

By the aviation team at XXIV Old Buildings¹

Turbulence in the aviation sector

It is no secret that the aviation industry is under financial pressure. At the end of 2017 Monarch Airlines collapsed, followed by VLM, Primera, Cobalt Air, Flybe, WOW. Then last year Thomas Cook fell and this year has seen the last gasp of Flybe. Now it is clear the coronavirus pandemic will once again put airlines, and hundreds of their suppliers, under severe stress. That will be a cause for immediate worry for employees² asked to take unpaid leave, if they are lucky, and whose jobs may sadly be at risk. To compound that, there is a real risk of a deep recession following the emergency economic measures now being taken by governments worldwide.

At the time of writing, the global aviation market has shrunk to a level unimaginable in recent times with many countries simply refusing to allow aircraft to land or take off in their territories, unless they are operating to repatriate their own nationals, and many others prohibiting entry to nationals of various named states³. Although the price of oil has dropped dramatically many airlines are carrying heavy debt burdens. Most airlines in Europe and North America were not in 2019 regularly generating enough cash to make any significant profit after servicing their debt obligations.

This article, which avoids the word “unprecedented”, contains a recent history of the sector, attempts an overview of the state of the airline industry today and makes some predictions about the future. It considers how airlines might weather the storm, manage first their fleets and then their recoveries. Finally it considers:

- the effect of the insolvency laws on airlines and the aviation industry;
- the nature of the statutory liens enjoyed by airports and others;
- landing slots, which it is now recognised can be exchanged (and in effect sold) even by a company in insolvency;
- the Special Administrative Regime which was proposed following the collapse of Thomas Cook, and which looks like an idea whose time has come; and
- how creditors and investors might use bilateral investment treaties to claw back losses following the insolvency of airlines.

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² The Airports Council International (ACI) estimates that there are some 10m jobs in the aviation sector (operations, engineering, maintenance aerospace designers and manufacturers, crew, airport staff, ground handling, freight forwarders, catering, air traffic control, car rental, customs and immigration) and another 55m jobs which are indirectly related or reliant upon the sector.

³ <https://www.theguardian.com/travel/2020/mar/24/coronavirus-travel-updates-which-countries-have-restrictions-and-fco-warnings-in-place>

Thomas Cook

Despite raising £900m just a month earlier⁴, on 23 September 2019 Thomas Cook went into liquidation. Thomas Cook was a diverse group of travel companies which had a significant high street presence, a legacy from its history as a travel agency, as well as some 100 aircraft. The Official Receiver estimated it to have liabilities of £3.3bn excluding inter-company debt⁵. The directors later attributed the group's insolvency to a number of factors including uncertainty over Brexit, the hot summer of 2018 in the UK and the challenges from low-cost airlines. However evidence given to a House of Commons select committee suggested that it was struggling under the burden of debt which cost it in the region of £150m per year to service⁶.

Grant Shapps, the Travel Minister said at the time:

"Look, the government is not in the business of running travel operators...If we did try to step in, it would only have been a few weeks away from having to do exactly this anyway. In the end, the private investors, the bondholders, all the rest of them, couldn't come together with a deal. That's why we took the decision."

Andrea Leadsom, the then Business Secretary said in the House of Commons:

"Why did we not bail out Thomas Cook? Simply because it was clear that the £200 million it was asking for was just a drop in the ocean. There was no way the company could realistically be restored, despite the Government seriously considering the prospects for doing so and for making it an ongoing concern."

The collapse left more than 140,000 holiday makers stranded abroad, the vast majority in Turkey, Spain and Greece. They were repatriated by the efforts of the Civil Aviation Authority (CAA) regardless of whether the customers had booked 'ATOL' protected holidays. That was a decision taken by the Secretary of State for Transport and is ultimately likely to cost the Government some £83m⁷. That compares to the figure of £45m for the repatriation of customers after the collapse of Monarch, of which only £2.3m was recovered.

Thomas Cook had been monitored by the CAA for some time before its collapse. The Government said that it and the CAA had used their experience of the Monarch repatriation and the recommendations of the Airline Insolvency Review (which had been published in March 2019 – as to which, see below) to plan for the collapse of Thomas Cook.

⁴ <https://www.theguardian.com/business/2019/aug/28/thomas-cook-agrees-terms-of-900m-rescue-deal-with-fosun>

⁵ That compares with over \$20bn and \$33bn debt for United and American Airlines respectively, as at the end of 2019

⁶ <https://www.parliament.uk/business/committees/committees-a-z/commons-select/business-energy-industrial-strategy/inquiries/parliament-2017/thomas-cook-17-19/>

⁷ The total cost of the repatriation is estimated to come in at £152m but £69 will be covered by the ATOL scheme. See the National Audit Report published on 19 March 2020: <https://www.nao.org.uk/report/investigation-into-governments-response-to-the-collapse-of-thomas-cook/>

Flybe

In January 2020 Flybe was bailed out by the UK Government. The Business Secretary Andrew Leadsom said:

“The government isn’t in the market to bail out private companies. What we do on a case to case basis is look to see if a business is viable. In the case of Flybe, it is a viable business.”

