the agreement, the lessee must gross up that payment so as to ensure that the lessor receives the full amount to which it is entitled. This process is generally carried out until any further calculation is insignificant. For example, if a payment of \$100 is to be made to the lessor and such payment is subject to a 25% withholding tax, the gross up procedure will be as follows:

$$\begin{aligned}
 \$100 \times 25\% &= \$25.00 \\
 25.00 \times 25\% &= 6.25 \\
 6.25 \times 25\% &= 1.56 \\
 1.56 \times 25\% &= .39 \\
 .39 \times 25\% &= .09 \\
 .09 \times 25\% &= \underline{.02}
 \end{aligned}$$

\$33.31 tax to be remitted by the lessee.]

6.10 Value Added Taxes

The Security Deposit, Basic Rent, Supplemental Rent and other amounts payable by Lessee under this Agreement are exclusive of any value added tax, turnover tax or similar tax or duty which

may from time to time be payable in respect thereof. If a value added tax or any similar tax or duty is payable in any jurisdiction in respect of the Security Deposit, Basic Rent, Supplemental Rent or other amounts as aforesaid, Lessee shall pay the full amount of such Security Deposit, Basic Rent, Supplemental Rent or other amount and shall, in addition, pay all such tax or duty and indemnify Lessor against any claims for the same.

6.11 Evidence of Indebtedness

Save where expressly otherwise provided in this Agreement, any certificate or determination by Lessor as to Default Interest or as to any amount payable under this Agreement shall, in the absence of manifest error, be conclusive and binding on Lessee.

ARTICLE 7 – GENERAL UNDERTAKINGS

7.1 General

Lessee undertakes with Lessor that, from the date of this Agreement until all its liabilities under this Agreement have been discharged, Lessee shall comply with the following provisions of this Article 7. All undertakings set forth in this Article 7 shall, except where otherwise expressly stated, be performed at Lessee's sole cost and expense.

7.2 Authorizations

Lessee shall obtain and maintain in full force and effect all authorizations for the time being required by all applicable Laws, including the Laws or regulations of the State of Registration, to enable Lessee to perform its obligations under this Agreement.

7.3 Notice of Default

Lessee shall forthwith notify Lessor if Lessee becomes aware of the occurrence of an Event of Default, and shall provide Lessor with full details of any steps which Lessee is taking, or proposes to take, to remedy or mitigate the effect of such Event of Default.

7.4 Financial Statements

Lessee shall deliver each of the following to Lessor:

7.4.1 Audited Financial Statements

A copy of its audited financial statements in English for each financial year of Lessee (which shall be prepared in accordance with generally and internationally accepted accounting principles and practices, shall present a true and fair view of the financial position of Lessee and its Affiliates as at the end of such financial year and the results of its and their operations of such year and shall disclose all significant liabilities, actual or contingent, of Lessee and its Affiliates) as soon as practicable and not later than one hundred and eighty (180) days after the end of the financial year to which they relate.

[DISCUSSION: While 180 days should give sufficient time to produce audited statements, there are rare occasions, such as in the case of a State owned airline, where financial statements cannot be disclosed until they have either been approved by the State's government or at least presented to the government. Technically therefore, the audited statements may have been completed but they are not available for general distribution. Some creditors are prepared to recognize this legal requirement and extend the prescribed period but others are not and consequently the airline may potentially face a technical default. An additional problem prevalent until recently with some non-Western airlines, particularly those of Eastern European countries, was the unavailability of statements prepared in "accordance with generally and internationally accepted accounting principals and practices". It took a long time and a significant amount of money for these countries to convert their accounting systems to incorporate acceptable standards and, as a result, most of these situations have now been eliminated.]

7.4.2 Unaudited Financial Statements

Copies of its unaudited half-yearly and quarterly accounts, prepared on a basis consistent with the most recent audited annual accounts, within sixty (60) days of the end of the period to which they relate.

7.4.3 Other Documents

Copies of all reports, notices or other documents issued by Lessee to its creditors or shareholders.

7.5 Further Information

Lessee shall promptly provide Lessor with:

- (a) such financial, operational and other information and documents concerning Lessee and its affairs as Lessor may from time to time reasonably request;
- (b) all information which Lessor may from time to time reasonably request regarding the Aircraft, any Engine or engine installed on the Airframe or any Part, and the use, location and condition of the Aircraft, any Engines and any Parts including, but not limited to, the hours

remaining on the Aircraft and any Engine until the next scheduled check, inspection, overhaul or shop visit, as the case may be;

- (c) on request, either (i) evidence satisfactory to Lessor that Lessee has paid and discharged in full all Taxes, charges and other outgoings incurred by Lessee including, but not limited to, all payments which are then due to the relevant airport and traffic control authorities, which, if unpaid, could give rise to the sale, forfeiture or loss of the Aircraft or to Lessor or Lessor's Lenders (if applicable) becoming liable to such Taxes, charges or outgoings or (ii) confirmation that such Taxes, charges or other outgoings are being contested in good faith;

[DISCUSSION: Of particular concern is the Eurocontrol charges which have presented great heartache to lessors in the past.²⁵ Some lessors require that a letter be sent to Eurocontrol authorizing the lessor to obtain periodic information with respect to the lessee's account status. Some of these lessors also require confirmation from Eurocontrol that such information will be forthcoming when requested.²⁶]

- (d) written notice of any loss, theft, damage or destruction of the Aircraft, any Engine or any Part and of any claim or other occurrence likely to give rise to a claim under the insurances relating to the Aircraft if the potential cost of repair, or the claim under such insurances is likely to exceed the applicable Damage Notification Threshold. Lessee shall provide Lessor, upon request, with details of any negotiations with the insurers, reinsurers or brokers relating thereto.

7.6 Performance of Obligations

Lessee shall duly perform and observe its obligations under this Agreement and under any other agreement between Lessor and Lessee with respect to the Aircraft or any aircraft, engines or aircraft equipment.

²⁵ See: *supra*, Navigation Charges § 5.2.4.5.

²⁶ See also: Flight Charges - Article 8.9 hereof.

ARTICLE 8 – OPERATION OF THE AIRCRAFT**8.1 General**

Lessee undertakes with Lessor that, throughout the Term and until redelivery of the Aircraft to Lessor in accordance with Article 20, Lessee shall comply with the following provisions of this Article 8. All undertakings set forth in this Article 8 shall, except as otherwise expressly stated, be performed at the sole cost and expense of Lessee.

8.2 Operation and Compliance with Laws**8.2.1 Operation**

Throughout the Term, Lessee shall:

- (a) maintain operational control of the Aircraft and use the Aircraft solely in commercial or other operations for which it is duly authorized by the Civil Aviation Authority and applicable Law in accordance with applicable Laws of the State of Registration and of any country, state, territory or municipality in, into or over which Lessee may operate;
- (b) not use the Aircraft for the carriage of goods, materials, livestock or items of cargo which could reasonably be expected to cause damage to the Aircraft or which would not be adequately covered by the insurances relating to the Aircraft, or any items or substance whose possession or carriage is illegal under any applicable Law; and Lessee shall comply with any and all carriage regulations or restrictions from time to time issued by IATA;
- (c) not do or knowingly permit to be done (or omit or knowingly permit to be omitted to be done) any act or thing which might reasonably be expected to jeopardize the rights of Lessor as owner and lessor of the Aircraft or of Lessor's Lenders (if applicable) as an additional insureds, contract party or loss payee under the

Insurances or the validity, enforceability or priority of this Agreement or any other agreement between Lessor and Lessee with respect to the Aircraft; and

- (d) on all occasions when the ownership of the Aircraft, any Engine or any Part is relevant, make clear to third parties that title is held by Lessor.

8.2.2 Compliance with Laws

Throughout the Term, Lessee shall comply with all applicable Laws regulations, rules, orders, recommendations of the Civil Aviation Authority and the Manufacturer and the Engine Manufacturer relating to the Aircraft which the Aircraft may be subject to in its use and operation.

8.3 Licenses and Other Authorizations

Lessee shall obtain and maintain in full force and effect all certificates, licenses, permits and authorizations required for the use and operation of the Aircraft.

8.4 Personnel

Lessee shall ensure that the crew and engineers employed in connection with the operation and maintenance of the Aircraft have the qualifications and licenses required by the Civil Aviation Authority and applicable Law.

8.5 Location

Lessee shall ensure that, except during the term of any approved sublessee, the Aircraft shall be based in and operated from the Location (or such other airport approved in writing by Lessor).

8.6 No Violation of Insurance Policies

Lessee shall not use or permit the Aircraft to be used in a manner or for any purpose which is not covered by the insurance or reinsurance policies Lessee is required to carry and maintain pursuant to this Agreement. Lessee shall not carry any goods of

any description excepted or exempted from such policies or do any other act or permit to be done anything which could reasonably be expected to invalidate or limit any such insurance or reinsurance policies.

8.7 Training

Lessee shall not use the Aircraft for testing or for training of flight crewmembers other than Lessee crewmembers and shall not use the Aircraft for such testing or training any more than it uses any other aircraft in its fleet.

8.8 Costs of Operation

Lessee shall promptly pay, at all times during the Term, all costs incurred in the operation of the Aircraft including, but not limited to, the costs of flight crews, cabin personnel, fuel, oil, lubricants, maintenance, insurance, storage, landing or navigation fees, airport charges, passenger service and any and all other expenses of any kind or nature, directly or indirectly, in connection with or related to the use, movement and operation of the Aircraft. The obligations, covenants and liabilities of Lessee under this Article 8.9 arising prior to the redelivery of the Aircraft to Lessor shall continue in full force and effect, notwithstanding the expiration or termination of this Agreement.

[DISCUSSION: Obviously the lessor is concerned about any liens which might affect the aircraft should any of the foregoing charges not be paid.]

8.9 Flight Charges

8.9.1 Payment of Flight Charges

Lessee shall promptly pay when due, all navigation charges, navigation service charges and all other charges payable by Lessee for the use of or for services provided at any airport, whether in respect of the Aircraft or any other aircraft of Lessee, and shall indemnify and hold Lessor harmless in respect of the same. This indemnity shall continue in full force and effect notwithstanding the expiration or termination of this Agreement for any reason whatsoever or the redelivery of the Aircraft to Lessor.

8.9.2 Airports to which Lessee operates and Eurocontrol

- (a) If requested by Lessor, Lessee shall provide Lessor with a list of the airports to which Lessee regularly operates the Aircraft or its other aircraft. Lessee hereby authorizes Eurocontrol or any other Civil Aviation Authority or airport or creditor claiming rights on the Aircraft to confirm the status of Lessee's payments to such creditor to Lessor for the Aircraft and its other aircraft, as and when requested by Lessor.
- (b) If Lessee's Eurocontrol payment performance is likely to give rise to an Event of Default, then Lessee shall explore in good faith with Eurocontrol and the Civil Aviation Authority any options which would reduce the likelihood of any action to detain the Aircraft, including, but not limited to, the provision by Lessee to Eurocontrol of other security or collateral.

8.10 **Records**

Lessee shall keep accurate, complete and current records of all Flights made by the Aircraft, of all hours and cycles utilized by each Engine and the auxiliary power unit installed on the Aircraft, and of all maintenance and repairs carried out to the Aircraft and every part thereof. Such records shall:

- (a) be kept in English and in such manner as the Civil Aviation Authority may from time to time require, comply with the recommendations of the Manufacturer, Engine Manufacturer and any other manufacturers and suppliers of any part of the Aircraft and with the best practices of major international air transport operators;
- (b) be kept by Lessee in its possession at a location approved by the Civil Aviation Authority, and Lessee shall not, without Lessor's prior written consent, permit any other person to have possession of or control over the same; and
- (c) be deemed part of the Aircraft Documents and shall be the property of Lessor.

Lessee shall permit Lessor or any authorized representative of Lessor to examine such records upon giving reasonable notice provided that such examination does not impede the normal commercial operation of the Aircraft.

[DISCUSSION: An important part of a lessor's asset management program is monitoring the lessee's compliance with its regulatory authority's approved maintenance program and with airworthiness directives (ADs). If the aircraft records are kept up to date as required, the lessor should be able to forecast when major maintenance is due and ensure that these events are adequately completed in a timely manner.

During the lease negotiations, technical representatives for both the lessor and the lessee meet to determine, among other things, the way in which required maintenance is to be performed and recorded during the lease term. The lessor is very conscious of the desirability to keep records in accordance with industry standards so as to facilitate the transition from one lessee to another. Every large carrier customizes maintenance programs to satisfy their own requirements and to ensure consistency within the fleet but any deviation from industry standards can have an adverse impact on the mobility of the equipment. Consequently, once the parties have agreed to a maintenance program some lessors require that the lessee notify it of any changes to the maintenance program so as to allow the program to be bridged from one lessee to another.

Records should be maintained by the lessee in such a manner so as to enable the aircraft and its records to be transferred from one jurisdiction to another without complications. If records are incomplete or unsatisfactory to the next lessee or its regulatory authority, their restoration can be costly and time-consuming and may result in completed work being redone or even the installation of new equipment in order to obtain or maintain a certificate of airworthiness.²⁷]

8.11 No Relinquishment of Possession

Lessee shall not, without the prior written consent of Lessor, deliver, transfer or relinquish possession or full operational

²⁷ See: *supra*, Aircraft Documentation and Records §5.2.1.8, Service Bulletins and Airworthiness Directives §5.1.2.1 and Logbooks and Records, §5.1.2.11 and Airworthiness Certification § 5.2.2.2; Richard Spaulding, *Logbooks and Leases*, AIRLINE EXECUTIVE, Aug. 1988, at 30.

control of the Aircraft, the Engines or any Part thereof, except for the purposes of pooling, maintenance or repairs permitted under this Agreement or as otherwise permitted by Article 9. Notwithstanding any such parting with possession or operational control, Lessee shall remain responsible for procuring observance of and compliance with all the provisions of this Agreement.

8.12 No Security Interests

Lessee shall not create or permit to arise any Security Interest (other than Permitted Liens) on or with respect to the Aircraft, title thereto or any interest therein. Lessee shall forthwith, at its sole cost and expense, take all action as may be necessary to discharge or remove any such Security Interest if it exists at any time. Lessee shall within twenty-four (24) hours after becoming aware of the existence of any such Security Interest give written notice thereof to Lessor.

8.13 No Pledge of Credit

Lessee has no authority to pledge, and shall not pledge, the credit of Lessor or Lessor's Lenders (if applicable) for any fees, costs or expenses connected with the maintenance, overhaul, repair, replacement of, or modification to the Aircraft or any part thereof or otherwise connected with the use or operation of the Aircraft or any part thereof.

8.14 Rights against Manufacturer and Engine Manufacturer

Lessee shall not do or permit to be done anything which might prejudice any right which Lessor or Lessor's Lenders (if applicable) may have against the Manufacturer, the Engine Manufacturer or any other manufacturer or supplier of any part of the Aircraft or any provider of any service relating to the repair or maintenance of the Aircraft.

8.15 Affixing Identification Plates

Lessee shall ensure that there is always affixed, and not removed or in any way obscured, the fireproof plates in accordance with Appendix "L".

8.16 Representations to other Parties

Lessee shall not, at any time, represent or hold out Lessor or Lessor's Lenders (if applicable) as carrying goods or passengers on the Aircraft or as being in any way connected or associated with any operation of the Aircraft or carriage (whether for hire or reward or gratuitously) which may be undertaken by Lessee or any approved sublessee, provided that compliance with Article 8.15 shall not contravene this obligation.

8.17 No Discrimination

Lessee shall not operate, maintain, insure or deal with the Aircraft or any Engine or Part in any manner which discriminates against the Aircraft or Engine or Part when compared with the manner in which Lessee operates, maintains, insures or deals with similar aircraft, engines or parts in Lessee's fleet.

8.18 Lessor's Rights of Inspection**8.18.1 Lessor's Inspection**

Lessee shall permit Lessor, or any duly qualified agent authorized by Lessor, at any time on reasonable notice (or without notice if an Event of Default is continuing) provided (as long as there is no continuing Event of Default) the same does not interfere with Lessee's commercial operations, to inspect the Aircraft or any part thereof to ascertain the condition of the Aircraft or any part thereof and satisfy itself that the Aircraft is being properly repaired and maintained in accordance with the terms of this Agreement. During this inspection, Lessor may take copies of the technical records and other operational records relating to the Aircraft. The cost of any such inspection shall always be borne by Lessee if it occurs while an Event of Default is continuing. All time taken in respect of the inspection and any repairs arising therefrom shall form part of the Term.

[DISCUSSION: The requirement for inspections is often the object of heated discussion during negotiations. The main bone

of contention is who will bear the costs of such inspections. If the lessee is to bear the inspection costs then inevitably there will be an inspection every year. In the interest of fairness to both parties, the matter should be self-policing – that is to say, if an annual inspection by the lessor reveals material non-compliance with the agreement then the lessee should pay the costs of such inspection but otherwise the lessor should bear such costs. As one might expect, this generally avoids unnecessary inspections throughout the lease term.^{28]}

8.18.2 No duty on Lessor to perform Inspection

Lessor shall have no duty or liability to make any such inspection or survey, nor any liability arising therefrom.

²⁸ See *supra*, Inspections § 5.1.2.10.

ARTICLE 9 – SUBLEASES**9.1 No Sublease without Lessor's Consent**

Lessee shall not enter into, or agree to enter into, any sublease of the Aircraft or any part thereof or part with possession of the Aircraft (except for maintenance and repair) at any time without the prior written consent of Lessor, which consent shall be in Lessor's absolute discretion and upon such terms and conditions as may from time to time be agreed in writing between Lessor and Lessee. Notwithstanding the foregoing, Lessee may sublease the Aircraft without the consent of Lessor in circumstances where Lessee's crew retains operational control of the Aircraft and the maintenance of the Aircraft is effected by Lessee and there is no change in the State of Registration or in the insurance arrangements relating to the Aircraft, provided that the term of such sublease (including any extensions) does not exceed a period of six (6) months.

9.2 Any Approved Sublease

Any sublease approved by Lessor shall contain the terms and conditions established by Lessor in its absolute discretion. Lessee shall not amend the terms of any approved sublease without the prior written consent of Lessor, which shall not be unreasonably withheld and any such sublease shall be subject and subordinate to this Agreement and Lessee shall deliver to Lessor within seven (7) Business Days after the date of execution of any sublease, an acknowledgement from the approved sublessee that the sublease and interests of the approved sublessee thereunder are subject and subordinate to this Agreement.

9.3 Continued Responsibility of Lessee

Notwithstanding any sublease of the Aircraft, Lessee shall remain fully liable to perform all its obligations under this Agreement during any period of sublease, provided that if any obligation which is required to be performed by Lessee under this Agreement or any other agreement between Lessor and Lessee in respect of the Aircraft is performed by any party to any sublease entered into by Lessee in accordance with Articles 9.1 and 9.2, then performance by such party shall for the purposes of the relevant agreement constitute performance pro tanto by Lessee.

9.4 Documentation Arising from an Approved Sublease

Where Lessor consents to a proposed sublease of the Aircraft pursuant to Article 9.1, Lessor shall, at Lessee's sole cost and expense, promptly and duly execute and deliver to Lessee such documents and assurances and take such action as Lessee may from time to time reasonably request in order to carry out the intent and purpose of such subleasing including, but not limited to, all documents, assurances and action necessary or desirable for the de-registration and any re-registration of the Aircraft in any relevant state of registration.

[DISCUSSION: For comments on this Article see Section 3.2.4.3(e). Where the parties wish to provide for a list of preauthorized sublessees the following provision may be considered:

- (a) *Definitions of "Permitted Sub-Lease" and "Permitted Sub-Lessee" should be added to the Definitions in Article 1.1 of this Agreement. For example:*

""Permitted Sub-Lease" means an agreement for the leasing or hiring of the Aircraft to any Permitted Sub-Lessee as permitted by the provisions of Article 9."

""Permitted Sub-Lessee" means, subject to the provisions of Article 9.3, any person to which Lessee leases the Aircraft in accordance with the provisions of Article 9 and which is listed in Appendix "O" provided that in each case at the time of entering into and throughout the term of such Permitted Sub-Lease, such person is licensed to operate aircraft of the same type as the Aircraft and that at the time of entering into such Permitted Sub-Lease such person is incorporated in or based in a state, country or jurisdiction which is not subject to any sanction or embargo by the United Nations, the European Union or the United States of America."

- (b) *Insert a new appendix in the Agreement:*

"Appendix O – PERMITTED SUBLESSEES"

- (c) *A new Article 9 as follows:*

"ARTICLE 9 – SUBLEASES

9.1 No Sublease without Lessor's Consent

Lessee shall not enter into, or agree to enter into, any sublease of the Aircraft or any part thereof or part with possession of the Aircraft (except for maintenance and repair) at any time without the prior written consent of Lessor, which consent shall be in Lessor's absolute discretion and upon such terms and conditions as may from time to time be agreed in writing between Lessor and Lessee. Notwithstanding the foregoing, Lessee may, without the consent of Lessor:

- (a) *provided that no Event of Default has occurred and is continuing as at the commencement thereof, sublease the Aircraft to any Permitted Sub-Lessee provided always that such Permitted Sub-Lease shall be on an operating lease basis and shall be subject to the following terms and conditions:*
- (i) *such Permitted Sub-Lease shall only be made by virtue of an agreement in writing between Lessee and the Permitted Sub-Lessee;*
 - (ii) *such Permitted Sub-Lease shall contain an express provision to the effect that it is and shall remain subject and subordinate to the rights of Lessor and its lenders under this Agreement and that Lessor will be entitled, at any time after an Event of Default has occurred and is continuing, to terminate such Permitted Sub-Lease by notice in writing to the Permitted Sub-Lessee and Lessee;*
 - (iii) *the terms of such Permitted Sub-Lease or in conjunction with any other document or arrangement thereto shall not confer on such Permitted Sub-Lessee the right to continue*

to use or operate the Aircraft for an aggregate term of more than two (2) years, nor shall such Permitted Sub-Lease permit any further sub-leasing (other than wet-leasing in accordance with Article 9.1(b) below) by such Permitted Sub-Lessee;

- (iv) *if under such Permitted Sub-Lease the State of Registration is to be changed, the delivery of the Aircraft to such Permitted Sub-Lessee is subject to Lessor having received at least three (3) Business Days' prior to such delivery, at Lessee's expense, an opinion in form and substance satisfactory to Lessor from independent legal counsel satisfactory to Lessor in the new state of registration in which Permitted Sub-Lessee intends to register the Aircraft. Such legal opinion should enable Lessor to conclude that (x) the priority, validity and enforceability of any existing ownership, lease or security interest held by Lessor, its lenders or any other secured party on or in respect of the Aircraft will not be adversely affected by any proposed Permitted Sub-Lessee; (y) such Permitted Sub-Lease will not render this Agreement or the rights of Lessor or obligations of Lessee invalid, illegal or unenforceable; or (z) there are no requirements of the laws of the state which must be fulfilled in order for, and that it is possible under the laws of that state for:*
- (1) *any ownership, lease or security interest in the Aircraft to remain valid and enforceable in accordance with their respective terms (including the exercise of rights of repossession and export of the Aircraft from such state);*
 - (2) *title to the Aircraft to remain vested in its owner during the course of such Permitted Sub-Lease;*

- (3) *the rights under the Permitted Sub-Lease shall be subject and subordinate to this Agreement and Lessee shall deliver to Lessor within seven (7) Business Days after the date of execution of such Permitted Sub-Lease an acknowledgment from the Permitted Sub-Lessee that such Permitted Sub-Lease and interests of the Permitted Sub-Lessee thereunder are subject and subordinate to this Agreement; and*
- (4) *the Aircraft to be deregistered from the state of registration of the Permitted Sub-Lessee following the occurrence of an Event of Default which is continuing and where the term of such Permitted Sub-Lease has ended or if there are any provisions of the laws of the new state of registration requiring any documents to be executed or filed, or any other formalities to be completed, that such requirements have been complied with or completed to the satisfaction of Lessor.*
- (v) *the subleasing of the Aircraft under such Permitted Sub-Lease or any extensions thereto not extending beyond the Term and shall be automatically terminated upon the termination of this Agreement;*
- (vi) *Lessor having received insurance opinions or certificates of insurance, or both, from the brokers or the insurers, or both, through whom or by whom the required insurances are to be procured during the term of such Permitted Sub-Lease, satisfactory to Lessor; and*
- (vii) *if any of Lessor's lenders require an assignment of Lessor's rights under any Permitted Sub-Lease, then the Permitted*

Sub-Lessee shall do all things necessary to immediately effect such assignment;

- (b) *"wet lease", charter or enter into any similar arrangement for the use of the Aircraft under which operational control, insurance and maintenance of the Aircraft is maintained by Lessee. Provided that such "wet lease", charter or similar arrangements or any extensions thereof shall not extend beyond the Term and the Aircraft shall remain registered in the State of Registration.*

Provided further that (AA) Lessee shall notify Lessor as to the identity of any Permitted Sub-Lessee at least seven (7) Business Days before entering into a Permitted Sub-Lease and of the new state of registration thereunder (and if Lessee has not received a notice from Lessor that such Permitted Sub-Lessee has not been removed from Appendix "O" in accordance with its rights under Article 9.3, Lessee shall be entitled to assume that such Permitted Sub-Lease has not been removed from Appendix "O" in accordance therewith; and (BB) Lessee shall notify Lessor if any "wet lease", charter or similar arrangement is entered into as contemplated by Article 9.1(b) for a term in excess of three (3) months, as to the term thereof and as to the identity of the lessee or charterer thereunder; and (CC) Lessee shall provide a certificate to Lessor at least ten (10) Business Days prior to the delivery of the Aircraft to a Permitted Sub-Lessee pursuant to a Permitted Sub-Lease under Article 9.1(a) confirming that such Permitted Sub-Lease does not contravene the provisions of this Agreement, the term thereof and confirming the identity of the Permitted Sub-Lessee; and (DD) if an event of default should occur and be continuing under the Permitted Sub-Lease while a Permitted Sub-Lessee is in possession of the Aircraft, Lessee shall promptly notify Lessor of the steps that it proposes to take to enforce the terms of such Permitted Sub-Lease and recover possession of the Aircraft and thereafter Lessee shall take all such steps as are necessary, or as Lessor may instruct, to ensure that the Aircraft is so repossessed; and (EE) Lessee shall take all such steps as are reasonably necessary during the term of

any Permitted Sub-Lease to ensure that the respective interests of Lessor and its lenders in the Aircraft are fully protected; and (FF) during the term of any Permitted Sub-Lease, Lessee shall notify Lessor of any matters of which it becomes aware relating to such Permitted Sub-Lease which would have the effect of jeopardizing the ownership interests of Lessor in the Aircraft or any security related thereto.

