Aviation Finance Transactions

Selected Legal and Documentary Issues

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Funding and Refinancing Issues

- **Source of funds**
  - Interbank market
    - Theory of matched funding
    - Based on the assumption that a bank obtains a deposit from the interbank market to fund the loan for each interest period, and has to repay that deposit and re-borrow a new deposit at the end of each interest period
    - Often of no / limited relevance, but provides a framework / certainty for floating rate funding

- Customer deposits
- Bond issuance: CP, CDs, covered bonds, MTNs etc.
- Specific third party funding line (e.g. insurance company)
- Documentation must include day 1 protections as conditions precedent - free availability of US$ etc. funds / no material adverse change in capital or credit markets that would impact ability to fund

- **Risks**
  - Dependent on refinancing method
  - Day 1, ongoing and prepayment exposure / risks
  - Difficulty to quantify potential exposure
  - Different lenders have different approaches

- **Day 1 risk**
  - Availability of currency and amount
  - Loan agreement should include “funding” conditions precedent (see above)
  - Secure availability of funds in advance (i.e. before execution of Drawdown Notice)
  - Requirement for indemnity coverage = ensure that you have support for the indemnity obligation
  - Importance of “several” lender obligations

- **Ongoing risk - market disruption**
  - Floating / fixed rate loans
  - No Screen Rate available **or** cost of funding is in excess of LIBOR
  - Generally accepted approach for funding mismatch
    - Market disruption must not be the result of circumstances affecting a lender that are peculiar to it / its location
      - Historic tiering approach of London interbank market - results in borrowing premium for particular banks, particular types of bank or banks in particular locations
      - Japan premium: November 1997 - economic slump plus bankruptcy of Sanyo Securities results in Japanese banks LIBOR funding premium of 30 bps

- Korea premium: November 1997 - concerns over banking system heavily reliant on short-term borrowing from Japanese banks results in Korean banks LIBOR funding premium of 70 bps

- Requirements
  - Circumstances affecting the interbank market generally
  - Exclusion for lender that is affected by circumstances specific to it
  - Affected lender(s) must have minimum loan participation(s) of X%
    - » if a material percentage of lenders is affected, that must be evidence of the above
- Market disruption notice to be given for each interest period
- Cost of funds applies assuming no agreed alternative rate

- Alternative rate - Reference Bank Rate
  - Rate at which the “Reference Banks” can borrow in the London interbank market
  - But that is not necessarily the rate at which the lenders under any given facility could borrow
  - History has generally shown that it does not work in practice
  - A bad idea
- Alternative rate - Interpolated Screen Rate
  - “**Interpolated Screen Rate**” means, in relation to the Loan and any Interest Period, the rate (rounded to the same number of decimal places as the two relevant Screen Rates) that results from interpolating on a linear basis between:
    - the applicable Screen Rate for Dollars as of 11:00 (London time) on the applicable Quotation Day for the longest period (for which that Screen Rate is available) that is less than such Interest Period; and

- » the applicable Screen Rate for Dollars as of 11:00 (London time) on the applicable Quotation Day for the shortest period (for which that Screen Rate is available) that exceeds such Interest Period."
- A better back-up rate, but might well not reflect actual funding cost

– Borrower protections
  - Amounts claimed must be determined in good faith and based on normal banking practices at the relevant time
  - Requirement for written statement
    - » To certify Cost of Funds
    - » To include "any available relevant information" **or "**[reasonably detailed] information with respect to the basis of determination of Cost of Funds" (be careful with drafting)

» To certify non-discriminatory basis of calculation (resist-very difficult to do that in light of treasury practices); if agreed, be careful with wording:

- Example

"The delivery of any such written statement shall constitute certification by the applicable affected Lender that its Cost of Funds has been determined fairly and accurately and invoked on a non-discriminatory basis with respect to its similar commercial aviation financing transactions (to the extent, in relation to any such transaction, that its debtor has a financial liability with respect to any comparable market disruption claim)"