“The difference, for example, between Flybe and Thomas Cook was that in the case of Thomas Cook it had huge amounts of debt and any taxpayers’ money would have simply been throwing good money after bad. It was not a viable company.”

At that time, British Airways, Ryanair and easyJet were strident in their condemnation of the bail out⁸. Michael O’Leary, Ryanair’s chief executive said:

“This government bailout of billionaire-owned Flybe is in breach of both competition and state aid laws. The Flybe model is not viable which is why its billionaire owners are looking for a state subsidy for their failed investment”. He added “If Flybe fails, as it undoubtedly will once this government subsidy ends, then Ryanair, easyJet, BA and others will step in and provide lower fare flights from the UK regional airports, as we already have to make up for the recent failure of Thomas Cook Airways.”

On 5 March 2020, less than 2 months later, Flybe went into administration⁹. Kelly Tolhurst MP, the Parliamentary Under-Secretary at the Department for Transport, said: *“Unfortunately, in a competitive market, companies do fail, and it is not the role of government to prop them up.”*

The position today

The effect of the pandemic coronavirus outbreak is likely to put the aviation industry and airlines in particular under even more pressure. Airlines, manufacturers and airports have all been vocal in seeking state support to help them through the next few months¹⁰; early reports suggested that HM Government might nationalise some airlines¹¹. In the US, the CARES Act passed on 25 March 2020 offering \$61bn to the aviation industry¹². However more recent comments from the Chancellor of the

⁸ <https://www.travelweekly.co.uk/articles/354979/easyjet-and-ryanair-enter-fray-to-oppose-government-flybe-bailout>

⁹ <https://www.theguardian.com/business/2020/mar/05/flybe-collapses-two-months-after-government-announces-rescue>

¹⁰ <https://news.sky.com/story/virgin-atlantic-boss-urges-boris-johnson-to-sanction-7-5bn-airline-bailout-11957708>; <https://www.ft.com/content/7248b0fc-6857-11ea-a3c9-1fe6fedcca75>; <https://www.abc.net.au/news/2020-03-31/virgin-seeks-coronavirus-bailout-qantas-warns-against-payouts/12105654> ;<https://www.internationalairportreview.com/news/114275/uk-support-aviation-industry-lacking-aoa/>

¹¹ <https://inews.co.uk/news/business/airline-industry-part-nationalised-rescue-plan-save-thousands-jobs-2504972>

¹² <https://www.natlawreview.com/article/covid-19-update-us-senate-passes-61-billion-relief-package-aviation-industry>

Exchequer have dampened airlines' hopes of a bail out¹³. Airports are also disappointed¹⁴; some of them are closing their doors altogether¹⁵.

All of the major airlines have drastically reduced their passenger operations – with some completely suspending all flights¹⁶. Eurocontrol, which monitors all European flights, reported 24,000 fewer flights on 29 March 2020 than the equivalent Sunday in 2019 – that is down 88%. There are now difficult decisions for them to make balancing paying out refunds to customers and preserving cash. Many are already getting bad publicity¹⁷ for delaying repayments¹⁸ or just making claiming them cumbersome¹⁹. Canada has already permitted airlines to offer vouchers rather than refunds²⁰. UK airlines have eyed that change enviously; Airlines UK, which represents British Airways, easyJet, Jet2, TUI Airways and Virgin Atlantic, has asked the Department for Business, Energy and Industrial Strategy (BEIS) for a refund holiday²¹.

One piece of good news for the sector – air cargo is flying, and, based on China's gradual recovery, could remain healthy²². Indeed passenger aircraft are now being operated just to carry freight²³.

What is going to happen?

The scale of the recession which is likely to flow from the emergency measures²⁴ being put in place to prop up national economies will compound the problems faced by the airline industry. There can be little doubt that some will fail. Some will be bailed out

¹³ <https://www.bbc.co.uk/news/business-52027342>

¹⁴ <https://www.aoa.org.uk/government-u-turn-on-aviation-covid-19-support-package-disappointing-for-uk-airports/>

¹⁵ Teeside airport closed on 24 March. Dubai and other UAE airports also closed that day. City Airport closed on 26 March, but only so as to be available for RAF flights landing close to the Excel centre, itself to be used as a makeshift hospital: <https://ukaviation.news/london-city-airport-to-become-raf-nightingale-in-covid-19-battle/>

¹⁶ <https://www.businessinsider.com/coronavirus-global-airlines-suspending-operations-as-demand-worsens-2020-3>; <https://www.thenational.ae/lifestyle/travel/50-countries-where-commercial-passenger-flights-are-grounded-due-to-the-coronavirus-1.996215>

¹⁷ <https://www.which.co.uk/news/2020/03/airlines-failing-to-refund-cancelled-flights/mounting-coronavirus-refund-claims-idUKKBN21E32O>

¹⁹ <https://www.independent.co.uk/travel/news-and-advice/emirates-cancelled-flights-refunds-coronavirus-crisis-cancelled-flights-grounded-passengers-a9428731.html>; <https://www.forbes.com/sites/advisor/2020/03/26/master-list-of-all-major-international-airline-coronavirus-change-and-cancellation-policies/#2b3789f83a59>