9.2 Continued Responsibility of Lessee

Notwithstanding any Permitted Sub-Lease, Lessee shall remain fully liable to perform all its obligations under this Agreement during the period of such Permitted Sub-Lease, provided that if any obligation which is required to be performed by Lessee under this Agreement or any other agreement between Lessor and Lessee in respect of the Aircraft is performed by any party to any Permitted Sub-Lease entered into in accordance with the provisions hereof, then performance by such party shall, for the purposes of the relevant agreement, constitute performance pro tanto by Lessee.

9.3 Changes to Appendix "O"

Lessor shall have the right upon not less than five (5) Business Days' notice to remove any Permitted Sub-Lessee listed in Appendix "O" if Lessor has reasonable cause to believe that the right, title or interest of Lessor and its lenders in the Aircraft would be materially adversely affected if the Aircraft were to be leased to such airline or other person provided always that Lessor may not exercise such right with respect to any Permitted Sub-Lessee who entered into a Permitted Sub-Lease prior to such Permitted Sub-Lessee being removed from Appendix "O"; and Lessee shall have the right at any time to request additional airlines or other persons to be added to Appendix "O". Lessor agrees to act reasonably and to consider any such request in good faith."}

ARTICLE 10 - MAINTENANCE AND REPAIR**10.1 General Obligations**

Throughout the Term and until the Aircraft is redelivered to Lessor in the condition required by this Agreement, Lessee shall, at its sole cost and expense, maintain and repair the Aircraft, Engines and all of the Parts in accordance with:

- (a) the Approved Maintenance Program and perform (at the respective intervals provided in the Approved Maintenance Program) all major overhauls of the Aircraft;
- (b) all applicable Laws and regulations of the Civil Aviation Authority and any other aviation authorities with jurisdiction over Lessee or the Aircraft, any Engine or Part, regardless of upon whom such requirements are imposed, and which relate to the maintenance, condition, use or operation of the Aircraft or require any modification of or alteration to the Aircraft, any Engine and Part; and
- (c) any other regulations or requirements necessary in order to maintain in good standing a current and valid certificate of airworthiness (in the Transport Category (Passenger)) for the Aircraft at all times during the Term and upon redelivery of the Aircraft to Lessor on the Expiry Date or Termination Date, as the case may be, for a similar certificate of airworthiness to be issued by such civil aviation authority as Lessor may direct.

[DISCUSSION: Pursuant to Article 10.1, the aircraft must be maintained to such standard so as to enable it to receive a certificate of airworthiness from any jurisdiction. This provision can be particularly onerous from the lessee's point of view. Normally, a lessor will require the lessee to maintain the aircraft according to the requirements of the jurisdiction of registration. However, if such jurisdiction has different requirements from those of the FAA or JAA for example, the lessor may either require that (i) the aircraft be maintained according to the civil aviation authority of the state of registration and another jurisdiction such as an FAA or JAA jurisdiction; or (ii) the aircraft be maintained according to the civil aviation authority of the state of registration during the lease term but returned to the lessor in a

condition enabling it to be registered in another jurisdiction such as an FAA or JAA jurisdiction. The difference between (i) and (ii) is to accommodate the problems which often arise out of conflicts between the respective requirements of various jurisdictions. For example, to require a non-U.S. carrier to maintain and operate the aircraft strictly according to FAA requirements may be economically unreasonable. For instance, the FAA requires seats in commercial category aircraft type certificated after 1988 to meet a "16G test" rather than the current 9G test. Such seats must be specially designed and manufactured and are considered by many experts to be unnecessary. Furthermore, 16G seats are expensive and hard to obtain as there is limited production. In October 2002, the FAA proposed to mandate the installation of 16G seats on all Part 121 aircraft manufactured after 1958. If this proposal becomes law, airlines registered in the United States would be required to retrofit 16G seats prior to 2016 and manufacturers would have to install seats on all transport category aircraft manufactured before 2006 - all at an estimated cost of US\$ 519 million. Civil aviation authorities in jurisdictions outside of the United States operating under FAA rules give their carriers exemptions to avoid this apparently unnecessary cost but if, on termination of the lease, the aircraft were to be placed on the U.S. registry, then 16G seats have to be installed. At the termination of a long lease, the aircraft generally requires major overhaul and new seats could be incorporated at that time but if next lessee is not registering the aircraft in the U.S. then the requirement could be avoided altogether.]

10.2 Specific Obligations

Without limiting the provisions of Article 10.1, Lessee agrees that such maintenance and repairs will include, but not be limited to, each of the following specific items:

- (a) performance in accordance with the Approved Maintenance Program all routine and non-routine maintenance work, including line maintenance on the Aircraft;
- (b) incorporation in the Aircraft of all applicable airworthiness directives ("AD") and all alert service bulletins ("SB") issued by the Manufacturer, Engine Manufacturer or other vendors or manufacturers of Parts incorporated on the Aircraft having a compliance date during the Term or

within one hundred and eighty (180) days after the Expiry Date or Termination Date, as the case may be;

- (c) incorporation in the Approved Maintenance Program of the full corrosion prevention and control program as recommended by the Manufacturer and the Civil Aviation Authority (but in any event, no less frequently than at "C" check or equivalent), including periodic inspections by penetration of fuel tanks, periodic inspection and clean-up under galleys and lavatories, and the correction of any discrepancies in accordance with the recommendations of the Manufacturer and the structural repair manual;
- (d) if Lessee, at its option, chooses to comply with the Civil Aviation Authority or the Approved Maintenance Program requirements by means of sampling within its fleet, performance of all such inspections and tasks on the Aircraft;
- (e) maintaining and keeping in an up-to-date status all Aircraft Documents. At redelivery of the Aircraft, upon Lessor's request, Lessee shall translate into English such Aircraft Documents as may be reasonably requested by Lessor or required by the civil aviation authority to which the Aircraft may be exported;
- (f) maintaining historical records for condition-monitored, hard time and life limited parts, the hours and cycles the Aircraft and Engines operate and all maintenance and repairs performed on the Aircraft;
- (g) properly documenting all repairs, Modifications and all alterations and the additional or removal of equipment, systems or components in accordance with the rules and regulations of the Civil Aviation Authority and reflecting such items in the Aircraft Documents. In addition, all repairs, Modifications and alterations to the Aircraft will be accomplished in accordance with the Manufacturer's structural repair manual (and, if outside the scope of the same then accomplished in accordance with Lessor's instructions).

[DISCUSSION: See: Service Bulletins and Airworthiness Directives - Section 5.1.2.1. Article 10.2(b) is normally a subject of

ardent negotiating by the lessee. As drafted, the lessee is required to terminate each AD no matter what the cost or compliance date. So, in the extreme case, a compliance date for an AD, which might cost \$50,000, falling within six months of the lease termination would have to be effected by the lessee at its cost. This patently unfair situation is considered unreasonably by almost everyone other than the most hardheaded lessor. Consequently, it is desirable to incorporate a cost-sharing provision that more fairly distributes the cost of the AD between the parties on a basis of the number of useful years left in the aircraft and the number of months left in the term of the lease.²⁹ It is also customary that such cost sharing only applies in cases where the cost of an AD exceeds a predetermined amount (e.g. \$50,000) known as the "Cost Threshold". The following is a suggested addition to Article 10.2(b):

"Lessor shall bear that part of the cost of terminating any ADs or SBs ("Cost") incurred by Lessee in accordance with the following formula:

$$\text{Lessor's Share} = (A-B) \times [(D-C)/D]$$

Where: A = the Cost;
 B = Cost Threshold absorbed by Lessee;
 C = the number of months from the date of termination of the AD or SB until expiry of the term; and
 D = the amortization period of the AD or SB

For the sake of clarity and by way of example only:

A = \$100,000;
 B = \$50,000;
 C = 10 months; and
 D = 120 months
 Lessor's Share = $(100,000-50,000) \times [(120-10)/120]$
 = \$45,833

²⁹ See: Howard E. Turner and Peter B. Barlo, *AD Cost-sharing Provisions in Operating Leasing*, AIRFINANCE JOURNAL, Guide to Aviation Lawyers, 2002, at 18.

If the life of the AD or SB is related to Flight Hours or cycles then a time related life shall be computed for such AD or SB based on the average utilization of the aircraft during the Term which computed life shall be substituted for 120 in the above formula.

Lessor and Lessee agree that the Cost shall be calculated as follows: -

- (i) if Lessee performs the relevant work, the Cost shall be based on the direct cost to Lessee, such cost to be verified by Lessee to Lessor's reasonable satisfaction; or*
- (ii) if an independent third party performs the relevant work, Lessee shall provide Lessor with evidence of the Cost in the form of an invoice or similar document together with a corresponding receipt evidencing payment.*

Lessee and Lessor agree that Lessor's Share shall be refundable to Lessee within ten (10) Business Days of the Expiry Date or Termination Date, as the case may be. Lessor shall calculate Lessor's Share in accordance with the above formula on the basis of the actual number of months in the Term and shall pay Lessor's Share to Lessee, to such account as Lessee shall notify Lessor in writing.

Provided that, if an Event of Default has occurred and is continuing at any time, any amount that would otherwise be payable to Lessee by Lessor in accordance with this Article shall, at the sole discretion of Lessor, be applied or retained by Lessor in or towards settlement of any amounts owing or sums due by Lessee to Lessor under this Agreement."

In some situations, the lessor will not pay for any part of the Cost of ADs if the requirement is only issued by the Civil Aviation Authority or recommended by the State of design. This obviously is a commercial matter to be negotiated. In such an event an addition to the Article might be made as follows:

"If such AD is (i) issued by the Civil Aviation Authority or (ii) the aviation authority of the

State of design, then Lessor shall not reimburse Lessee for any of such Cost."

In some circumstances, where it is determined during the negotiations that the nominated aircraft will be scheduled for heavy maintenance checks during the term, the lessor may agree to participate in the cost of such maintenance, particularly if such lessor holds maintenance reserves pursuant to a prior lease. The following is a provision which may be inserted in the agreement to accommodate such situation:

"10.3 Maintenance Contribution

Provided no Event of Default has occurred and is continuing, Lessor will pay to Lessee, by way of contribution to the cost of maintenance of the Aircraft, upon submission by Lessee to Lessor within six (6) months of the commencement of that maintenance and before the Expiry Date or Termination Date (or as soon as may be practicable thereunder) an invoice and supporting documentation reasonably satisfactory to Lessor evidencing: -

- (a) with respect to the Airframe, the completion, in accordance with this Agreement, of those items of maintenance characterized by the Manufacturer's maintenance planning document and best industry practice as "D" Check and/or individual structural inspections having an interval of not less than [] Flight Hours for the Aircraft (but not including repairs arising as a result of operational or maintenance mishandling), the lesser of (i) the amount of that invoice; and (ii) an amount equal to the aggregate amount of (x) Airframe Supplemental Rent paid under this Agreement at the time of commencement of such maintenance; and (y) Predecessor Airframe Supplemental Rent (as defined below) less the aggregate amount previously paid by Lessor under this sub-article. Following the first occasion on which Lessee*

accomplishes the aforementioned work with respect to the Airframe, in the event that any payment to be made by Lessor pursuant to this Article 10.3(a) is insufficient to cover the relevant cost, then, so long as no Event of Default shall have occurred and be continuing, any shortfall shall be shared by Lessor and Lessee pro rata, with Lessor's share being calculated by reference to the number of Flight Hours flown by the Airframe since new until (but excluding) the Delivery Date and Lessee's share being calculated by reference to the number of Flight Hours flown by the Airframe from the Delivery Date until the date of completion of such work;

- (b) *with respect to any Engine, the performance, in accordance with this Agreement, of all shop visits requiring engine disassembly (other than (i) repairs arising as a result of foreign object damage or operational or maintenance mishandling and/or (ii) removal, installation, maintenance and repair of Quick Engine Change ("QEC") kits), the lesser of (i) the amount of that invoice; and (ii) an amount equal to the aggregate amount of (x) Engine Supplemental Rent paid in respect of that Engine under this Agreement at the time of commencement of such maintenance; and (y) Predecessor Engine Supplemental Rent (as defined below) relating to such Engine less the aggregate amount previously paid in respect of that Engine by Lessor under this sub-article. Following the first occasion on which Lessee accomplishes the aforementioned work with respect to each Engine, in the event that any payment to be made by Lessor pursuant to this Article 10.3(b) with respect of such Engine is insufficient to cover the relevant cost, then, so long as no Event of Default shall have occurred and be continuing, any shortfall*

shall be shared by Lessor and Lessee *pro rata*, with Lessor's share being calculated by reference to the number of Flight Hours flown by the relevant Engine since new until (but excluding) the Delivery Date and Lessee's share being calculated by reference to the number of Flight Hours flown by the relevant Engine from the Delivery Date until the date of completion of such work; and

- (c) with respect of any Engine, the replacement, in accordance with this Agreement, of all life limited parts relating to such Engine (other than (i) replacement arising as a result of foreign object damage or operational or maintenance mishandling and/or (ii) removal, installation, maintenance and repair of QEC kits, the lesser of (i) the amount of that invoice and (ii) an amount equal to the aggregate amount of (x) Engine LLP Supplemental Rent paid in respect of that Engine under this Agreement at the time of commencement of such replacement; and (y) Predecessor Engine LLP Supplemental Rent (as defined below) relating to such Engine less the aggregate amount previously paid in respect of that Engine by Lessor under this sub-article.

For the purpose of this Article 10.3:

"Predecessor Airframe Supplemental Rent" means, with respect to the first occasion on which Lessee accomplishes the work described in Article 10.3(a), an amount equal to (x) the sum of \$ ____; multiplied by (y) the number of Flight Hours flown by the Aircraft since new until (but excluding) the Delivery Date;

"Predecessor Engine Supplemental Rent" means, with respect to the first occasion on which Lessee accomplishes the work described in Article 10.3(b) with respect to each Engine, with respect to such

Engine, an amount equal to (x) the sum of \$____; multiplied by (y) the number of Flight Hours flown by such Engine since new until (but excluding) the Delivery Date; and

"Predecessor Engine LLP Supplemental Rent" means, with respect to the first occasion on which Lessee accomplishes the work described in Article 10.3(c) during the first Engine refurbishment with respect to each Engine, with respect to such Engine, in order to release such Engine with a minimum of [] cycles to the next Engine life limited part restriction, an amount equal to (x) the actual direct cost of the replaced Engine life limited parts; less (y) the amount of Engine Supplemental Rent payable by Lessee in respect of such Engine from the Delivery Date until the first Engine refurbishment during the Term.

With respect to each of the first Engine refurbishment for each Engine during the Term, Lessee and Lessor shall cooperate with a mutually acceptable maintenance and spare engine support agency to agree a mutually acceptable repair workscope and supply of spare engine(s). Lessee shall be directly responsible for the lease (including, without limitation, the cost) of any spare engine(s) (including, without limitation, insurance, operational risk and maintenance together with any supplemental rent or maintenance reserves relating thereto). So long as no Event of Default shall have occurred and be continuing, Lessor shall pay the engine lease rental daily charges for the duration of each of two (2) first Engine refurbishments (i.e. one per Engine) and a maximum allowance of ten (10) Business Days per Engine shop visit for transport and engine change by Lessee."}]

10.3 Removal of Engines

Lessee shall, in the ordinary course of maintaining, repairing, servicing, overhauling, testing, altering or modifying, be entitled to remove any Engine from the Airframe. Title to such Engine

shall, subject to the permanent replacement thereof in accordance with Article 10.4, remain vested in Lessor.

[DISCUSSION: See: DISCUSSION under Article 10.5]

10.4 Permanent Replacement of Engines

Lessee shall promptly procure the replacement of any Engine (an "Original Engine") which has become time-, cycle- or calendar expired or has suffered a Total Loss, with an engine complying with the following conditions:

- (a) it is of the same manufacturer and model, or (at Lessee's option) an engine of an improved model and has equivalent (or improved) value, utility and modification status to those of the Original Engine, and is otherwise suitable for installation and use on the Airframe without impairing the value or utility of the Airframe and is compatible with the remaining installed Engine;
- (b) it has become and remains the property of Lessor free from Security Interests (other than Permitted Liens) and on installation on the Airframe shall, without further act, be subject to this Agreement. To the extent permitted by the Laws of the State of Registration and lex situs, it is the intent of Lessor and Lessee that without further act and immediately upon any replacement engine becoming installed on or attached to the Airframe, (i) title to the Original Engine shall thereupon vest in Lessee, free and clear of all rights of Lessor and Lessor's Lender (if applicable); (ii) title to the replacement engine shall thereupon vest in Lessor free and clear of all rights of Lessee; and (iii) such replacement engine shall be deemed to be an Engine hereunder to the same extent as the Original Engine; and
- (c) Lessee has full details of such replacement engine's service and maintenance records (which shall thereafter form part of the relevant Aircraft Documents).

10.5 Removal and Interchange of Engines

Lessee shall be entitled to remove any Engine from the Airframe to interchange such Engine provided Lessee:

- (a) ensures that no Engine is removed from the Airframe unless it is promptly replaced with an engine of the same model as, or an improved or advanced version of, such Engine and Lessee has full details of the service and maintenance records of the interchanged engine;
- (b) ensures that any Engine which is not installed on the Airframe (or an aircraft permitted by Articles 10.5(d) and 10.11) is, except as expressly permitted by this Agreement, properly and safely stored and insured, and kept free from Security Interests (other than Permitted Liens) and that the identification plates referred to in Article 8.15, are not removed from any such Engine;
- (c) from time to time, on request by Lessor, procures that any person to whom possession of an Engine is given acknowledges in writing to Lessor, in form and substance satisfactory to Lessor, that it will respect the interests of Lessor as owner and lessor and Lessor's Lenders (if applicable) as mortgagees of such Engine and will not seek to exercise any rights whatsoever in relation to such Engine; and
- (d) without prejudice to Article 10.5(a), if no Event of Default has occurred and is continuing, Lessee shall be entitled to install any Engine on an aircraft operated by Lessee, provided that neither (i) the provisions of any applicable Law nor (ii) the terms of any lease or other agreement or Security Interest to which such aircraft is subject, prohibit such installation or will have the effect at any time of divesting or impairing the title and interests of Lessor as owner and lessor and Lessor's Lenders (if applicable) as mortgagees of such Engine.

[DISCUSSION: On commercial aircraft, engines are interchanged between aircraft or removed for servicing on a regular basis.³⁰

Although these activities are normal in the industry they nevertheless give rise to considerable heartburn for lessors and financiers who worry that they may lose title to their equipment or their equipment may become subject to third party liens.

³⁰ An exception is the large high thrust engine such as the Rolls-Royce Trent series; GE-90 series or Pratt & Whitney 4000 series that are seldom removed from the airframe but rather are serviced "on wing" or have their modules interchanged or removed.

Indeed, in an attempt to minimize their risk, some lessors include provisions in their agreements permitting the removal of an engine for servicing but requiring that the same engine be reinstalled on the same airframe immediately after the servicing has been completed. This is false security because the industry simply doesn't work that way. Notwithstanding anything in the agreement to the contrary, engines simply don't stay with their original airframe forever. No airline can afford to have an aircraft remain on the ground until its engine or any other piece of equipment has been serviced. Indeed, minimizing delays arising from technical issues is essential for the profitability of every airline and, as such, the engineering department's only goal in an AOG situation is to replace the defective engine or component and return the aircraft to service as quickly as possible. In such situations there is no time to re-read the agreement or consult with the lessor or lenders. Consequently, in practice, an aircraft with an engine or component to be removed is taken out of service for only the length of time it takes to remove and replace such item with a serviceable one. The removed items are then repaired and used to replace other unserviceable engines or components, as the case may be, when needed, but normally not on the same aircraft - this is particularly true if the airline has a number of the same aircraft type in its fleet. To take the original aircraft out of service a second time merely to replace the original engine or component would be highly uneconomical.

When faced with the practical realities, a lessor will usually suffer someone else's engine being installed on its aircraft for a temporary period but some lessors still insist that the installation of one of its engines on an airframe owned by another party will only be allowed if all the relevant parties enter into a Recognition of Rights Agreement ("RORA") whereby each lessor or owner will acknowledge that they will not claim title to each other's engines. In the absence of a RORA, aircraft and engine lessors have no contractual relationship with each other, but to get all the interested parties to agree to the terms of a RORA is not always an easy task.

The following is an example of a RORA provision found in an ILFC agreement which demonstrates how impractical this requirement can be for a lessee:

"Removal of Engines

If an Engine is removed for testing, service, repair, maintenance, overhaul work, alterations or

modifications, title to such Engine will at all times remain vested in Lessor.

Lessee will be entitled to remove any of the Engines from the Aircraft and install another engine or engines on the Aircraft, provided that Lessee complies with each of the following obligations:

- (a) Lessee may only install engines specified in the flight manual on the Aircraft;*
- (b) the insurance requirements set forth in Article [] and Exhibit [] are in place;*
- (c) Lessee ensures that the identification plates referred to in Article [] are not removed from any Engine upon such Engine being detached from the Aircraft; and*
- (d) title to the Engine remains with Lessor free from all Security Interests (except Permitted Liens) regardless of the location of the Engine or its attachment to or detachment from the Aircraft.*

Installation of Engines on other aircraft

Any Engine removed from the Aircraft may be installed on another aircraft in Lessee's fleet which utilizes engines of the same type as the Engine only if one of the situations described in this Article [] exists:

- (a) Lessor is the owner of such other aircraft;*
- (b) Lessee has title to such other aircraft free and clear of all Security Interests (except Permitted Liens);*
- (c) Lessee, Lessor and all other relevant parties enter into a Recognition of Rights Agreement ("RORA") in the form and substance of Exhibit []. To the extent Lessee or any of the*

other relevant parties at any time request changes to the RORA, Lessee will reimburse Lessor and its lender for their reasonable attorneys' fees and costs in negotiating and finalizing the arrangements with Lessee and the other relevant parties;

- (d) *Such other aircraft is subject to a creditor agreement (but no other Security Interests except Permitted Liens) which by its terms expressly or effectively states that such creditor and its successors and assigns will not acquire any right, title or interest in any Engine by reason of such Engine being installed on such aircraft. To evidence the foregoing, at or before delivery, Lessee will provide Lessor with an opinion of counsel and officer's certificate as to this matter (and such opinion and officer's certificate will be provided during the Term with respect to other creditor agreements regarding aircraft entering Lessee's operating fleet subsequent to delivery). Lessee hereby agrees that if Lessor's title to an Engine is in fact impaired under any such creditor agreement, such impairment will be a Total Loss of such Engine and the provisions of Article [] will apply. To the extent another creditor agreement contains such provisions, then Lessor hereby agrees for the benefit of the creditor of such creditor agreement that neither Lessor nor its successors or assigns will acquire or claim any right, title or interest in any engine in which Lessee or another creditor has an interest as a result of such engine being installed on the Airframe."*

In light of the difficulty in agreeing the terms of a RORA, some lessors include restrictive covenants in their lease agreements which prohibit or limit the lessee's ability to interchange or swap equipment but, for the reasons given above, this is not a practical approach and will undoubtedly provide such lessors with a false sense of security. Other lessors, particularly those who are more experienced, tend to take a more pragmatic approach and,

recognizing that the administration of restrictive covenants in this regard is difficult at best, choose from two alternatives, namely: (a) title exchange, whereby the owner will acquire title to the substituted engine while it is on his airframe; or (b) title preservation, whereby title to the removed engine remains vested in the lessor. For a temporary removal of an engine or major component, the title exchange alternative is subject to many difficulties (e.g. the lessor may impose requirements as to the model, utility, age, condition and value of the replacement engine and such requirements are not practical in a temporary situation) and therefore title preservation seems to be the best of a bad situation.

Title exchange and the lessor's associated requirements as described above could only ever be applicable to situations where engines are permanently replaced, such as in the case of a total loss of an engine as contemplated in Article 10.4, but virtually never in normal maintenance procedures.

Since the introduction of engines composed of modules which are regularly exchanged during maintenance, it is virtually impossible to recognize an engine at any time during the term and categorically state that it is the same engine as originally installed. Once modules are replaced, an engine, while perfectly airworthy, is neither of the same utility or value as when it was delivered. This is a difficult issue to resolve as no lender will willingly agree to a provision allowing a lessee *carte blanche* to possibly decrease the value of the aircraft but, on the other hand, no responsible lessee could possibly declare in good faith that only engines of similar utility and value will be installed on the airframe.

No matter what restrictive language is finally agreed, the reality is that the lessee is going to administer its activities in a manner best suited for its own efficiency. In my view, it is best for lessors to face reality and live within the net of circumstances. They should agree that, except in cases of permanent replacement, engines can be freely exchanged within a lessee's fleet in the absence of an event of default that is continuing.

Notwithstanding all of the restrictive covenants and prohibitions which were undoubtedly present in the numerous leases and financing agreements affecting Pan Am's fleet, when that airline shut down permanently their aircraft and associated equipment were in a shambles. Aircraft not in use had parts removed and installed on other aircraft, engines which had problems were simply left in pieces in the maintenance shops while other engines were returned to lessors with parts missing –

with the result that several lessors discovered that returned aircraft were not in the redelivery condition contemplated in the lease agreement.³¹ My point is that no matter how carefully worded and negotiated the provisions with respect to maintenance and covenants regarding the preservation of security interests, they are of little value when the airline hits the skids. For those who argue that the breach of such provisions constitutes an event of default, I suggest that they should be able to find another reason to call a default (e.g. failure to pay rent) when the airline starts failing.³²]

10.6 Engine Thrust Rating

If an Engine is utilized by Lessee on the Airframe or any other airframe (or if the Engine is utilized by any sublessee or user under a pooling arrangement in accordance with the terms of this Agreement, at a thrust rating set forth in Appendix "A"), Lessee shall promptly notify Lessor and the amount of Supplemental Rent for such Engine set for Article 11.1.2 shall be increased in an amount proportional to the accelerated rate of deterioration of the Engine resulting from the increased thrust rating.

