

ADS-B OUT Compliance as Part of Lease Redelivery Conditions

November 25, 2020

Introduction

Countries around the world are putting in place a more accurate system of tracking aircraft in the skies called Automatic Dependent Surveillance-Broadcast (ADS-B). This technology will eventually replace radar as the primary surveillance method for Air Traffic Control (ATC) monitoring and separation of aircraft. Certain ADS-B equipment allows equipped aircraft and ground vehicles to broadcast their identification, position, altitude and velocity to other aircraft and ATC. This broadcast capability is called ADS-B OUT. The ability to receive this information is called ADS-B IN.

The United States and other countries have published regulations requiring ADS-B OUT equipment on aircraft operating in their regions according to different timeframes. The deadline in the United States for all civil aircraft to comply was January 1, 2020. The European ADS-B OUT mandate required new aircraft with a maximum takeoff weight of 5,700 kg (12,500 pounds) or greater or a maximum cruise speed of more than 250 knots enter service with ADS-B OUT capability as of January 8, 2016, and that existing aircraft be equipped by June 7, 2020. Because of COVID-19, the European Commission extended the deadline to retrofit existing aircraft from June 7, 2020 to December 7, 2020, except that the deadline was further extended to June 7, 2023 for aircraft that remain in the fleet of an operator that has established before December 7, 2020 a retrofit program to install the ADS-B OUT modification on all such aircraft by June 7, 2023.

This Aviation Advisory discusses how the return conditions and maintenance and mandatory modification obligations set forth in an existing aircraft lease to an European Union Aviation Safety Agency (EASA)-governed lessee might require that the lessee install an ADS-B OUT modification kit on the aircraft at lessee expense even if the lease term is scheduled to end before the final compliance deadline in June 2023.

Lease Provisions

An operating lease of a mainline aircraft by a major aircraft leasing company to a European airline will typically have some variation of most or all of the following relevant terms:

Redelivery on Last Day of Lease Term

The lease will provide that the leasing of the aircraft to the lessee is scheduled to and will terminate on a specified date, provided that on such date the lessee performs its obligation to redeliver the aircraft to the lessor on such date in compliance with the redelivery conditions set forth in the lease and the lessee is not otherwise in default in performing its covenants set forth in the lease.

Redelivery Conditions

The redelivery conditions will include that at redelivery:

- the aircraft shall be in full compliance with all operational certifications of the Airworthiness Authority that are or will become mandatory within 18 months after redelivery;
- the aircraft shall be in full compliance with any subsequent (i.e., after 18 months) lessee modification requirements requested by lessor, but not required under the terms of the preceding bullet point provided the incorporation of such modification does not result in the lessee's being obligated to incur material additional ground time or time out of service;
- the aircraft shall be "ready for flight" and operating within the guidelines established by the Aviation Authority and EASA; and
- if any Airworthiness Directive or Alert Service Bulletin issued before redelivery requires terminating action before redelivery or within 18 months thereafter, lessee shall have completed such terminating action.

Aviation Authority would include any national or local government or agency, and any association, organization, or institution, international or otherwise, having jurisdiction over any national or local government or agency, in any case having jurisdiction over the lessee. Airworthiness Directive could include any airworthiness directive issued by the Aviation Authority, EASA or the Federal Aviation Administration (FAA) (all of which could be included even for a European airline), or any other requirement of the Aviation Authority applicable to the aircraft. Alert Service Bulletin is a service bulletin whose issuance is stated or intended by the manufacturer that issued it to be mandatory or necessary for airworthiness certification whether or not the same becomes the basis for an Airworthiness Directive.

Alterations, Modifications and Additions

Apart from the redelivery conditions, the lease would provide that during the lease term, the lessee shall make all modifications to the aircraft required to comply with the requirements of the Aviation Authority or any other government entity having jurisdiction over the aircraft.

