THE EXECUTIVE'S GUIDE TO LEASE DOCUMENTATION

EQUIPMENT LEASING AND FINANCE ASSOCIATION

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INTRODUCTION

The Legal Committee of the Equipment Leasing and Finance Association (ELFA) first published the *Executive's Guide to Remedies* along with a companion *Executive's Guide to Lease Documentation* in 1994. Both *Guides* provide leasing executives and others involved in commercial equipment financing with a comprehensive overview of the major issues pertaining to leasing transactions from documentation through enforcement. This *Guide* was updated in 2008 by the then current Legal Committee, under the leadership of Stewart G. Abramson, Chairman, and Teresa Davidson, Publishing Editor, and is further updated in the present edition. The purpose of both *Guides* remains unchanged.

Since 1994, both business practices and the law applicable to leasing have evolved. Accordingly, the Legal Committee has updated and revised the *Guides* with the assistance of experienced and knowledgeable leasing industry attorneys. Nevertheless, it is impossible to discuss in adequate detail the many issues that may arise during negotiation, drafting, administration, or enforcement of equipment lease agreements and related documents. The *Guides* are not intended to be an exhaustive review of all issues arising in equipment leasing. Rather, they should be consulted only as general references about key equipment leasing issues, both pre- and post-funding. A careful leasing executive will confer with in-house or outside counsel for expert advice on specific issues arising in lease transactions. There is no substitute for sound legal advice on the specifics of any given transaction and the reader is encouraged to seek such advice.

ELFA, the Legal Committee and the editors and authors of these *Guides* hope you find them useful and accessible tools, and that they prove to be a benefit to the equipment finance industry at large.

Dominic Liberatore
Chairman, 2014 Legal Committee
December 2014

Acknowledgments

The Legal Committee would like to thank the lawyers who took the time out of their busy practices to contribute chapters to this *Executive's Guide to Lease Documentation*.

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We also are indebted to ***Ryan C. Thompson*** of De Lage Landen for being the primary editor for this updated *Executive's Guide to Lease Documentation*.

Eric Gazin
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DISCLAIMERS

This publication is intended to provide general information regarding commercial equipment leasing in the United States. The *Guide* does not address consumer, inventory, or international transactions. Neither the Equipment Leasing and Finance Association nor the various authors or editors intend for this publication to be construed as offering any legal advice or a legal opinion on any specific laws, transactions, facts, circumstances or documents. As leasing transactions vary dramatically depending on a number of factors, including the type of equipment, negotiated economics of the transaction, and applicable state laws, this publication is not intended to serve as the definitive or exhaustive authority on equipment leasing. The readers of this publication should consult with their own attorneys regarding any questions that they might have with respect to such matters.

The issues and documentation discussed in this *Guide* relate primarily to “true leases,” not leases which are intended as security (disguised financing agreements). While true leases are governed by a version of Article 2A of the Uniform Commercial Code (the “UCC”) in forty nine states, the District of Columbia, and Puerto Rico (Louisiana has not adopted Article 2A), leases intended as security are merely disguised security agreements and are governed by Article 9 of the UCC. Unless noted otherwise, when the term *”lease”* is used in this *Guide*, it refers to a *“true lease”* under Article 2A.[1] See *Chapter 1. Lease Agreements and Various Legal Doctrines* of *The Executive’s Guide to Remedies* for a detailed discussion of the differences between a “true lease” and a lease which is a disguised financing agreement.

[1] Article 2A of the UCC is the legal framework for equipment leasing. Article 2A was completed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) in 1987 and amended by these bodies.

1. PROPOSAL LETTERS AND COMMITMENT LETTERS

Most smaller lease transactions are consummated without the use of proposal or commitment letters. However such letters are often used as an aid in negotiating larger or more complicated lease transactions. These preliminary letters of understanding can serve many useful purposes. They can capture those terms upon which the parties agree and establish the ground rules for future negotiations.

As described below, proposal letters are intended to be expressions of interest that are not legally binding on the parties until the final lease documentation is signed. Such letters usually contain written disclaimers to minimize the risk that the letter may be deemed to be a binding legal agreement that is enforceable against the lessor. One of the biggest challenges in drafting Proposal Letters is clearly separating those provisions that the lessor wishes to be binding (usually very few, for example, payment of a deposit for fees) from the vast majority that are intended to be non-binding expressions of interest.