²⁰ <https://www.businesstraveller.com/business-travel/2020/03/27/canada-says-airlines-can-offer-customers-vouchers-in-lieu-of-refunds/>

²¹ <https://www.independent.co.uk/travel/news-and-advice/coronavirus-uk-airlines-refund-passenger-rights-flights-cancelled-a9429866.html>

²² <https://www.flightglobal.com/air-transport/eurocontrol-all-cargo-flights-stay-level-as-passenger-traffic-collapses/137623.article>; <https://www.stattimes.com/news/passengers-are-not-flying-but-cargo-is-air-cargo/>

²³ <https://www.latimes.com/business/story/2020-03-31/airlines-passengers-cargo-coronavirus-crisis>

²⁴ At the time of writing, many western governments (US, UK, France, Germany, Spain, Australia) are considering support worth between 10% and 20% of their annual GDP

with grants, loans or partial nationalisation, just as happened in 2008 with the Royal Bank of Scotland²⁵. Others will of course survive and thrive in the less crowded market.

On 24 March, International Air Transport Association (IATA) updated its analysis²⁶ of the impact of the pandemic on the aviation industry, and now estimates revenues will fall away by \$252bn, which would be down 44% on 2019. That estimate is based on severe travel restrictions for 3 months, followed by a gradual economic recovery later in the year. Even based on what is looking like an optimistic assumption, that predicted fall in revenue is more than twice as much as IATA had estimated less than 3 weeks earlier, at a time when few countries had introduced sweeping travel restrictions. IATA's CEO said *"Without immediate government relief measures, there will not be an industry left standing. Airlines need \$200 billion in liquidity support simply to make it through."* IATA's analysis suggests that the biggest percentage drop for the industry will be in Europe.

IATA also commented upon airlines' cash reserves, reporting that the median airline had 2 months of cash at the start of 2020. Outside the biggest 30 global airlines, the level of debt is worryingly high. *"Only 30 airlines drove the improvement in profitability that we saw in the last 10 years"* Brian Pearce, chief economist at IATA was reported as saying. He continued *"Obviously, there are a number of airlines that are in a much stronger position to weather this lack of revenues but the majority are in a very fragile place."*

easyJet issued a statement to the stock market which said:

"European aviation faces a precarious future and there is no guarantee that the European airlines, along with all the benefits it brings for people, the economy and business, will survive what could be a long-term travel freeze and the risks of a slow recovery. Whether it does or not will depend significantly on European airlines maintaining access to liquidity, including that enabled by governments across Europe."

Industry analysts report that, of European airlines, Wizz and Ryanair are looking relatively safe with high levels of liquidity but that Norwegian, SAS and Lufthansa at the more worrying end of the spectrum²⁷.

The Airports Council International (ACI) is a non-profit body which represents the airport industry. It estimates that around the world airports will suffer a drop in revenue of \$46bn. Airports of course will suffer indirectly from airlines in distress. ACI identifies the risks including flight cancellations, aircraft groundings, travel bans and border closures resulting in fewer flights with lower load factors. They are also worrying that they will suffer from higher cleaning costs.

²⁵ HM Government paid £46bn for its stake in RBS in 2008/9. It still owns 62% of RBS – having sold off only a tenth of its interest in the intervening decade

²⁶ <https://www.iata.org/en/iata-repository/publications/economic-reports/third-impact-assessment/>

²⁷ [https://centreforaviation.com/analysis/reports/wizz-air--ryanair-lead-europe-on-liquidity-for-covid-](https://centreforaviation.com/analysis/reports/wizz-air--ryanair-lead-europe-on-liquidity-for-covid-19-517608)

Other companies in the aviation service sector are reporting bad news or heavy falls in share prices: Menzies Aviation²⁸, Meggitt plc²⁹ and Melrose Industries³⁰ to mention just those starting with a single letter of the alphabet.

On 28 March 2020, Alok Sharma MP, the Secretary of State for Business announced proposed legislative changes to enable companies undergoing a rescue or restructure process to continue trading, without the risk of the directors being in breach of the existing wrongful trading rules³¹. Aspects of those changes are considered in another XXIV briefing [here](#). In announcing them, the Government said:

“This will also include enabling companies to continue buying much-needed supplies, such as energy, raw materials or broadband, while attempting a rescue, and temporarily suspending wrongful trading provisions retrospectively from 1 March 2020 for three months for company directors so they can keep their businesses going without the threat of personal liability.

“...Current insolvency rules stipulate that directors of limited liability companies can become personally liable for business debts if they continue to trade when uncertain about whether their businesses can continue to meet their debts. Relaxation of these wrongful trading rules will reassure directors that the difficult decisions they have to make about the future viability of their business will not have to be unduly influenced by the exceptional circumstances which are entirely beyond their control.”

The UK Government has also introduced a scheme to assist employees to ameliorate the financial burden upon them and, indirectly, upon airlines and other employers. Fuel costs are not an issue: the planes are not flying and anyway the fuel price had plummeted. The attitude of banks and aircraft lessors is harder to gauge but it is a fair guess that they will be sympathetic partly out of altruism (we are, truly, all in this together) but also as there is no alternative revenue stream. The terms of the leases and agreements will usually be strict and in favour of the lessors and lenders, but one can imagine rent and finance holidays being offered soon, albeit quietly and behind the scenes.