- **Prepayment**
  - Borrower and lender must understand the potential exposure on prepayment
  - “Classic” floating rate interbank funding
    - Simple
    - Difference between the amount of interest that would have been payable (assuming no prepayment) and the amount of interest that the lender could receive by placing the prepaid amount on overnight deposit for the remainder of the current interest period (no obligation to place on deposit)
  - Depending on refinancing method, need to cover liquidity spread risk

- Can be difficult to quantify
  - Bank treasury generally will not match-fund
  - Reinvestment rate obtainable at time v refinancing cost (which remains unaltered)
  - Results in perceived lack of treasury transparency

Payments and Tax

- **Lease payments**
  - Typical major operating lease payments
    - Scheduled rent
    - Maintenance reserves
    - Security deposit
    - Return compensation
    - Early termination payment
    - Total loss payment
  - Level of control

- Depends on type of deal and quality of lessor / support provided by lessor
  - No lessor recourse / support
    - lenders must be able to control all lease payments
    - all lease payments to designated account(s) of lessor held with security trustee
    - retention of all amounts
      - pre-loan EoD: application to all amounts owing to finance parties before application to lessor
        - » subject to retention of specific lease payments for specific loan purposes
      - post-loan EoD: specific blocker on any distribution to lessor

- Lessor recourse / support
  - Lessor's ability to deal with lease payments depends on level of quality / support
  - Many "real" lessors will expect to freely deal with all lease-generated cash (except for lease rental, but not always)
  - Possible linkage to occurrence of specified events (such as a breach of financial covenants or occurrence of event of default (too late))

- Careful lease review
  - Identify major lease payments and deal with them specifically in the loan agreement
  - Payment of different types of lease payment into different accounts (simplifies bank monitoring)
  - Allocation and usage of major lease payments:
    - Scheduled rent
    - Maintenance reserves
    - Security deposit
    - Return compensation
    - Early termination payment (depends on type of deal)
    - Total loss payment

- Does the bank need to ensure that any payment is treated as collateral for the deal?
  - e.g. - if a bank's approval of the transaction requires that the security deposit is allocated as part of the bank's collateral, then ensure lessor's ability to fund liability to lessee (and ensure no related covenants from the bank in favour of the lessee)
- Early termination payment
  - More common on a "structured" / "hybrid" operating lease financing
  - Often linked to lessee exercise of early termination option
  - Related loan will often comprise
    - » a tranche that amortizes to zero on the lease early termination date; and

- a further non-amortizing tranche that has a term to match the full lease term (assuming no early termination option) / a further tranche that only starts amortizing after the lease early termination date
- ensure that early termination payment must first be applied to the outstanding debt (here the second tranche) and that lessor cannot take cash out of deal

- Return compensation payment
  - Often where no scheduled MRs are payable
  - Can be a very large payment and is critical for preservation of the aircraft's value
  - Careful lease review to identify (can sometimes be easy to miss)
  - How is it to be used?

- Maintenance reserves (and L/C proceeds)
  - Careful lease review –a “maintenance payment” might be available to apply to any defaulted obligation (not just an obligation related to maintenance events)
  - How is it to be used?
- Security deposits (and L/C proceeds)
  - How is it to be used?

- **Payments - general**
  - Must be made in full, without set-off or counterclaim and without any deduction or withholding
  - Lessor must have any required authorization to make payments
    - Check for any central bank / exchange control issue
    - Very rare given location of most lessors (c.f. lessees)
    - No authorization = event of default

- Payment direction to lessee / lease payment account
  - Some lessees will refuse to make payments to certain accounts – e.g. an account of a person other than its lessor or in a jurisdiction other than the jurisdiction of its lessor (ignoring payments to tax havens)
  - Need to take effective security over third party lessor account(s)

- **Currencies**
  - Aircraft are US$ assets
  - Loans can be US$ or non-US$
  - Leases can be US$ or non-US$
  - Management of currency exposure
    - Cashflows: no currency arbitrage – no mismatch between lease and loan currencies (ideally)
    - Asset: benchmark exchange rate for US$: other currency - periodic testing / resultant ability to require specified actions: cash or L/C collateralisation or loan prepayment

