

## REGISTRATION – WHO HOLDS THE POWER

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Deregistration powers of attorney are one of the essential transaction documents that all aircraft lessors and financiers request before delivering aircraft to lessees. In essence, through this document, the lessor (and often also the aircraft owner and managers) is authorised to serve as agent for the lessee and arrange for the deregistration and export of the lease aircraft if the lessee defaults under the lease. The deregistration power of attorney is therefore seen as a security instrument granted by the lessee to protect the lessor from the potential adverse effects of registering the aircraft in the lessee's or operator's country and having to deal with local authorities and requirements if the aircraft needs to be deregistered without the consent of the lessee. In line with such nature, this kind of power of attorney is usually granted irrevocably, i.e., the lessee undertakes not to revoke such power unless and until it has been fully released from all its obligations under the lease agreement.

Not all countries accept the validity of this kind of instrument. Firstly, the irrevocability issue is controversial, as a good number of jurisdictions consider that powers of attorney are essentially revocable at the discretion of the grantor, notwithstanding any provision to the contrary in any such instrument. In this respect, Spanish case law also starts with the absolute revocability of powers of attorney as the general rule. However, the Spanish courts also accept certain situations where an irrevocability clause will be upheld. Such irrevocability is acceptable where either (1) there exists an express agreement stating the irrevocability, such agreement is in conformity with the desired purpose and there is no breach of good ethics, or (2) where the irrevocability stems from the requirements of another contract which is in the interest of the lessee, the lessor and third parties; i.e., where the irrevocable power of attorney is merely a formal instrument of an underlying legal relationship (the lease agreement) which serves as its reason to exist and the performance of which requires the irrevocability clause. Where such requirements are met, Spanish courts accept the validity of an irrevocable power of attorney. It must also be pointed out, though, that the courts have stated that such powers of attorney can nevertheless be revoked if (a) the underlying contract is terminated, (b) the beneficiary's behaviour shows a will to waive the authorities received, and (c) the beneficiary incurs in a serious breach of the underlying contract, so that the reason for the existence of the power of attorney disappears.

From a formal perspective, powers of attorney should be executed before a public attesting officer (notary public, Spanish consul, etc.) as a public deed so as to be opposable as against third parties. Although the applicable conflicts of laws rules state that it is sufficient to comply with the formalities of the country where the power of attorney is granted, in practice Spanish authorities could refuse to acknowledge the authority of the named attorney-in-fact under a

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power of attorney which does not comply with Spanish law formalities. If the instrument is executed outside Spain, then it will have to be legalised with the Apostille of the 1961 The Hague Convention or (to the extent that the State where the power of attorney is executed is not a member of the said Convention) by diplomatic conduct. An official translation into Spanish will also be required in Spain.

Finally, a word should be said in connection with the practical validity of these instruments. Recent experience with the Spanish aviation authorities seems to suggest that they are not inclined to accept the validity of deregistration powers of attorney as a matter of practice. Generally, aircraft are deregistered and exported with the joint agreement and signature of lessees and lessors. However, where the lessee refuses to cooperate in the deregistration process the lessor may have to exercise the authorities granted under the power of attorney. It is in these circumstances where the Spanish aviation authorities have shown reluctance to act on the basis of the said instrument, but request that appropriate court orders are produced. The delays and additional costs associated with this request are, obviously, of concern to lessors and their financiers. While usually the controversy can be overcome, the practical validity of the instrument should not be taken for granted.