10.7 Information regarding Engines

Commencing with a report furnished ten (10) days after the end of the calendar Month of the Delivery Date, Lessee shall furnish to Lessor a Monthly report, in a form and substance reasonably acceptable to Lessor:

- (a) the hours/cycles operated for the Airframe;
- (b) the hours/cycles operated for each Engine and their location by airframe; and
- (c) a list of those service bulletins, airworthiness directives and engineering modifications incorporated on the Aircraft.

³¹ Michael Marray, *Setting a Precedent*, AIRFINANCE JOURNAL, March 1992, at 31.

³² See also: Frances Butler-Sloss, *Engine Swapping Among Financed Fleet Aircraft*, AIRFINANCE JOURNAL SUPPLEMENT, 1991, at 21.

Each Monthly report shall be furnished within ten (10) days after the end of each calendar Month, except that the Monthly report relating to the last Month (or any portion thereof) of the Term shall be furnished to Lessor on the Expiry Date or Termination Date, as the case may be.

10.8 Removal of Parts

Lessee shall, in the ordinary course of maintaining, servicing, repairing, overhauling or testing, be entitled to remove any Part from the Airframe or any Engine. Title to such Part shall, subject to the permanent replacement thereof in accordance with Article 10.9, remain vested in Lessor.

10.9 Permanent Replacement of Parts

Lessee shall promptly procure the replacement of any Part ("Original Part") which has become time-, cycle- or calendar expired, lost, stolen, seized, confiscated, destroyed, damaged beyond repair, unserviceable or permanently rendered unfit for use, with a part complying with the following conditions:

- (a) it is in as good operating condition, has substantially similar or more hours available until the next scheduled check, inspection, overhaul or shop visit, is of the same or a more advanced make and model and is of the same interchangeable modification status as, and of equivalent (or improved) value and utility, to the Original Part;
- (b) it has become and remains the property of Lessor free from Security Interests (other than Permitted Liens) and on installation on the Airframe or any Engine shall, without further act, be subject to this Agreement. To the extent permitted by the Laws of the State of Registration and lex situs, it is the intent of Lessor and Lessee that without further act and immediately upon any replacement part becoming incorporated, installed or attached to the Airframe or any Engine (i) title to the Original Part will thereupon vest in Lessee, free and clear of all rights of Lessor and Lessor's Lender (if applicable); (ii) title to the replacement part shall thereupon vest in Lessor free and clear of all rights of Lessee; and (iii) such replacement part shall become subject to this Agreement

and be deemed to be a Part hereunder to the same extent as the Original Part; and

- (c) Lessee has full details of such replacement part's service and maintenance records (which shall thereafter form part of the relevant Aircraft Documents).

Lessee may substitute for any Part a part that does not meet the requirements of Article 10.9(a) if a complying Part cannot be procured or installed within the available ground-time of the Aircraft provided that, as soon as practicable, the non-complying part is removed and replaced with a complying Part.

10.10 Removal and Interchange of Parts

Lessee shall be entitled to remove any Part from the Airframe or any Engine to interchange such Part:

- (a) provided Lessee ensures that no Part is removed from the Airframe or any Engine unless it is promptly replaced with a part of the same model as, or an improved or advanced version of, such Part and Lessee has full details of the service and maintenance records of the replacement part;
- (b) provided Lessee ensures that any Part which is not installed on the Airframe or any Engine (or an aircraft or engine permitted by Articles 10.10(c) and 10.11) is, except as expressly permitted by this Agreement, properly and safely stored and insured, and kept free from Security Interests (other than Permitted Liens); and
- (c) without prejudice to Article 10.10(a), if no Event of Default has occurred and is continuing, install such Part on an aircraft or engine operated by Lessee, provided that neither (i) the provisions of any applicable Law nor (ii) the terms of any lease or other agreement or Security Interest to which such aircraft or engine is subject, prohibits such installation or will have the effect at any time of divesting or impairing the title and interests of Lessor as owner and lessor and Lessor's Lenders (if applicable) as mortgagees of such Part.

10.11 Pooling of Engines and Parts with other Operators

With Lessor's prior written consent, such consent not to be unreasonably withheld or delayed, Lessee may subject the Engines and Parts to normal pooling arrangements with responsible international commercial air carriers customary in the airline industry and entered into by Lessee in the ordinary course of its business with respect to its fleet provided that, in the case of pooling of an Engine, such Engine is returned to Lessee within one (1) Month; no re-registration of the Engine occurs; all other terms and conditions of this Agreement continue to be observed with respect to such Engine or Part including, but not limited to, Articles 5, 8, 13, 14, 15, 16 and 17; and Lessee continues to be fully responsible to Lessor for the performance of all of its obligations hereunder.

10.12 Modifications

10.12.1 Lessor's Consent to Modifications

Lessee may, at its sole cost and expense, modify, convert, alter, add to or remove from the Aircraft or deviate from the Aircraft's original type, design or configuration ("Modification") and make such Modification to the Aircraft as Lessee may deem desirable in the proper conduct of its business provided that:

- (a) Lessee notifies Lessor of all such Modification and obtains Lessor's written consent, not to be unreasonably withheld or delayed, prior to effecting any such Modification. For the avoidance of doubt, Modifications do not include any applicable airworthiness directives or Manufacturer or Engine Manufacturer's recommended service bulletins, for which Lessor's consent is not required;
- (b) no Modification shall be made which has the effect of diminishing or impairing the utility, value, condition and airworthiness of the Aircraft, assuming that the Aircraft was then in the condition required to be maintained by the provisions of this Agreement or invalidating

any warranty given by the Manufacturer or Engine Manufacturer; and

- (c) no Modification shall be made by Lessee if an Event of Default exists and is continuing hereunder.

10.12.2 Documentation of Modification

Lessor may review Lessee's proposed designs, plans, engineering drawings and diagrams, flight and maintenance manual revisions for any proposed Modification. If requested by Lessor, Lessee shall furnish to Lessor, at Lessee's sole cost and expense, such other documents in final form and any other documents required by applicable Law, as a result of such Modification. All Modifications incorporated on the Aircraft shall be properly documented in the Aircraft Documents and be fully approved by the Manufacturer, Engine Manufacturer or Civil Aviation Authority.

10.12.3 Title of Modification

- (a) Unless otherwise agreed by Lessor in writing, all permanent or structural Modifications shall forthwith become a part of the Aircraft and Lessee relinquishes to Lessor all rights thereto.
- (b) Title to all Parts installed on the Aircraft as the result of a Modification shall, without further act, vest in Lessor subject to this Agreement, free and clear of all Security Interests. Lessee shall at its sole cost and expense take all such steps and execute, and procure the execution of, all such instruments as Lessor may require and which are necessary to ensure that title to such replacement Parts passes to Lessor according to all applicable Laws; provided, however, that so long as an Event of Default shall not have occurred and be continuing, at any time during the Term, Lessee may remove any such Part if (i) such Part is in addition to, and not in replacement of or in substitution for,

any Part originally installed on the Aircraft at the time of the delivery thereof hereunder (or any Part installed in replacement of or in substitution for any such original Part), (ii) such Part is not required to be installed on the Aircraft pursuant to the provisions of this Agreement and (c) such Part can be removed from the Aircraft without diminishing or impairing the value, utility, condition or airworthiness of the Aircraft below the value, utility, condition and airworthiness thereof immediately prior to such Modification, assuming the Aircraft was then in the condition required to be maintained by the provisions of this Agreement.

10.12.4 Removal of Modifications

- (a) Notwithstanding Article 10.12.3, all temporary and non-structural Modifications shall remain the property of Lessee and, at Lessor's request and Lessee's sole cost and expense, shall be removed from the Aircraft prior to the redelivery of the Aircraft to Lessor, with Lessee restoring the Aircraft to the condition it was in prior to the Modification in a manner cosmetically acceptable to Lessor. Notwithstanding the foregoing, no such removal shall be permitted without Lessor's permission after the occurrence of an Event of Default hereunder and immediately upon the occurrence of an Event of Default hereunder, without the requirement of any further act or notice, all right, title and interest in such Modification will immediately vest in Lessor.
- (b) Upon the removal by Lessee of any such Part as above provided, title thereto shall, without further act, vest in Lessee. Unless the Parties agree otherwise, any Part not removed by Lessee as above prior to the redelivery of the Aircraft to Lessor shall remain the property of Lessor as aforesaid.

10.12.5 No Lessor Liability for Modifications

Lessor shall not bear any liability whatsoever for the cost of Modifications of the Aircraft whether in the event of grounding or suspensions of certification, or any other cause.

10.13 Information regarding the Maintenance Program

If required by Lessor, Lessee shall provide Lessor with a copy of or information regarding the Approved Maintenance Program for the Aircraft.

ARTICLE 11 – USE OF SUPPLEMENTAL RENT**11.1 Use of Supplemental Rent****11.1.1 Airframe Supplemental Rent**

Lessor shall reimburse Lessee from maintenance reserves in respect of the Airframe for the actual cost of the structural inspection portion of completed scheduled "structural checks" as described in the Approved Maintenance Program (as may be amended) and the rectification of any structural deficiencies resulting from such inspection, with work performed for all other causes excluded, including those causes set forth in Article 11.3. Subject to Articles 11.2, 11.3 and 11.5, and excluding handling, packaging and shipping charges, reimbursement will be made up to the amount in such maintenance reserves.

11.1.2 Engine Supplemental Rent

- (a) Subject to the limitations set forth in Article 11.1.2(b), Lessor shall reimburse Lessee from maintenance reserves in respect of each Engine for the actual cost associated with performance restoration or the replacement of life-limited parts or permanent repair of on-condition Parts in the Engine during completed shop visits (i.e. heavy maintenance visits) requiring off-wing tear-down and/or disassembly, with work performed for all other causes excluded, including those causes set forth in Article 11.3. Subject to Articles 11.2, 11.3 and 11.5, and excluding handling, packaging and shipping charges, reimbursement for an Engine will be made up to the amount in the maintenance reserves applicable to such Engine.
- (b) Twenty percent (20%) of the per Flight Hour maintenance reserves payable by Lessee for an Engine will be designated and will be reimbursable solely for the replacement of life-limited parts in such Engine. Reimbursement

will further be limited as to each module of such Engine in accordance with the following percentages of the remaining total amount (after setting aside the portion of the maintenance reserves for an Engine applicable to the replacement of life-limited parts in such Engine) in the maintenance reserves for such Engine.

- 18% Module 1, Low Pressure Compressor and Gear Box
- 22% Module 2, High Pressure Compressor and Intermediate Case
- 44% Module 3, High Pressure Turbine Assembly and Diffuser Case and Combustor Assembly
- 16% Module 4, Low Pressure Turbine

Lessee may adjust the foregoing breakdown of percentage by increasing or decreasing any of the percentages by up to two percent (2%) per module, so long as the resulting total percentages add up to one hundred percent (100%).

11.1.3 Auxiliary Power Unit ("APU") Supplemental Rent

Lessor shall reimburse Lessee from maintenance reserves in respect of the APU for the actual cost of work on the APU in the nature of overhaul and requiring removal and disassembly with work performed for all other causes excluded, including those causes set forth in Article 11.3. Subject to Articles 11.2, 11.3 and 11.5, and excluding handling, packaging and shipping charges, reimbursement will be made up to the amount in such maintenance reserves.

11.1.4 Landing Gear Supplemental Rent

Lessor shall reimburse Lessee from maintenance reserves in respect of the left-hand main landing gear, right hand main landing gear and nose landing gear (collectively, the "Landing Gear") for the actual cost

of work on the Landing Gear in the nature of overhaul and requiring removal and disassembly with work performed for all other causes excluded, including those causes set forth in Article 11.3. Subject to Articles 11.2, 11.3 and 11.5, and excluding handling, packaging and shipping charges, reimbursement will be made up to the amount in such maintenance reserves.

[DISCUSSION: Unless the lessee is of a particularly good credit, it will probably be required to make regular payments towards a maintenance reserve fund (known as supplemental rent) held by, or for the benefit of, the lessor as collateral for the maintenance of the aircraft either in the case of the lessee's insolvency or as a contribution towards the cost of heavy maintenance should the same be scheduled after the expiration of the lease term. While these funds are considered as security, they should be regarded as contributing towards the value of the aircraft. In reality, the aircraft plus the maintenance reserves should equal the optimal residual value of the aircraft at any given time.³³]

11.2 Quarterly Reimbursement

Lessee shall be entitled to reimbursement from the relevant Supplemental Rent on a quarterly basis, after the work is completed and the Airframe or Engine has left the repair agency by submitting invoices and proper documentation.

11.2.1 Airframe

For the Airframe, proper documentation includes a list of all routine and non-routine work cards with corresponding references to the Approved Maintenance Program and an itemized labor and materials report.

11.2.2 Engine

For the Engine, proper documentation includes a description of the reason for removal, a shop teardown report, a shop findings report, a full description of the workscope and complete disk

³³ See: *supra*, Maintenance Reserves § 5.1.2.8.

records for the Engine both prior to and after the shop visit. Both the invoices supplied by the repair facility and that submitted by Lessee to Lessor with respect to an Engine will state whether or not credits were provided due to reduction of life remaining in Engine buildup and the amount of such credits will be itemized.

11.2.3 APU

For the APU, proper documentation includes a description of the reason for removal, a shop teardown report, a shop findings report, a full description of the workscope and complete disk records for the APU both prior to and after the shop visit. Both the invoices supplied by the repair facility and that submitted by Lessee to Lessor with respect to the APU will state whether or not credits were provided due to reduction of life remaining in Engine buildup and the amount of such credits will be itemized.

11.2.4 Landing Gear

For the landing gear, proper documentation includes a description of the reason for removal, a shop teardown report, a shop findings report, a full description of the workscope and complete disk records for the Engine both prior to and after the shop visit. Both the invoices supplied by the Engine repair facility and that submitted by Lessee to Lessor with respect to an Engine will state whether or not credits were provided due to reduction of life remaining in Engine buildup and the amount of such credits will be itemized.

[DISCUSSION: The invoices submitted to the lessor by the lessee for any completed maintenance should be thoroughly checked to ensure that the correct items are paid for out of the reserves. Often, when an aircraft is undergoing a "C" check, additional work may be carried out, such as deferred line items, which is not covered by the "C" check and therefore should not be reimbursed out of the reserves.]

11.3 Reimbursement Adjustment

By way of example, among the exclusions from reimbursement are those items resulting from repairs covered by Lessee's or a third party's insurance (deductibles being for the account of Lessee), or required as a result of an airworthiness directive, Manufacturer's and Engine Manufacturer's service bulletin, non-routine or non-scheduled maintenance, faulty maintenance or installation, improper operations, misuse, neglect, accident, incident, ingestion or other accidental cause. Reimbursement from the relevant Supplemental Rent shall not be available for the thrust reversers or any of their associated components. It is also the intent of the Parties that all invoices subject to reimbursement from Lessor will be reduced (by adjustment between Lessee and Lessor retroactively if necessary) by the actual amounts received by Lessee on account of such work from responsible third parties or other sources, such as insurance proceeds, Warranties, guarantees, concessions and credits (including with respect to Engines, credits due to reduction of life remaining in Engine buildup).

11.4 Costs in Excess of Supplemental Rent

Lessee will be responsible for payment of all costs in excess of the amounts reimbursed hereunder. If on any occasion the balance of the relevant Supplemental Rent in respect of the Airframe, an Engine, the APU or Landing Gear is insufficient to satisfy a claim for reimbursement in respect of the Airframe, such Engine, APU or Landing Gear, the shortfall may not be carried forward or made the subject of any further claim for reimbursement.

[DISCUSSION: If the maintenance reserves are insufficient to cover the expenditure of a "C" check, it may not necessarily mean that the reserves were under-funded because such reserves are determined on the basis of the full maintenance cycle and not of an individual check.]

11.5 Reimbursement after the Expiry Date or Termination Date

Lessee may not submit any invoice for reimbursement from the Supplemental Rent after the Expiry Date or Termination Date, as the case may be, unless on or prior to such date Lessee had notified Lessor in writing that such outstanding invoice will be submitted after the Expiry Date or Termination Date and the

anticipated amount of the invoice. So long as Lessee has provided such notice to Lessor, Lessee may then submit such outstanding invoice at any time within six (6) months after the Expiry Date or Termination Date.

11.6 Retention of Supplemental Rent

Subject to Article 11.5, any balance remaining of the Supplemental Rent on the Expiry Date or Termination Date, including termination on account of a Total Loss of the Aircraft, Airframe or Engine shall be retained by Lessor.

ARTICLE 12 – MANUFACTURERS' AND VENDORS' WARRANTIES**12.1 Assignable Warranties**

On the Delivery Date, Lessor shall assign to Lessee, for the duration of the Term, such rights as Lessor may have under any Warranty with respect to the Aircraft. Lessor makes no representations that there are any such Warranties, manufacturer's or otherwise, which still exist.

12.2 Non-Assignable Warranties

To the extent that any Warranty given to Lessor with respect to the Aircraft cannot be assigned, Lessee shall be entitled to take such action to enforce such Warranty in Lessor's own name and behalf, but subject to Lessee ensuring that Lessor is indemnified against all losses, damages, costs, expenses and liabilities thereby incurred or to be incurred.

12.3 Reassignment

On the Expiry Date or Termination Date, as the case may be, the benefit of any Warranty assigned by Lessor to Lessee shall be reassigned to Lessor or its designee. Lessee will also reassign to Lessor or its designee such Warranties (including Lessee's claim and rights to payment thereunder) during any period of an Event of Default. Lessee shall, at its sole cost and expense, do all such things and execute such documents as may be required for this purpose.

12.4 Warranty Claims

Lessee shall diligently and promptly pursue any valid claims it may have against the Manufacturer, Engine Manufacturer, or any other manufacturer or vendor with respect to the Aircraft and shall provide notice of the same to Lessor. Upon the request of Lessee, Lessor shall provide reasonable assistance to Lessee in the pursuit of such claims. Any cash payments to Lessee in respect of Warranty claims which are not in respect of compensation for loss of use of the Aircraft, any Engine or any Part during the Term shall be applied by Lessee to remedy the defect, if any, in the Aircraft, any Engine or any Part giving rise to such claim.

ARTICLE 13- TITLE AND REGISTRATION**13.1 Lessor's Title**

Title to the Aircraft throughout the Term shall be and remain vested in Lessor. Save as aforesaid, Lessor gives no condition, warranty or representation in respect of title or its interest in the Aircraft and all such conditions, warranties or representations, express or implied, statutory or otherwise, are hereby expressly excluded.

13.2 Lessee's Rights

Lessee shall have no right, title or interest in or to any part of the Aircraft except the rights expressly set out in this Agreement.

13.3 Registration of the Aircraft

Lessee shall:

- (a) register and maintain the registration of the Aircraft at the appropriate register with the Civil Aviation Authority in the name of Lessor (as lessor and owner) and with the interest of Lessee (as lessee and operator) duly recorded. Lessee shall not do or suffer to be done anything which can or may adversely affect the validity of the registration of the Aircraft with the Civil Aviation Authority; and
- (b) do any and all acts and things (including, but not limited to, making any filing or registration with the Civil Aviation Authority or any other Government Entity or as required to comply with the Geneva Convention where applicable) and execute and deliver any and all instruments and documents (including, but not limited to, any amendment of this Agreement that has been agreed by the Parties) as may be reasonably required by Lessor, including:
 - (i) following any change or proposed change in the ownership of the Aircraft or in the manner of securing Lessor's obligations to Lessor's Lenders (if applicable);

- (ii) following any Modification of the Aircraft, any Engine or any Part or the permanent replacement of any Engine or Part in accordance with this Agreement, so as to ensure that the rights of Lessor (as owner) of the Aircraft and under this Agreement apply with the same effect as before; and
- (iii) establishing, maintaining, preserving, perfecting and protecting the rights of Lessor and Lessor's Lenders (if applicable) under this Agreement or in the Aircraft and any other agreement(s) entered into between Lessor and Lessee in connection with the Aircraft and, in particular, including, but not limited to, if, in the State of Registration there shall be, or shall be brought into force, any legislative or other provisions giving effect to the Geneva Convention or otherwise relating to recognition of rights in aircraft, Lessee shall, at its sole cost and expense, forthwith do all such acts as may be necessary to perfect recognition of Lessor's title to and interest in the Aircraft and the rights of Lessor's Lenders (if applicable) in accordance with such legislative or other provisions.

13.4 Filing of this Agreement

To the extent permitted by Law and in accordance with the requirements of the Law from time to time, Lessee shall cause this Agreement to be kept, filed, recorded or refiled or rerecorded in the State of Registration and in any other offices necessary to protect Lessor's rights hereunder.

13.5 Evidence of Registration and Filings

At Lessor's request from time to time, Lessee shall furnish to Lessor an opinion of counsel or other evidence reasonably satisfactory to Lessor of the registrations and filings required hereunder.

ARTICLE 14 – INSURANCE**14.1 Insurances****14.1.1 General**

From the Delivery Date until the expiration or termination of the Term and redelivery of the Aircraft to Lessor in accordance with Article 20, Lessee shall, at its sole cost and expense, effect and maintain or cause to be effected and maintained, in full force and effect, insurances in respect of the Aircraft in form and substance reasonably satisfactory to Lessor (the "Insurances", which expression shall where the context so admits include any relevant re-insurance(s) obtained in respect thereof).

14.1.2 Brokers

The Insurances shall be effected through such brokers and with such insurers, and shall be subject to such deductibles and exclusions, as may (in each case) be approved by Lessor, such approval not to be unreasonably withheld or delayed.

14.1.3 Insurances/Reinsurances

The Insurances shall be effected either:

- (a) on a direct basis with insurers of recognized standing who normally participate in aviation insurances in the leading international insurance markets and led by reputable underwriter(s) reasonably approved by Lessor; or
- (b) with a single insurer or group of insurers reasonably approved by Lessor who does not fully retain the risk but effects substantial reinsurance with reinsurers in the leading international aviation markets and through brokers each of recognized standing and reasonably acceptable to Lessor for a

percentage reasonably acceptable to Lessor (the "Reinsurances").

14.2 Requirements

Lessor's current requirements as to the Insurances as at the date of this Agreement are as specified in this Article 14 and in Appendices "G" and "H". Lessor shall be entitled from time to time to stipulate other requirements for the Insurances based on what is generally available in the leading international aviation insurance market so that (a) the scope and level of cover are maintained in line with the insurance programs of major international airlines; and (b) the interests of Lessor and the other Indemnitees continue to be fully protected. Lessee agrees to comply with the requirements set out in this Article 14 and Appendices "G" and "H" and any other stipulated reasonable requirements. Lessee further agrees that, without prejudice to the requirements set out in this Article 14 and Appendices "G" and "H", it will not in any way adversely discriminate against the Aircraft by comparison to other aircraft operated by Lessee.

14.3 Change

Subject to the parameters established in this Article 14 and Appendices "G" and "H", if at any time Lessor wishes to revoke its approval of any insurer, reinsurer, Insurances or Reinsurances, Lessor and/or its brokers shall consult with Lessee and Lessee's insurers or, if applicable, brokers (as for the time being approved by Lessor) regarding whether same should be changed to protect the interests of the parties insured. If, following such consultation, Lessor in its reasonable opinion considers that any change should be made, Lessee shall then promptly arrange or procure the arrangement of alternative insurance or reinsurance cover satisfactory to Lessor.

14.4 Renewal

Lessee shall commence renewal procedures at least thirty (30) days prior to the expiration or termination date of any Insurances and shall provide or cause to be provided to Lessor:

- (a) confirmation of completion of renewal prior to the expiry or termination date; and

- (b) certificates of Insurances (and where appropriate certificates of Reinsurances), and a brokers' letter of undertaking in substantially in the forms set forth in Appendices "H" and "I", in the English language, within seven (7) days before the renewal date.

14.5 Compliance with Legal Requirements

Lessee shall comply with all legal requirements as to insurance of the Aircraft or any part thereof which may from time to time be imposed by the Laws of the State of Registration or any state to, from or over which the Aircraft is flown insofar as they affect or concern the operation of the Aircraft and, in particular, those requirements compliance with which it is necessary to ensure that the Aircraft is not in danger of detention or forfeiture, the Insurances remain valid and in full force and effect and the interests of the Indemnitees in the Insurances and the Aircraft or any part thereof are not thereby prejudiced.

14.6 Compliance with Policies

Lessee shall not use, cause or permit the Aircraft to be used for any purpose or in any manner not covered by the Insurances or any insurances or outside any geographical limit imposed by such Insurances or any such insurance. Lessee shall comply, and procure compliance, with the terms and conditions of each and every policy of the Insurances and shall not do, consent or agree to any act or omission which invalidates or may invalidate or renders unenforceable or may render void, voidable or unenforceable the whole or any part of any such Insurances or bring any particular insured liability within the scope of an exclusion of or exception to the Insurances.

14.7 Assignment

If Lessor or any other Indemnitee assigns its rights or any part thereof in the Aircraft and/or the Insurances, Lessee shall, upon request and subject to the agreement of the insurers, procure that the assignee shall be added as additional assured in any policy effected under this Article 14, so as to enjoy the same rights and insurances enjoyed by the assignor under the insurance policy or policies and any amendments thereof.

14.8 Other Insurances

Lessee shall not without the prior written consent of Lessor take out or maintain insurances with respect to the Aircraft other than those required under this Article 14 unless relating solely to liability insurances, hull total loss only coverage or other coverage the effect of which will not be prejudicial to the Indemnitees.

14.9 Information

Lessee shall provide Lessor with any information reasonably requested by Lessor from time to time concerning such Insurances or Reinsurances including, but not limited to, evidence of the Insurances satisfactory of Lessor in addition to the certificates of Insurances or Reinsurances required hereunder and evidence of premium payment.