Commitment Letters differ from Proposal Letters in that they are intended to legally bind the parties to the lease transaction, subject to certain customary “outs” for the lessor (for example, negotiation of satisfactory documents).

I. PROPOSAL LETTERS

A proposal letter is usually issued by a lessor to indicate its interest in leasing equipment to the prospective lessee and to let the prospect know the basic business terms and conditions upon which the financing might be offered. While these letters are typically binding on some terms, they are almost never intended to be binding on all terms. The function of a proposal letter is both to inform and to entice the prospect with respect to the proposed transaction, and to ensure that there are no misunderstandings on the main commercial points. Besides outlining the basic structure of the proposed transaction, a proposal letter may also lay out the ground rules for future negotiations. These may include provisions regarding access to information, confidentiality, and allocation of the cost of due diligence and documentation.

A proposal letter is not intended to bind anyone to the business terms of a transaction and may contain language that is similar to the following:

> This proposal letter is an expression of interest and a proposal to provide financing on the foregoing terms and conditions, but does not constitute or create a legally binding commitment or obligation of either party. The lessor’s willingness to enter into a lease agreement under such terms and conditions is subject to, among other things, the satisfactory completion of the lessor’s standard credit approval process and the negotiation, execution and delivery of documentation that is acceptable to the lessor in its sole discretion.

Even though a proposal letter is not intended to bind the parties to the entire lease transaction, the lessor will often will ask the prospect to execute an acknowledgment that confirms the prospect's acceptance of those terms that are intended to be binding and its willingness to proceed toward consummation of the transaction on the terms and conditions proposed. At a minimum, written acknowledgement of a proposal letter evidences the prospect's commitment to proceeding with the deal. On occasion a lessor may request payment of a good faith deposit upon acceptance of a proposal letter to cover costs and expenses for which the prospect will be responsible, even if the transaction is not consummated. If a deposit is required it is critical that the proposal letter lay out the purpose of the deposit and the conditions under which the deposit, or any part of it, might be refundable (which, as noted above, would be one of the few legally binding provisions in the letter).

II. COMMITMENT LETTERS

Commitment letters, unlike proposal letters, are intended to create a binding commitment on the part of the lessor, subject to certain conditions. A well-drafted commitment letter in most cases will specify all of the material terms of the proposed lease agreement. It will, however, contain a reservation by the lessor of the right to propose additional terms based upon new information or a change in circumstances. In those situations in which all of the business terms of the transaction have not been established, the letter will so state. The commitment letter may set standards for the negotiation of open items and a limit on the time and expense to be expended. The commitment letter may also allocate between the parties the costs of due diligence and the expense of negotiating and documenting the transaction. In certain circumstances a commitment letter may contain exclusivity or "no shop" provisions.

Even after all the material terms of the transaction have been set, a commitment letter may still permit the lessor to be relieved from its obligations to the lessee if specified conditions are not satisfied. Typical conditions include:

a. The negotiation, execution and delivery of lease documentation mutually acceptable to the lessor and lessee by a certain date;

b. The delivery by the lessee of specified information and documents, including required consents, authorizations, and approvals;

c. The delivery and acceptance of the leased goods by a date certain;

d. No material adverse change in the lessee's or any guarantor's financial condition prior to the execution of the lease documentation and acceptance of the leased goods;

e. No material adverse change occurring in market conditions, governmental regulations or policy that adversely affect the lessor; and

f. The satisfactory completion of any due diligence, credit investigation, and approval processes that were not accomplished prior to the issuance of the commitment letter.

It is also prudent for a lessor to include standard contractual provisions such as choice of law, forum selection, integration, prohibition of assignment, limitations on damages, releases, waivers and indemnifications. In short, a well drafted commitment letter will have most of the protections found in a well drafted lease agreement; with the added benefit of disengagement without liability should there be a material change in circumstances.

2. PURCHASE ORDERS AND BILLS OF SALE

Purchase orders and bills of sale are used to arrange for and evidence a transfer of title to goods. In true lease transactions, the lessor holds legal title to the leased equipment and therefore will purchase the equipment. This purchase is usually from the equipment vendor but sometimes from the lessee in a sale/leaseback transaction or from a non-vendor third party.

