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Message from the Chair

Seasons Greetings YLD Air & Space Law Committee Members!

I hope this message finds all of you well as we enter the holiday season and finish up the end of the year. 2015 has been an exciting and challenging year in the world of aviation, especially in the area of aviation law. We saw the loss of MetroJet Flight 9268 after it was believed to have been blown out of the sky over Sharm-El-Sheik, Egypt, and the adoption of emergency measures by the ICAO Dangerous Goods Committee to combat the risks of carrying lithium metal batteries as cargo by air. Although 2015 was, by no means, as busy of a year as we saw in 2014, for many of us, the issues presented this year concern concepts the aviation law profession will be tackling with for years to come.

On the Unmanned Aerial Vehicle (UAV) front, we celebrated the first-annual Remotely Piloted Aircraft Systems Symposium held in Montreal, Canada at the International Civil Aviation Organization, at which regulators and private practitioners pledged alike to work towards the promulgation of worldwide UAS regulations by the year 2018. We also saw large developments in space law after President Obama signed into law H.R. 2262, to “facilitate a pro-growth environment for the developing commercial space industry by encouraging private sector investment and creating more stable and predictable regulatory conditions,” which was specifically noteworthy for its specific recognition of asteroid resource property rights for the first time by law.

No matter what your area of interest, we believe that we have put together future programming for the committee in 2016 that will have something for everyone. We will soon be offering a teleconference entitled, “Breaking Through the Clouds—Tips and Tricks for New Lawyers Looking to Break into Aviation and Space Law,” a program designed for young lawyers and law school grads to gain access to successful practitioners to get their personal advice on breaking into the aviation law industry, and how to develop your career. We’re also planning on hosting numerous Young Lawyer’s Division Air and Space Law Committee get-togethers in large cities such as Washington D.C. and New York, with plans on expanding the events to other cities throughout the year.

We’ve also changed the format of this newsletter to ensure our members get the best information possible from our publications, so as to help our members network and get the most they can out of their committee membership. Along these lines we’ve included sections on upcoming events, features on successful YLD committee members or other aviation and space attorneys, and also, job and scholarship listings. We hope that including this information will be hopeful to our members, and I look forward to continuing to serve all of you throughout next year, as well!

Happy Holidays to all of your and cheers to another great year in 2016!

Sincerely,
Dayan Hochman, Chair
2015-16 ABA YLD Air & Space Law Committee
YLD Aviation and Space Lawyer Featured Practitioner: Drew Derco, Esq.

Drew currently serves the YLD as the liaison between the ABA Forum on Air and Space Law and the YLD Air and Space Law Committee. Drew is an associate attorney at Eckert Siemans, counseling domestic and foreign airlines on aviation regulatory matters before numerous federal agencies. He handles airline start-up process and assists foreign airlines with the launch of U.S. service, both for first time entrants into the U.S. marketplace and for existing carriers already serving the U.S. He also assists airlines in obtaining permits, exemptions and code-share authority from the U.S. Department of Transportation, as well as Part 129 Operations Specifications from the FAA. He advises clients on international regulatory compliance issues, legislation, OFAC/sanctions, export controls, antitrust, FCPA, the transportation of materials, and cargo security matters. He also supports clients in defending litigation, as well as major enforcement actions before major U.S. federal agencies.

Recent Happenings in Air and Space Law

The International Aviation Womens’ Association held their 27th Annual Meeting this year in Dubai, United Arab Emirates at the Fairmont Hotel at the Palm. After attending the annual 2015 Dubai Airshow, the IAWA conference tackled many issues, including: Building Aviation Capacity in the Middle East, India and Africa: Issues and Challenges, Managing Safety Challenges in Aviation—Today and Tomorrow, Global Topics Concerning Risk, Unlocking Female Aviation Leaders’ Potential, Aviation and Sustainable Development, Women in the Middle East—Where Do We Go from Here? And the highlighted event, the Forum on Young Women in Aviation, which attracted over 100 young women in the Middle East interested in pursuing careers in aviation. Several awards were given out, including those honoring current IAWA President Abby Bried, the IAWA Governing Board, and the 2015 IAWA Scholarship Award Recipients: Jacqueline Hueneke from Embry-Riddle University in Daytona, Florida; Lindsey Altmeyer from Texas Southern Methodist University, and Dayan Hochman, from McGill University in Montreal, Canada. The 28th Annual Meeting will be held on October 19-21, 2016 in Montreal, Canada.
Islamic Financing—A Successful Takeoff or a Crash Landing? Whether or Not Islamic Financing Should Be Used to Finance and Lease Aircraft