All this is going to be tough, but the world will need to continue flying after this crisis. We are all learning to use technology to work remotely, and environmental awareness is growing. But the world is too interconnected to go back to the era before easy and cheap access to flying. The industry will recover, changed no doubt, and maybe for the better. As Alexandre de Juniac, IATA's Director-General & CEO puts it *“Stay strong. We will get through this crisis and keep the world connected”*.

²⁸ <https://www.cityam.com/aviation-services-firm-john-menzies-axes-17500-staff-over-coronavirus-hit/>

²⁹ <https://www.proactiveinvestors.co.uk/companies/news/915959/meggitt-throws-out-dividend-plans-amid-coronavirus-pandemic-915959.html>

³⁰ <https://www.hl.co.uk/shares/shares-search-results/m/melrose-industries-plc-ordinary-487p>

³¹ <https://www.gov.uk/government/news/regulations-temporarily-suspended-to-fast-track-supplies-of-ppe-to-nhs-staff-and-protect-companies-hit-by-covid-19>

Storage and parking up

The crisis will result in some airlines bringing forward their plans to retire the less profitable, ageing aircraft in their fleets³², notably some Airbus 380s, Boeing 747s and 777s not to mention the few remaining Boeing 767s and MD90s³³ still in commercial operation in North America. But most will have to be stored.

Aircraft like to fly³⁴. But they can be parked up for long periods of time as long as the appropriate maintenance procedures are applied. They are resilient enough to be left outside a hangar in all weathers as long as they are closed up. US Operators have long used the desert states³⁵ to park up aircraft, and indeed many have had some recent experience because of the grounding of the Boeing 737 Max fleet, which was some 500 strong. As long as the apertures, engines, pitons, windows and doors are adequately protected from the sun, wind, sand, insects and birds, aircraft can be stored pretty much indefinitely, albeit at a cost³⁶. In western Europe the risk from rain and dampness is more serious than from sand so preservation measures will have to be adjusted to reduce the risk of corrosion³⁷. In the UK Kemble Cotswold airport in Gloucestershire has long been used to park aircraft as have Teruel in Spain and Tarbes in France.

But given that the airports are also now quiet, many operators have taken to storing their grounded fleets at the airports, even on unused runways – such as Copenhagen, Frankfurt, Delhi³⁸, Atlanta, Tulsa and Orlando³⁹. In the UK, Glasgow and Bournemouth are the parking airports of choice for British Airways. Lufthansa is using Berlin Brandenburg airport which is yet to open⁴⁰. Emirates, which is owned by the government of Dubai, is lucky that its home airport is large, dry and essentially free for it to use – also being owned by the government of Dubai⁴¹. As a hub, the closure of

³² <https://runwaygirlnetwork.com/2020/03/16/aircraft-retirements-accelerate-but-this-is-not-another-post-9-11/>

³³ Mainly operated by Delta Air Lines

³⁴ Many long-haul aircraft spend more of their lives in the air than on the ground – a 10 to 12 hour flight might be followed by a 2 or 3 hour turnaround at the airport, and another long-haul flight. And so on with only brief interludes for maintenance.

³⁵ Primarily Arizona and California. These sites are also graveyards of aircraft then dismantled for parts.

³⁶ Some estimates put this at US\$2,000 per month per aircraft

³⁷ Modern parts are made from metal alloys and carbon composites. Aluminium is very common but still prone to corrosion. Cables, hinges, skins, fasteners and landing gear all employ steel.

³⁸ <https://simpleflying.com/delhi-airport-has-already-run-out-of-space-to-park-planes/>

³⁹ <https://www.latimes.com/business/story/2020-03-24/where-airlines-are-parking-grounded-planes;>
<https://www.businessinsider.com/coronavirus-airport-runways-taxiways-used-for-aircraft-storage-2020-3?r=US&IR=T>

⁴⁰ https://simpleflying.com/lufthansa-storing-grounded-aircraft-at-unopened-berlin-airport/?utm_source=Biblio

⁴¹ Doubly lucky, some might say, as the Dubai government has vowed to bail it out:

<https://www.arabianaerospace.aero/emirates-to-be-bailed-out-by-the-dubai-government.html>

Dubai International Airport⁴² is another blow to any airline which used it as a stopover for flights between Europe and SE Asia and Australasia – notably Qantas.

Airlines can usually estimate in advance how long they might want to store an aircraft or a fleet. All manufacturers and operators have short-term, medium-term and long-term storage maintenance programmes. In the case of the B737 Max parking up, the term was of course unknown and remains indefinite. With the current pandemic, it is similarly unknown but it would be a fair guess to imagine that a lot of aircraft for a lot of airlines will be parked up for 3 to 6 months. It will take about 80 hours of maintenance to put aircraft and, importantly, engines into an appropriate state for storage.

