

Atypical Contracts and Airport Contracts

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OVERVIEW

- I. Labour Contracts
- II. Procurement
- III. Property Contracts

I. Labour Contracts



Special class of contract & particular branch of law

- A. Legislative considerations around aircraft operations and safety often override employment law
- B. Labour contracts cannot be enforced against the employee & certain rights sacrosanct

A. Legislative considerations around aircraft operations & safety often override employment law

- Eg. a captain during a flight has statutory powers to do things as necessary (in the name of safety), that cannot be over-ridden



B. Labour contracts cannot be enforced against the employee & certain rights sacrosanct

- NOT that employer cannot compel staff to do something
- BUT that the **labour normally has the right to withdraw their labour**
- **Exception**: Can be overridden in cases of what government designates as 'essential services'
 - In US laws prohibit certain employee groups from striking (eg. police, fire fighters, air traffic controllers etc.) to ensure the safety or security of the general public (strikes exceptionally possible after going through complex procedure and obtaining essential permissions)

PATCO strike & US President Reagan

- 1981: PATCO declared a strike demanding better working conditions, pay, etc.
 - In striking the union violated current 5 U.S.C. § 7311, which prohibits strikes by Fed. Government employees
 - Reagan declared strike a “*peril to national safety*”
 - Ordered strikers to return to work
 - Those who refused, were fired
- Compare to current European ATM situation

Issues on termination

- Notice: Non-compete and Confidentiality
 - There are non-compete and non-disclosure agreements to stop person from going to work for a direct competitor and have confidential information that could damage the company
- Any such restrictions must be paid for and
- Can't last for ever (only reasonable length of time)

Anti-Poaching

- Usually verbal/handshake agreements between executives to not actively solicit the other's employees
- Not legal in US:
 - Anti-competitive and a violation of anti-trust laws
 - Eg. Adobe, Apple and Google's Anti-Poaching Agreements come to an end (September 2010)
 - These companies used to have policies of “*if you don't poach my employees, I won't poach yours*”
 - The Department of Justice reached a settlement with Abdoe, Google, Intel, Intuit, Apple and Pixar, preventing the companies from entering anti-poaching agreements for each other's employees.

Mandatory retirement vs. Ageism

•Mandatory retirement

- Set age at which people who hold certain jobs or offices are required by industry custom or by law to retire.
- Rationale: Certain occupations are either too dangerous (eg. military personnel) or require high levels of physical and mental skill (eg. air traffic controllers & pilots)

•Ageism or age discrimination:

- The age at which retirement is mandated is often somewhat arbitrary and not based upon an actual physical evaluation of an individual person
- Many find this discriminatory

Eg. 1: Qantas Ltd v Christie (1998)

•Australia: Compulsory retirement generally discriminatory and thus unlawful. There are however exemptions

- Eg. permanent members of the Australian Defence Force

•**Case Qantas Ltd v Christie (1998)**

- High Court of Australia considered the scope of the ‘inherent requirements’ exception
- Convention on International Civil Aviation barred captains > 60 from flying many of the routes which Qantas pilots might be asked to fly
- It’s an inherent requirement of a pilot’s position to be able to fly over countries which were signatory to the Convention

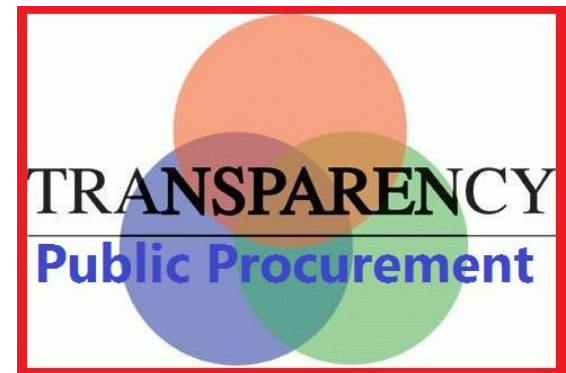
- **Other obligations**
 - Occupational Health and Safety
 - Requirements for compliance by employee imposed by law/regulation
 - Obligations on employer imposed by law/regulation
- **Subject to social demands**