Jennifer Ann Urban

A key aspect of stability and continued growth for air travel is access to an assortment of different financing options. The recent financial crisis was the cause of uncertainty in many traditional financial structures. Through the strength and rising presence of Islamic financing during the financial crisis, it has become another alternative for aviation financing and leasing. The Middle Eastern region is booming with international travel. According to Islamic Finance News’ 2015 Annual Report, “[t]his [air travel] expansion is particularly important from the perspective of Islamic financing as Boeing is forecasting around two-thirds of commercial aircraft deliveries to the Middle East region will be supported by debt sourced from locally-based banks with a natural inclination to promote Islamic lease and financing structures.”

The key characteristic of whether or not the aviation financial transaction will pass Sharia law standards depends on how the lender is obtaining a profit and how this profit affects all of the parties involved. There are three main structures that Islamic aviation finance transactions may form, because aircraft are physical assets. First, the structure most similar to conventional financial transactions used by the United States is called Bay’mu’ajjal, meaning credit sale. This structure is essentially an agreement between the parties for the buyer to pay the price of the asset at a specified time in the future. The contract is likely to include a provision that states if the buyer defaults on a payment, the entire amount owed will be due immediately. The second structure known as murabahah, is where the lender actually buys aircraft or parts thereto and then the lender itself sells the aircraft or parts to

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1 Jennifer Ann Urban is a Mississippi licensed attorney and is currently completing her LL.M. in Air and Space Law at the University of Mississippi School of Law. Previously, she earned her Juris Doctor, Master of Business Administration, and Bachelor of Arts in Public Policy Leadership and Political Science, all at the University of Mississippi. This is an excerpt from a much more in depth paper that can be viewed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2673290.


3 Id.

4 Id.

5 Id.

6 Id.


8 Id.

9 Id.


11 Id.

12 “Murabahah is a sale of goods with an agreed upon profit mark up. There are two types of murabahah sales: an example of the first type is when an Islamic bank purchases goods and makes them available for sale without any prior promise from a customer to purchase them. An example of the second type is when an Islamic bank purchases the goods ordered by a customer from a third party and then sells these goods to the same customer. In the later case, the Islamic bank purchases the goods only after a customer has made a promise to purchase them from the bank.” quoted in Mahmoud Mohieldin, Realizing the Potential of Islamic Finance, Economic Premise – The World Bank 1 (Mar. 2012), http://siteresources.worldbank.org/EXTPREMNET/Resources/EP77.pdf.
the lessor after marking up its price. The lessor can then make smaller payments to the lessor until the entire asset is paid off.13 The final structure is *ijara*, which has been discussed above. In an *ijara* aircraft financial transaction, the lessor would buy aircraft or parts thereto and then lease them to the client with the addition of a rental fee.14

The three Islamic aviation finance structures do not have to be done separately and instead the combination of them can sometimes provide the best transaction. The most common combination of the structures is called an *ijara wa-iqtina*, which is when the *murabahah* structure and *ijara* structure are blended.15 An *ijara wa-iqtina* is essentially two separate transactions with the involvement of the same parties.16 The first transaction would be the *ijara* where the lessor owns the aircraft and leases it to the lessee.17 The second transaction would have to occur at the end of the *ijara* and, after all of the leasing payments have been made, the lessee would then have the option to buy the aircraft.18 There are three main conditions of an *ijara wa-iqtina*.19 First, the leasing agreement for the aircraft and the transfer of ownership of the aircraft have to be done in two completely separate documents.20 Second, in order for the two transactions to be completely independent there cannot be any pre-condition added to the *ijara* that there will be a transfer of ownership.21 Last, the *murabahah* part, or the promise to transfer ownership of the aircraft, can only be done by the lessor and it can only bind the lessor, not the lessee.22 One reason this structure is preferred is because

> [b]oth traditional lease financing and the *ijara wa-iqtina* structure have the ability to produce a fixed debt obligation that can be collateralized. Since the price of the asset is fixed under Islamic sale/lease arrangements, future benefit streams may be quantified for the purposes of hedging risk and . . . the lease terms can reflect prevailing interest rates for the purposes of pricing the lease.23