Then they will need to be checked periodically, so that bacteria do not proliferate in fuel tanks⁴³. Engines, auxiliary power units (APUs) and flight computers need to be started up from time to time to ensure they are working and because, like all machinery, they benefit from usage. Operational checks of the hydraulics, avionics, electrical systems and landing gear will have to be done. Other moving parts like the flaps and flight-control surfaces need extending, retracting and lubricating. Aircraft have to be moved to avoid wear on just one part of tyres. In wetter environments such as in western Europe, the interiors will need to be checked for water ingress, dampness or mould.

On return from storage, each aircraft might need another 100-150 hours of maintenance, which will include an audit to put the aircraft back into the regular maintenance programme, as well as other tests on the systems which will have been in hibernation. And they will need to be cleaned, inside and out.

In the worst case, airlines will go into administration or liquidation. This article now turns to consider some of the insolvency law principles and the factors to be considered in that eventuality.

Insolvency processes

When considering an insolvency or potential insolvency, it will be important to ascertain:

- What assets would fall within that insolvency (e.g. does a lease automatically terminate on insolvency);
- Where those assets are (particularly as flights continue to operate);
- What type of insolvency is suitable (can the company be rescued by administration or is liquidation unavoidable?); and

⁴² <https://www.dubaiairports.ae/alert>

⁴³ The movement of the aircraft in flight, and the renewal of fuel in normal operations, is usually sufficient to ensure that bacteria growth is insignificant. When aircraft are stored this can become a problem.

- What powers a creditor or the company might want to invoke or benefit from (e.g. the moratorium against the company or its assets applied automatically in administration or by application in anticipation of administration).

A company can only be placed into administration if one of three purposes might be achieved: (a) to rescue the company as a going concern; (b) to achieve a better result for the company's creditors as a whole than would be likely if the company went into liquidation; or (c) to realise property in order to make a distribution to one or more secured or preferential creditors. In the case of Thomas Cook those purposes could not be satisfied and the companies went directly into liquidation. Flybe by contrast went into a remains in administration.

Insolvency proceedings started in the place of the centre of main interests of the company (main proceedings) will be recognised automatically across the EU member states and the UK. This is the effect of the EU Regulation on Insolvency Proceedings 2015 (Recast), at least until 31 December 2020 and subject to an agreed extension prior to that date. The Regulation has the effect of extending the territorial scope of the main proceedings' insolvency practitioner across the EU, including the IP's powers: e.g. all EU member states would or ought to recognise the automatic moratorium applied by an English administration which was main proceedings.

Conversely, it is also possible to take steps in the UK to protect local assets and local creditors, even in the face of foreign EU main proceedings, by instigating local or secondary proceedings.

For assets or insolvencies outside the EU member states, it will be necessary for the insolvency practitioner to be recognised in the foreign country. It is most likely that this will be under the UNCITRAL Model Law on Cross-Border Insolvency, in those states party to it. The Model Law is given effect in the UK under the Cross Border Insolvency Regulations 2006. Recognition under the Model Law is not automatic: both recognition and any relief have to be sought by application. This can cause an undesirable lacuna whilst the foreign insolvency practitioner is applying for recognition. Foreign insolvency practitioners who wish to protect their position are therefore well advised to seek provisional relief (similar to injunctions) prior to their recognition to preserve the company's assets or protect creditors.

The timing of any administration or winding up order is crucial. Thomas Cook was wound up by order of Marcus Smith J at 1:56am. The judge referred in his judgment⁴⁴ to a statement made on behalf of the CAA which explained why:

"It is highly desirable that if the court makes the winding up orders sought, these take effect in the early hours of the morning at or about 2:00am, when at least a large majority of the fleet of planes of Thomas Cook Airlines will be stationary and so the CAA, the Official Receiver and the proposed special managers can begin to give effect to the [repatriation] exercise within hours thereafter, before flights commence later in the

⁴⁴ [2019] EWHC 2626 (Ch) <https://www.bailii.org/ew/cases/EWHC/Ch/2019/2626.html>

morning. If the winding up orders sought are made at or about 2:00am, it is likely that the six planes of Thomas Cook Airlines will be in flight. However, following consultation with representatives from the CAA Safety and Airspace Regulation Group and the accountable managers of Thomas Cook Airlines, the Official Receiver has agreed that while these flights can proceed to their planned destination, no further flights operated by Thomas Cook will be authorised to depart."

Issues for lessors and insolvency practitioners

The insolvency of an airline throws up legal and practical issues for aircraft lessors and liquidators or administrators. Although their interests may diverge, the issues which they may need to consider are similar.

First, they need to consider where the assets are physically located because local laws may pose additional considerations. Besides the aircraft, they should have to consider where the engines, including spare engines and any spares are to be found. Some may be in maintenance. They will also need to consider whether any engines are subject to pooling arrangements and whether they are on aircraft belonging to other lessors. Next they will have to review the aircraft and engine records and how well they have been maintained.

Other legal issues then arise: what type of aircraft/engine leases are involved – operational leases or finance leases – and what length of term remains outstanding? In addition to the governing law and jurisdiction clauses, it will be important to consider whether the particular insolvency event would be an event of default. There are particular questions around whether voluntary or non-court controlled procedures may be caught. There might be other defaults, such as non-payment of rent. Advisors will have to consider the remedies under the lease and, importantly, whether there are any fetters to the exercise of those remedies either under the relevant insolvency law or under the local laws of the place where the aircraft is situated. For example, some countries do not allow self-help entry into aircraft hangars without court orders.