Where the vendor is the seller of the leased equipment, it is not uncommon for the lessor to issue a purchase order to the vendor. In many transactions, however, the lessee has already issued a purchase order or has entered into a purchase agreement with the vendor and this purchase order or agreement will be assigned to the lessor. Some lease agreements contain language implementing this assignment. Other times, a separate document will be executed. Often, the vendor is willing to ship the equipment based on an informal order by the lessee and notification that the lessor is to be substituted for the lessee as purchaser. In these situations, no purchase order will be issued at all.

While purchase orders are used to order equipment, bills of sale evidence the transfer of title from the seller to the buyer. Vendors sometimes provide lessors with bills of sale but often simply deliver an invoice, which, upon payment and subject to the terms of any purchase order or agreement, acts as a bill of sale and evidences the transfer of title to the equipment.

Where equipment is purchased from the lessee or a non-vendor third party, a bill of sale will often be required by the lessor to evidence the transfer of ownership. Bills of sale are also used by lessors to evidence the transfer of title to leased equipment to lessees or third party purchasers upon expiration of the lease or in connection with an assignment of the lease.

I. PURCHASE ORDERS

Purchase orders and purchase agreements are governed by Article 2 (Sales) of the Uniform Commercial Code (UCC). Purchase orders and agreements specify the parties by their correct legal names, describe the equipment adequately in order to avoid confusion, specify price, date or deadline for delivery, designate any additional charges such as sales tax and installation costs as well as any commissions or other fees payable and designate any delivery costs or state that the sale is “F.O.B.” (meaning “free on board”) either at the point of shipment or receipt and state that has risk of loss in transit.

From the lessor’s perspective, any purchase order or assignment of a lessee purchase order or agreement will make it absolutely clear that the lessor has no obligation to purchase or pay for the equipment until certain contingencies are satisfied.

These may include:

(1) A statement that the lessee does not have the power to change the quantity, model or specifics as to the equipment or the delivery location without the lessor's consent;

(2) A statement that payment is only made upon lessee's acceptance of the equipment and execution of all lease documentation required by lessor;

(3) A statement that the purchase order may be cancelled under certain circumstances (such as lessee's bankruptcy or material adverse change);

(4) A statement that if, for any reason, the purchase order is cancelled the vendor will look to the lessee and not the lessor (this contingency often requires the lessee to sign the purchase order along with the lessor);

(5) A statement that any discounts belong to the lessor and that no other consideration has been received by the vendor from the lessee or a third party.

Where a purchase order or agreement is being assigned by the lessee to the lessor, it is customary and prudent for the vendor to consent to the assignment acknowledging that the lessor's obligation to purchase the equipment is subject to the indicated contingencies. The assignment should state that it is limited to assignment of rights with respect to specific equipment. If the vendor insists on a "clean" or unqualified purchase order, the lessor, if it agrees, will be obligated to purchase the equipment whether or not it is accepted by the lessee and whether or not the lessee signs the lease documentation. If the lessor is willing to take this risk, some form of pre-funding agreement or indemnity from the lessee may be helpful.

Many purchase orders specify or otherwise reference the representations and warranties to be made by the manufacturer or distributor of the equipment and some provide that such representations and warranties will benefit and be enforceable by both the lessor and the lessee. Warranties are typically assigned to the lessee in the lease agreement and this assignment occurs by operation of law in the case of a finance lease under Article 2A of the UCC. Typical representations and warranties include (a) that the purchaser is receiving good title free and clear of liens and security interests and (b) that the leased equipment complies with all specifications and requirements of the purchase order.

II. BILLS OF SALE/INVOICES

A bill of sale issued by a vendor, lessee or non-vendor third party seller often includes warranties that the seller conveys to the lessor good title to the equipment free of any security interest or claim of ownership. Bills of sale commonly also include undertakings to indemnify the lessor against claims arising by reason of breach of such warranties.

As a general rule, these bills of sale may be drafted on commonly used commercial forms and no special form is required for equipment leasing. However, it is important that the bill of sale list the lessor as the purchaser or buyer in a true lease transaction. It is not uncommon for commercial vendors to issue an invoice instead of a bill of sale and it is important in such situations for the equipment to be listed as "sold to" lessor in a true lease transaction. In addition, the receipt of a properly prepared original bill of sale or invoice is one important protection against fraudulent transactions.