The *ijara wa-iqtina* gives the lessor the ability to make a profit for its work and risk taking on this transaction. The terms of the profit from the leasing transaction need to be included within the leasing agreement and the terms of the profit from the transfer of ownership need to be contained in the sale agreement.24

*Case Study: United Arab Emirates*

The United Arab Emirates (UAE) is currently one of the top five fastest growing economies in the world and is known for its two primary airlines Emirates and Etihad, making it an optimal place for

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14 Id.
15 Id. at 45.
16 Id.
17 Id. at 45.
18 What is Ijara wa iqtina?, Ijara Community Development Corporation (last visited Apr. 12, 2015), http://www.ijaraloans.com/?p=147.
19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
aviation financing and leasing laws to come into play.\textsuperscript{25} This can become complex, because Article 7 of the UAE’s constitution proclaims that Islam is the national religion and Islamic \textit{Sharia} is the main source of legislation.\textsuperscript{26} Although the \textit{Sharia} is the main source of legal guidance, it is not the only source.\textsuperscript{27} Usually courts within the UAE will rule according to the \textit{Sharia} if there is not specific legislation on the matter that is contrary to the \textit{Sharia},\textsuperscript{28} which creates uncertainty and unpredictability as to how future issues in the UAE will be decided by the courts.

While aviation financing and leasing within the UAE does carry the risk of uncertainty, it should not be excluded for these types of transactions because there are also many benefits under the \textit{Sharia}. According to the United States Library of Congress’s Federal Research Division, “[i]slamic banking has assumed a more prominent role in the UAE in recent years, and most conventional banks are opening or expanding Islamic banking departments; sharia-compliant consumer and investment productions also are being introduced. Government agencies and majority state-owned companies are using Islamic bonds—\textit{sukuk}—to finance development and acquisitions.”\textsuperscript{29} Because many UAE nationals are Muslim, and due to the fact that many government departments are using \textit{sukuk}, there is a good chance that the \textit{Sharia} will govern the registration of aircraft in the UAE. Only aircraft owned by UAE nationals, UAE government departments, or companies that have their primary place of the business is the UAE can be registered on the UAE register.\textsuperscript{30} Also, aircraft that have been leased to a UAE government department, also referred to as a Qualifying Person, may be included on the UAE register.\textsuperscript{31}

The actual leases and financing agreements over aircraft in the UAE are more complicated than traditional aviation financing and leasing practices due to the \textit{Sharia}. UAE’s laws, mainly UAE Federal Law No. 5 of 1985 of the Civil Code, recognize a lease as a contractual right to use the aircraft, but the lease itself does not grant any proprietary rights of the aircraft.\textsuperscript{32} While the \textit{Sharia} does not allow surety, the way to get around this issue, under the UAE’s Commercial Code, is by making sure the mortgagee has possession of the aircraft.\textsuperscript{33} UAE Federal Law No. 18 of 1993 of the Commercial Code sets out the following requirements in order for the mortgagee to be considered in possession of aircraft, “the installation of name plates on the aircraft and engines, the fact that the aircraft registration will include details of the mortgagee’s interest and, ... the fact that the mortgage will usually be registered as an international interest under the Cape Town Convention.”\textsuperscript{34} Due to these requirements, it is not uncommon for the mortgage to be taken in another country if the aircraft can be in the other country at that time.\textsuperscript{35}

\textsuperscript{28} \textit{Id}.
\textsuperscript{31} \textit{Id}.
\textsuperscript{32} \textit{Id}.
\textsuperscript{33} \textit{Id}.
\textsuperscript{34} \textit{Id}.
\textsuperscript{35} \textit{Id}.
The UAE’s Civil Code also addresses the Islamic financing principle of sharing risks between all parties, which is very different than traditional financing and leasing methods. The Civil Code creates the presumption that “the lessor will be responsible primarily for ensuring the continued enjoyment of the leased asset by the lessee and that the lessee will cease to be liable under the lease to the extent that its enjoyment of the leased asset is interrupted.” There is a chance that this Sharia principle may be overcome, because the UAE law gives weight to freedom of contract, which may allow the parties to contract the terms differently.37

The UAE has decided, according to Article 54(2) of the Cape Town Convention, that any remedies under the Convention, regarding repossession and deregistration, that do not require court approval may still only be allowed through a motion for leave of court. The UAE has a process where court approval is not explicitly required called Irrevocable De-Registration and Export Request Authorization (IDER). While the GCAA was the agency that created IDERA, they are unlikely to pursue any action through it without a court order. While not yet tested in the UAE, the country did agree to Protocol Article X to allow for parties to get quick relief with a contractual rights or obligations issue; so, there is hope that this will help with the repossession and deregistration process in the future. This shows the unlikeliness of getting around a court order for repossession and deregistration within the UAE.