14.10 Failure to Insure

If at any time Insurances in compliance with this Agreement cease to be in full force and effect or if Lessor considers that the Insurances arranged are inadequate in any respect, then (without prejudice to any other rights which Lessor may have acquired under this Agreement by reason of such failure):

14.10.1 Ground the Aircraft

Lessee shall, if the result thereof is that (x) hull and hull war insurance on the conditions specified in this Agreement in an amount at least equal to the Agreed Value or (y) liability insurance on the conditions specified in this Agreement in the amount at least equal to the Minimum Liability Coverage is not in force with respect to the Aircraft, forthwith ground the Aircraft and shall keep the Aircraft grounded until such time as the Insurances shall again be in full force and effect or until, if earlier, Lessor gives its consent for the Aircraft to continue to be operated.

14.10.2 Further Action by Lessor

Lessee shall immediately notify Lessor of the non-compliance and provide Lessor with full details of

any steps which Lessee is taking, or proposes to take, and Lessor shall be entitled, but not bound (without prejudice to any other rights which it may have or acquire under this Agreement by reason of such non-compliance);

- (a) to pay the premiums due or to effect and maintain insurances satisfactory to Lessor (including without limitation to effect and maintain, at Lessee's sole cost and expense, an alternative policy in such form as Lessor considers necessary or desirable) as Lessor considers appropriate. Any sums so expended by Lessor shall become immediately due and payable by Lessee together with Default Interest thereon from the date of expenditure by Lessor up to the date of reimbursement by Lessee; and
- (b) at any time while Insurances in compliance with this Agreement are not in full force and effect (unless Lessor is satisfied that the rights of Lessor and Lessor's Lenders (if applicable) are not materially prejudiced or imperiled), to require the Aircraft to remain at any airport or (as the case may be), to proceed to and remain at any airport designated by Lessor until Insurances in compliance with this Agreement are in full force and effect to Lessor's satisfaction.

14.10.3 Owner's Interest Policy

If, at any time, Lessor considers that the Insurances effected by Lessee with respect to the Aircraft do not provide to Lessor and the other Indemnitees a satisfactory breach of warranty endorsement (in the case of hull and war risk policies) or a satisfactory breach of warranty endorsement or cross-liability or severability of interests clause (in the case of liability policies), Lessor shall consult with Lessee and its insurers and/or brokers and if, following consultation, Lessor still considers this to be the case, they shall be entitled to effect and maintain, at

Lessee's sole cost and expense, an "owner's interest" policy in favor of Lessor and the other Indemnitees with such insurers and in such form as Lessor may consider appropriate.

14.11 Continuing Insurance for Indemnity

Lessor may require Lessee to effect and maintain (at no cost to Lessor) insurance after the Expiry Date or Termination Date, as the case may be, with respect to its liability under the indemnity in Article 16 for such period as Lessor may reasonably require (but in any event for not more than two (2) years or until completion of the next major check with respect to the Aircraft (whichever is the earlier to occur) which provides for each Indemnatee to be named as additional insured. Lessee's obligation in this Article 14 shall not be affected by Lessee ceasing to be lessee of the Aircraft and/or any of the Indemnitees ceasing to have any interest in the Aircraft.

14.12 AVN 2000

Without in any way limiting Lessee's obligations under the other provisions of this Article 14, Lessee undertakes that if, at any time, clause "AVN2000 Date Recognition Exclusion Clause" or any equivalent clause is endorsed on the policies of Insurances required hereunder, Lessee shall, at its sole cost and expense, do all things and take any and all such action available to it to ensure that the interests of Lessor and the other Indemnitees under such policies of Insurances are fully protected (including, but not limited to, using its best efforts to ensure that clauses "AVN2001 Date Recognition Limited Coverage Clause" and "AVN2002 Date Recognition Limited Coverage Clause" or any equivalent clauses available in the leading international aviation insurance market ("Write-back Clauses") are endorsed on the policies of Insurances required hereunder as soon as possible thereafter). If at any time Lessor shall be of the reasonable opinion that the interests of Lessor and the other Indemnitees in the Insurances are not adequately protected by reason of the operation of clause "AVN2000 Date Recognition Exclusion Clause" or any equivalent clause, notwithstanding that Write-back Clauses have been endorsed on such policies, Lessor may (but shall not be obliged to) take out such policy of insurance in the leading international aviation market to insure Lessor and the other Indemnitees against such risks as Lessor may think fit

(acting reasonably) and Lessee shall indemnify and does hereby indemnify Lessor against any and all costs incurred in connection therewith.

[DISCUSSION: The objective of the insurance provisions³⁴ is two-fold: (i) to protect the lessor's investment in the leased equipment (all risk hull and engine insurance) and (ii) to protect the parties from liability to a third party resulting from an injury to the third party's person or property (public legal liability and property damage). At the beginning of negotiations, the lessee should immediately send, among other things, Articles 14, 15 and 16, Appendices "G" and "H" and relevant definitions to its insurance broker for comment or written approval, as the case may be, as to acceptability of the contemplated insurance provisions in light of the lessee's existing policies. The broker should also be advised of any negotiated changes and provided with copies of the final, agreed insurance provisions prior to the lessee's execution of the agreement.]

³⁴ See: *supra*, Insurance § 5.1.I.

ARTICLE 15 – LOSS, DAMAGE AND REQUISITION**15.1 Notice of Total Loss**

Unless a Total Loss of the Aircraft, Airframe or any Engine occurs prior to the Delivery Date, Lessee shall notify Lessor in writing within two (2) Business Days after a Total Loss of the Aircraft, Airframe or any Engine.

15.2 Total Loss of Aircraft or Airframe**15.2.1 Total Loss prior to the Delivery Date**

If a Total Loss of the Aircraft or Airframe occurs prior to the Delivery Date of the Aircraft, this Agreement shall immediately terminate, and Lessor shall return to Lessee the Security Deposit in accordance with Article 19.3 and any prepaid Basic Rent, without interest. Thereafter, neither Party shall have any further obligation or liability under this Agreement in respect of the Aircraft.

15.2.2 Total Loss during the Term

If a Total Loss of the Aircraft or Airframe occurs during the Term, until receipt by Lessor of the Agreed Value and all other amounts then due under this Agreement, Lessee shall continue to pay Basic Rent and, to the extent applicable, the Parties shall perform all of their obligations under this Agreement.

15.3 Payment on Total Loss

On the date which is the earlier of (x) the date on which the Total Loss Proceeds of the Aircraft or the Airframe are received by Lessor; and (y) the date which falls thirty (30) days after the Total Loss Date (the "Due Date"), Lessee shall pay to Lessor an amount equal to the sum of:

- (a) the Agreed Value; and
- (b) all other amounts then accrued under this Agreement

less an amount equal to the Net Total Loss Proceeds received by Lessor by such date.

15.4 Application of Proceeds

Lessor shall apply the Net Total Loss Proceeds and any amount received from Lessee pursuant to this Article 15.3 as follows:

- (a) first, in discharge of any unpaid Basic Rent and any other amounts accrued and unpaid up to the date of Lessor's receipt of the Agreed Value;
- (b) second, in discharge of the Agreed Value together with Default Interest thereon for any period from the Due Date up to the date of discharge; and
- (c) third, payment of the balance, if any, to Lessee.

Upon receipt by Lessor of all moneys payable by Lessee pursuant to this Article 15 provided no Event of Default has occurred and is continuing, this Agreement will terminate except for Lessee's obligations under Articles 8.9, 16 and 17 which shall survive the Termination Date.

FOR THE AVOIDANCE OF DOUBT, THE AGREED VALUE OF THE AIRCRAFT SHALL BE PAYABLE BY LESSEE PURSUANT TO ARTICLE 15.2 WHEN A TOTAL LOSS OF THE AIRFRAME OCCURS EVEN IF THERE HAS NOT BEEN A TOTAL LOSS OF AN ENGINE OR ENGINES.

15.5 Other Loss or Damage

15.5.1 Lessee's continuing obligations

If the Aircraft or any part thereof suffers loss or damage not constituting a Total Loss of the Aircraft or Airframe or any Engine, all the obligations of Lessee under this Agreement including, but not limited to, payment of Basic Rent, shall continue in full force and effect and Lessee shall, at its sole cost and expense, promptly procure the repair or replacement of all damaged or lost Parts in accordance with this Agreement.

15.5.2 Repair of Damage

- (a) In the event of any loss or damage to the Aircraft, Airframe or any Engine, which does not constitute a Total Loss of the Aircraft, Airframe, or such Engine, Lessee shall at its sole cost and expense fully repair the Aircraft, Airframe or Engine in order that the same is placed in an airworthy condition and substantially the same condition as it was prior to such loss or damage.
- (b) Lessee shall notify Lessor forthwith of any loss, theft or damage to the Aircraft for which the cost of repairs is estimated to exceed the Damage Notification Threshold and shall provide Lessor with Lessee's proposal for carrying out the repair. In the event that Lessor does not agree with Lessee's proposal for repair, Lessor shall so notify Lessee within two (2) Business Days after its receipt of such proposal. The Parties shall then consult with the Manufacturer or Engine Manufacturer and hereby agree to accept as conclusive, and to be bound by, the Manufacturer or Engine Manufacturer's directions or recommendations as to the manner in which to carry out such repairs. If the Manufacturer or Engine Manufacturer declines to give directions or recommendations, Lessee shall carry out the repairs in accordance with the directions of Lessor.
- (c) To the extent insurance proceeds received by Lessee directly from its insurers do not cover the cost of such repair work on the Aircraft, Airframe or Engine and Lessor has received additional insurance proceeds from Lessee's insurers with respect to such repair work, Lessor shall (subject to Lessor's right to deduct therefrom any amounts then due and payable by Lessee under this Agreement and submission by Lessee of reasonable documentation in support of such excess repair

costs) pay to Lessee insurance proceeds received by Lessor as and when such repair work is performed on the Aircraft, Airframe or Engine.

15.6 Surviving Engine(s)

If a Total Loss of the Airframe occurs and there has not been a Total Loss of any Engine (the "Surviving Engine") then, provided no Event of Default has occurred and is continuing, Lessor shall, subject to any applicable rights of salvage or of the insurers, transfer all its right, title and interest in the Surviving Engine(s) to Lessee, but without any responsibility, condition or warranty whatsoever on the part of Lessor other than as to freedom from encumbrances created by Lessor upon receipt of all amounts referred to in Article 15.3.

If prior to the transfer of title to a Surviving Engine, such Surviving Engine shall become a Total Loss, all insurance proceeds received in respect thereof shall, provided Lessor has received all amounts referred to in Article 15.3, be paid to Lessee.

15.7 Total Loss of Engine and not Airframe

15.7.1 Destroyed Engine

Upon a Total Loss of any Engine not installed on the Aircraft or a Total Loss of an Engine installed on the Airframe not involving a Total Loss of the Airframe (in either case, a "Destroyed Engine"), Lessee shall give Lessor prompt written notice thereof and Lessee shall replace the Destroyed Engine as soon as reasonably possible by ensuring that Lessor acquires, at Lessee's sole cost and expense, title to another engine complying with Article 10.4. Such replacement engine shall, upon acquisition by Lessor, be an Engine as defined herein.

15.7.2 Replacement Engine

- (a) Lessee agrees at its sole cost and expense to take such action as Lessor may reasonably request in order that any such replacement Engine becomes the property of Lessor and is

leased hereunder on the same terms as the Destroyed Engine.

- (b) Upon full compliance by Lessee with the terms of Articles 10.4 and 15.7, Lessor shall, subject to any rights of the insurers, transfer to Lessee all of its rights, title and interest in and to the Destroyed Engine free and clear of all Lessor's Liens and any Security Interest.
- (c) Lessee's obligation to pay Basic Rent shall continue in full force and effect, but an amount equal to the Net Total Loss Proceeds received by Lessor with respect to the Destroyed Engine shall, subject to Lessor's right to deduct therefrom any amounts then due and payable by Lessee under this Agreement, be paid to Lessee.

15.8 Copy of Insurance Policy

Promptly after the occurrence of a partial loss or Total Loss of the Aircraft or an Engine, Lessee shall provide Lessor with a copy of Lessee's insurance policy.

15.9 Government Requisition

15.9.1 Lessee's Continuing Obligations

If the Aircraft, Airframe or any Engine is requisitioned for use by any Government Entity or other competent authority during the Term then, unless and until the Aircraft, Airframe or such Engine becomes a Total Loss following such requisition and Lessee shall have paid to Lessor all sums due pursuant to Article 15.2, the leasing of the Aircraft to Lessee under this Agreement shall continue in full force and effect for the remainder of the Term and Lessee shall remain fully responsible for performance and observance of all its obligations under this Agreement, other than obligations with which Lessee is unable to comply solely by virtue of such requisition.

15.9.2 Condition of Aircraft

Lessee shall, as soon as practicable after the end of the requisition for hire, and whether such requisition shall end during or after the expiration or termination of the Term, cause the Aircraft, Airframe or any Engine to be put into the condition required by this Agreement.

15.9.3 Application of Compensation received for Requisition

Lessor shall apply any compensation actually received by it as a result of the requisition for hire of the Aircraft, Airframe or Engines in or towards discharge of Basic Rent and other amounts due from Lessee hereunder (including such amounts as may be required to restore the Aircraft to the condition required by this Agreement after the end of such requisition and shall, provided no Event of Default has occurred or is continuing, release to Lessee any surplus remaining after such application.

15.9.4 Requisition at the end of the Term

If the Aircraft, Airframe or any Engine is under requisition for hire at the end of the Term, the leasing of the Aircraft under this Agreement shall (unless otherwise agreed between the Parties) nevertheless be terminated at such end, but without prejudice to the accrued rights of the Parties including, without prejudice to the generality of the foregoing, Lessee's obligation at Article 15.9.2.

15.10 Lessor Retention of Supplemental Rent

For the avoidance of doubt, the Parties agree that notwithstanding the Total Loss of the Aircraft, Airframe or any Engine, Lessor shall retain all Supplemental Rent paid by Lessee and not reimbursable by Lessor pursuant to Article 11.

[DISCUSSION: Since the supplemental rent (i.e. maintenance reserves) is actually paid as a collateral security by the lessee to the lessor, in the event of a total loss of the aircraft the lessee should be entitled to a return of the remaining balance of the maintenance

reserves provided, of course, that the lessor has received payment of the agreed value. Whilst some lessors agree with this position, others do not. This point is generally the subject of extensive negotiation but a compromise may be achieved where the parties agree to share on a predetermined formula.^{35]}

³⁵ See: *supra*, Maintenance Reserves § 5.1.2.8.

ARTICLE 16 – INDEMNITIES**16.1 General Indemnities**

Lessee agrees at all times to defend, indemnify and hold each of the Indemnitees harmless from and against any and all Losses imposed on, incurred by or asserted against any Indemnitee in anyway relating to, based on or arising out of the following:

- (a) this Agreement or any transactions contemplated hereby;
- (b) the operation, possession, use, non-use, control, leasing, subleasing, maintenance, storage, overhaul, testing, inspection at delivery and redelivery of the Aircraft, Engine or any Part whatsoever, whether or not the same is in compliance with the terms of this Agreement including, but not limited to, claims for death, personal injury, property damage, other loss or harm to any person whatsoever and claims relating to any Laws including, but not limited to, environmental control, noise and pollution laws, rules or regulations;
- (c) the manufacture, design, sale, purchase, acceptance, rejection, delivery, redelivery, import, export, condition, repair, modification, servicing, rebuilding, enforcement of Warranties whether in Lessor's or Lessee's name, airworthiness, registration, re-registration, performance, non-delivery, sublease, merchantability, fitness for use, substitution or replacement of the Aircraft, Engine or any Part pursuant to this Agreement or other transfer of use or possession of the Aircraft, Engine or any Part including, but not limited to, latent and other defects, whether or not discoverable, and patent, trademark or copyright infringement;
- (d) any non-compliance by Lessee with any term or condition of this Agreement or the falsity or inaccuracy of any representation or warranty of Lessee set forth in Article 2;
- (e) the prevention or attempt to prevent the arrest, confiscation, seizure, taking in, execution, impounding, forfeiture or detention of the Aircraft or in securing the release of the Aircraft; or

- (f) as a consequence of any failure by Lessee in the payment of any amount to be paid by Lessee when due under this Agreement or any other failure by Lessee in the due and punctual performance of its obligations under this Agreement.

The foregoing indemnities by Lessee are intended to include and cover any Losses to which an Indemnitee may be subject (in contract, tort, strict liability or under any other theory) regardless of the negligence, active or passive or any other type, of such Indemnitee, so long as such Losses do not fall within any of the exceptions contained in Article 16.2.

16.2 Exceptions to General Indemnities

The indemnities contemplated at Article 16.1 shall not extend to Losses of any Indemnitee to the extent that such Losses are mutually agreed by the Parties, or absent mutual agreement have been judicially determined:

- (a) to have resulted from the gross negligence or willful misconduct of that Indemnitee; or
- (b) to be attributable to acts or events which occur after the Expiry Date or Termination Date, as the case may be, and redelivery of the Aircraft to Lessor in the condition required by this Agreement, but in any such case only to the extent not attributable to acts or omissions of Lessee.

16.3 Defense of Losses

Unless an Event of Default has occurred and is continuing, Lessee and its insurers shall have the right (but not the obligation), at Lessee's sole cost and expense, to investigate or, provided that Lessee or its insurers have not reserved the right to dispute liability with respect to any insurance policies pursuant to which coverage is sought, defend or compromise any claim covered by insurance for which indemnification is sought pursuant to Article 16.1 and each Indemnitee shall co-operate with Lessee or its insurers with respect thereto.

16.4 After-Tax Basis

The amount which Lessee shall be required to pay with respect to any Losses indemnified against pursuant to Article 16.1 shall be an amount sufficient to restore the Indemnitee, on an after-tax basis, to the same position such Indemnitee would have been in had such Losses not been incurred.

16.5 Timing of Payment

It is the intent of the Parties that each Indemnitee shall have the right to the indemnities set forth in Article 16.1 whether or not liability is established (but without prejudice to the obligations of both Parties under Article 16.3). Lessee shall pay an Indemnitee pursuant to this Article 16 within ten (10) days after receipt of a written demand therefore from such Indemnitee accompanied by a written statement describing in reasonable detail the basis for such indemnity.

16.6 Subrogation

Upon the payment in full of any indemnities pursuant to this Article 16 by Lessee, Lessee will be subrogated to any right of the Indemnitee in respect of the matter against which such indemnity has been made.

16.7 Notice

Each Indemnitee and Lessee shall give prompt written notice one to the other of any liability of which such party has knowledge for which Lessee, is or may be, liable pursuant to this Article 16, provided, however, that failure to give such notice shall not terminate any of the rights of Indemnitees under this Article 16 except to the extent that Lessee has been materially prejudiced by the failure to provide such notice.

16.8 Refunds

If any Indemnitee obtains a recovery of all or any part of any amount which Lessee has paid to such Indemnitee, such Indemnitee shall pay to Lessee the net amount recovered by such Indemnitee.

16.9 Survival of Obligation

Notwithstanding any provision of this Agreement to the contrary, the indemnities by Lessee in favor of the Indemnitees shall continue in full force and effect notwithstanding any breach by Lessor or Lessee of this Agreement, the termination of the lease of the Aircraft to Lessee under this Agreement or the repudiation by either Party of this Agreement. The representatives, warranties, indemnities and agreements of Lessee provided in this Article 16 shall survive the Expiry Date or Termination Date, as the case may be.

[DISCUSSION: Indemnities are basically divided into two types: general indemnities on the operation of the aircraft and tax indemnities.

The purpose of a general indemnity is to protect the vendor or the lessor and any relevant lender or head lessor against potential claims or losses resulting from the lessee's operations³⁶. Most indemnities are covered by the lessee's insurance but this may not always be the case and as such all indemnification provisions in any agreement should be reviewed by the lessee's insurance broker at the beginning of the agreement and ultimately approved by him in writing prior to the lessee's execution of the agreement. On occasion there are provisions which are requested but not covered by the existing insurance and consequently should be deleted from the indemnity provisions and adequate and appropriate insurance put into place to cover such provisions. In cases where there is technical disagreement between the parties, it is sometimes advisable to have the lessor's and lessee's insurance representatives work out the details. Normally, the lessor is able to live with the limits of the lessee's existing insurance coverage, as it can be difficult for the lessee to renegotiate an insurance policy simply because a particular lessor requires different coverage.³⁷

The indemnification provisions of aviation transactions are probably the most frustrating and misunderstood subjects of transaction negotiations. Lessees and their non-aviation lawyers can never seem to understand why a lessor should be indemnified for damages which should actually be its responsibility and purchasers balk at having to

³⁶ A contract of indemnity is an undertaking by one party to indemnify the other against a liability or loss irrespective of whether there is default by the other party and independent of who is to blame for the loss. See also: *supra*, Guarantees and Indemnities § 4.3.3.

³⁷ With the introduction of AVN-67 by the aviation industry in 1994 and subsequently AVN-67B which is currently in effect, the requirements of lessor and lenders which underwriters are prepared to cover have been set in stone and have been generally accepted by the industry. Consequently, there should not be any great discrepancies between the expectations of lessors and bankers and the coverage available. See: *supra*, Description of Risk § 5.1.1.2(a).

indemnify sellers of aircraft for periods of up to three years or the next heavy check after the sale. Yet indemnification is essentially a straightforward insurance and risk-assignment concept. The lessor who leases a used aircraft to an airline does not want to be a party to a claim for damages if any part of the aircraft fails. In the event of an accident, there will always been a question as to who was responsible for repairs affecting the failed part and how many lawyers will be paid to represent the parties involved. It is much better to have one party assume responsibility through indemnification and lay off the risk through insurance. Taking the problem one step further, lenders and financial lessors have no relationship to the aircraft physically and insist on being held harmless. The same issue lies with the vendor who ceases to purchase insurance with respect to the aircraft and wishes to ride the coattails of the purchaser's insurance. This is well understood and accepted practice in the industry and works well.

The following points should be considered when negotiating general indemnity provisions:

- (a) the time period should be expressly stated;*
- (b) negligence or willful misconduct of any indemnitee, its employees or agents should not be indemnified;*
- (c) the indemnitees should be obliged to mitigate their damages; and*
- (d) the indemnitees should not be permitted to settle any claim without the lessee's approval.^{38]}*

³⁸ See also: Stephen C. Kenny, *Indemnities and Risks in Aircraft Deals*, AIRFINANCE JOURNAL, December 1984, at 41; Robert Ricketts, *Rites of Passage*, COMMUTER WORLD, August-September 1996, at 29.

ARTICLE 17 – TAXES**17.1 General Obligations**

Except as set forth in Article 17.2, Lessee agrees to promptly pay when due, and to indemnify and hold Lessor and the other Indemnitees harmless on a full indemnity basis from all license and registration fees and all Taxes, fees, levies, imposts, charges, duties, deductions or withholdings of any nature whatsoever together with any assessments, fines, additions to tax or interest thereon, howsoever or wherever imposed (whether imposed upon Lessor, Lessee or all or part of the Aircraft or Engines or otherwise) by any Government Entity or taxing authority in the state of incorporation of Lessee or Lessor or the State of Registration or any foreign country or by any international taxing authority upon or with respect to, based upon or measured by any of the following:

- (a) the Aircraft, the Engines or any Parts;
- (b) the use, operation or maintenance of the Aircraft or carriage of passengers, cargo and mail during the Term;
- (c) this Agreement, the payments due hereunder and the terms and conditions hereof; and
- (d) the purchase, ownership, delivery, financing, import or export, return, sale, payment of Total Loss Proceeds or other disposition of the Aircraft.

17.2 Exceptions to Indemnities

The indemnities provided for in Article 17.1 does not extend to any of the following Taxes:

- (a) imposed by the Government Entity of the state of incorporation of Lessor on Lessor's net income, gross receipts, capital or net worth;
- (b) imposed as a result of Lessor's transfer or other disposition of the Aircraft or this Agreement except a transfer or sale resulting from Lessee's default hereunder or the loss of the Aircraft or any part thereof (if and to the extent that such Taxes exceed the Taxes which would have been imposed

and in respect of which Lessee would have been liable to indemnify Lessor under this Agreement had Lessor not so transferred its interest);

- (c) attributable to Lessor's gross negligence, willful misconduct or breach of this Agreement; and
- (d) attributable to the period prior to the Delivery Date or after redelivery of the Aircraft to Lessor in accordance with this Agreement.

17.3 After-Tax Basis

The amount which Lessee is required to pay with respect to any Taxes indemnified against under Article 17.1 is an amount sufficient to restore Lessor on an after-tax basis to the same position Lessor would have been in had such Taxes not been incurred.

17.4 Timing of Payment

Any amount payable to Lessor pursuant to this Article 17 will be paid within ten (10) days after receipt of a written demand therefor from Lessor accompanied by a written statement describing in reasonable detail the basis for such indemnity and the computation of the amount so payable; provided, however, that such amount need not be paid by Lessee prior to the earlier of (i) the date any Tax is payable to the appropriate Government Entity or taxing authority or (ii) in the case of amounts which are being contested by Lessee in good faith or by Lessor pursuant to Article 17.6, the date such contest is finally resolved.

17.5 Subrogation

Upon the payment in full of any Tax pursuant to this Article 17 by Lessee, Lessee shall be subrogated to any right of Lessor in respect of the Tax paid by Lessee pursuant to this Article 17.

17.6 Contests

If a claim is made against Lessor for Taxes with respect to which Lessee is liable for a payment or indemnity under this Agreement, Lessor shall promptly give Lessee notice in writing of such claim; provided, however, that Lessor's failure to give

notice shall not relieve Lessee of its obligations hereunder unless such failure materially impairs or precludes Lessee's ability to contest the claim. So long as (i) a contest of such Taxes does not involve any danger of the sale, forfeiture or loss of the Aircraft or any interest therein; (ii) if Lessor so requests Lessee has provided Lessor with an opinion of independent tax counsel that a reasonable basis exists for contesting such claim and (iii) adequate reserves have been made for payment of such Taxes or, if required, an adequate bond has been posted, then Lessor at Lessee's written request shall, in good faith, with due diligence and at Lessee's sole cost and expense, contest (or permit Lessee to contest in the name of Lessee or Lessor) the validity, applicability or amount of such Taxes.

17.7 Refunds

Upon receipt by Lessor of a refund of all or any part of any Taxes (including any deductions or withholdings referred to in Article 6.9) which Lessee has paid, Lessor shall pay to Lessee the net amount of such Taxes refunded.