Finally, there are practical considerations such as the timing of any lease termination, where re-delivery might occur, to whom, and who will carry out any inspections. Arrangements for insurance, maintenance, storage, de-registration and re-registration will also then have to be put in place quickly.

Liens for airport and air navigation charges when an airline enters administration

Both airports and the CAA are generally entitled to detain an airline's aircraft as security for unpaid airport or air navigation charges – but, when an airline becomes insolvent, they must often act swiftly to gain control of the relevant aircraft if they are to exercise this right.

Section 88 of the Civil Aviation Act 1982 permits an airport to detain an aircraft if certain airport charges due have not been paid. If they remain after 56 days of detention, the airport may then sell the aircraft. Similar provisions apply to air navigation charges levied by Eurocontrol, giving the CAA the same powers to detain aircraft for non-payment⁴⁵. The power to detain takes the form of a statutory lien permitting the airport to detain an aircraft:

- (a) to secure charges incurred in respect of that particular aircraft – and, importantly, irrespective of whether they were incurred by the current operator (the Aircraft Lien); and
- (b) to secure any and all charges incurred by the operator of the aircraft at the time that it is detained (the Fleet Lien). This is a particularly powerful tool, since no airline can sustainably operate if its entire fleet is liable to detention at one of its destination airports. It is a remedy peculiar to the UK which has been criticised but upheld by the courts as lawful.

When an airline enters administration, the appointment of the administrator imposes a moratorium on taking any step “to enforce security over the company’s property except with the consent of the administrator or the permission of the Court” (see paragraph 43(2) of Schedule B1 to the Insolvency Act 1986). An airline’s property includes any leased aircraft: *Bristol Airport Plc v Powdrill*⁴⁶.

An important distinction exists between the creation of security by an airport or other authority under their statutory powers – to which the moratorium does not apply – and the enforcement of that security. An airport or other authority can therefore create the security by serving a lien notice on the Captain or fixing it to the aircraft during the moratorium, but cannot take steps to enforce that lien by preventing its operation.

Thus if a lien is exercised over an aircraft to detain it before the administrator is appointed, then the above moratorium does not apply and no-one (including the administrator) can remove the aircraft until the charges are paid.

Once the administrator has been appointed, however, the Authority will need the administrator’s consent or the Court’s permission to detain the aircraft. Accordingly, Authorities and lessors need to act swiftly to gain control of the aircraft which are liable to detention under the Fleet Lien.

This is precisely what happened when Monarch went into administration in 2017. The administrator made clear that it did not intend to carry on the airline’s business and so lessors sought to reclaim aircraft before airports could exercise liens. This led to urgent communications between those parties and the administrators, with the lessors seeking to obtain lease-surrenders and the airports seeking to obtain consent to detain aircraft.

⁴⁵ S.73 of the Transport Act 2000 and Civil Aviation (Chargeable Air Services) (Detention and Sale of Aircraft for Eurocontrol) Regulations 2001)

⁴⁶ [1990] Ch 744

What happens if the administrator does not consent to the lien? Then the airport needs to make an urgent application to Court under the Insolvency Act 1986, for permission to detain the aircraft. This application needs to be heard on an emergency basis, but will still take some time to be heard. If the administrator will not give appropriate undertakings in the meantime, Woolf LJ suggested in *Powdrill*, at page 769, that an airport or other authority is entitled to detain the aircraft for an interim period if it tells the administrator that, unless it consents to the detention, it will promptly apply to Court for permission and then does so.

The permission to enforce is a matter of the Court's discretion in the particular circumstances of the case, balancing the Authority's interest in recovering charges against the interests of the airline's other unsecured creditors. In general, if the administrator does not wish to carry on the airline's business, the airport should be able to gain consent or permission to detain. In that case, the main issue is the timing – that consent or permission must be obtained before the lessor repossesses (or the administrator sells) the aircraft. All steps must be taken with that ultimate deadline in mind.

This is an area in which time is of the essence. It is strongly in lessors' interests to seek to repossess aircraft where an airline has incurred airport or air navigation charges and is close to insolvency. They should check the terms of the lease to see when they can do that. Airports and other authorities need to react swiftly if they wish to exercise Fleet Liens and should be ready to run to Court within a matter of hours, for emergency orders permitting them to do so.

Slots as assets in insolvency

One special class of assets of an airline, and one which can be realised by a liquidator or administrator is its slots – the right to land at, use and take off from particular airports at particular times. Not all airports are slot-controlled⁴⁷, but the busiest 200 or so are⁴⁸. These slots can be hugely valuable particularly at overcrowded airports such as Heathrow and Gatwick: in 2016 Oman Air was reported to have paid Air France \$75m for a slot at Heathrow⁴⁹.