II. Procurement



- **Public procurement**
 - The process by which **public** authorities purchase work, goods or services from companies
- Laws to **restrict** behaviour of **government** employees
- Requirement for **transparency** of
 - Process
 - Procedure
 - Information
- Open tendering processes **can also** apply to **private** entities



FCPA/OECD rules

1. **OECD** (Organisation for Economic Co-operation & Development)



- Eg. Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement (2012)
 - www.oecd.org/daf/competition/RecommendationOnFightingBidRigging2012.pdf
 - Step forward in the fight against collusion in public procurement
 - Calls for governments to assess their public procurement laws & practices at all levels of government, to promote more effective procurement & reduce the risk of bid rigging in public tenders

2. US Foreign Corrupt Practices Act (FCPA)



U.S. SECURITIES AND
EXCHANGE COMMISSION

www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf

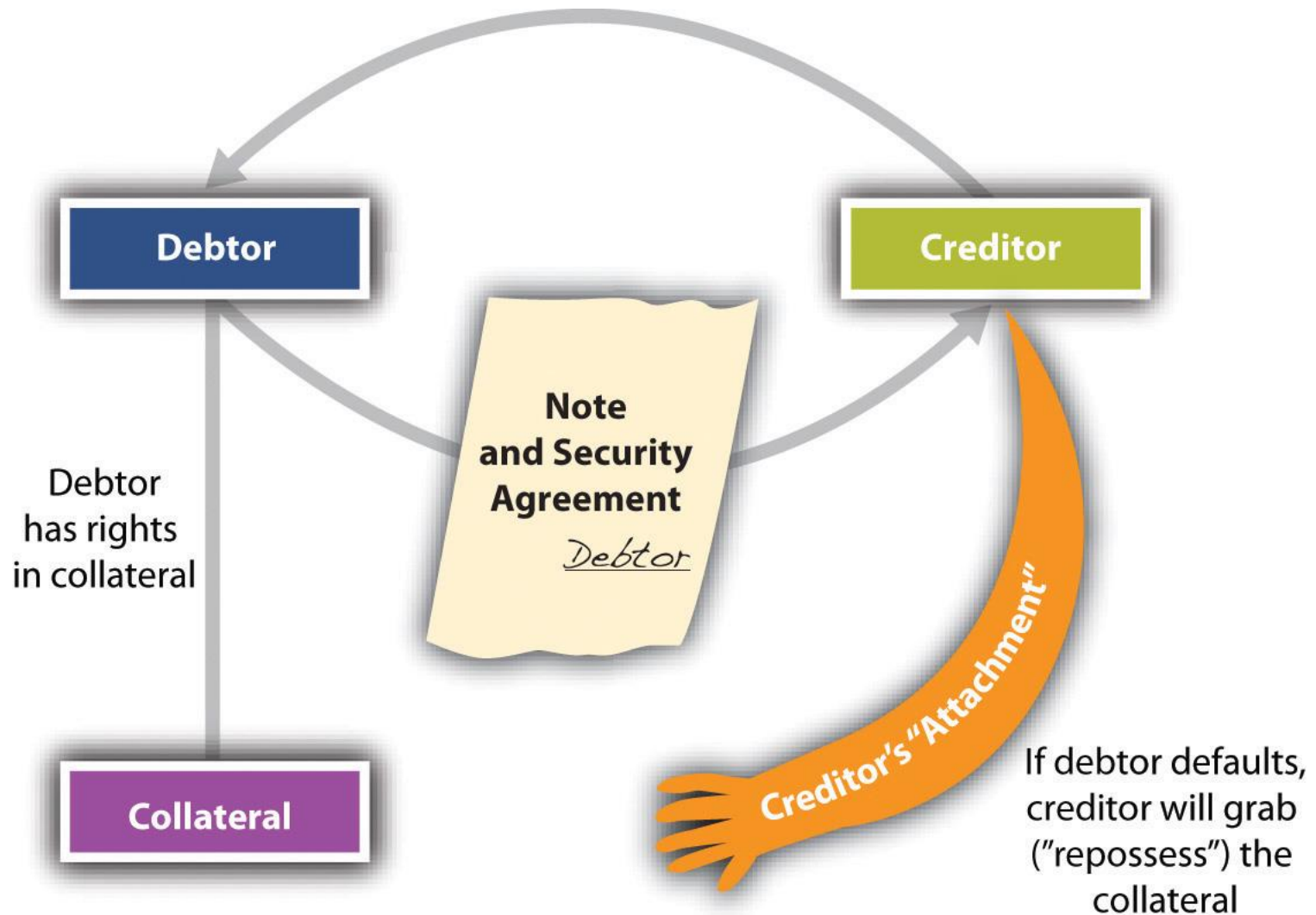
- Prohibits companies issuing stock in US from bribing foreign officials for government contracts and other business
 - The Securities & Exchange Commission (SEC) created specialized unit to further enhance its enforcement of FCPA
- Recent case eg: *Michael L. Cohen & Vanja Baros* (1/26/17)
 - The former Och-Ziff executives were charged with being the driving forces behind a far-reaching bribery scheme that paid tens of millions of dollars in bribes to high-level government officials in Africa.
- **NOTE: Och-Ziff and other executives settled charges in 2016** <https://www.sec.gov/news/pressrelease/2016-203.html>