17.8 Co-operation in Filing Tax Returns

Lessee and Lessor shall co-operate with one another in providing information which may be reasonably required to fulfill each Party's tax filing requirements and any audit information request arising from such filing.

17.9 Survival of Obligations

The representations, warranties, indemnities and agreements of Lessee provided for in this Article 17 shall survive the Expiry Date or Termination Date, as the case may be.

[DISCUSSION: Due to the significance of tax benefits in leasing transactions, the loss of such benefits could turn a positive situation very negative. Frequently, lessors enter into leases primarily for their tax shelter benefits including interest, depreciation and any investment tax credits.³⁹ Consequently, the loss of these advantages could be devastating, particularly if the asset loses its tax qualification and the lessor becomes liable for a claw-back of previously used tax benefits at the hands of a tax authority together with penalties and interest.

³⁹ See: *supra*, Leasing § 3.2.4.3.

Viewed in this light, the objective of a tax indemnification provision is to place the lessor in the same after-tax position as it would have been in had the loss not occurred. Problems emerge, however, in determining when the provision is applicable. There are normally three situations which might trigger a loss: (i) the lessor may cause the loss by its own acts or omissions;⁴⁰ (ii) the lessee may be the cause, as a result of its own act or omission;⁴¹ or (iii) the loss may result from factors beyond the control of either party. For example, changes to the applicable tax law or the interpretation thereof or the loss of a license or permit through no fault of its own.⁴²

If the lessor is the cause of its own loss, the lessee should not be required to compensate the lessor for such loss. Lessors try, but this should be vigorously resisted. Actually, in all fairness, if the lessor is the cause of a tax loss to the lessee, then by rights it should indemnify the lessee, although I have never seen where such a case should be applicable. If the lessee causes a loss to the lessor then the indemnification provisions should apply, and if the lessee causes its own loss then it should suffer such loss itself. The real problems then emerge with respect to a change of law which will be resolved by the party with the greatest bargaining power – this is usually the lessor who seldom will enter into a transaction without indemnification. If the loss is so large that the transaction becomes uneconomical, the parties should be obliged to restructure or the lessee should be allowed to terminate the agreement subject to the terms of any existing burdensome event provisions.^{43]}

⁴⁰ E.g., the lessor may change its own tax jurisdiction by moving its place of business or disposing of its interest in the agreement to a third party.

⁴¹ E.g., the lessee may change the character of its business or the jurisdiction of its place of business or, in the case of certain investment credits, it may use the equipment before it is subject to the agreement.

⁴² E.g., Kenya Airways lost its air operator's certificate (AOC) in October 2002 because of a change of government which created a new Kenyan Civil Aviation Board who could not issue new AOCs until a new director was appointed – there was no transitional provision in the legislation. See: Kamua Kaniaru, *Technicality leaves Kenyan Airlines without AOCs*, FLIGHT INTERNATIONAL, 21-27 Jan. 2003, at 12; Air carriers in India were required to terminate leases involving foreign carriers by July 15, 1998 (See: AIRCLAIMS LTD., BLUE PRINT, Jun. 26, 1998, at 2).

⁴³ See: Illegality and Burdensome Events DISCUSSION at Article 18.1 hereof. See also: *supra*, Tax Indemnities, § 3.2.5.5(e).

ARTICLE 18 – DEFAULT**18.1 Events of Default**

Each of the following events shall constitute an Event of Default and a repudiation of this Agreement by Lessee:

- (a) Lessee fails to take delivery of the Aircraft when obliged to do so under the terms of this Agreement;
- (b) Lessee fails to pay Basic Rent, Supplemental Rent or any other amount due under this Agreement in the manner and by the due date or within three (3) Business Days after such amount is due; or
- (c) Lessee fails at any time to comply with any provision of Article 14 or Appendices "G" and "H" or Lessee commits any breach of or makes any misrepresentation in respect of such Insurances resulting in the relevant insurer avoiding the policy or otherwise being excused or released from all or any of its indemnity liability thereunder to any of the insured described in Appendix "H" or any of the said Insurances ceases for any reason whatsoever to be in full force and effect; or
- (d) Lessee fails to comply with any other provision of this Agreement or any other agreement between Lessor and Lessee relating to the Aircraft (other than any obligations referred to in Articles 18.1(a) and 18.1(b) above) and such failure, if capable of being remedied, is not remedied to Lessor's satisfaction within fifteen (15) days after written notice thereof from Lessor requiring such remedy. If such failure or default cannot by its nature be cured within such fifteen (15) days, Lessee will have a reasonable number of days necessary to cure such failure or default (not to exceed a period of sixty (60) days) provided Lessee uses its best efforts to do so or such longer period upon Lessee remitting to Lessor within three (3) Business Days of Lessor's request to do so, a bond for an amount equal to the Agreed Value or such lower amount acceptable to Lessor acting reasonably; provided always that, for the avoidance of doubt, the grace periods referred to in this Article 18.1(d) shall not entitle Lessee to operate the

Aircraft otherwise than in accordance with applicable Law; or

- (e) any representation or warranty made (or acknowledged to have been made) or repeated (or deemed to be repeated) by Lessee in or pursuant to this Agreement or any other agreement between Lessor and Lessee relating to the Aircraft or contained in any document, certificate, notice or statement provided by Lessee under this Agreement or any other agreement between Lessor and Lessee relating to the Aircraft is or proves to have been materially incorrect when made or so repeated or would at any time prove to be materially incorrect if then repeated by reference to the facts and circumstance then existing and such inaccuracy (if capable of being remedied) is not remedied within fifteen (15) days after Lessee first became aware of the same; or
- (f) any representation or statement made by the Civil Aviation Authority or any other body or department which has given assurances as contemplated in Article 3.1.2(b)(vi) hereof proves, as a result of changed circumstances or otherwise, to be untrue or incorrect in any material respect; or
- (g) the registration of the Aircraft is cancelled other than as a result of an act or omission of Lessor; or
- (h) Lessee abandons the Aircraft or Engines or they are no longer in the possession and unencumbered control (other than Permitted Liens) of Lessee or an approved sublessee; or
- (i) Lessee either temporarily or permanently changes substantially the nature of its business or disposes of, or threatens to dispose of, all or a material part of its business or a substantial part of its assets; or
- (j) a material adverse change occurs in the financial condition of Lessee; or
- (k) Lessee no longer possesses the licenses, certificates and permits required for the conduct of its business as a certificated air carrier of the State of Registration; or

- (l) Lessee (i) suspends payment of its debts or other obligations or (ii) is unable to or admits its inability to pay its debts or other obligations as they fall due; or (iii) is adjudicated or becomes bankrupt or insolvent or (iv) proposes or enters into any composition or other arrangement for the benefit of its creditors generally; or
- (m) any proceedings, resolutions, filing or other steps are instituted with respect to Lessee relating to the bankruptcy, liquidation, reorganization or protection from creditors of Lessee or a substantial part of Lessee's property. If instituted by Lessee, the same shall be an immediate Event of Default. If instituted by another person, the same shall be an Event of Default if not dismissed, remedied or relinquished within sixty (60) days; or
- (n) any order, judgment or decree is entered by any court of competent jurisdiction appointing a receiver, trustee, administrator, liquidator or similar officer of Lessee or a substantial part of its property, or if a substantial part of Lessee's property is to be sequestered. If instituted by or done with the consent of Lessee, the same shall be an immediate Event of Default. If instituted by another person, the same shall be an Event of Default if not dismissed, remedied or relinquished within sixty (60) days; or
- (o) (x) any debt or other indebtedness of Lessee in an aggregate amount of [Two Hundred and Fifty Thousand Dollars (\$250,000)] (the "Indebtedness") or more (or its equivalent in any other currency) becomes due or capable of being declared due before its stated maturity other than as a result of the exercise by Lessee of its contractual right of prepayment or early termination or (y) any obligation of Lessee to pay an amount equal to or greater than the Indebtedness under any guarantee or similar obligation of Lessee is not discharged at maturity or when called upon or (z) Lessee is in default under, or is in breach of, any instrument or agreement relating to any such debt, Indebtedness, guarantee or other obligation and in each case Lessee is not contesting its liability in good faith by appropriate proceedings; or

- (p) Eurocontrol has notified Lessor that there are unpaid Eurocontrol charges due from Lessee (unless such charges are being contested in good faith and by appropriate proceedings, an adequate bond has been provided and such proceedings do not involve any danger of the detention, interference with the use or operation, sale, forfeiture or loss of the Aircraft) and such charges remain outstanding for a period of thirty (30) days from the date of Eurocontrol's notice to Lessor; provided that such thirty (30) day grace period will not apply if there is a danger of detention, interference with the use or operation, sale, forfeiture or loss of the Aircraft; or
- (q) Lessee is in default under any other lease or agreement between Lessor and Lessee and the same is not remedied within its specified grace period; or

[DISCUSSION: While an event of default is very serious, the impact of such event of default on the lessee can be devastating particularly as many leases and other financing documents contain cross-default clauses which provide that a default under one agreement is automatically deemed to be a default under another. In effect, a lessee could be faced with fighting a number of creditors at the same time simply because of a default (technical or otherwise) under a single agreement. Lessees often ignore cross-default provisions during the negotiations on the assumption that they will never default and therefore such provisions won't be relevant. However, they fail to recognize that cross-default clauses may include events beyond the lessee's control such as the change in regulations by the relevant governmental authorities (e.g. declaring that husk-kitted aircraft may not be registered in such state).

When negotiating cross-default clauses, the airline's representatives should separate those events that are under its control from those which are beyond its control so that cross-default clauses never apply to circumstances outside the lessee's control. Furthermore, provision should also be made for a concept of materiality with respect to the less important issues so that the lessee is provided with sufficient time to cure non-material breaches without triggering a cross-default.

It should also be noted that where possible, the lessee should attempt to restrict cross-default clauses to agreements between the lessor and lessee only and try to avoid agreements with third parties which are beyond the lessee's control.]

- (r) this Agreement is or becomes wholly or partly invalid, ineffective or unenforceable due to reasons beyond Lessor's control and either (i) Lessee fails in its continuing performance notwithstanding such invalidity, ineffectiveness or unenforceability or (ii) after good faith negotiation, the Parties have not arrived at a mutually acceptable alternative basis for continuation of this Agreement within fifteen (15) days after Lessor's notice requiring negotiation; or
- (s) any approved sublessee acts so as to prevent present or future performance by Lessee of its obligations under this Agreement.

[DISCUSSION: The events of default set out in Article 18.1 are very basic. Many agreements contain additional provisions to cover other general potential situations such as the failure to maintain established financial standards or financial ratios or to address the lessor's 'transaction specific' concerns such as the loss of a particular route, contract or key executive. The only limit on what situations constitute as event of default, is the human imagination!]

A breach of an agreement results when one of the parties fails to perform one or more of its obligations pursuant to such agreement. By expressly setting out in a broad manner those acts or omissions which constitute an event of default, the lessor puts the lessee on notice that any deviation from the agreed terms may result in the lessor pursuing its rights and remedies. Stipulation in the agreement as to the lessor's remedies does not ensure that a court will uphold those options, but it gives notice to the lessee of the likely consequences of an event of default.

Events of default fall into three categories:

1. *Breaches of the agreement itself such as non-payment or non-performance (particularly of the obligation to maintain insurance);*
2. *Anticipatory breaches - those breaches which are likely to develop into an event of default such as insolvency or outstanding unpaid claims of third parties; and*
3. *Involuntary breaches such as changes in government regulations or laws.*

Non-payment is the most important event of default as it is fundamental to the transaction that the lessor be paid amounts to which it is entitled (particularly the rent) and therefore falls within the first category. Lessees will invariably ask for grace periods for making

payments if only to protect themselves against delays in the banking system. This consideration is a holdover from the days of non-electronic bank transfers and is really not relevant in the modern context of electronic fund transfers that generally take place within minutes.⁴⁴ Many lessors are more sympathetic with respect to grace periods for delays in paying unscheduled amounts (such as indemnity payments) which might become due from time to time under the agreement as it could be argued that such amounts do not fall due until the lessee has received notice thereof. A similar argument does not however apply for scheduled payments since the lessee is aware, or should be aware, when such amounts are due and payable and should have made appropriate arrangements for the timely payment of the same. Furthermore, a lessor should always maintain the maximum ability to move quickly in serious default situations. Grace periods, particularly those combined with a notice period, drastically reduce the lessor's ability to move quickly which is more important in some jurisdictions than in others. For example, under the U.S. Bankruptcy Code⁴⁵ many lessors consider it prudent in potential bankruptcy situations to terminate the agreement and repossess the equipment before a bankruptcy petition can be filed rather than risk a trustee's assumption of such agreement. The Bankruptcy Code gives the trustee the ability to assign unexpired leases and invalidates, *ipso facto*, bankruptcy clauses similar to Articles 18.1(m) and (n)⁴⁶ which is clearly not in the lessor's interest.

The obligation to maintain adequate insurance to cover the agreed value of the asset being financed and the potential public liability related thereto is as important as the obligation to make rental

⁴⁴ For example: A common system which is used extensively in the aviation financing community is "S.W.I.F.T." which, in most cases, avoids any delays whatsoever. SWIFT is the acronym for the Society for Worldwide Interbank Financial Telecommunication. It was formed almost twenty years ago as a cooperative society under Belgian law to serve the financial data processing and telecommunication needs of the banks that founded, own and direct the society. Today, it operates a value-added international communication system based in Brussels, Belgium. The primary function of SWIFT is to provide its members with a standardized method for facilitating international transactions among each other, based on advanced data processing and telecommunications technology. At the heart of SWIFT is a core messaging service which employs standard formats for transferring messages between banks, both to initiate transactions and to provide information about transactions. SWIFT helps international correspondents to serve the financial needs of their customers by providing an infrastructure which facilitates international trade and trading activity. SWIFT has brought correspondent banks around the world together to develop a messaging system tailored to meet their common needs for a secure, reliable and economical interbank telecommunications system. By sharing ideas and technology, SWIFT members have for years been able to exchange transactions and information efficiently, effectively and productively.

⁴⁵ 11 U.S.C. § 101; See also: *supra*, Bankruptcy § 5.1.3.5.

⁴⁶ 11 U.S.C. § 541(c)(i).

payments. Any argument advanced by a lessee that it should be entitled to a grace period with respect to insurance matters must not be readily accepted as a failure by a lessee to discharge its obligations in this regard until notified by a lessor of an event of default may have extremely severe consequences - even a brief period of lapse in the insurance should be unacceptable.

Breaches of non-monetary obligations fall into the second category of events of default and are generally considered of less importance to lessors. Consequently, grace periods are normally granted in order to allow sufficient time for such breaches to be remedied if they are capable of being remedied. Some lessors will not, however, agree a grace period if the default cannot be cured promptly or the potential consequences of the breach require a swift response. This provision is often qualified by a materiality test so that the non-performance must materially and adversely affect the ability of the lessee to perform or must materially prejudice the interests or rights of the lessor. For example, a standard event of default included in most agreements is the breach of a representation or warranty, as contemplated by Article 18.1(e). Such an event of default should be qualified by a test of materiality since some representations and warranties are more important than others.

If any provision of the agreement is or becomes wholly or partly invalid, ineffective or unenforceable resulting in the agreement becoming illegal as contemplated at Article 18.1(r), there is no leeway for continued participation and the agreement must be treated as terminated. Often there is a provision contained in the agreement providing for a good faith attempt by the parties to restructure the transaction so as to avoid the illegality and continue with the transaction. In the rare case where such restructuring is not possible or is uneconomical, the aircraft must be returned to the lessor, the agreement terminated and all outstanding amounts paid by the parties to each other, all in accordance with the applicable provisions of the agreement.

The third category of breaches is those breaches which arise involuntarily. For example, some agreements contain what are called "burdensome events" provisions whereby the lessee can terminate the agreement in the event that an applicable law is changed or comes into effect (usually a tax law) which results in the lessee having to indemnify the lessor or other relevant parties under the indemnity provisions for such a large amount that the transaction is no longer uneconomical for the lessee.⁴⁷ While such a provision may afford the lessee some relief, the financial consequences of exercising its right of termination thereunder

⁴⁷ Normally in tax-driven capital leases.

may prove equally onerous. The following is an example of a burdensome events provision:

"XX.1 Illegality and Burdensome Events

XX.1.1 If this Agreement shall cease to constitute the legally, valid, binding and enforceable obligations of the Parties, then the affected Party shall forthwith notify the other and either Party shall be entitled by such notice to, after good faith negotiations, restructure this Agreement to avoid such illegality or unenforceability or terminate this Agreement either (i) forthwith or (ii) on a future specified date prior to the latest date on which enforcement of such obligations become unlawful or contrary to applicable Law or on which this Agreement ceases to constitute legally valid, binding and enforceable obligations of the Parties. This Agreement shall terminate upon the date so stipulated in the notice contemplated above and Lessee shall pay to Lessor, the Termination Sum on the date of such termination together with all amounts of Rent and other amounts then due and owing under this Agreement. For the purposes of this Article XX.1.1, the term "Termination Sum" shall be defined as an amount equal to [] months Basic Rent less any Security Deposit held by Lessor (or such other measure as may be agreed)."]

18.2 Lessor's Rights

Upon the occurrence of any Event of Default or at any time thereafter for so long as such Event of Default is continuing, Lessor shall be entitled, without prejudice to any of its other rights hereunder, by notice in writing to Lessee, to:

- (a) do anything that may reasonably be required to remedy any Event of Default and recover from Lessee all reasonable costs, including legal fees and expenses, incurred by Lessor in so doing together with Default Interest thereon; and/or
- (b) apply all or any portion of the Security Deposit and any other security deposits held by Lessor pursuant to any other agreements between Lessor and Lessee to any amounts due; and/or

- (c) accelerate all Basic Rent which would be due from and after the Event of Default, subject to any duty Lessor may have by Law to mitigate its damages; and/or
- (d) accept such repudiation and by notice to Lessee and with immediate effect terminate the leasing of the Aircraft (but Lessee's obligations hereunder will continue, including the obligations to protect and insure the Aircraft as required by this Agreement) whereupon all rights of Lessee under this Agreement shall cease; and/or
- (e) proceed by appropriate court action or actions to enforce performance of this Agreement or to recover damages for the breach of this Agreement; and/or
- (f) either:
 - (i) take possession of the Aircraft, for which purpose Lessor may enter any premises belonging to or in the occupation of or under the control of Lessee where the Aircraft may be located; or
 - (ii) require that Lessee immediately move the Aircraft to an airport designated by Lessor.

[DISCUSSION: The remedies available to the lessor following an event of default in any agreement should be drafted to compensate the lessor without penalizing the lessee. Any attempts to penalize the lessee will, at least in most common law jurisdictions, be unenforceable and might jeopardize the lessor's legitimate rights of recovery (although this is not necessarily so in civil law jurisdictions).

Under Article 18.2 of the agreement, the lessor has two basic remedies, namely to: (a) terminate the agreement pursuant to Article 18.2(d) by written notice to the lessee, whereupon the lessor becomes entitled to immediate possession of the equipment and to all past-due and accrued rent together with any other amounts which might be due and payable under the agreement. Notwithstanding Article 18.2(c) of the agreement, the future rent payments normally are not 'accelerated' as would be the case under a loan agreement or capital lease. In such circumstances, the courts may consider rent acceleration

provisions as a penalty⁴⁸ or regard the transaction as a loan rather than a true operating lease but rent can generally be accelerated as a measure of damages if the discount factor is reasonable.⁴⁹ As an alternative to accelerated rent, agreements often provide for liquidated damages based, in part, on the present value of future rent less the present value of estimated reasonable rent obtainable for the remainder of the original lease term;⁵⁰ or (b) pursuant to Article 18.2(e), the agreement continues in force and the lessor sues for actual damages resulting from the lessee's event of default and then, if applicable, for specific performance of the terms of the agreement.⁵¹

The so-called "self-help" remedy contemplated at Article 18.2(f)(i) with respect to taking possession of the equipment by the lessor without first obtaining a court order, may be available as a remedy to the lessor upon lessee's event of default provided that there is no breach of the peace.⁵² In the event that such self-help remedy is not available because of the lessee's resistance or the lessor's reluctance, the lessor must resort to judicial proceedings to enforce its right to repossess the equipment.⁵³

The contractual rights of a lessor to take immediate possession of its equipment upon the occurrence of an event of default by the lessee is an important aspect of operating leases in

⁴⁸ *Fairfield Lease Corp. v. Fine Decorations*, 242 N.Y. Sup. Ct. 1972.

⁴⁹ Whenever possible at the inception of the lease, the lessor should insist that the lessee agree to the consequences of an event of default even though certain remedies may not be available to the lessor under general law. This gives the lessor a little more latitude in dealing with the lessee following an event of default, even though it may, as a matter of law, have to mitigate its damages.

⁵⁰ The present value (See: Present Value of Payments - Article 18.5 hereof) is obtained by discounting the two rent amounts by the judicial interest rate prevailing in the relevant jurisdiction at the time of the event of default.

⁵¹ See generally: In the U.S. - John I. Karesh, *Repossession of Collateral and Foreclosure of Security Interests in Leveraged Lease Aircraft Finance Transactions*, AIR AND SPACE LAWYER, Vol. 10, No. 2, Fall 1995 p. 9; Robert A. Greenspon, *Enforcement of Security Interests in Spare Aircraft Engines: The U.S. Approach to Choice of Law Issues*, AIR & SPACE LAW, Vol. XXI, 1996, p. 150; In the U.K. - *The Art of Repossession*, AIRLINE FLEET & ASSET MANAGEMENT, Mar. 1999, at 40; *Taking Credit Where Due*, AIRLINE FLEET & ASSET MANAGEMENT, Mar./Apr. 2002, at 16; Julia Salt, *Insolvency, Administration and Repossession: The Effect of the New Legislation on Leasing*, paper presented at the Leasing Digest Conference in London, Oct. 1988; In Europe - Berend J.H. Crans, *The Validity, Perfection and Enforceability of Security Interests in Aircraft and Spares in The Netherlands*, AIR & SPACE LAW, Vol. XXI, 1996, p. 145; Berend Crans, *Enforcement of "Authentic" Lease Instruments in Europe*, AIR & SPACE LAW, Vol. XXII, 1997, p. 77.

⁵² For example, U.C.C. § 9-609 (1999); See also: JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, 896 (West Group, St. Paul, Minn., 5th ed. 2000).

⁵³ These proceedings are sometimes characterized as an action or sounding in trover, replevin, detinue or claim and delivery in the common law or a seizure after judgment (or before judgment where permitted) in the civil law.

that the equipment represents the lessor's prime security in any lease transaction. However, given the international nature of most operating leases and the high mobility of aviation assets generally, repossession can present major difficulties in practice which require that the relevant documentation be carefully drafted to include as many foreseeable situations as possible. Consequently, the lessor and its advisors must closely investigate the laws of the lessee's jurisdiction, and if different, the State of Registration of the aircraft as well as the laws of the jurisdiction of the proposed routes on which the aircraft will be flown and where it will be maintained.

Repossession by judicial action is obviously more expensive than by employing the self-help remedy and, in addition to legal costs, the lessee would be liable for ancillary costs, such as the cost of posting a bond and sheriff's fees.⁵⁴

In very rare circumstances, a lessor may find that notwithstanding a right of repossession, and sometimes even in spite of a court order, the ruling authority of a foreign State may block any attempt by the lessor to exercise his rights. These situations have caused great anguish and frustration and often have led to extraordinary costs for the creditor. Indeed, some of these events have even led to the complete loss of the aircraft.⁵⁵ In one such case in 1991, the lessor, in an act of total frustration, wrote an open letter to aircraft lessors and financiers to publicly warn others of the risks of dealing with a particular State. In light of the following, it is incredible that representatives of such State are scandalized by the attitude of the international financial community with respect to their creditworthiness. The text of the letter which was published in the aviation press⁵⁶ is set out below:

**WARNING
AIRCRAFT LESSORS & FINANCIERS**

In July 1991, IAL 361, Inc., a subsidiary of International Air Leases, leased two B-737-200 aircraft to Barnax, a privately held airline in Nigeria.

⁵⁴ In the U.S. see: U.C.C. (1999) § 9-615 (a) and (d).

⁵⁵ While insurance is available to protect against such losses, the cost of such insurance is very high and the mechanism for collection isn't user friendly. See: *supra*, Political Risk, § 4.3.14.1.

⁵⁶ See: AIRCRAFT LEASING, Aug./Sept. 1992, at 7.

At the time, Barnax signed a document that authorized the Nigerian Federal Civil Aeronautics Authority (FCAA) to release and deregister the aircraft upon IAL's notice that Barnax was in default. The FCAA signed a separate document which stated that the aircraft would be removed from the Nigerian registry upon IAL's request.

Barnax stopped payments to IAL in January 1992. Since then, IAL has battled with Barnax in the Nigerian Courts for the release and deregistration of the aircraft.

In spite of IAL's efforts to help Barnax succeed by rescheduling its outstanding account, Barnax obtained a court injunction issued by the Federal High Court in Port Harcourt prohibiting IAL from removing the aircraft from Nigeria and prohibiting the F.C.A.A. from removing the aircraft from the Nigerian registry. The court issued this order without requiring Barnax to provide a bond to protect IAL's interest.

This court order was issued based on Barnax's unsubstantiated allegations, which in fact, were false accusations aimed at damaging IAL's position. Barnax has told IAL that it would hold the aircraft until IAL submits to their ransom demands to reduce the rental rates and renegotiate the purchase price options. As each day passes, the aircraft are rapidly deteriorating because Barnax stopped flying them months ago and is allowing them to corrode without any maintenance. Barnax has refused to permit IAL to preserve or otherwise protect the aircraft.

We would like to call to the attention of the lessors and financiers that the actions of Barnax are already having serious consequences, in that we are advised by one lessor that its political risk insurance has been increased by \$300,000.00 due to the uncertainty in Nigeria of being able to obtain the aircraft back in case of default.

We respectfully suggest that each of you take a hard look before you lease or finance aircraft to Nigerian operators to make sure that the Nigerian courts will deal with your company fairly and impartially and will not give a Nigerian company a favorable position just because it is Nigerian.

We wish to thank you for your attention.