In *R (Monarch Airlines) v Airport Coordination Ltd*⁵⁰ the Court of Appeal addressed the question of whether an insolvent airline is still an “air carrier” for the purposes of the Article 2(f)(i) Slot Regulation⁵¹ definition. It established that an airline does not cease to be an air carrier within the Slots Regulation definition whenever it becomes

⁴⁷ In the UK, it is all the London airports, plus Manchester, Bristol and Birmingham. In the US, it is JFK, La Guardia and Ronald Reagan Washington National

⁴⁸ On IATA's latest figures, 198 airports are slot controlled in the summer and 167 in winter: <https://www.iata.org/en/policy/slots/slot-guidelines/>

⁴⁹ <https://onemileatatime.com/oman-air-heathrow-slot/>

⁵⁰ [2017] EWCA Civ 1892

⁵¹ Council Regulation (EEC) No 95/93 of 18 January 1993: <https://eur-lex.europa.eu/eli/reg/1993/95/oj>

unable to operate air transport services i.e. a failed air transport undertaking is still an “air carrier”.

The effect of this decision is that an airline is still entitled to slot allocation on the basis of the ‘grandfather rights’ provision in Article 8(2) of the Slots Regulation provided that, at the time slots fall to be allocated, it stills holds an Operating License (see [56]-[57]).

The Court came to this decision because imposing any other test would require the relevant slot allocation authority/coordinator (in this case, the UK entity ACL) to carry out investigations into the financial viability of operators which they were not equipped to do and which would be inconsistent with the “*very limited remit, consistent with the need for speed and flexibility*”, that it was recognised as having in the case of *R v Airport Co-ordination Ltd ex p. The States of Guernsey Transport Board*⁵². The Court therefore considered that investigations relating to an airline’s financial circumstances were best left to the licensing process and the competent licensing authority which is the CAA in the UK.

Within weeks of the Court of Appeal decision British Airways bought Monarch’s slots at Gatwick⁵³. Monarch received £54m for the sale of its slots⁵⁴, most of which it seems went to its former private equity owner⁵⁵ which it was reported⁵⁶ made a profit on its investment as it converted the equity it acquired at a discount into secured debt. The slots represented Monarch’s largest asset by far.

The Official Receiver and the Special Managers appointed to deal with Thomas Cook’s insolvency reported that its slots at Gatwick and Bristol Airport were sold to easyJet for £36m. Its slots in Manchester, Birmingham and Stansted slots were sold to Jet2.com.

The Use it or Lose it rule

The Monarch case proves that office holders can realise “slots” as assets. However, the ‘grandfather rights’ provision is subject to the “use it or lose it rule”, which requires airlines to operate 80% of their scheduled flights in order to avoid forfeiting their slots.

In the current climate, it has become increasingly difficult for airlines to not fall foul of the rule, with some airlines having to resort to operating “ghost” flights (which carry very few or no passengers).

⁵² [1999] Eu LR 745

⁵³ <https://www.flightglobal.com/networks/ba-parent-iag-to-acquire-monarchs-gatwick-slots/126291.article>

⁵⁴ <https://www.insolvency-kpmg.co.uk/Viewer/pdfViewer.aspx?sid=13vhf1na0ko3vb1dgmwscptg&did=5ad7e5dc-82cc-4080-a7b7-9161b8549a18>

⁵⁵ <https://www.standard.co.uk/business/jim-armitage-sale-of-monarch-s-slots-should-pay-for-rescue-operation-a3667641.html>

⁵⁶ <https://www.ft.com/content/a4c3d9a2-d1d3-11e7-8c9a-d9c0a5c8d5c9>

This prompted the Secretary of State for Transport, Grant Shapps MP to write to ACL⁵⁷ on 5 March 2020:

*ACL has already agreed to waive this rule...on flights to and from Mainland
“there is a now significant risk of airlines falling short of the “80/20” rule....
China and Hong Kong...I recognise that ACL....remains best placed to
make decisions regarding administration of slots in the UK. However, I
would be grateful if you could explicitly take in to account the implication
of flying empty planes on the UK’s environmental commitments in reaching
your decisions on alleviation.”*

On 11 March 2020 the US FAA waived the 80/20 requirement until 31 May 2020 for US and foreign airlines that have affected flights⁵⁸. The FAA made it clear that it expected US carriers to be offered reciprocal relief by foreign authorities at airports in their countries, and that it would not grant a like waiver to foreign carriers whose home jurisdiction did not reciprocate.

On 13 March 2020 the European Commission⁵⁹ put forward a proposal to amend the Slots Regulation in light of the coronavirus outbreak and measures taken to contain it (as foreshadowed by Ursula von der Leyen on 10 March 2020) suspending the 80/20 rule to relieve pressure on airlines and reduce the adverse impact on the environment. The proposal requires approval by both the European Council and Parliament but it is unlikely to be contentious. The European Airport Coordinators Association said it would ‘anticipate’ (apparently meaning, assume) its implementation⁶⁰.

The rule has previously been changed or suspended: immediately after the terrorist attacks of 9/11 in 2001, during the SARS epidemic of 2003 and after the economic crisis of 2008.

The proposed Special Administration Regime for airlines

When Monarch went into administration in 2017, some 113,000 passengers were stranded overseas and required repatriation. That repatriation was undertaken by the Civil Aviation Authority so effectively paid for by the taxpayer.

