

AIRCRAFT REPOSSESSION AND ARREST UNDER MALAYSIAN LAW

Article by Fuzet Farid¹ and Muhammad Danial Mohamad Nizam
Messrs Fuzet Farid, Kuala Lumpur, Malaysia, April 2015

The aviation sector has faced several significant challenges in the past year. Unique high-profile incidents as well as general factors related to the world economy have both contributed. Although the lower cost of aviation fuel resulting from the drop in crude oil prices per barrel has benefited several airlines, strong competition and tricky margins continue to dog others.

In such a challenging aviation environment, aircraft financiers may wish to exercise their right to enforce security over aircraft in cases of defaults under loans secured by them. The nature of aircraft and differing security documents dictate that multi-jurisdictional legislation in this regard differs across the aviation industry. One of the remedies sought after by financiers is the repossession and arrest of aircraft either through legislation and/or contractual means.

Therefore whilst aircraft are on the ground in Malaysian airports², there may be a concern on the part of airlines whether there is a risk, if any, of general creditors being able to arrest the aircraft in Malaysia for debts owed to them. The type of potential creditors vary widely and include though are not limited to lessors, employees, airport authorities, fuel vendors and MRO service providers. This article summarises the aircraft repossession and arrest legislation regime in Malaysia.

Malaysian law on aircraft repossession and arrest

Malaysia has enacted the Cape Town Convention³ in the form of its International Interests in Mobile Equipment (Aircraft) Act 2006. The following declarations were deposited under the Cape Town Convention Article 39(1):

“Malaysia declares that the following categories of non-consensual right or interest have priority under its laws over an interest in an aircraft object equivalent to that of the holder of a registered international interest and shall have priority over a registered international interest, whether in or outside insolvency proceedings:

(a) liens in favour of airline employees for unpaid wages arising since the time of a declared default by that airline under a contract to finance or lease an aircraft object;

(b) liens or other rights of an authority of Malaysia relating to taxes or other unpaid charges arising from or related to the use of that aircraft object and owed by the owner or operator of that aircraft object, and arising since the time of a default by that owner or operator under a contract to finance or lease that aircraft object; and,

(c) liens in favour of repairers of an aircraft object in their possession to the extent of service or services performed on and value added to that aircraft object.

Malaysia declares that nothing in the Convention shall affect its right or that of any entity thereof, or any intergovernmental organisation in which Malaysia is a member, or other private provider of public services in Malaysia, to arrest or detain an aircraft object under its laws for payment of amounts owed to the Government of Malaysia, any such entity, organisation or provider directly relating to the service or services provided by it in respect of that or another aircraft object.”

Although the Federal Constitution of Malaysia guarantees the protection of property from expropriation without adequate compensation, the aircraft may be detained and forfeited pursuant to any of the following circumstances:

(i) Civil Aviation Regulations 1996 (“MCA”))

¹ Fuzet Farid contributed in *Kluwer’s Aircraft Repossession & Enforcement – Practical Aspects*, Malaysian chapter, 2009-2010.

² Malaysia has 6 international airports and 17 domestic airports, as well as 2 short take-off and landing ports (STOLports) that serve the rural and remote areas in Malaysia. Out of them all, the Kuala Lumpur International Airport in Sepang is the largest in the country which is operated by Malaysia Airports Holdings Berhad as the largest airport operator in Malaysia and licensee under the Civil Aviation Act 1969.

³ Accession on 2 November 2005 and entry into force on 1 March 2006.

The MCAR provides for the Director-General of the DCA to enter in the Aircraft Register a lien over (a) the aircraft in respect of which charges were incurred; and (b) any other aircraft of which the person in default is the owner or operator at the time when the detention begins.

(ii) Income Tax Act 1967

The Director-General of the Inland Revenue Board of Malaysia may with the approval of the Minister of Finance of Malaysia, direct the customs authority to refuse clearance from any airport in Malaysia to any aircraft wholly or partly owned or chartered by the person incurring income tax until the unpaid tax is paid.

(iii) Customs Act 1967

Clearance in respect of any aircraft operated by the operator and departing from any customs airport in Malaysia may be refused by an officer of the Customs and Excise Department of Malaysia Under the same Act, the customs officer also has the power to go on board any aircraft and search the aircraft.