Boyd D. Mesecher

*Senior Vice President Marketing
International Air Leases, Inc.]*

18.3 Deregistration and Export of the Aircraft

If an Event of Default occurs, Lessor may, without prejudice to Lessee's obligations under Articles 18.4 and 20, take all steps necessary to effect deregistration of the Aircraft and export the Aircraft from the State of Registration or where the Aircraft is, for the time being situated and any other steps necessary to enable the Aircraft to be redelivered to Lessor.

[DISCUSSION: Additional concerns for the lessor are its ability to have the aircraft deregistered from the State of Registration, obtain an airworthiness certificate or export permit where required or satisfy the requirements of the central bank or other agencies in the State of Registration or the state in which the aircraft is located. State agencies more often than not, side with the lessee to thwart the efforts of the lessor to repossess.⁵⁷ Furthermore, the lessor's efforts may also be frustrated by difficulties in obtaining entry visas for their representatives and inspectors or by the refusal of the authorities to grant the necessary licenses or endorsements to their pilots to fly the aircraft out of the state in which it is located or by other political pressure.⁵⁸ The lessor's attempts to decrease these risks include obtaining pre-deregistration approvals prior to delivery of the aircraft and powers of attorney in favor of lessor's representatives entitling them to do all things in the name of the lessee to deregister, repossess and export the aircraft but these aids do not necessarily help in cases where the relationship between the lessor and the State of Registration are deteriorating. In transactions where the lessor is particularly concerned about its ability to repossess, deregister and export the aircraft, in addition to typical insurance requirements, the lessee may also be required to obtain political risk insurance⁵⁹ as a precondition to delivery. However, such insurance is expensive

⁵⁷ The Cape Town Convention may, if it comes into force, give some relief if the relevant State adopts the Convention and it has the political will to comply with its obligations thereunder. See: Cape Town Convention on International Interests in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment (2001) § 6.1.5.

⁵⁸ For example, pursuant to political pressure, the Turkish aviation authorities refused to grant access to a Boeing B737-300 aircraft that was detained in Istanbul for over 5 years until a court order finally provided for the release of the aircraft.

⁵⁹ See: *supra*, Political Risk § 4.3.14.1.

and more often than not makes the transaction uneconomical for the lessee and therefore most lessees reject this requirement.]

18.4 Lessee's Liability for Damages

If an Event of Default occurs, Lessor shall have the right to recover from Lessee, and Lessee shall pay to Lessor within two (2) Business Days after Lessor's written demand (by way of agreed compensation for loss of bargain and not as a penalty, and without prejudice to any right to damages of Lessor) the amount notified by Lessor to Lessee as the aggregate of:

- (a) all amounts which are then due and unpaid under this Agreement and which become due prior to the earlier of Lessor's recovery of possession of the Aircraft or Lessee making an effective tender thereof; and
- (b) any lost profits suffered by Lessor because of Lessor's inability to place the Aircraft on lease with another lessee on financial terms as favorable to Lessor as the terms of this Agreement or because whatever use, if any, to which Lessor is able to put the Aircraft upon its return or the funds arising from a sale or other disposition of the Aircraft are not as profitable to Lessor as leasing the Aircraft in accordance with the terms hereof would have been; and
- (c) all costs associated with Lessor's exercise of its remedies hereunder, including but not limited to repossession costs, legal fees, Aircraft storage costs, Aircraft re-lease or sale costs and Lessor's internal costs and expenses (including the cost of personnel time calculated based upon the compensation paid to the individuals involved on an annual basis and general Lessor overhead allocation); and
- (d) any amount of principal, interest, fees or other sums paid or payable on account of funds borrowed in order to carry any unpaid amount; and
- (e) any loss, premium, penalty or expense which may be incurred in repaying funds raised to finance the Aircraft or in unwinding any financial instrument relating in whole or in part to Lessor's financing of the Aircraft, if any; and

- (f) any loss, cost, expense or liability sustained by Lessor due to Lessee's failure to redeliver the Aircraft in the condition required by this Agreement; and
- (g) any other losses (including lost profits), damage, expense, cost or liability which Lessor suffers or incurs as a result of the Event of Default and/or termination of this Agreement, including an amount sufficient to fully compensate Lessor for any loss of or damage to Lessor's residual interest in the Aircraft caused by Lessee's default.

[DISCUSSION: See also DISCUSSION relating to Article 18.2.

Article 18.4 contemplates the lessee's liability for damages upon the occurrence of an event of default and is tantamount to a "liquidated damages" provision. As discussed elsewhere in this agreement, in most common law jurisdictions liquidated damages provisions are generally upheld by the courts of such jurisdictions if the damages resulting from the event of default are speculative and unascertainable at the time of entering into the agreement and if the amount is a genuine estimate, agreed by the parties at the inception of the agreement, of the damages which the lessor is likely to suffer from a lessee event of default.

In contrast to common law jurisdictions, civil law regards penalty clauses are acceptable but such provisions may not be enforceable with respect to minor breaches and should only be invoked where the magnitude of the breach is equivalent in severity to that of non-payment of rent.

The provision at Article 18.4(c) for attorney's fees and other costs associated with the exercise of lessor's remedies, shifts the burden of such expenses to the lessee but the likelihood of recovering such amounts is relatively small as a material event of default by the lessee under an agreement will almost always be because the lessee is facing insolvency. Nevertheless, it is still advisable to provide for such damages because, if nothing else, it may be used to establish the lessor's claim in any bankruptcy proceedings.

In the United States, the application of proceeds received from a collateral disposition are governed specifically by the Uniform Commercial Code § 9-615.⁶⁰

⁶⁰ Timothy R. Zinnecker, *The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part I*, 54 BUS. LAW. 1113 (May 1999) and *The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part II*, 54 BUS. LAW. 1737 (Aug. 1999).

18.5 Present Value of Payments

In calculating Lessor's damages under this Agreement upon an Event of Default, all Basic Rent and other amounts which would have been due under this Agreement during the Term if an Event of Default had not occurred shall be calculated on a present value basis using a discounting rate of [four (4%)] percent per annum discounted to the earlier of the date on which Lessor obtains possession of the Aircraft or Lessee makes an effective tender thereof.

[DISCUSSION: Money has a time value because of the opportunity to invest money received at an earlier date at an interest rate. Consequently, money to be received in the future is less valuable than money received at an earlier date.⁶¹ The procedure for determining how much money must be received at an earlier date to be equivalent to money to be received in the future is known as "discounting."⁶²

The formula for determining the present value of any amount to be received in the future is as follows:

$$PV = FV/(1+r)^n$$

*Where: PV = present value
FV = future value
r = interest rate or discount rate
n = Number of periods]*

18.6 Waiver of Default

Lessor may, by written notice to Lessee, at its election waive any Event of Default and its consequences and rescind and annul any prior notice of termination of this Agreement. The respective rights of the Parties shall then be as they would have been had no Event of Default occurred and no such notice been given.

[DISCUSSION: See DISCUSSION at Article 22.3.]

⁶¹ Furthermore, not generally considered in placing a value on money in hand is the risk of money being under someone else's control as well as the currency risk.

⁶² See: *supra*, Time Value of Money § 2.5.6.

ARTICLE 19 – TERMINATION AND RETURN OF THE SECURITY DEPOSIT

19.1 Termination of Agreement

This Agreement may be terminated at any time before the Expiry Date upon the occurrence of any of the following events:

- (a) by either Party pursuant to Article 4.8;
- (b) Total Loss of the Aircraft prior to the Delivery Date pursuant to Article 15.2.1;
- (c) Total Loss of the Aircraft during the Term and payment of the Agreed Value to Lessor pursuant to Article 15.3, with all other obligations of Lessee under this Agreement having been performed;
- (d) Lessee's redelivery of the Aircraft to Lessor on the Expiry Date or Termination Date, as the case may be, in the condition required by Article 20.2 and Appendix "M", with all other obligations of Lessee under this Agreement having been performed; or
- (e) an Event of Default pursuant to Article 18.1.

19.2 Survival of certain Lessee Obligations

The obligations of Lessee set forth in Articles 8.8, 8.9, 12.3, 14.11, 16.9, 17.9 and 20.1 and any other obligations of Lessee which were due to have been performed but have not been fully performed prior to the termination of this Agreement pursuant to Article 19.1, shall survive such termination.

[DISCUSSION: The purpose of a "survival clause" is to extend certain of the lessee's obligations beyond the lease term for the following reasons:

- (i) the lessee may not have fulfilled all of its obligations under the agreement upon its termination (e.g. discharge of liens arising from the lessee's operations of the equipment during the term);*
- (ii) the lessor requires the right to enforce certain provisions of the agreement against the lessee after its termination (e.g. insurance for liabilities assumed by lessee); or*

(iii) some obligations do not arise until the agreement has terminated (e.g. payment of indemnities arising post-termination).]

19.3 Return of Security Deposit

Upon termination of this Agreement in accordance with Article 19.1 other than in an Event of Default, Lessor shall return to Lessee the amount of the Security Deposit then held by Lessor, without interest, less an amount determined by Lessor to be a reasonable estimate of the costs, if any, which Lessor will incur to remedy any unperformed obligations of Lessee under this Agreement, including the correction of any discrepancies from the required condition of the Aircraft on redelivery of the Aircraft.

ARTICLE 20 – REDELIVERY OF AIRCRAFT**20.1 Date of Return**

Unless a Total Loss of the Aircraft has occurred, upon the expiration or termination for any reason whatsoever of this Agreement Lessee shall, at its sole cost and expense, redeliver the Aircraft together with the Aircraft Documents and all equipment and records supplied to Lessee pursuant to this Agreement to Lessor at the Redelivery Location or such other airport as is mutually acceptable to the Parties.

20.2 Redelivery Condition

Upon redelivery, the Aircraft shall comply with the provisions of Appendix "M" and shall be free and clear of all Security Interests (other than Lessor's Liens and Security Interests falling within the scope of paragraph (d) of the definition of "Permitted Liens").

[DISCUSSION: Redelivery conditions are the most technical aspect of the operating lease and a legal draftsman must rely almost exclusive on technical experts in this regard. The lessor will seek to have strict wording in the agreement to ensure that the aircraft is redelivered in a condition such that it can be immediately leased again and its residual value is maximized but the lessee will seek to limit its financial exposure at the end of the lease term.]

The redelivery condition provisions establish the physical state that the aircraft should be in upon its return to the lessor and whilst the lessor may verbally stress that it has a reputation for acting reasonably, it will probably refuse to incorporate objective tests of reasonableness in the agreement in respect of the redelivery condition. Normally, it is understood between the parties that the equipment will be returned in a condition similar to that at delivery, normal wear and tear excepted. However, in the case of an operating lease, the condition on redelivery of the aircraft may be specified in much greater detail and subject to much more technical argument than in the case of a capital lease. The lessee should take care, particularly in an operating lease, that it is not, in effect, required to upgrade the aircraft at the end of the term especially in view of potentially expensive airworthiness directives that might be issued by the relevant aviation authority at any time during the term – in such

circumstances and particularly for short term leases, the lessee should insist on a cost sharing provision.⁶³ Even if an airworthiness directive does not require terminating action within such period, many lessors impose such requirement. For instance, I have seen leases which include the following provision with respect to airworthiness directives on redelivery of the aircraft to the lessor:

"All Airworthiness Directives which are issued prior to the date of return of the Aircraft and require compliance (either by means of repetitive inspections, modifications or terminating action) prior to return of the Aircraft to Lessor or within six (6) months after the Termination Date will have been complied with. In addition, Airworthiness Directives that require compliance by terminating action prior to return or within six (6) months after the Termination Date will have been terminated. If after, using best efforts, Lessee is unable to acquire the material, parts or components necessary to accomplish such Airworthiness Directive, Lessee will pay to Lessor upon return of the Aircraft the estimated cost of terminating such Airworthiness Directive. If the estimated cost cannot be mutually agreed upon by the Lessee and Lessor, Lessee and Lessor will each obtain an estimate from a reputable FAA or JAA approved maintenance faculty (unaffiliated with Lessee or Lessor) and the estimated cost will be the average of the two estimates."

From a lessee's perspective, the redelivery condition provisions should include a netting and final settlement element to compensate for components and engines that are returned to the lessor in a 'better than required' condition. Generally, there is agreement between the parties to the effect that increased and decreased values should be offset against each other. If an engine has six more hours since overhaul than allowed by the redelivery provisions, it would be absurd for the lessor to require that the engine be torn down simply to ensure compliance and therefore the reasonable remedy is for a monetary rate to be

⁶³ See: *supra*, Service Bulletins and Airworthiness Directives § 5.1.2.1. and DISCUSSION at Specific Obligations - Article 10.2(b) hereof.

established for each hour over the required limit. On the other hand, a lessor does not want an engine returned with only one hundred hours left to the next scheduled overhaul and consequently some reasonable limits must be established.

Other considerations include:

- Lessors sometimes require that an aircraft be redelivered in a condition so as to meet the airworthiness requirements of an aviation authority other than that of the lessee. This provision can cause considerable problems since the lessee may, for example, be obliged to maintain the aircraft throughout the term in a manner that satisfies both authorities and this is not always possible. In particular, there may be operational issues that preclude both requirements being met at the same time.
- A common redelivery condition is "fresh out of "C" check." What is the meaning of "fresh"? A "C" check might have been conducted two months prior to the redelivery date and the aircraft parked since such check. One party would argue that the aircraft is "fresh" because it has not flown whereas the other may insist that the calendar time be "zeroed". If the "C" check has a calendar constraint as well as an hourly one, then the check cannot be considered as "fresh". To avoid confusion, a provision should be inserted such as "check performance shall be performed not more than ten (10) Flight Hours or ten (10) calendar days prior to the Expiry Date."
- Defining the exact type of check to be performed is also important. Ideally, it should relate to the manufacturer's maintenance planning document (MPD) e.g. a block "C" check or an equalized/phased "C" check. In years gone by, it took four to six weeks or more down time to accomplish a heavy check. This represented a long time to have an aircraft out of service and consequently, most operators developed programs to divide these checks into quarters, thirds and halves thereby reducing the down time for each check. With the introduction of phase check programs, structural checks were divided into mini-checks ranging up to 20 segments or more thereby enabling an operator to accomplish its

overhaul during an overnight inspection.⁶⁴ However, on the downside, since no two operators are on the same program, a bridging check has to be accomplished which may include the advancing of a number of segmented checks to reach a common ground that the next lessee's aviation authority will accept.

- Lessees often develop their own particular maintenance schedules that are usually useless for the next lessee. This activity generally represents a waste of money and time to such lessee as the enhanced procedures aren't necessary and bring about no benefit.
- A final "C" check may include more rigorous requirements than in the normal course of maintenance, depending on the next lessee's opinion of the current lessee's maintenance program and the lessor's perception of the current lessee's ability to comply with the agreed redelivery conditions.

For maximum efficiency, well-organized lessors will coordinate the redelivery of a particular aircraft from one lessee with its acceptance by the next lessee. The lessor will specify that the new lessee be present at the redelivery of the equipment by the prior lessee to witness the compliance with the redelivery conditions and technically accept delivery of the aircraft from the prior lessee.⁶⁵]

20.3 Maintenance Program

20.3.1 Access to the Approved Maintenance Program

Prior to redelivery of the Aircraft and upon Lessor's request, Lessee shall provide Lessor or its agent reasonable access to the Approved Maintenance Program for the Aircraft and one copy of the relevant

⁶⁴ Under segmented phase checks, the entire aircraft is divided into zones. The operator selects a number of zones to be inspected at predetermined intervals, normally during "B" and "C" checks, but even these checks are often segmented. Overhauls are then accomplished on overnight checks resulting in increased utilization as more of the total aircraft is checked because of the overlap of zones while major structural points such as engine mounts and landing gear are no longer opened for complete structural inspections.

⁶⁵ For further details see: Robert Ricketts, *Rites of Passage*, COMMUNTER WORLD, Aug. - Sept. 1996, at 29; Phil Seymour, *Aircraft Lease Return or Redelivery Conditions: Avoiding Hidden Costs*, COMMERCIAL AVIATION REPORT - MAINTENANCE REVIEW, 2001, at 14; Kenneth Taylor, *ILFC Outlines its Maintenance Strategy*, AIRCRAFT LEASING, June 1990, at 24.

technical records updated in order to facilitate the Aircraft's integration into Lessor's or any subsequent operator's fleet.

20.3.2 Copy of Approved Maintenance Program

Upon redelivery, Lessee, if requested by Lessor, shall delivery to Lessor a certified true current and complete copy of the Approved Maintenance Program for the Aircraft.

20.3.3 No-charge kits

All no-charge vendor and manufacturer's service bulletin kits ordered and received by Lessee for the Aircraft but not installed therein shall be returned with the Aircraft and shall be loaded by Lessee on board the Aircraft as cargo.

20.4 Inspection and Acceptance Flight

20.4.1 Ground Inspection

During the maintenance checks performed immediately prior to the proposed redelivery and at the actual redelivery of the Aircraft, Lessor and its agents shall have an opportunity to conduct a full systems functional and operational inspection of the Aircraft and Parts, inspection of the Engines, including without limitation, (a) boroscope inspection of (i) the low pressure and high pressure compressors, and (ii) turbine area, and (b) Engine condition runs (and other types of reasonable inspections based on the Aircraft type, age, use and other known factors with respect to the Aircraft) and a full inspection of the Aircraft Documents (including records and manuals), all to Lessor's satisfaction. Any deficiencies from the Aircraft redelivery condition requirements set forth in Appendix "M" shall be corrected by Lessee at its sole cost and expense prior to the acceptance flight described in Article 20.4.2

20.4.2 Acceptance Flight

Immediately prior to the proposed redelivery of the Aircraft, Lessee shall, at its sole cost and expense, carry out for Lessor or its agents an acceptance flight in the Aircraft in accordance with the Manufacturer's standard flight operation check flight procedures or, if agreed to in writing by Lessor, in accordance with an airline test flight procedure, either of which shall be for a duration necessary to perform such check flight procedures but in any event not more than two (2) hours' duration. Any deficiencies from the Aircraft redelivery condition requirements set forth in Appendix "M" shall be corrected by Lessee at its sole cost and expense prior to the redelivery of the Aircraft to Lessor.

To the extent that the ground inspection and acceptance flight extend beyond the earlier of the Expiry Date or the Termination Date, as the case may be, the Term shall be deemed to have been automatically extended and the obligations of Lessee under this Agreement shall continue on a day-to-day basis until the Aircraft is in the redelivery condition set forth in Appendix "M" and is accepted by Lessor executing an Aircraft Redelivery Certificate.

20.5 Inspection Indemnities

Lessee agrees to indemnify and hold Lessor and the other Indemnitees harmless from and against all Losses for injury to or death of any person or damage to any property (including the Aircraft) arising out of or in any way connected with such ground inspection and acceptance flight unless caused by the willful misconduct or gross negligence of Lessor or such other Indemnitee.

20.6 Export Documents

Upon redelivery of the Aircraft, Lessee shall, at its sole cost and expense, if requested by Lessor, provide to Lessor all documents necessary to export the Aircraft from the State of Registration and required in relation to the deregistration of the Aircraft with the Civil Aviation Authority including, but not limited to an export certificate of airworthiness issued by the Civil Aviation Authority to such other jurisdiction as Lessor may specify.

ARTICLE 21 – ASSIGNMENT AND TRANSFER

21.1 No Assignment by Lessee

Lessee shall not assign, novate, transfer (whether voluntarily or involuntarily, by operation of law or otherwise), create or permit to exist any Security Interest over, any of its rights under this Agreement or with respect to the Aircraft, Engine or any Part.

[DISCUSSION: Article 21.1 absolutely prohibits the lessee from transferring its rights under the agreement. Some agreements contain language such as "without lessor's prior written consent, which consent shall not be unreasonably withheld," but this only provides for potential confusion and misunderstanding. Lessors and their lenders assess a lessee's creditworthiness at the inception of the lease and will only agree to an assignment, sublease or novation after a thorough evaluation of the proposed transferee and they don't want the lessee to have any color of right in this regard.]

In some cases, of course, the lessor will be more flexible. Where, for example, a lessee is virtually insolvent it may be prudent for the lessor to consider a more solvent alternative lessee. Similarly, if the agreement is close to termination the lessor may be agreeable to a transfer if the new lessee is prepared to extend the agreement or where such lessee is a better credit risk than the current lessee.

An argument can be made to the effect that even if a lessor were to consent to the lessee assigning its interest in the agreement, the lessee would continue to be liable thereunder unless a novation occurred. It is a matter of trite law that one may assign his rights but not his obligations under an agreement. He may delegate his obligations to a third party who may assume them but this does not relieve him of those obligations vis-à-vis the original creditor.⁶⁶ Nevertheless, a lessor wants to control the situation and wishes to maintain the sole decision as to who will be responsible for the possession and operation of its equipment. Consequently, most lessors take the hard position of not allowing unauthorized transfers but reserve the right to be approached on the issue.]

⁶⁶ A novation (See: *supra*, Novation § 4.3.10) in this context would actually substitute one debtor for another and the original debtor would have no continuing relationship with the original creditor.

21.2 Sale or Assignment by Lessor

Subject to Lessee's rights pursuant to this Agreement, Lessor may at any time before or during the Term, and without Lessee's consent sell, assign or transfer its rights and interest in this Agreement or with respect to the Aircraft to a third party ("Lessor's Assignee"). Lessee shall be not responsible for any withholding or other Tax which is greater than Lessee would have to bear if Lessor were still lessor under this Agreement. For a period of three (3) years after such sale or assignment and at Lessee's sole cost and expense, Lessee shall continue to name Lessor as an additional insured under the Insurances specified in Article 14 and Appendices "G" and "H".

[DISCUSSION: An argument similar to that in the discussion at Article 21.1 above can be made with respect to assignments or other transfers by the lessor. However, in most such cases, the lessor is not merely looking to assign the agreement but requires a novation either for tax purposes or to purge their balance sheets of contingent liabilities, or both. A lessee should be very cautious about allowing the unilateral transfer of the lessor's rights under the agreement as it must protect itself with respect to peaceful enjoyment, the security of deposit, maintenance reserves, purchase options, tax indemnities and other obligations of the lessor generally.]

21.3 Lessor's Lender

Subject to Lessee's rights pursuant to this Agreement, Lessor may at any time before or during the Term and without Lessee's consent grant Security Interests over the Aircraft and the benefit of this Agreement to a Lessor's Lender as security for Lessor's obligations to such Lessor's Lender. Lessee shall not be responsible for any withholding or other Tax which is greater than Lessee would have to bear had such Security Interest not been granted.

21.4 Lessee's Co-operation

On Lessor's or Lessor's Assignee's or Lessor's Lender's request, Lessee shall execute all such documents (such as a lease assignment agreement) as Lessor, Lessor's Assignees or Lessor's Lender may reasonably require to confirm Lessee's obligations under this Agreement and obtain Lessee's acknowledgement that

such assignment of Lessor's interest or creation of the Security Interest hereunder does not materially change Lessee's duties and increase the burden or risk imposed on Lessee. Lessee shall provide all other reasonable assistance and co-operation to Lessor, Lessor's Assignees or Lessor's Lender in connection with any such sale or assignment, including, at Lessor's sole cost and expense, making all necessary filings and registrations in the State of Registration and providing all opinions of counsel with respect to matters reasonably requested by Lessor, Lessor's Assignee or Lessor's Lender.

21.5 Protections

Wherever the term "Lessor" is used in this Agreement in relation to any of the provisions relating to disclaimer, title and registration, insurance, and indemnities contained in Articles 5, 8, 13, 14, 16 and 17 respectively, the term "Lessor" shall be deemed to include Lessor's Assignee and Lessor's Lender, if applicable.

ARTICLE 22 – FURTHER PROVISIONS

22.1 Nature of Lessee's Obligations

All obligations of Lessee under this Agreement shall constitute conditions and the time for performance of such conditions shall be of the essence (without prejudice to the grace periods specified in Article 18.1).

[DISCUSSION: "Time is of the essence" (or similar wording) is a legal expression indicating that a party should strictly adhere to the time limitations imposed by the agreement. A slight variation in the timely performance of an obligation may give rise to a cause of action for breach.

Certain contracts such as sale and lease agreements are bilateral or reciprocal in that the parties expressly enter into mutual engagements each binding itself to the other. The existence of a right of a party depends on the discharge of such party's obligations to the other, so that in a lease agreement, the lessor's obligation to give peaceful enjoyment during the term of the lease is dependant upon the lessee's discharge of its obligations including the payment of rent.^{67]}

22.2 Further Assurances

Each Party agrees to do and perform such other and further acts and execute and deliver any and all such other instruments as may be required from time to time by Law or reasonably required by the other Party to establish, maintain and protect the rights and remedies of such Party and to carry out and effect the intent and purpose of this Agreement.

[DISCUSSION: Article 22.2 is a "catch-all" provision to avoid having to list all the possible documents or actions that could be requested. Lessors simply want to reserve their right to ask the lessee to take further actions or provide additional documents warranted under the circumstances of a particular transaction. For example, in the case of a change in law a new filing may be required to protect the interests of the lessor or the lessor's lenders in the agreement or the leased equipment. Lessees can be expressly protected by drafting in a standard of reasonableness if they feel that the same is necessary.]

⁶⁷ In civil law such a contract is referred to as a "synallagmatic contract."

22.3 Rights Cumulative, Waivers

The rights of the Parties under this Agreement are cumulative, may be exercised as often as each Party considers appropriate and are in addition to such Party's rights under general Law. The rights of one Party against the other Party (whether arising under this Agreement or the general Law) shall not be capable of being waived or varied otherwise than by an express waiver or variation in writing and, in particular, any failure to exercise or delay in exercising any of such rights shall not operate as a waiver or variation of that or any other such right; any defective or partial exercise of any such rights shall not preclude any other or further exercise of that or any other such right; and no act or course of conduct or negotiation on a Party's part or on its behalf shall in any way preclude it from exercising any such right or constitute a suspension or any variation of any such right.

[DISCUSSION: The inclusion of an express statement to the effect that a waiver of a party's rights does not constitute a waiver of that or any other right, protects such party from an involuntary release of its rights.