While there is currently no reason to completely abandon traditional aviation financing and leasing methods, this article shows that, by diversifying the available methods with Islamic financing, there will likely be continued growth within the aviation industry. If done correctly, it is hopeful that Islamic aviation financing and leasing will be a successful takeoff and not a crash landing.

**Upcoming Events**


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36 *Id.*
37 *Id.*
39 Giddings, *supra* note 29.
40 Civil Aviation Regulations and Civil Aviation Advisory Publication No. 58 construed in Giddings, *supra* note 29.
41 Giddings, *supra* note 29.
43 Giddings, *supra* note 29.
4. Aviation Law Association of Australia and New Zealand (ALAANZ) – Annual ALAANZ Conference: May 4-6, 2016 (QT Hotel, Canberra, ACT, Australia).


We Want to Hear from You!

The Air and Space Law Committee is dependent upon the participation of members like YOU to produce quality and interesting publications throughout the year! Each and every person registered to be a part of this committee is such because you are a committed member of a tight community dedicated to the practice of this very special niche area of law. Because air and space law can also encompass a large number of issues, it is our hope to produce a newsletter that is adequately reflective of our members’ diverse interests and areas of expertise. If you or someone you know is interested in submitting an article to be included in future newsletters, please contact one (or all) of our committee leaders at: dayan.hochman@gmail.com; p_dumoulin@yahoo.fr or Anthony.ciolli@gmail.com.

YLD News and Announcements

Social Media Team Update

The Social Media Team is pleased to announce the new Social Media Policy! The purpose of this policy is to provide direction on appropriate and effective ways to utilize social media on behalf of the ABA YLD when delivering content, facilitating engagement, and communicating with both members and non-members. The policy includes such information as sample posts, proper use of our social media channels, and of course directions for using the online spreadsheet we set up to capture posts from across the division. The new policy can be found at:

http://www.americanbar.org/content/dam/aba/administrative/young_lawyers/leadership_portal/social_media_policy.authcheckdam.pdf

Disaster Legal Services Team

The DLS team is currently implementing DLS in Mississippi, Texas, South Carolina, and California. Earlier this year, we implemented DLS in Texas, Wyoming, Saipan, and Kentucky. We expect this to be a busy year on the DLS font, as NASA predicts that this year’s El Nino is going to be the worst ever.

The DLS team encourages all young lawyers to be prepared in the event of an emergency or disaster, and to coordinate with your local or state bar association to help disaster survivors. More information about the DLS program can be found on our website.

National Conferences Team Update
In addition to the regular activities of the ABA YLD National Conferences Team during the ABA Midyear meeting, this Team is putting together a social media photo scavenger hunt. New attendees will have the opportunity to be a part of a scavenger hunt that allows them to meet seven YLD leaders, receive their business cards, and also take a selfie and post it to their social media accounts with the hashtag #YLDmidyear16. The first person to have a selfie with each YLD leader and receive their signature on a business card will receive a generous gift from the ABA YLD National Conferences Team.

**Member Services Project Update**

The Member Services Project is proud to launch the Young Lawyer Toolkit at the ABA Midyear Meeting. The Toolkit is a curated collection of ebooks, tutorials, and online resources, intended to be a one-stop-shop for lawyers in their first years of practice. The Toolkit contains resources covering trial practice, the business of law, going solo/opening a firm, financial wellness, diversity and inclusion, and first-year lawyers. At launch, the Toolkit will include materials for lawyers with one to three years of experience, with materials for more experienced lawyers to come.

To access the Toolkit, please visit [http://www.ambar.org/youglawyer toolkit](http://www.ambar.org/youglawyer toolkit). The Young Lawyer Toolkit is free for ABA Members.

**YLD Spring Conference**

May 5 – 7, 2016

St. Louis, MO

*Watch for the Next YLD Air & Space Law Committee Newsletter in April 2016!*