Nondiscrimination

The lease would provide that the lessee:

- shall cause the aircraft to be maintained, modified and used in the same manner and with the same care as used by the lessee with respect to similar aircraft operated by the lessee; and
- shall not discriminate in a manner in any way adverse to the interests of the lessor as compared to other aircraft of the same type operated by the lessee with respect to its maintenance or modification status.

Discussion

The European Commission has mandated that certain commercial aircraft must have an ADS-B OUT modification installed by December 7, 2020. In a lease to a European airline, the European Commission will likely qualify as an "Aviation Authority" and "Government Entity." However, the European Commission will defer the deadline to install the ADS-B OUT modification on an aircraft if and so long as the aircraft remains in the fleet of an operator that has a program to retrofit such aircraft and similarly situated ones with such kit by June 7, 2023.

Assume an aircraft is on lease for a term that expires in January 2021. Upon redelivery of such an aircraft by the lessee to its lessor at the expiration of the lease term, the aircraft will no longer be in the lessee's fleet. Therefore upon redelivery, the aircraft will not in fact be covered by the lessee's program to retrofit the aircraft in the lessee's fleet with ADS-B OUT modification. Accordingly, the deferral of the December 7, 2020 ADS-B OUT

modification compliance deadline to June 7, 2023 will not apply to the aircraft. Redelivery will occur in January 2021, which is after the December 7, 2020 compliance deadline. Therefore at redelivery, the aircraft must have the ADS-B OUT modification installed in order to comply with the redelivery condition that the aircraft be in full compliance with all operational certifications of the Aviation Authority, ready for flight within Aviation Authority operating guidelines, and having all mandatory modifications completed, as described above.

Even if the lease term expires before the modification compliance deadline of December 7, 2020, it is not necessarily the case that the lessee may redeliver the aircraft without the ADS-B OUT modification installed. The lease should be checked to see if it provides that the lessee must cause the aircraft to comply with mandatory modifications that have a compliance deadline that falls within a specified period after the expiration of the lease, such as 18 months. Sometimes the lease will alternately mandate that the lessee perform a modification that has a compliance deadline after the end of the term, but only at the lessor's request and expense and if the same can be done without interrupting lessee's operation of the aircraft and/or if kits are available. This would require the lessee to make the modification at the typical redelivery airframe "C" check, after the aircraft is removed from service, if requested and paid for by lessor.

The lease also should be checked to see if it is a requirement that the lessee not discriminate against the aircraft in the performing of repair, modification or maintenance because of its leased status. The modification order requires that the affected airline have a retrofit program in place. So the lessor should see where its aircraft fits in the lessee's retrofit schedule. If the lessee places the aircraft (and other leased aircraft) sufficiently far behind in its queue for the ADS-B OUT modification that the modification would not be completed by the redelivery of the aircraft, that action is evidence of nonpermitted discrimination. The discrimination is apparent no matter how many aircraft in its fleet the lessee has actually retrofitted at the time of redelivery of the lessor's aircraft.

This modification would not typically be thought of as an airworthiness directive, because it is intended to facilitate more efficient air traffic control rather than address any safety or maintenance issue on aircraft of a certain make and model. However, it is possible that the language of the lease is broad enough to include the ADS-B OUT modification. It may nevertheless be more advantageous for the lessor to rely on another lease covenant. The reason is that if the lessee makes a modification to an aircraft to comply with an airworthiness directive, the lease will usually obligate the lessor to reimburse the lessee for a pro rata cost of the modification that takes into account how much of the lease term the lessee had the benefit of the modified aircraft. Under that formula, if the lessee performs the modification only at redelivery, the lessor will pay the full cost of the modification (but would still have the benefit of having the modification done and ready for service by the next operator).

Conclusion

In order to comply with the redelivery conditions, mandatory-modification and non-discrimination provisions of the lease, a European airline lessee may be obligated to install an ADS-B OUT modification on an aircraft before an upcoming redelivery, even though the compliance deadline can be as late as June 2023.

CONTACTS

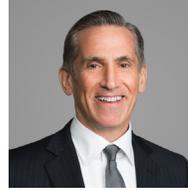
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