A waiver is the intentional or voluntary relinquishment of a known right⁶⁸ or such conduct as warrants an inference of the relinquishment of such right⁶⁹ or when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, does or forebears to do something.⁷⁰

Waiver should not however be confused with "estoppel." A party may be precluded from relying on a "no waiver" provision where the other party has justifiably relied, to its detriment, on the other's conduct.⁷¹ "Waiver" is distinguished from "estoppel" in that in "waiver" the essential element is an actual intent to

⁶⁸ *Lehigh Val. R. Co.*, 172F.364, 97 C.C.A.62; *Vermillion v. Prudential Ins. Co. of America*, 230 Mo. App. 993, 93 S.W. 2d 45, 51.

⁶⁹ *Rand v. Morse*, C.C.A. Mo., 289F. 339, 344.

⁷⁰ *Estoup Signs v. Frank Lower, Inc.*, La. App., 10 So.2d 642, 645.

⁷¹ "Estoppel" is the rule of evidence or doctrine of law which, *inter alia*, precludes a person from denying the existence of facts which he has by words or conduct led others to believe in. A person who stands by and keeps silent when he observes another acting under a misapprehension or mistake, which by speaking he could have prevented by showing the true state of affairs, can be estopped from later alleging the true state of affairs. "Estoppel" in its broadest sense is penalty paid by one perpetuating wrong by known fraud or by affirmative act which, though without fraudulent intent, may result in legal fraud on another. See: *Harvard v. Prince*, Tex. Civ. App., 98 S.W. 2d 1022, 1026; *Vagliano v. Bank of England*, [1891] A.C. 107.

abandon or surrender a right, while in "estoppel" such intent is immaterial, the necessary condition being the deception to an enquiry of the other party by the conduct of the one estopped.^{72]}

22.4 Delegation

Lessor may, upon written notice to Lessee, delegate to any person or persons all or any of the rights, powers or discretions vested in it by this Agreement and any such delegation may be made upon such terms and conditions as Lessor in its absolute discretion thinks fit.

22.5 Application of Moneys

If any sum paid or recovered in respect of the liabilities of Lessee under this Agreement is less than the amount then due, Lessor may (save in any case where this Agreement expressly stipulates an order of application) apply such sum to Basic Rent and Supplemental Rent payments, interest, fees or any other amount due under this Agreement in such proportions and order and generally in such manner as Lessor shall determine.

22.6 Lessor's Payment Obligations

Any obligation of Lessor under this Agreement to pay or release any amount to Lessee is conditional upon all amounts then due and payable by Lessee to Lessor under this Agreement or under any other agreement between the Parties having been paid in full and no Event of Default having occurred and continuing hereunder at the time such payment or release of payment is payable to Lessee.

22.7 Variation

The provisions of this Agreement shall not be varied otherwise than by an instrument in writing executed by or on behalf of the Parties.

22.8 Entire Agreement

Save as may be otherwise expressly agreed between the Parties, this Agreement constitutes the entire agreement between the

⁷² *Insurance Co. of North America v. Williams*, 42 Ariz. 331, 26 P.2d 117, 119.

Parties in relation to the leasing of the Aircraft by Lessor to Lessee and supersedes all previous proposals, agreements and other written and oral communications in relation thereto.

[DISCUSSION: Article 22.8 is a standard provision to present the agreement as the entire agreement between the parties so that if a term has not been included, the parties will not be bound by it unless otherwise agreed. This has the practical effect of limiting the admissibility of parol evidence (oral testimony) or prior agreements between the parties.]

22.9 Notices

Any notice or communication to be made hereunder or in connection with this Agreement shall be in writing in the English language and shall be delivered personally or by post, telex, facsimile transmission or SITA communication to the respective addresses, telex, facsimile numbers or SITA in Appendix "D" or such other address or telex, facsimile number of SITA as the recipient may have notified to the sender in writing. Proof of delivery, posting or dispatch shall be deemed to be proof of receipt:

- (a) in the case of a letter, upon delivery thereof (if delivered by hand) or (if sent by post) on the tenth (10th) Business Day after posting;
- (b) in the case of a telex, facsimile transmission or SITA communication on the Business Day immediately following the date of dispatch.

[DISCUSSION: Notices should be sent to the attention of a specific officer or other agent of the addressee rather than to a specifically named individual.]

22.10 Invalidity of any Provision

If any of the provisions of this Agreement becomes invalid, illegal or unenforceable in any respect under any Law, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired.

22.11 Lessor's Right to Remedy

If Lessee fails to comply with any provision of this Agreement, Lessor may, without being in any way obliged to do so or responsible for so doing and without prejudice to the ability of Lessor to treat such non-compliance as an Event of Default, effect compliance on behalf of Lessee, whereupon Lessee shall become liable to pay immediately any amounts expended by Lessor together with all costs and expenses (including legal costs) in connection therewith together with Default Interest.

22.12 Confidentiality

This Agreement and any other agreement between Lessor and Lessee in respect of the Aircraft and all non-public information obtained by either Party about the other are confidential and between Lessor and Lessee only and shall not be disclosed by either Party to third parties (other than to the Government Entities as required by Law, such Parties' auditors or legal advisors) without the prior written consent of the other Party. If disclosure is required as a result of applicable Law, the Parties shall co-operate with one another to obtain confidential treatment as to the commercial terms and other material provisions of this Agreement. The provisions of this Article 22.12 shall survive the expiration or termination of this Agreement.

22.13 Transaction Fees

Each Party shall be responsible for its own respective costs (including, but not limited to, legal costs) incurred in connection with the negotiation and preparation of this Agreement.

ARTICLE 23 – GOVERNING LAW AND JURISDICTION

23.1 Governing Law

This Agreement regardless of where executed, shall be subject to, governed by and construed in accordance with the Governing Law.

[DISCUSSION: The governing law provision is included to ensure that the agreement is drafted in compliance with the specific laws of a particular State and to avoid any "conflict of law"⁷³ in the event of a dispute between the parties. Lessors generally try to select the same governing law for all their agreements so as to maintain consistency of interpretation in their standard documentation. Lessees, on the other hand, may wish to have the laws of its own or of some other neutral jurisdiction govern the agreement. If the lessor agrees to deviate from its standard, the parties will generally choose the law of a jurisdiction with well-developed commercial legal precedents such as England or New York. Having said this, lessors will generally only agree to a change in the governing law from their standard documentation in extreme cases since the lessor will require sufficient time to acquaint himself with the chosen law and to modify the documentation accordingly.]

23.2 Jurisdiction

23.2.1 Submission to Jurisdiction

For the benefit of Lessor, Lessee agrees that the courts of country of the Jurisdiction shall have jurisdiction to settle any disputes which may arise in connection with the legal relationships established by this Agreement including, but not limited to, claims for set-off or counterclaim or otherwise arising in connection with this Agreement, and Lessee submits to the jurisdiction of the courts of the country of the Jurisdiction in connection with this Agreement.

⁷³ See: DONALD H. BUNKER, THE LAW OF AEROSPACE FINANCE IN CANADA 309 (Institute and Centre of Air and Space Law, McGill University, Montreal, Quebec 1988).

23.2.2 Retention of Lessor's Right for Non-exclusive Jurisdiction

The agreement contained in Article 23.2.1 above is included for the benefit of Lessor. Accordingly, Lessor shall retain the right to bring proceedings in any other court which has jurisdiction.

23.2.3 Lessee's Waiver

Lessee irrevocably waives any objections on the ground of venue or forum non-conveniens or any similar grounds.

23.3 **Process Agent**

The Parties shall at all times during the Term maintain an agent, respective details of which are set forth in Appendix "D", for service of process and any notice of claim, writ, judgment or other notice of legal process shall be sufficiently served on the relevant Party if delivered to such agent at its address for the time being. If, for any reason, such agent no longer serves as agent for the relevant Party to receive service for such Party, that Party shall promptly appoint another agent and advise the other Party thereof.

[DISCUSSION: In order to save costs, wherever possible, the lessee should nominate its office or ticket agency in the relevant jurisdiction to avoid the fees of a professional agent. If the lessor is concerned about the continued existence of such an office, a signed document appointing an alternative can be provided to the lessor upon delivery of the aircraft with the understanding that such document will be used only if the nominated office ceases to exist.]

23.4 **Counterparts**

This Agreement may be executed in any number of counterparts and each such counterpart shall constitute an original. All such counterparts, when taken together, shall constitute one single instrument when each Party has signed and delivered one such counterpart to the other Party. Delivery of an executed counterpart of this Agreement by facsimile transmission shall be deemed effective delivery of an originally executed counterpart.

Any Party delivering an executed counterpart of this Agreement by facsimile transmission shall also deliver an originally executed counterpart; provided however, the failure of any Party to deliver an originally executed counterpart of this Agreement shall not affect the validity or effectiveness of this Agreement.

IN WITNESS WHEREOF the Parties have caused this Agreement to be executed by their respective officers as of the day and year first herein written.

[LESSOR]

[LESSEE]

Per: _____
Name: _____
Title: _____

Per: _____
Name: _____
Title: _____

WITNESS

WITNESS

APPENDIX "A"

DESCRIPTION OF AIRCRAFT

AIRFRAME

Model:		Engine Model:	
Serial No.:		APU:	
Line No.:		Current Registration:	
Date of Manufacture:		Previous Operator:	

OPERATIONAL WEIGHTS

Basic Empty Weight:		Max Zero Fuel Weight:	
Max. Taxi Weight:		Operating Empty Weight:	
Max. Take-Off Weight:		Max. Landing Weight:	
Fuel Capacity:		Lower Cargo Capacity:	

HR/CYCLE DATA - AIRFRAME (AS OF _____)

Hrs Since New:		Time Remaining to "A" Check:	
Cycles Since New:		Time Remaining to "C" Check:	
Total Landings:		Time Remaining to "D" Check:	

HR/CYCLE DATA - ENGINES (AS OF _____)

Pos	MSN	Total Hrs	Total Cycles	Hrs/cycles to next shop visit		Time remaining to next LLP removal		Thrust Rating
				Hrs	Cycles	Hrs	Cycles	
1								
2								
3								
4								

HR/CYCLE DATA - APU (AS OF _____)

Total Hrs	Hrs/cycles remaining until HIS inspection		Hrs/cycles remaining on turbine and compressor life limited parts	
	Hrs	Cycles	Hrs	Cycles

HR/CYCLE DATA – LANDING GEAR (AS OF _____)

<u>Pos</u>	<u>MSN</u>	<u>Total Hrs/cycles</u>		<u>Hrs/cycles since last overhaul</u>		<u>Hrs/cycles to next scheduled removal</u>	
		<u>Hrs</u>	<u>Cycles</u>	<u>Hrs</u>	<u>Cycles</u>	<u>Hrs</u>	<u>Cycles</u>
Nose							
Right Main							
Left Main							

MAINTENANCE INTERVALINTERIOR CONFIGURATION

A Check:		Seating Capacity:	
B Check:		Galley Units:	
C Check:		Service Centers:	
D Check:		Beverage & Aux. Bars:	
T Check:		Lavatories:	

ANNEX 1 TO APPENDIX "A"
AIRCRAFT PRINCIPAL DIMENSIONS

ANNEX 2 TO APPENDIX "A"

AVIONICS

APPENDIX "B"

DELIVERY CONDITION

The Aircraft and Aircraft Documents shall be delivered by Lessor, at its sole cost and expense, to Lessee at the Delivery Location on the Delivery Date. Subject to provision otherwise contained in the definitive lease agreement, the Aircraft and Aircraft Documents shall be delivered in "AS-IS, WHERE-IS" condition and comply with the following conditions:

- (a) be airworthy, clean by international airline standards and suitable for immediate operation in commercial service;
- (b) be in good operating condition and appearance, ordinary wear and tear excepted;
- (c) have installed the full complement of Engines, furnishings and other equipment, parts and accessories and loose equipment as should be installed in such aircraft and all systems and equipment will be properly functioning;
- (d) be free and clear of all liens except those created by Lessor;
- (e) have been inspected for corrosion;
- (f) exterior fuselage shall be painted white with smooth aerodynamic surfaces and be in the interior configuration contemplated in Appendix "A";
- (g) have a valid certificate of airworthiness or, if requested by Lessee, an export certificate of airworthiness to the State of Registration issued by the appropriate civil aviation authority;
- (h) comply with all applicable airworthiness directives and manufacturer's mandatory service bulletins issued prior to the Delivery Date and which require terminating action prior to the Delivery Date; and
- (i) be free from any waivers, deferred maintenance, open or carryover items on the Aircraft or engines at the time of return of the Aircraft.

At the time of delivery of the Aircraft, the airframe, each engine and all time-controlled components will conform to the following:

- (i) Airframe – the airframe shall have undergone a complete block “C” check including all phases and multiples in accordance with the Approved Maintenance Program. The time remaining to the structural requirements of the 4C inspection will be not less than fifty (50) percent of the allowable interval between inspections.
- (ii) Engine – each engine shall have undergone a complete video taped hot and cold section borescope inspection and a power assurance run in accordance with the engine manufacturer’s manual and all items beyond the manufacturer’s limits will be repaired. Each engine will have no more than two thousand (2,000) hours since last hot section refurbishment and no more than four thousand (4,000) hours since last cold section refurbishment. No engine will be “on watch” for any reason requiring any special or out of sequence inspection. Each life limited part within each engine will have at least fifty (50) percent of its allowable life remaining. In addition, engine trend monitoring will show no adverse trends during the last thirty (30) days operation.
- (iii) APU – the time since last heavy shop visit will be no more than fifty (50) percent of the mean time between heavy shop visits as determined by the manufacturer and all outputs will be in the normal operating range.
- (iv) Landing Gear – the time remaining to overhaul will not be less than fifty (50) percent of the overhaul interval. In addition, each life limited part within each landing gear will have at least the same time remaining as the landing gear itself.
- (v) Parts – the time remaining to overhaul will not be less than fifty (50) percent of the allowable overhaul interval or one complete block “C” check interval whichever is the greater.

APPENDIX "C"

AIRCRAFT DOCUMENTS

Manuals, records and data as Lessee may reasonably require in connection with the maintenance, use and operation of the Aircraft. Such documentation shall be current and include:

1. Engine and Airframe historical records reasonably satisfactory to Lessee.
2. Engine and Airframe service bulletin accomplishment.
3. Aircraft operating manual.
4. Aircraft and Engine maintenance manuals, wiring diagrams and IPC.
5. Aircraft flight manual.
6. Weight and Balance Control and Loading Manual.
7. Actual Weight and Balance Compliance Report.
8. To the extent reasonably required by Lessee and upon Lessee's request, drawings of major modifications installed by Lessor, if not already incorporated in the other manuals.
9. Aircraft logbook (current and file copies).
10. Maintenance time control listing (components, maintenance visit, special items next due, Airframe hours and cycles, based upon Lessor's Maintenance Program).
11. Aircraft previous maintenance visit record including the last inspection performed.
12. Component history records.
13. Summary of Airworthiness directives' accomplished for each Engine and for the Airframe.

14. Airworthiness directives status requiring continuous surveillance with maintenance control action for each Engine and for the Airframe.
15. Each Engine time summary sheet or equivalent including life limited items.
16. Engine logbooks for each Engine, if available (current and file copies).

APPENDIX "D"

FURTHER DEFINITIONS AND VALUES

"Agreed Value"	U.S. \$ _____
"Basic Rent"	U.S. \$ _____
"Damage Notification Threshold"	For the Aircraft - U.S. \$ _____ For an Engine - U.S. \$ _____
"Default Interest"	Three Month LIBOR plus [5] % per annum
"Delivery Date"	
"Delivery Location"	
"Engine Manufacturer"	
"Expiry Date"	
"Governing Law"	
"Indemnitees"	Lessor, Lessor's Lender (if applicable) and its /their respective directors, officers, agents, employees and insurers
"Jurisdiction"	
"Lessee"	
"Lessor"	
"Lessor's Account"	Bank: Account Number:
"Location"	
"Manufacturer"	
"Minimum Liability Coverage"	U.S. \$ _____ per occurrence
"Notices"	Lessor: Address: Telephone: ■ Facsimile ■ SITA ■ Attention:
	Lessee: Address: Telephone: ■ Facsimile ■ SITA ■ Attention:

"Process Agent"	For Lessor: Address: Attention:
	For Lessee: Address: Attention:
"Redelivery Location"	
"Security Deposit"	U.S. \$ _____
"State of Registration"	
"Supplemental Rent"	Airframe U.S. \$ _____ per Flight Hour
	Landing Gear U.S. \$ _____ per cycle (to be divided into the following: <ul style="list-style-type: none"> • L/H MLG; • R/H MLG; and • NLG)
	Engine(s) U.S. \$ _____ per Flight Hour for each Engine (to be divided into the following modules: <ul style="list-style-type: none"> • Fan; • Low pressure compressor; • High pressure compressor; • Low pressure turbine; • High pressure turbine; and • Gearbox)
	Engine U.S. \$ _____ per Engine Flight Hour for Life Limited Parts
	APU U.S. \$ _____ per Flight Hour
"Term"	

APPENDIX "E"CIVIL AVIATION AUTHORITY
DEREGISTRATION UNDERTAKING

To: [insert Lessor's details]

[Date]

Dear Sirs,

Aircraft Lease Agreement dated [] between [insert Lessor's details] ("Lessor") and [insert Lessee's details] ("Lessee") relation to [insert Aircraft details] (the "Aircraft") (the "Agreement")

We hereby undertake that:

1. No cancellation, alteration or change in the registration of the Aircraft or the recordation of liens will be made until receipt of written consent of such specified change from Lessor.
2. On written receipt of Lessee, we shall promptly de-register the Aircraft and provide such confirmation as is requested by Lessor together with any other confirmation or information Lessor may require to enable the Aircraft to be reregistered in any other country or state.
3. On written receipt of Lessor, we shall release, remove or cancel all liens it may have over the Aircraft and shall acknowledge in doing so that all liability for such liens as discharged are for the sole account of Lessee.
4. We shall not allow the registration, use or operation of the Aircraft for any purposes other than the category of fare paying passenger transportation.
5. We shall consent to the export of the Aircraft of the termination of the Agreement or at Lessor's written request.

Yours faithfully,

Director General of Civil Aviation
For and on behalf of the Department of Civil Aviation

APPENDIX "F"

LEGAL OPINION TO BE PROVIDED BY LESSEE

To: [insert Lessor's details]

[Date]

Dear Sirs:

Aircraft Lease Agreement dated [] between [insert Lessor's details] ("Lessor") and [insert Lessee's details] ("Lessee") relation to [insert Aircraft details] (the "Aircraft") (the "Agreement")

I am the senior legal counsel of Lessee and, in that capacity, I have acted as legal counsel to Lessee in connection with the leasing by Lessee from Lessor of the Aircraft pursuant to the terms and conditions of the Agreement. Words and expressions used herein shall bear the same meanings as defined in the Agreement.

Pursuant to the Agreement, I am required to render my legal opinion to you on certain matters set forth below. The laws upon which this opinion is based are in all cases those in effect at the date hereof.

I have examined executed copies of the Agreement and other pertinent records, documents, certificates and other matters as in my judgment are sufficient to render the opinion set forth herein. For the purposes of this opinion, I have assumed that all documents examined or reviewed by me which purport to be originals are authentic and those which purport to be certified copies conform to the originals thereof.

Based upon and subject to the foregoing, I am of the opinion that:

1. Lessee is a corporation duly incorporated with limited liability, validly existing for an unlimited duration and in good standing under the Laws of [insert country of incorporation] and has the corporate power to own its property and assets and to carry on its business as it is now being conducted;
2. Lessee has the corporate power to enter into and perform the Agreement and has taken all necessary action to authorize the lease of the Aircraft upon the terms and conditions of the Agreement;

3. The Agreement constitutes legal, valid and binding obligations of Lessee enforceable in accordance with its terms;
4. The execution, delivery and performance of the Agreement will not violate in any respect any provision of (i) any Law of [insert country of incorporation], or (ii) the Memorandum and Articles of Association of Lessee, or (iii) any agreement or other undertaking or instrument which to my knowledge Lessee is a party; and
5. The obligations of Lessee under the Agreement rank at least equally and ratably (pari passu) in point of priority and security with all other unsecured obligations of Lessee pursuant to any agreement or other undertaking or instrument which to our knowledge Lessee is a party.

My opinion expressed above is subject to the following qualification:

- (A) The rights and remedies of the Parties to the Agreement are subject to any applicable bankruptcy, insolvency, reorganization, liquidation, limitation of action or similar Laws affecting creditors' rights generally;
- (B) The availability of the remedy of specific performance or injunctive relief is subject to the discretion of the court before which any proceedings therefor may be brought;
- (C) The enforceability of provisions contained in the Agreement to indemnify Lessor may be limited by applicable Law; and
- (D) I have assumed for the purposes of my opinion that the Agreement and the covenants, commitments, rights, duties and obligations recited or impliedly contained therein would be found to be legal, valid and binding under the laws of, and not otherwise contrary to public policy in, or contrary to any mandatory provisions of the Laws of [insert country of incorporation] as presently or hereafter in force or given effect. As we are qualified to render legal advice only with regard to the Laws of [insert country of incorporation], I do not pass upon and I do not express or imply any opinion in respect of matters governed by or construed in accordance with the Laws of any other jurisdiction.

This opinion is personal to you and may not be delivered to or relied upon by any other person without my prior written consent.

Yours faithfully,

APPENDIX "G"

INSURANCE REQUIREMENTS

1.1 Types of Insurances

The Insurances required to be maintained shall be as follows:

- (a) HULL ALL RISKS of loss or damage whilst flying and on the ground with respect to the Aircraft for the Agreed Value and with deductibles not exceeding U.S.\$ [] and for the indemnities contemplated by Article 16;
- (b) HULL WAR AND ALLIED PERILS, being such risks excluded from the Hull All Risks Policy (mentioned in (a) above) to the fullest extent available from the leading international insurance markets, including confiscation and requisition by the State of Registration for the Agreed Value (it being acknowledged that such coverage may be subject to an annual aggregate limit of U.S. \$[]);
- (c) ALL RISKS (including War and Allied Risk except when on the ground or in transit other than by air) insurance on all Engines and Parts when not installed on the Aircraft for their full replacement value and including engine test and running risks.
- (d) AIRCRAFT THIRD PARTY, CONTRACTUAL LIABILITY, PROPERTY DAMAGE, PASSENGER, BAGGAGE, CARGO AND MAIL AND AIRLINE GENERAL THIRD PARTY (INCLUDING PRODUCTS) LEGAL LIABILITY for a combined single limit (bodily injury/property damage) of an amount not less than the Minimum Liability Coverage for the time being for any one occurrence (but in respect of "products and personal injury (non-passenger)" liability, this limit may be U.S \$ [] in the aggregate and any one loss). War and Allied Risks (AVN 52C) are also to be covered the policy to the fullest extent available from the leading international insurance markets;

The insurances shall provide that the amounts provided in paragraphs (a) and (b) above shall increase to include the value of any engine attached to the Airframe which is not an Engine (and, if the insurances shall so require, Lessee shall advise the insurers of any such attachment).

1.2 Terms of Hull and Spares Insurance

All required hull and spares insurances, so far as it relates to the Aircraft shall:

- (a) **Additional Assureds:** name Lessor and Lessor's Lender, its/their successors, novatees and assigns as additional assureds for their respective rights and interests;
- (b) **Settlement of Losses:** subject (when and to the extent that AVN 67B is applicable with respect to the Aircraft) to the terms of AVN 67B, provide that any loss up to the Agreed Value (or in the case of paragraph (c) above insurance up to the replacement value) shall be settled with Lessor and shall be payable in Dollars to Lessor for the account of all interests;
- (c) **50/50 Provision:** if separate Hull "all risks" and "war risks" insurances are arranged, include a 50/50 provision in accordance with market practice (AVS.103 is the current market language);
- (d) **No Option to Replace:** confirm that the insurers are not entitled to replace the Aircraft in the event of an insured Total Loss.

1.3 Terms of Liability Insurance

All required liabilities insurance shall:

- (a) **Additional Assureds:** include Lessor and each of the other Indemnitees, as additional assureds for their respective rights and interests, warranted, each as to itself only, on operational interest;
- (b) **Severability:** include a "Severability of Interest" clause which provides that the insurance, except for the limit of liability, shall operate to give each assured the same protection as if there was a separate policy issued to each assured; and
- (c) **Primary Policy:** contain a provision confirming that the policy is primary without right of contribution and the liability of the insurers shall not be affected by any other insurance of which any Indemnitee may have the benefit so as to reduce the amount payable to the additional assureds under such policies.