- **Tax**
  - Little to worry about (c.f. tax-enhanced lease products)
  - Tax indemnity - unlikely ever to be needed
  - Enforcement of security – coverage potentially more relevant
  - Loan payments
    - Withholding tax
    - Interest payments
    - Reasons: method of levying tax; tax imposed on foreign recipient (but not really in light of gross-up obligation); and easy to collect by requiring deduction from payment

- “Qualifying Lenders”
- Day 1 status
- Change in status
  - Borrower general risk (subject to lender further assurance)
  - Change in law risk
    - No obligation to gross-up if a lender is not or ceases to be a Qualifying Lender, unless as a result of any change in law after the date of the loan agreement (in case of a day 1 lender) or after the date it becomes a lender (in the case of a loan transferee)

Events of Default

- Borrower fault / responsibility (c.f. prepayment events)
- Aim is to have very clear events of default
  - Ability to call without delay – no debate on the topic with the borrower
  - Confidence in making the call – no concern about “wrongful acceleration” and potential lender liability to borrower
  - Resist borrower cures, grace periods, exclusions
- Events of default where no grace period should apply

- Generally: willful breach of fundamental covenants – negative pledge, preservation of security, amendment to transaction (lease) documents without consent, SPC covenants, permitted distributions, etc.

- Minimise any exclusions to insolvency-related and “asset attaching” EoDs
- “MAC” clauses
  - Beware
  - Change needs to be cataclysmic for a lender to have confidence to accelerate without adverse consequences (subject to the actual text)

- "Wrongful acceleration"
  - "Elektrim" cases (2004/2005) involving Law Debenture and bond issuance by Elektrim
  - Committee of bondholders requests Law Debenture (as trustee) to declare default / accelerate the bonds as a result of the occurrence of one of the stated events of default – an event "**materially prejudicial to the interest of the bondholders**" (being the suspension by Elektrim of the trustee's nominee board member – any bondholder(s) with 25%+ value of the bonds having the right to nominate an Elektrim board member)
  - Elektrim disagrees that an event of default has occurred; Law Debenture is under pressure from bondholders to accelerate

- Law Debenture goes to court to get directions as to the meaning of “materially prejudicial to the interest of the bondholders”; court held that the events were evidently materially prejudicial
- Law Debenture requires indemnity from bondholders for potential losses resulting from any damages claim by Elektrim (feared to run to nearly €900m) *before* accelerating the bonds
- Court refuses to interfere in Law Debenture’s decision making process with respect to the indemnity:

> “It is well established that the circumstances in which a court will interfere with the exercise by a party to a contract of a contractual discretion given to it by another party are extremely limited … [the] cases show that provided that the discretion is exercised honestly and in good faith and for the purposes for which it was conferred, and provided also that it was **a true exercise of discretion in the sense that it was not capricious or arbitrary or so outrageous in its defiance of reason that it can properly be categorized as perverse**, the courts will not intervene”

- What types of liability to the borrower / issuer?
  - » Interference by unlawful means with business
  - » Conspiracy to cause injury by unlawful means

- Borrower vulnerable to “bad faith” lenders
- Relatively uncommon for aircraft finance transactions - more usual to include as a condition precedent

Loan prepayments

- **Voluntary prepayment**
  - Most lessors expect to have the right
  - Gives flexibility for aircraft sale or (worse for original lenders) loan refinancing
  - Deprives lenders of expected return
  - Voluntary prepayment fee: amount and period
  - In full or in part (minimum amount / multiples)

- **Prepayment Events**
  - No Borrower fault / responsibility (c.f. events of default)
  - Mandatory
    - sale of aircraft (in breach of negative pledge)
    - total loss
    - lease termination [payment]
      - subject to remarketing rights

- Optional
  - Additional or increased Borrower payment required for taxes or increased costs
  - Market disruption event
  - Illegality event that cannot be mitigated in an agreed manner
- LTV Testing / Exchange Rate Testing
  - Borrower option to prepay part of loan instead of cash-collateralise
- Remarketing
  - No successful remarketing for sale or lease by the end of any agreed remarketing period