Admiralty jurisdiction

As for potential arresting parties, their claim must fall within the Supreme Court Act 1981 of the United Kingdom. The Malaysian Courts of Judicature Act 1964 at Section 24(b) provides that the civil jurisdiction of the Malaysian High Court shall include:

“the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981;”

United Kingdom Supreme Court Act 1981 in turn sets out the admiralty jurisdiction of the High Court in Sections 20 to 24. Section 20(7) states that the sections apply:

“(a) in relation to all aircraft, whether [Malaysian] or not and whether registered or not and wherever the residence or domicile of their owners may be;

“(b) in relation to all claims, wherever arising (including, in the case of cargo or wreck salvage, claims in respect of cargo or wreck found on land): and

“(c) so far as they relate to mortgages and charges, to all mortgages and charges, whether registered or not and whether legal or equitable, including mortgages and charges created under foreign law:”

Under Section 20, the Admiralty jurisdiction of the High Court shall be:

“(a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);

(b) jurisdiction in relation to any of the proceedings mentioned in subsection (3);

(c) any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and

(d) any jurisdiction connected with aircraft which is vested in the High Court apart from this section, and is for the time being by rules of court made or coming into force after the commencement of this Act assigned to the Queen’s Bench Division and directed by the rules to be exercised by the Admiralty Court.”

In Subsection (2), the questions and claims that expressly refer to aircraft as opposed to ships are:

“(j) any claim in the nature of salvage (including any claim arising by virtue of the application, by or under section 51 of the [UK] Civil Aviation Act 1949, of the law relating to salvage to aircraft and their apparel and cargo);

(k) any claim in the nature of towage in respect of... an aircraft;

(l) any claim in the nature of pilotage in respect of ... an aircraft;”

The only jurisdiction given to the Admiralty court in relation to aircraft is that mentioned in para (j), para (k) and para (l) of s 20(2) of the United Kingdom Supreme Court Act 1981, which concerned with claims in the nature of salvage, towage, and pilotage⁴.

⁴ Hewson J in the Admiralty Division in *Schempp-Hirth Kommandit-Gesellschaft (Owners of the Glider Standard Austria SH 1964) v Persons Having Possession of the Glider Standard Austria SH 1964* [1965] 2 All ER 1022.

In relation to claims for towage or pilotage, Section 21(5) states that:

“In the case of a claim in the nature of towage or pilotage in respect of an aircraft, an action in rem may be brought in the High Court against that aircraft if, at the time when the action is brought, it is beneficially owned by the person who would be liable on the claim in an action in personam.” Should however any aircraft be arrested in an action in rem, Section 21(6) states that:

“Where, in the exercise of its Admiralty jurisdiction, the High Court orders any ship, aircraft or other property to be sold, the court shall have jurisdiction to hear and determine any question arising as to the title to the proceeds of sale.”

Section 20(c) and (d) also state that:

(c) any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and

(d) any jurisdiction connected with aircraft which is vested in the High Court apart from this section and is for the time being by rules of court made or coming into force after the commencement of this Act assigned to the Queen’s Bench Division and directed by the rules to be exercised by the Admiralty Court.”

Regarding the rules of court in force today which may vest admiralty jurisdiction connected with aircraft in the High Court and directed by the rules to be exercised by the Admiralty Court are the Rules of Court 2012 and the Practice Direction No. 1 of 2012 for Admiralty and Maritime Claims. There are no references to aircraft though in any of the rules of court. Therefore the Admiralty jurisdiction of the High Court under which an action in rem may be brought against the aircraft to arrest any of them appear to be expressly only for towage and pilotage.

It is imminently prudent for all parties in the aircraft financing business especially for owners, lessors and lessees of aircraft to be aware of the risk of repossession and arrest of aircraft which may arise when any aircraft are being flown into and on the ground of any airports around the world. This is due to the fact that the law on repossession and arrest of aircraft allows various parties the right of arresting aircrafts under numerous circumstances. It is also crucial to exercise the arresting rights with utmost caution as the laws also provide for a party to recover damages arising out of the arrest of property if the arrest was obtained unreasonably and without good cause.

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