The scale, logistics and costs of this exercise prompted HM Government to announce a review to explore options to allow an insolvent airline to continue operations for a short period so that passengers could be repatriated using the airline’s own aircraft, people, and systems and, importantly, without the state paying.

⁵⁷ <https://twitter.com/grantshapps/status/1235614933292920832>

⁵⁸ https://www.faa.gov/news/press_releases/news_story.cfm?newsId=24736

⁵⁹ https://ec.europa.eu/info/sites/info/files/regulation-coronavirus-allocation-airports-slots-march-2020_en.pdf

⁶⁰ <http://www.euaca.org/FNewsDetail.aspx?id=384&popup=1>

A key recommendation of the final report (published in March 2019)⁶¹ was a Special Administration Regime (SAR) for airlines. Under the proposed SAR:

1. 14-days' notice would need be given to the Secretary of State before seeking an administration or winding up order, to provide an opportunity for a SAR to be put in place instead.
2. An "Airline Administrator" would be appointed from a pre-approved panel of IPs with the necessary skills to oversee a repatriation exercise.
3. There would be a temporary repatriation period of 14 days during which the administrator would be under a duty to undertake a repatriation exercise, overriding the usual duties to creditors.
4. There would be a prohibition on essential suppliers terminating key contracts or making ransom demands.
5. Supplier fees and staff salaries would rank ahead of creditors as expenses of the administration to encourage retention of staff and supplier compliance.
6. An enhanced moratorium would be put in place during the notice period and repatriation period to protect the airline's aircraft from seizure under creditor actions.

The cash required for special administrations would come from a proposed "Flight Protection Scheme", which is part of HM Government's wider plan for funding repatriation. The scheme would be funded in advance by the airlines themselves (possibly in proportion to their risk of failure), as a condition of licensing, and could cost up to 50p per passenger.

R3 has criticised the proposed SAR⁶², expressing concern about (i) the ongoing personal risks to an administrator from permitting flights during administration, given the normal risks of airline travel (such as health and safety issues and terrorism), (ii) the difficulty of enforcing the moratorium outside the UK and EU, and (iii) the potential aversion of investors and suppliers from working with UK-based airlines in circumstances where creditors' interests will be prejudiced in favour of passengers' interests under the SAR.

Notwithstanding these criticisms, the proposed enactment of an airline SAR formed part of the Queen's Speech in December 2019, and it is expected that the SAR will be put into effect sooner than any of the broader reforms to the UK's corporate insolvency framework that have been proposed.

⁶¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800219/airline-insolvency-review-report.pdf.

⁶² In its letter dated 20 June 2019 to be found at <https://www.r3.org.uk/press-policy-and-research/consultations-responses/corporate-insolvency-restructuring/>.

Whilst this report was on the Government's shelves in September 2019, Thomas Cook went into liquidation. At the time, the CAA made a statement which went before the winding up court which predicted the scale of the job:

"The repatriation exercise will be the largest such exercise which the CAA has ever undertaken. It will involve very close co-ordination between the Official Receiver, the relevant proposed special managers and the CAA and will involve the contingency planning being implemented immediately upon the winding up orders coming into effect. For example, it will be necessary for the CAA and the Official Receiver to issue press releases and communications on social media very shortly after their appointment to advise and reassure consumers and employees of the steps which are being taken for their protection. This is of particular importance given the level of press interest which these matters have already generated and is likely to increase further upon the making of winding up orders. Identifying consumers abroad will require the use of the liquidated companies existing workforce, including cabin crew, all subcontractors both in the UK and abroad, and will necessarily involve access to certain of the liquidated companies' premises and in particular their IT systems. The CAA will need to put into effect this complex contingency planning in order to procure or secure aircraft to repatriate consumers who might otherwise be stranded abroad. The CAA and the proposed special managers will need to contact the foreign hotels at which the consumers are staying to seek to ensure that the consumers' accommodation for the remainder of that holiday is assured. It is estimated that consumers are staying at around 3000 foreign hotels."

It might be said that the Special Administrative Regime is an idea whose time has come. However Parliamentary time is, to put it mildly, restricted at the moment.

Treaty Arbitration

In the worst case scenario of an insolvent liquidation of an airline, shareholders and creditors will inevitably lose out. A fundamental difficulty for shareholders and creditors is that their recovery in any insolvency process may be limited, especially when an airline's operations cease overnight and select creditors can take secure possession of the airline's aircraft or other assets outside the insolvency process. A possible solution may be to issue an arbitration claim against the airline's home state pursuant to a bilateral investment treaty (BIT).

A BIT claim could be brought by a foreign investor (e.g. the disgruntled airline shareholder or creditor) against the airline's home state pursuant to a BIT which typically provides protections for foreign investors against host state action or inaction. By way of example (and there are others) BITs often protect investors from discriminatory treatment vis-à-vis nationals and if measures to protect home-state shareholders and creditors were not extended equally to their foreign counterparts this could potentially give rise to a claim.

A claim under a bilateral investment treaty offers a route worth exploring when dealing with what might be an otherwise insurmountable problem.