- Other
  - Lessor might want to have certain events characterized as Prepayment Events instead of Events of Default – usually because it does not want an Event of Default to trigger cross-default under its other financings
  - Example: shareholder ceasing to own the borrower
- Prepayment fee
  - To compensate for loss of expected return
  - Parties might agree a prepayment fee also in case of mandatory prepayment – e.g. on an aircraft sale or in connection with a loan refinancing

- Breakage indemnity
  - Floating rate loan: “classic” broken funding to cover the then current interest period
  - Fixed rate loan
    - to reflect lender’s refinancing method / preferences
    - NPV of interest payment differential
    - ISDA-based close-out determination; for a “pure” fixed rate deal this is likely not to match the lender’s actual refinancing
    - If possible, draft as widely and generically as possible; borrower comfort via good faith determination, written certification (resist detail) and non-discrimination provision

- For many commercial lenders, it is difficult to formulate losses because treasury invariably does not refinance for a specific loan / exposure
- Agreeing a specific methodology (as indicated above) may well only be an approximation of losses; actual losses will depend on the day 1 refinancing commitment (which will often cover the entire loan term) and the reinvestment conditions / options at the time of prepayment

– Indemnity must not only cover “liquidation or redeployment of deposits obtained from third parties” since that only applies to the interbank / matched funding approach
  - No basis for indemnity if a bank does not use this type of matched funding

- So the indemnification text needs to be extended to include “any arrangements entered into by a Lender [with any other person] for the purpose of or to facilitate its funding of the Loan”

- Borrower requirement for substantiation
  - Amounts claimed must be determined in good faith and based on normal banking practices at the relevant time
  - Requirement for written statement
    - To certify the amount claimed
    - To set out the basis of calculation of the indemnity payment (i.e. not full details of the actual calculation)
    - To certify non-discriminatory basis of calculation (resist – practically impossible to do that)

- Breakage gains
  - Frequent borrower expectation
  - If agreed, only pay if there is no EoD and characterize as Proceeds for application under the proceeds waterfall so that breakage gains are first applied to lenders for any amounts due and payable to them before application at the bottom of the waterfall
  - Problematic for some types of lender
    - e.g. absolute fixed return lender, such as an insurance company (or a lender refinanced by an insurance company) or a bank that is refinancing via a non-specific bond issuance, where there would be no actual breakage
    - many lenders are prohibited by internal policy from paying break gains

Cross-Default, Cross-Acceleration and Cross-Collateralisation

- **Cross-default**
  - Means different things
  - Simple
    - As part of the same transaction, more than one aircraft is financed (pursuant to separate loan agreements) by the same lenders for the same lessor / lessor group
    - Any event of default under one financing is automatically an event of default under the other financings
    - Lessor might resist and require that cross-default only applies as between aircraft leased to the same airline – best approach is only to agree this on a non-recourse deal

- What if there is one common bank across all aircraft but different syndicate banks across the aircraft?

- Wider
  - Wider lessor / lender relationship
    - » Cross-default to the lessor's other [aircraft] financings with the particular lenders
    - » Best approach – cover transactions involving lessor or any of its affiliates and lender or any of its affiliates
    - » Recourse limitation - Lessor might want to limit to other deals where there is actual recourse to it or its assets (except for the applicable aircraft / related collateral)

- What if one lender has other exposure, but other lenders do not?
  - Provision might be agreed:
    - only with respect to the lender that has other exposure (but all lenders benefit via the event of default)
    - only for so long as the lender with other exposure participates in the facility (possibly with a minimum - possibly Instructing Group - participation)
    - only with respect to other transactions where the applicable lender(s) has a day 1 participation (i.e. not by virtue of secondary trading)
  - Also where one of the lenders is a relationship lender for the borrower (but the other lenders are not)
- Cross-default to the lessor's other aircraft financings generally (i.e. not with the particular lenders)?
  - Less common – go straight to general Financial Indebtedness

- Example
  - “**Cross Default Event** means (following the expiry of any applicable grace period) the occurrence of any event of default (howsoever defined but subject to any applicable grace periods) under any loan, credit or other financing agreement between any Group Company and/or any SPE and [Bank] (whether entered into before or after the date of this Agreement) in relation to which [Bank] is a lender at the time of execution of the relevant initial financing documentation (unless otherwise agreed in writing by the Parent) **provided that** the occurrence of such an event of default shall not constitute a Cross Default Event if the recourse of [Bank] under the relevant loan, credit or other financing agreement is limited to certain specific assets and/or rights of the applicable Group Company and/or the applicable SPE and such person has not become personally liable for payment under the relevant loan, credit or other financing agreement.”