III. Property



- Particular body of law
- Standard **property contract** has **3 distinct features**:
 - For large sums of money
 - 2-step process:
 - a. Initial contracts exchanged when paying a deposit
 - b. Vendor must make warranties concerning property
 - After exchange, extensive due diligence to test warranties
 - If satisfactory: remainder of price paid (banks often involved here)

- Used for **security/mortgage transactions**
 - Therefore particular focus on registration
 - Ownership measured through registration on a land title register
- National systems vary
 - Proof of ownership paramount
 - If bank provided some finance, will secure it by having its interest marked on the title deeds (removed once loan paid)



- **Strata title**
 - Form of legal ownership used for multi-level apartments & horizontal subdivisions with shared areas
 - While the concept is used worldwide, the terms to designate it vary
- **Joint and severable liability**
 - 2 or more persons liable in respect of the same liability:
 - Jointly liable: Liable up to the full amount of the relevant obligation
 - Severally liable = proportionate liability: Liable only for respective obligations
 - Jointly and severally liable: Claimant may pursue an obligation against any party as if they were jointly liable and the defendants must sort out their respective proportions of liability and payment

Due diligence ≠ *As is; where is*

- When acquiring a property, a profound investigation is required (= crucial due diligence exercise)
- To realise issues such as title, permitted use, legality, encumbrances & easements which can impact the nature of the property etc.
- The extent & type of due diligence depend on the specific case



Leases

•Consideration?

•Quiet enjoyment vs. right to inspect/protect



- Lessor generally shouldn't interfere with lessee's 'quiet enjoyment' and possession of the premises
- NOTE however that on the other hand there is also landlord's right to inspect/protect the property (with good reason, eg: to make repairs or to inspect for safety issues or to ensure the property meets building safety codes)

•Fair wear and tear

- In general the lessee is responsible for 'reasonable wear and tear' arising in the context of repair and maintenance obligations
- However, this obligation can be explicitly excluded

•Term: subject to agreement

Purchase vs. Lease

	PURCHASE	LEASE
	<ul style="list-style-type: none"> - Fixed costs - Tax advantages & deductions - Financing (<i>mortgage loan</i>) - Access to equity (<i>property as guarantee</i>) - Additional income (<i>possibility of renting out your property</i>) - Capital growth (<i>investment profitable depending on the market</i>) - Control 	<ul style="list-style-type: none"> - Prime location & property (<i>otherwise not affordable</i>) - Available capital - Focus (<i>on running business, instead of managing investment</i>) - Quick response to changing business needs - Risk (<i>not necessarily long-term financial commitment</i>)
	<ul style="list-style-type: none"> - Lack of flexibility & agility (<i>property might over time not fit your business</i>) - Upfront costs & capital required - Capital loss (<i>in case you sell for less</i>) - Maintenance & improvements 	<ul style="list-style-type: none"> - Variable costs - Limited control - Lack of equity - Obligations (<i>possibly obligations and hidden costs</i>)