1.4 Terms of All Insurances

All Insurances shall:

- (a) **Best Industry Practice:** be in accordance with best industry practice of persons operating similar aircraft in similar circumstances;
- (b) **Dollars:** provide cover payable in U.S. Dollars;
- (c) **Acknowledgement:** acknowledge that the insurer is aware (and has seen a copy) of this Agreement and is aware that the Aircraft is owned by Lessor;
- (d) **Worldwide:** operate on a worldwide basis subject to such limitations and exclusions as may be imposed by the insurers from time to time in accordance with the then prevailing market practice, provided that Lessor (acting reasonably) does not consider any such limitation or exclusion to be materially prejudicial to its interests;
- (e) **Subrogation:** provide that the insurers will hold harmless and waive any rights of recourse of subrogation against the additional assureds or to be subrogated to any rights of the additional assureds or Lessee;
- (f) **Breach of Warranty:** provide that, in relation to the interests of each of the additional assureds, the Insurances will not be invalidated by any act or omission (including misrepresentation and non-disclosure) by Lessee, or any other person which results in a breach of any term, condition or warranty of the Insurance and shall insure the interest of each of the additional assureds regardless of any breach or violation by Lessee, or any other person save to the extent that the respective additional assured seeking protection of any warranty, declaration or condition, contained in such Insurances caused, contributed to or knowingly condoned the said act or omission;
- (g) **Premiums:** provide that the additional assureds will have no obligation or responsibility for the payment of any premiums due (but reserve the right to pay the same should any of them elect so to do) and that the insurers will not exercise any right of set-off or counter-claim in respect of any premium due against the respective interests of the additional assureds other than

outstanding premiums relating to the Aircraft, or the Engines or Parts which is the subject of the relevant claim;

- (h) **Cancellation/Change:** provide that the Insurances shall continue unaltered for the benefit of the additional assureds for at least thirty (30) days after written notice by registered mail or telex of any cancellation, change, event of non-payment of premium or installment thereof has been sent to Lessor, except in the case of war risk for which seven (7) days written notice (or such lesser period as is or may be customarily available in respect of war risks or allied perils) will be given, or in the case of war between the five great powers or nuclear peril for which termination is automatic;
- (i) **Reinsurance:** if reinsurance is a requirement pursuant to Article 14, such reinsurance shall:
- (A) be on the same terms as the original insurances and shall include the provisions of this Appendix;
- (B) provide that notwithstanding any bankruptcy, insolvency, liquidation, dissolution or similar proceedings of or affecting the reinsured that the reinsurers' liability will be to make such payments as would have fallen due under the relevant policy of reinsurance if the reinsured had (immediately before such bankruptcy, insolvency, liquidation, dissolution or similar proceedings) discharged its obligations in full under the original insurance policies in respect of which the then relevant policy of reinsurance has been effected; and
- (C) contain a "cut-through" clause in the following form (or otherwise satisfactory to Lessor):

"The Reinsurers and the Reinsured hereby mutually agree that in the event of any claim arising under the reinsurances in respect of a total loss or other claim where as provided by the Aircraft Lease Agreement dated as of {_____, ____} and made between [_____] and [_____] such claim is to be paid to the person named as sole loss payee under the primary insurances, the Reinsurers shall in lieu of payment to the Reinsured, its successors in interest and assigns pay to the person named as sole loss payee under the primary insurances effected by the Reinsured that portion of any loss for which the Reinsurers would otherwise be liable to pay the Reinsured (subject to proof of loss), it being

understood and agreed that any such payment by the Reinsurers shall (to the extent of such payment) fully discharge and release the Reinsurers from any and all further liability in connection therewith; subject to such provisions not contravening any Law of the state of incorporation”;

- (j) **Initiating Claims:** contain a provision entitling Lessor or any insured party to initiate a claim under any policy in the event of the refusal to failure of Lessee to do so; and
- (k) **Indemnities:** accept and insure the indemnity provisions of this Agreement, to the extent of the risks covered by the policies.

1.5 Deductibles

Lessee shall be responsible for any and all deductibles under the Insurances.

1.6 Application of Insurance Proceeds

The Insurances will be endorsed to provide for payment of proceeds as follows:

- (a) **Total Loss:** all insurance payments received as a result of a Total Loss occurring during the Term shall be paid to Lessor;
- (b) **Other Losses:**
 - (i) subject to the terms of AVN 67B (if applicable) all insurance proceeds of any property, damage or loss of the Aircraft, any Engine or any Part occurring during the Term not constituting a Total Loss and in excess of the Damage Notification Threshold will be paid to Lessor and applied in payment (or to reimburse Lessee) for repairs or replacement property upon Lessor being satisfied that the repairs or replacement have been effected in accordance with this Agreement.
 - (ii) subject to the terms of AVN 67B (if applicable) insurance proceeds in amounts less than the Damage Notification Threshold may be paid by the insurer direct to Lessee.
- (c) **Liability Proceeds:** all insurance proceeds in respect of third party liability will, except to the extent paid by the insurers to the relevant third party, be paid to Lessor to be paid directly in

satisfaction of the relevant liability or to Lessee in reimbursement of any payment so made; and

- (d) **Default:** notwithstanding the foregoing paragraphs, if at any time of the payment of any such insurance proceeds an Event of Default has occurred and is continuing, all such proceeds shall be paid to or retained by Lessor to be applied toward payment of any amounts which may be or become payable by Lessor in such order as Lessor may elect.

To the extent that insurance proceeds are paid to Lessee, Lessee agrees to comply with the foregoing provisions and apply or pay over such proceeds as so required.

1.7 AVN 67B

Lessee may maintain insurances in respect of the Aircraft for the purposes of this Agreement which incorporate the terms and conditions of Airline Finance / Lease Contract Endorsement AVN 67B. In that event, to the extent that any provision of AVN67B conflicts or is otherwise inconsistent with the requirements of this Agreement relating to insurances, then (so long as it is general practice to insure aircraft financed or leased on the basis of such endorsement) such conflicting or inconsistent provisions of AVN67B shall prevail and such endorsement shall be deemed to satisfy the requirements of this Agreement.

APPENDIX "H"

FORM OF INSURANCE / REINSURANCE CERTIFICATE

From: [insert Brokers details]

To: [insert Lessor's details]

[Date]

THIS IS TO CERTIFY THAT we in our capacity as Insurance Brokers to [insert Lessee's details] have arranged the following insurances with Underwriters at [insert underwriter's details] and certain Insurance Companies up to the limits stated, whilst operating anywhere in the world, other than as specified below:

Assured [insert Lessee's details].

Policy Period 12 months from [].

Aircraft [insert Aircraft and Engine details]

Situation Worldwide, excluding Iraq

Agreed Value U.S.\$[]

Coverages

1. Hull All Risks insurance covering the above Aircraft on an agreed value basis whilst in flight, taxiing or on the ground, subject to a deductible of U.S.\$ [] each and every claim (not applicable to total loss, constructive total loss or arranged total loss).

Cover includes a 50/50 provisional claims settlement provision (AVS 103) and is subject to War, Hi-jacking and Other Perils clause AVN 48B.

2. Hull War and Other Perils insurance covering the above Aircraft whilst in flight, taxiing and on the ground. This policy is also subject to an overall policy limit of U.S.\$ [] any one loss and in all during policy period. Covering under this section includes confiscation and requisition by the Government of the State of Registration.

[registration mark]
[Agreed Value]

Policy Deductible: HULL - Not applicable to Total Loss or Constructive Total Loss or Arranged Total Loss.

US\$ [] each and every claim

Nevertheless, in the event of an incident arising hereon involving the application of more than one deductible, if beneficial to such Insured, only one deductible shall apply, being the highest deductible applicable to the incident. This deductible shall be applied as an aggregate deductible for all claims arising out of that incident.

Spares and Equipment

US\$ [] each and every claim other than losses arising out of an accident to an aircraft, fire, tornado, wind, cyclone, flood or explosion. Ingestion losses occurring during engine running activities to be subject to Hull All Risks deductibles according to aircraft type to which engine destined to be fitted. Not applicable to Total Loss or Constructive Total Loss or Arranged Total Loss of engine concerned.

Contract Parties: [insert appropriate details]

and in addition, in respect of legal liability insurances, their respective successors and assigns and the respective officers, agents and employees of each of the above.

Contracts: Aircraft Lease Agreement between [Lessor] and [Lessee] dated [insert date].

All notices and acknowledgements and assignments specified under any of the foregoing.

Additional Premium: U.S.\$ 100 (receipt of which is hereby acknowledged)

Effective Date: Date of delivery to be advised.

Insurers have agreed to the following Endorsement to the above insurance policies:

It is noted that the Contract Parties have an interest in respect of the Aircraft under the Contracts. Accordingly, with respect to losses occurring during the period from the Effective Date until the expiry of the insurance or the expiry or the agreed termination of the Contract(s), or until the obligations under the Contract(s) are terminated by any action of the Insured or the Contract Parties whichever shall first occur, in respect of the Contract Parties and in consideration of the Additional Premium it is confirmed that the Insurance afforded by the policy is in force and effect and it is further agreed that the following provisions are specially endorsed to the policy:

1. Under the Hull, Hull War and Aircraft Spares Insurance:
 - 1.1 In respect of any claim on Aircraft that becomes payable on the basis of a Total Loss, settlement (net of any relevant policy deductible) shall be made to, or to the order of the Contract Party(ies). In respect of any other claim, settlement (net of any relevant policy deductible) shall be made with such party(ies) as may be necessary to repair the Aircraft unless otherwise agreed after consultation between the Insurers and Insured and, where necessary under the terms of the Contract(s), the Contract Party(ies). Such payments shall only be made provided they are in compliance with all applicable laws and regulations.
 - 1.2 Insurers shall be entitled to the benefit of salvage in respect of any property for which a claim settlement has been made.
2. Under the Legal Liability Insurance
 - 2.1 Subject to the provisions of this Endorsement, the Insurance shall operate in all respects as if a separate Policy has been issued covering each party insured hereunder, but this provision shall not operate to include any claim howsoever arising in respect of loss or damage to the equipment insured under the Hull or Spares

Insurance of the Insured. Notwithstanding the foregoing the total liability of Insurers in respect of any and all Insured shall not exceed the limits of liability stated in the Policy.

- 2.2 The Insurance provided hereunder shall be primary and without right of contribution from any other insurance which may be available to the Contract Party(ies).
 - 2.3 This Endorsement does not provide coverage for the Contract Party(ies) with respect to claims arising out of their legal liability as manufacturer, repairer, or servicing agent of the Aircraft.
3. Under ALL Insurances;
- 3.1 The Contract Party(ies) are included as Additional Insured(s)
 - 3.2 The coverage afforded to each Contract Party by the Policy in accordance with this Endorsement shall not be invalidated by any act or omission (including misrepresentation and non disclosure) of any other person or party which results in a breach of any terms, condition or warranty of the Policy PROVIDED THAT the Contract Party so protected has not caused, contributed to or knowingly condoned the said act or omission.
 - 3.3 The provisions of this Endorsement apply to the Contract Party(ies) solely in their capacity as financier(s) / lessor(s) in the identified contract(s) and not in any other capacity. Knowledge that any Contract Party may have or acquire or actions that it may take or fail to take in that other capacity (pursuant to any other contract or otherwise) shall not be considered as invalidating the cover afforded by this Endorsement.
 - 3.4 The Contract Party(ies) shall have no responsibility for premium and Insurers shall waive any right of set-off or counterclaim against the Contract Party(ies), except in respect of outstanding premium in respect of the Aircraft.

- 3.5 Upon payment of any loss or claim to or on behalf of any Contract Party(ies), Insurers shall to the extent and in respect of such payment be thereupon subrogated to all legal and equitable rights of the Contract Party(ies) indemnified hereby (but not against any Contract Party). Insurers shall not exercise such rights without the consent of those indemnified, such consent not to be unreasonably withheld. At the expense of Insurers such Contract Party(ies) shall do all things reasonably necessary to assist the Insurers to exercise said rights.
- 3.6 Except in respect of any provision for Cancellation or Automatic Termination specified in the Policy or any endorsement thereof cover provided by this endorsement may only be cancelled or materially altered in a manner adverse to the Contract Party(ies) by the giving of not less than thirty (30) days notice in writing to the appointed broker (7 days or such lesser period as may be customarily available in respect of War and Allied Perils). Notice shall be deemed to commence from the date of such notice is given by the Insurers.

Such notice will NOT, however, be given at the normal expiry date of the Policy or any endorsement.

EXCEPT AS SPECIFICALLY VARIED OR PROVIDED BY THE TERMS OF THIS ENDORSEMENT.

1. THE CONTRACT PARTY(IES) IS COVERED BY THE POLICY SUBJECT TO ALL TERMS AND CONDITIONS, LIMITATIONS, WARRANTIES, EXCLUSIONS AND CANCELLATION PROVISIONS THEREOF.
2. THE POLICY SHALL NOT BE VARIED BY ANY PROVISIONS CONTAINED IN THE CONTRACT(S) WHICH PURPORT TO SERVE AS AN ENDORSEMENT OR AMENDMENT TO THE POLICY.

[We further agreed to include the following Cut Through clause:

The insurers hereby agree (at the request and with the agreement of the Insured) that in the event of any valid claim arising hereunder the Insurers shall in lieu of payment to the Insured, its successors in the interest and assigns pay to the person(s) named as loss payee(s) under

the original insurance effected by the Assured that portion any loss for which the Insurers would otherwise be liable to pay the Assured (subject to proof of loss), it being understood and agreed that any such payment shall fully discharge and release Insurers from any and all further liability in connection with such claim.

The Insurers reserve the right to set off against any claim payable hereunder in accordance with this clause any outstanding premiums due on the reinsurance in respect of the Equipment.

Payment shall be made under this insurance notwithstanding any bankruptcy, insolvency, liquidation or dissolution of the Assured, and/or that the Assured has made no payment under the original insurance policy.

It is a condition that the conditions of this clause shall not operate in contravention of the laws, statutes or decrees of the Government of the country of domicile of the Assured.]*

SUBJECT TO THE POLICY TERMS, CONDITIONS, LIMITATIONS, EXCLUSIONS AND CANCELLATION PROVISIONS.

ADDENDUM (may be in separate document)

It is hereby noted and agreed that the following clauses are applicable hereon in respect of Hull All Risks, Spares and Aviation Legal Liability Insurances:

AVN 2000 Date Recognition Exclusion Clause

AVN 2001 Date Recognition Limited Coverage Clause

AVN 2002 Date Recognition Limited Coverage Clause

* Note: only required if reinsurance is in place

APPENDIX "I"

BROKERS' LETTER OF UNDERTAKING

To: [insert Lessor's details]

[Date]

Dear Sirs:

We confirm that insurances set out in Article 14 and Appendices "G" and "H" of a certain lease agreement dated [insert date] between [insert Lessor's details], as Lessor, and [insert Lessee's details] as Lessee, are in effect on and in respect of the [insert aircraft description] aircraft whose manufacturer's serial number is [] and whose current registration mark is [] for the risks set out in the attached certificate of insurance and that all premiums due to the date hereof in respect of such insurances have been paid in full. We also confirm that you are named as additional assured(s) on the insurance policies (including any part thereof, the "Insurances") evidenced in the attached certificate of insurance for the periods stipulated therein.

At the request of Lessee and in consideration of your approving our acting as the insurance broker for the Insurances, we undertake:

1. to pay to you without any set-off or deduction of any kind for any reason any and all proceeds from the Insurances (other than under the liabilities policies) collected from insurers in accordance with the terms of the attached certificate.
2. to advise you promptly upon becoming aware of:
 - (i) any change or alteration made to or proposed to be made to the Insurances by Lessee which would be material and adverse to any insured party's interests at least thirty (30) days before such proposed change or alteration is to take effect;
 - (ii) any cancellation or any proposed cancellation of the Insurances at least thirty (30) days (or such lesser period as may be specified from time to time in the case of war risks

and allied perils) before such proposed cancellation is to take effect;

- (iii) of any act or omission or of any event which might invalidate or render unenforceable in whole or in part the Insurances;
- (iv) non-receipt by us of renewal instructions from Lessee at least fifteen (15) days prior to the expiration date of Insurances; and
- (v) if any premiums are not paid to us in accordance with the insurers requirements.

3. We undertake to advise you immediately if we cease to be insurance brokers to Lessee.

The above undertakings are given subject to:

- (a) our lien, if any, on the policies referred to above for premiums due under such policies in respect of the above-mentioned Aircraft; and
- (b) our continuing appointment for the time being as insurance brokers to Lessee; and
- (c) all claims being collected through us as insurance brokers to the extent of our interest as evidenced by the attached certificate.

Yours faithfully,

[Insurance Broker]

APPENDIX "I"

DEREGISTRATION POWER OF ATTORNEY

KNOW ALL MEN by these presents that the Board of Directors of [insert Lessee's details] being a company incorporated and registered under the laws of [insert country of incorporation], having its registered office at [insert registered office address] ("Grantor") by this instrument hereby grants special irrevocable and non-retractable powers to [insert Lessor's details] ("Grantee") to represent Grantor before any public authority of the federal or any state or municipal government in [insert State of Registration], including but not limited to, the civil aviation authority of [insert State of Registration] ("Civil Aviation Authority"), any customs agency or any other governmental agency or department succeeding to any of the functions or duties of the foregoing, in order to effect the deregistration in [insert State of Registration] of, obtain export licenses from [insert State of Registration] for, and take any other actions necessary or advisable for, the repossession and exportation to any country of [insert Aircraft details] bearing manufacturer's serial number [] and current registration mark [], including [insert Engine details] installed thereon or any other engine which may hereafter be installed on the airframe in substitution of the above mentioned, or any airframe, engine or part that may be substituted thereon all in accordance with the terms of the Aircraft Lease Agreement dated [] between Grantor and Grantee in relation to the aircraft (collectively, the "Aircraft") and all equipment and documents appurtenant to the Aircraft.

Grantee is empowered to perform all acts necessary to effect the foregoing, including the signing of any document, the application for any receiving of export licenses and the submission of any statement or information in connection therewith.

Grantee may delegate the powers conferred by this Power of Attorney, in whole or in part, to any individual(s), including but not limited to employees of Grantee or legal counsel in [insert State of Registration].

Grantor hereby represents, warrants and covenants that this Power of Attorney is irrevocably granted to Grantee in the interest of Grantor and Grantee, and constitutes the valid, legally and irrevocably binding obligation of Grantor, enforceable against Grantor in accordance with its terms.

IN WITNESS WHEREOF, this Power of Attorney has been executed by Grantor at [insert appropriate details] this [insert date].

[Lessee]

APPENDIX "K"

AIRCRAFT ACCEPTANCE CERTIFICATE

To: [Lessor's Details]

Aircraft Lease Agreement dated as of [insert date] between [insert name of Lessor] ("Lessor") and [insert name of Lessee] ("Lessee") (the "Agreement") relating, inter alia, to [insert Aircraft details] (the "Aircraft")

Terms used in this Certificate bear the meanings given to such terms in the Agreement.

Lessee confirms that as at this ___ day of _____, _____ (the "Delivery Date"):

1. the Aircraft and all Aircraft Documents, including the usual and customary manuals, log books, flight records and historical information relating to the Aircraft, Engines and Parts was duly accepted by Lessee in accordance with and subject to the provisions of the Agreement and the execution and delivery of this Certificate further confirms the acceptance of the Aircraft and Aircraft Documents by Lessee for all purposes of the Agreement;
2. pursuant to the terms of the Agreement, the first Basic Rent payment was due and payable three (3) Business Days prior to the date set forth above and Lessee became obliged to pay to Lessee the amounts stipulated in the Agreement with respect to the Aircraft;
3. the Aircraft is insured in accordance with the Agreement;
4. the representations and warranties contained in Article 2 of the Agreement are, by reference to the facts and circumstances existing today, true and accurate in all respects;
5. the Aircraft, Engines, Parts and Aircraft Documents have been fully examined by Lessee and have been received in a condition fully satisfactory to Lessee and in full conformity with the Agreement in every respect;

6. the Agreement is in full force and effect, Lessor has fully, duly and timely performed all its obligations of every kind or nature thereunder and Lessee has no claim, right of set-off, deduction, withholding or counterclaim against Lessor whatsoever in connection with this Agreement;
7. Lessor's Lender (if applicable) may rely upon all of the foregoing in granting substantial financial accommodations to Lessee and Lessee understand and agrees that any funds being advanced by Lessor's Lender will be made in reliance on the foregoing;
8. prior to the Delivery Date, Lessee has obtained all required permits, authorizations, licenses and fees of the State or Registration or any Government Entity thereof necessary in order for Lessee to operate the Aircraft as permitted by the terms of the Agreement;
9. no Event of Default is subsisting; and
10. the amount of fuel on board the Aircraft at the Delivery Date is:

[NAME OF LESSEE]

Per: _____

Name: _____

Title: _____

APPENDIX "L"

IDENTIFICATION PLATES

Throughout the Term, Lessee shall ensure that there is always affixed and not removed or in any way obscured, the following fireproof identification plates on the Airframe and each Engine bearing the legends or any other legend requested by Lessor in writing:

Airframe Identification Plates

Location: In a reasonably prominent place in the cockpit of the Aircraft not less prominent than that of the certificate of airworthiness and another in a prominent place on the flight deck.

Size: No smaller than 4" x 6"

Legend: "THIS AIRCRAFT IS OWNED BY [insert appropriate details] AND LEASED TO [insert Lessee's details] AND MAY NOT BE OR REMAIN IN THE POSSESSION OR, OR BE OPERATED BY, ANY OTHER PERSON WITHOUT THE PRIOR WRITTEN CONSENT OF [insert Lessor's details]"

MANUFACTURER'S SERIAL NO.: _____

ADDRESS: [insert Lessor's details]"

Engine Identification Plates

Location: The legend on the plate must be no less prominent than the Engine data plate and must be visible from the forward view

Size: No smaller than 2" x 6"

Legend (Engines) "THIS ENGINE IS OWNED BY [insert appropriate details] AND LEASED TO [insert Lessee's details] AND MAY NOT BE OR REMAIN IN THE POSSESSION OR, OR BE OPERATED BY, ANY OTHER PERSON WITHOUT THE PRIOR WRITTEN CONSENT OF [insert Lessor's details]"

APPENDIX "M"

REDELIVERY CONDITIONS

The Aircraft shall be redelivered by Lessee, at its sole cost and expense, to Lessor at the Redelivery Location. Subject to provisions otherwise contained in the definitive lease agreement and taking into account ordinary wear and tear, the Aircraft shall comply with the following conditions:

- (a) be airworthy, clean by international airlines standards and suitable for immediate operation in commercial service;
- (b) be in good operating condition and appearance and otherwise in the condition to be maintained under the definitive lease agreement;
- (c) have installed the full complement of Engines, furnishings and other equipment, parts and accessories and loose equipment as when originally delivered to Lessee and all systems and equipment will be properly functioning;
- (d) be free and clear of all liens except those created by Lessor;
- (e) have been inspected for corrosion;
- (f) exterior fuselage shall have been stripped and painted white with smooth aerodynamic surfaces and the interior configuration shall be the same as when originally delivered to Lessee;
- (g) have a valid certificate of airworthiness or, if requested by Lessor, an export certificate of airworthiness to such country as Lessor may specify issued by the State of Registration;
- (h) have completed on a terminating action basis, all applicable airworthiness directives and manufacturer's mandatory service bulletins issued during the Term and requiring compliance during the Term or within one hundred and eighty (180) days of the end of the Term; and
- (h) be free from any waivers, deferred maintenance, open or carryover items on the Aircraft or engines at the time of return of the Aircraft.

At the time of redelivery of the Aircraft, the Airframe, each Engine and all time controlled Parts shall conform to the following:

- (i) Airframe – immediately prior to redelivery, the airframe shall have undergone will receive a complete block "C" check including all phases and multiples in accordance with the Approved Maintenance Program. The time remaining to the structural requirements of the 4C inspection will be not less than fifty (50) percent of the allowable interval between inspections.
- (ii) Engine – immediately prior to delivery, each engine shall have undergone a complete video taped hot and cold section borescope inspection and a power assurance run in accordance with the engine manufacturer's manual and all items beyond the manufacturer's limits will be repaired. Each engine will have no more than 2,000 hours since last hot section refurbishment and no more than 4,000 hours since last cold section refurbishment. No engine will be "on watch" for any reason requiring any special or out of sequence inspection. Each life limited part within each engine will have at least fifty (50) percent of its allowable life remaining. In addition, engine trend monitoring will show no adverse trends during the last thirty (30) days operation.
- (iii) APU – the time since last heavy shop visit will be no more than fifty (50) percent of the mean time between heavy shop visits as determined by the manufacturer and all outputs will be in the normal operating range.
- (iv) Landing Gear – the time remaining to overhaul will not be less than fifty (50) percent of the overhaul interval. In addition, each life limited part within each landing gear will have at least the same time remaining as the landing gear itself.
- (v) Parts– the time remaining to overhaul will not be less than fifty (50) percent of the allowable overhaul interval or one complete block "C" check interval whichever is the greater.

APPENDIX "N"

AIRCRAFT REDELIVERY CERTIFICATE

To: [Lessee's Details]

Aircraft Lease Agreement dated as of [insert date] between [insert Lessor's name] and [insert Lessee's name] (the "Agreement") relating, inter alia, to [insert Aircraft description] (the "Aircraft")

Terms used in this Certificate bear the meanings given to such terms in the Agreement.

Lessor confirms that as at this __ day of _____, _____:

1. the Aircraft and all Aircraft Documents, including the usual and customary manuals, log books, flight records and historical information relating to the Aircraft, Engines and Parts was duly redelivered by Lessee and accepted by Lessor in accordance with and subject to the provisions of the Agreement and the execution and delivery of this Certificate further confirms the acceptance of the Aircraft and Aircraft Documents by Lessor;
2. the Airframe, Engines and Parts had the following hours/cycles at redelivery:

(a) Airframe:

Total Hrs	Total Landings	Time since "C" check		Time since "A" check	
		Hrs	Cycles	Hrs	Cycles

(b) Engines:

Pos	MSN	Total Hrs	Total Cycles	Hrs/cycles since Last shop visit	Time remaining to next LLP removal	
					Hrs	Cycles

(c) Auxiliary Power Unit:

Total Hrs	Hrs/cycles remaining Until HIS inspection		Hrs/cycles remaining on turbine and compressor life limited parts	
	Hrs	Cycles	Hrs	Cycles

(d) Landing Gears:

Pos	MSN	Total Hrs/cycles	Hrs/cycles Since last overhaul		Hrs/cycles to next scheduled removal	
			Hrs	Cycles	Hrs	Cycles
Nose						
Right Main						
Left Main						

- (e) the status of components or Parts with time/cycle and calendar limited is attached hereto;
 - (f) other technical information relating to the Aircraft and its components are attached hereto;
5. the above specified aircraft, engines, parts and documents are hereby accepted by Lessor subject to the provisions of the Agreement and correction by Lessee (or procurement by Lessee at its sole cost and expense) as soon as reasonably possible of the discrepancies as attached;
 6. subject to the following paragraph, the leasing of the Aircraft by Lessor to Lessee pursuant to the Agreement is hereby terminated without prejudice to Lessee's continuing obligations under the Agreement including, but not limited to, paragraph (5) above and Articles 8.8, 8.9, 12.3, 14.11, 16.9, 17.9 and 20.1 of the Agreement;
 7. Lessee hereby represents and warrants that during the Term all maintenance and repairs to the Airframe and Engines were performed in accordance with the requirements contained in the Agreement;

- 8. Lessee confirms that all of its obligations under the Agreement whether acquiring prior to the date hereof or which survive the termination of the Agreement by their terms and accrue after the date hereof, shall remain in full force and effect until all such obligations have been satisfactorily completed; and
- 9. the amount of fuel on board the Aircraft at the date hereof is:
_____.

[NAME OF LESSOR]

Per: _____

Name: _____

Title: _____