- Financial Indebtedness
  - The purpose of this provision is
    - » to allow lenders to take action in relation to the borrower in case other creditors start to take action – preserve lenders' position compared to other creditors
    - » to be able to create leverage: a borrower is more likely to deal first / quickly with creditors who pose an immediate threat
  - Any Financial Indebtedness is not paid when due (subject to grace periods) or is accelerated / becomes capable of acceleration as a result of any event of default (same approach for commitments for any Financial Indebtedness)
    - » Subject to minimum aggregate amount

- Possibly subject to any good faith contest of the entitlement of the applicable creditor to take the applicable action

- Less common where an aircraft lessor is the borrower, even on recourse deals
  - Main reason: a bank has security over the aircraft and the lease collateral, which is intended to have the effect of ring-fencing the assets on any insolvency (so that you are not in a race with other creditors)
- More common where an airline is the borrower or the ultimate credit on a deal (e.g. finance leases including JOLCOs)

- Example

  “(a) Any Financial Indebtedness of the Lessee is not paid when due (after the expiry of any originally applicable grace period).

  (b) Any Financial Indebtedness of the Lessee:

  - is declared to be or otherwise becomes due and payable prior to its specified maturity; or
  - is declared to be due and payable on demand prior to its specified maturity,

  in each case as a result of any event of default (howsoever described or defined) that is attributable to the Lessee.

(c) Any commitment for any Financial Indebtedness of the Lessee is cancelled or suspended (or becomes capable of being cancelled or suspended) by a creditor of the Lessee as a result of any event of default (howsoever described or defined) that is attributable to the Lessee.

(d) No Event of Default will occur under this Clause [●] if:

- the aggregate amount of Financial Indebtedness and/or commitment for Financial Indebtedness falling within [(a), (b) and (c)] is less than [●] million Dollars (US$[●]) (or its equivalent in any other currency or currencies); or
- each of the Lessor and the Security Trustee is satisfied (acting in good faith and based on information provided by the Lessee) that the Lessee is contesting in good faith the entitlement of the applicable creditor to take the applicable action."

- **Cross-acceleration**
  - Instead of cross-default
  - Improved position for borrower
  - An Event of Default only occurs if another financing is actually accelerated / enforced (so a later time)
  - A reduced form of Financial Indebtedness cross-default
  - Should not be accepted under the “simple” cross-default regime

- **Cross-collateralisation**
  - Basic approach
    - More than one aircraft is financed
    - All obligations in relation to all aircraft / loans are secured (via the Secured Obligations definition)
    - Proceeds for an aircraft are applied to that aircraft and then to amounts owing for other aircraft, before any proceeds go to the borrower

- Proceeds application
  - Assuming no event of default, surplus proceeds for an aircraft would go to the borrower at the bottom of the waterfall (as there is nothing to apply against for the other aircraft – amounts would only be those that are then due and payable)
  - How could / should surplus proceeds be used?
    - » Use all or part of surplus proceeds to prepay one or more other loans (in full or in part)?
      - Any prepayment might cause breakage losses
      - Possible to agree timing of application so as to minimize losses (assuming no Event of Default)

- Use all or part of surplus proceeds to cash-collateralise one or more other loans (in full or in part)?
- Required only in case of continuing Event of Default at time of application?
- Answer will largely depend on lessor's requirement to return equity to investors and bank's willingness to allow that; and on the basis on which the transaction is approved by the bank.