Lease in context of the **AIRPORT**

- Airlines normally lease airport slots (\neq purchase)
- What do airlines concretely lease at the airport?
 - Counter space and access to Departure Control System (DCS)
 - Technical back office
 - Land side space



IATA developed **Worldwide Slot Guidelines (WSG)**
currently used at 177 airports

<http://www.iata.org/policy/infrastructure/slots/Documents/wsg-8-english.pdf>

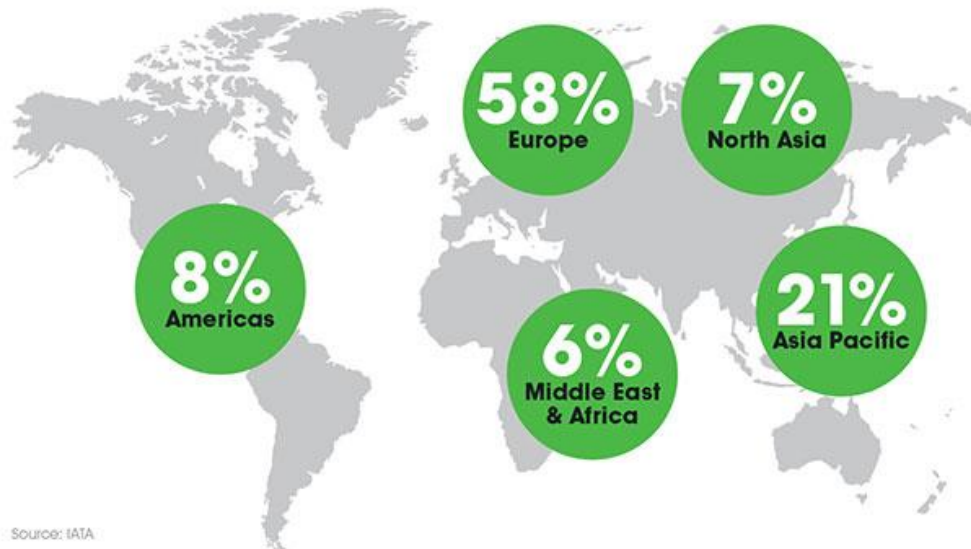
•Define “airport slot” as (1.6):

- “... a permission given by a coordinator for a planned operation to use the full range of airport infrastructure necessary to arrive or depart at a Level 3 airport on a specific date and time.”
- “Level 3 airport” (1.4.1.c): “airports where capacity providers have not developed sufficient infrastructure, or where governments have imposed conditions that make it impossible to meet demand. A coordinator is appointed to allocate slots to airlines and other aircraft operators using or planning to use the airport as a means of managing the declared capacity.”

WSG questionable...

- Not followed in China, US... → International??
- Drafted by IATA with very little input of the airports and thus rather in favor of the airlines instead of the travelling public and the communities the airports serve
- ...

Proportion of global slot coordinated airports



Slot auctions

- Allocation
 - Auction vs. WSG?
 - Airlines vs. Airport vs. ANSP
- Ownership
 - Leasehold
 - Outright Ownership
 - Security
- Primary & Secondary Auctions
 - Windfall gain
 - Competitive implications
 - Airport considerations
 - ANSP considerations

Concession Agreements in context of the **AIRPORT**

- What is a concession agreement?
 - Agreement between the owner of a facility and the concession owner or concessionaire, that grants the latter exclusive rights to operate a specified business in the facility under specified conditions.
 - Eg. Restaurants and retail stores located at airports
- Benefits for the airports
 - Terminal concessions (various airport stores & restaurants) and landside concessions (eg. Parking and rental cars) provide:
 - Important revenue generation and
 - Passenger services



Critical issues in concession agreements

Financial Terms	Service & Operational Terms
<ul style="list-style-type: none"> - Rent structures - Defining gross revenues - Solicitation - Term - Improvements provided by airport - Improvements provided by concessionaire - Monthly reporting - Audit 	<ul style="list-style-type: none"> - Exclusivity of concession rights granted - Hours of operation - Personnel & on-site manager requirements - Street pricing - Maintenance of and title to improvements - Recapture or relocation of premises - Materials handling

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