– Security
  - Security is granted for all of the Secured Obligations
  - Security granted in relation to one aircraft must allow for release when the Secured Obligations (as applicable to that aircraft) have been fully discharged, subject to no continuing Event of Default at the relevant time

Intercreditor Issues

- Senior / junior / mezzanine / intra-group members / others (with an interest)
- Subordination
  - purpose
    - vary pari-passu entitlement against debtor
    - regulate priority and rights associated with loan
    - needs to be more that a simple statement of subordination
  - contractual
  - structural

- Senior protections (subject to negotiation)
  - Insolvency / non-petitioning
    - Permitted if there is a legal obligation to take the action, if a failure to take the action would result in any loss of right of action or if a senior finance party has already taken action and the related action of the junior finance party is secondary
    - Subject to junior turnover obligation in all cases
  - No right to instruct Security Trustee / not form part of Instructing Group until Senior Secured Obligations discharged
  - No Security Trustee obligation to consult with or have regard to the interests of the junior finance parties (subject to any express provision in the transaction documents)

- Junior facility agent must notify any junior loan event of default
  - No acceleration of junior loan
  - Restrictions of junior loan transfers (varies by transaction type)
  - Covenant not to take independent security, guarantee or collateral
  - Covenant not to amend junior loan agreement or any other transaction document without prior written consent of senior facility agent (subject to permitted minor technical or administrative changes)
  - Turnover covenant in relation to all junior receipts

- Junior rights (subject to negotiation)
  - Right to accelerate junior loan (subject to other protections above)
    - if the senior loan has been accelerated
    - following notice to senior facility agent (weak)
  - Following notified junior loan acceleration, right to instruct the Security Trustee to enforce the security - with no subsequent right to direct enforcement activities
  - Senior facility agent must notify any senior loan event of default
  - Senior facility agent must notify any proposed acceleration of the senior loan or any proposed security enforcement action

- If a junior loan acceleration notice or a senior loan acceleration notice is delivered, the junior lenders have a buyout right for the full amount of the Senior Secured Obligations
  - » Timing
    - notice and exercise
    - lengthy standstill periods are likely to be prejudicial and are to be avoided
  - » Right is only available once
    - senior finance parties need to have clear enforcement path
  - » Entire senior loan participations
    - involves careful assessment of total cost including breakage indemnities

Loan assignments, transfers and sub-participations

- Arguably **the** most important documentary provision
- Ability to effect loan transfers:
  - frees up lending capacity
    - generally
    - particular exposure / concentration limits
      - to a particular creditor (lessor or airline)
      - to a particular country or region
      - to a particular aircraft type

- enables a bank to develop relationships with new investors / investment sources
- enables a bank to utilize refinancing platforms (i.e. assignments of payments to service linked CP / bond programmes)
- enables a bank to respond to wider internal strategic lending policies
- enables an escape in case of a defaulting transaction; without free transferability, a bank will have to sit on a defaulting deal until it has no value, rather than being able to get out early (even at a loss)

- Text of “transfer” provision
  - **Assign** “or otherwise deal with” rights =
    - Assignment Agreement
    - Sub-Participation Agreement
    - Other method – would include declaration of trust
    - Note – under English law “rights” cannot be transferred; they can be assigned
  - **Transfer** rights and obligations
    - Transfer Certificate
    - A transfer of all rights and obligations with respect to the specified portion of the loan / commitment transferred
      - » Creates a new contract / new rights and obligations (on matching terms)
      - » A transfer by novation

- Issues with “accessory security”
  - Applies in (usually) civil code jurisdictions – e.g. Germany, France, The Netherlands and Korea
  - Security is “accessory” to the secured debt – i.e. it follows and depends on it
  - Security granted in favour of all creditors
  - Execution of transfer certificate = new loan and new rights and obligations which operates to discharge the original debt and, as a result, the security as it relates to the discharged debt
  - A new lender (and the other transaction parties) might not want to pay for the cost of producing the required security assignment documentation and filing it with an aviation authority
    - Other security granted on the transaction can help (e.g. a Lessor Security Agreement that includes a security interest over the lessor’s right to any residual proceeds as part of the Collateral)

- Historically, the LMA documentation only provided for execution of Transfer Certificate
- LMA documentation now includes form of Assignment Agreement
  - should be used in jurisdictions involving accessory security
  - subject to verification of protective mechanisms in loan and security documents
    - e.g. parallel debt and independent acknowledgement of debt in favour of security trustee

- Transferees
  - Lenders' position
    - Draft as widely as possible
    - Limit application of transfer restrictions
    - Limit transfer restrictions to "transfers", "assignments" and/or "other dealings"?

- Categories of Transferee
  - Affiliates
  - SPC established by existing or new lender (or supported by a person that otherwise qualifies as a new lender)
  - Other “banks or financial institutions”
  - Insurance companies
  - Trusts, funds or other entities engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets
  - Central banks
  - Anyone after an Event of Default (right is of limited value at this time)

- Borrower's position
  - Concern about "control" varies as between lessors / borrowers
  - No transfer pre-drawdown
    - » Obligation to make the advance is the primary lender obligation
    - » Permitted if transferring lender agrees to make advance if new lender fails to do so
      - In which case must ensure that new lender's participation is automatically transferred back at drawdown
      - Contrary to basic principle of secured lending that the lenders' obligations are several and that no lender is responsible for the performance of another lender's obligations
  - No transfer to Competitors

- No transfer to person involved in dispute with Borrower or breach of obligations owed to Borrower
  - » Example

    “a person with which the Borrower (acting reasonably) objects to doing business, either by reason of (x) the occurrence of any contractual or non-contractual dispute between the Borrower or any of its Affiliates and such person or any of its Affiliates or (y) the default by such person or any of its Affiliates in the performance of any material obligation owed to the Borrower or any of its Affiliates.”

- No transfer to hedge funds
  - Example

    "**Hedge Fund** means a pooled investment vehicle or similar entity that is commonly, but not exclusively, referred to in the financial marketplace as a "hedge fund" and having the following characteristics: (a) it generally seeks consistent levels of return regardless of market conditions, (b) it generally uses complex strategies (which may include, but not be limited to, short-selling, use of leverage and arbitrage and derivatives transactions) in order to minimise market correlations with the goal of generating high returns (either in an absolute sense or over a specified market benchmark) and (c) it generally is open only to financially sophisticated investors. **Hedge Fund** will be construed so as to include "vulture funds" and any pass-through or structured finance vehicles in whatever legal form which are used by a Hedge Fund as part of structuring an investment."

- No transfer to a person that is not a Qualifying Lender (or equivalent) at the transfer date (but arguably covered by the “no increased or additional obligations” point below)
  - Representation as to Qualifying Lender status in Transfer Certificate / Assignment Agreement
  - Possible related condition that tax procedural formalities must be completed (e.g. IRS W-9, W-8BEN etc.)
- No transfer if it would result in more than a specified number of lenders
- Minimum conditions for banks / financial institutions (assess relevance of each)
  - Engagement / experience in aviation finance transactions
  - Minimum long-term unsecured rating
  - Location

- No transfer if it would cause any increased or additional borrower obligations (by reference to the position at the transfer date)
- Prior written notice / consultation
  - » Also an agent point to ensure completion of any required KYC / AML / CDD procedures
- Relationship importance

- Assignments – a couple of other notes
  - Assignment in breach of prohibition / consent requirement = ineffective to vest rights in assignee
    - Linden Gardens Trust v Lenesta Sludge Disposals
  - Assignment that is not notified to the debtor =
    - Debtor validly discharges debt obligation by paying to assignor (unless otherwise has notice), so assignee has assignor payment risk
    - Assignee would usually not be able to sue the debtor for the debt (would need to join assignor in any action)

- Sub-participations
  - A realistic option only if the loan “transfer” restrictions do not apply to the “otherwise deal with” part of the transfer text
  - Nature of relationship between grantor and participant
  - [Much] more expensive option on aircraft finance transactions
  - Why bother?
    - Loan transfer restrictions
    - Disclosure / confidentiality reasons (both sides)
    - Transferring lender wants to retain control / fronting relationship under original loan documents
    - WHT issues (but unlikely to solve)

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