Where the lessor sells equipment coming off lease to the lessee or a third party, similar warranties will most often be required unless the buyer is willing to accept an "AS-IS" (without warranty) sale. Providing warranties can expose the lessor to liability if the lessee has not discharged all liens (including tax liens) before the lease expired or was terminated.

Even if warranties of clear title are required, the lessor may insist on a standard UCC disclaimer of implied warranties of merchantability and fitness, in case the lessor might be deemed a "merchant" with respect to the equipment or otherwise deemed to have made such warranties under the UCC. Such disclaimers must be "conspicuous" to be enforceable. Similarly, if a third party purchaser requires representations regarding the condition of the equipment, the lessor will find itself relying on compliance by the lessee to avoid liability.

Where the bill of sale is issued to the lessee, which usually occurs when the lessee exercises a purchase option pursuant to the lease agreement, the bill of sale may be qualified at least to the extent any defect in the equipment or its title would result from breach of the terms of the lease agreement by the lessee.

3. DELIVERY AND ACCEPTANCE CERTIFICATES

I. THE CERTIFICATE

The lessor uses the delivery and acceptance certificate, which is also called a delivery and installation certificate or acceptance notice, in order to verify the delivery, installation and acceptance of the equipment to the satisfaction of the lessee. The delivery and acceptance certificate may also be used to confirm other important terms of the lease agreement, including payment terms; the lessor's disclaimer of warranties; the lessee's agreement that all rent will be paid under the lease notwithstanding any defect or failure of the equipment; the lessee's acknowledgment that it will pay rent to any assignee of the lessor without asserting any claim or defense that the lessee may have against the lessor; and/or a reaffirmation by the lessee of its representations and warranties (including the absence of material adverse change in financial condition). Some lessors incorporate delivery and acceptance provisions into the lease agreement rather than use a separate certificate. One concern with this practice is the increased possibility that the lessee will sign as to these provisions at the same time it signs the lease and thereby negating the provisions' effectiveness as evidence of lessee's acceptance of the equipment.

II. PROVISIONS

The certificate may identify the lease agreement by reference to the lessor, the lessee, the date of the lease agreement and, if appropriate, the lease number. The certificate may either include a description of the equipment or refer to the description contained in the lease agreement.

The certificate often requires the lessee to insert the date on which the equipment was delivered. The delivery date is important in some leases because that date is the date the lease commences. Inserting a delivery date is also useful when the lease is actually a disguised secured transaction as the lessor may then use the date contained in the delivery certificate to prove that it perfected its security interest within the time period required for purchase money priority under Article 9 of the UCC.

The certificate may require the lessee to confirm that the equipment has been delivered, assembled, installed and otherwise serviced and completed to the satisfaction of the lessee; that the equipment is in good condition, working order and repair, and is in compliance with all of the lessee's specifications; and that the equipment has been inspected and accepted by the lessee. Though many delivery certificates do not include all of these provisions, it is helpful to include them in the certificate in the event a dispute arises over the condition of the equipment or its conformity with the lease terms.

The certificate may also confirm other terms of the lease agreement. If the certificate does include reference to the terms of the lease agreement, the language of the confirmation should mirror the language set forth in the lease agreement so as to avoid uncertainty and to avoid creating a potential conflict over what the lease terms actually are.

Finally, the delivery and acceptance certificate may also contain provisions acknowledging that the lease agreement may qualify as a finance lease under Article 2A of the UCC. These provisions may include representations that the lessor did not select, manufacture, or supply the equipment; that the lessor acquired the equipment in connection with the lease; and that the lessee has been advised that it may have rights under the lease agreement evidencing the lessor's purchase of the equipment, and that the lessee should contact the supplier named therein for a description of those rights.

III. EXECUTION

The certificate may warn the lessee that it should not be signed prematurely. Though the form of the delivery and acceptance certificate may be provided to the lessee or vendor either at the time the lease documents are signed or after delivery of the equipment, the certificate should be executed by the lessee only after the equipment has been delivered and accepted, although a lessee may execute the certificate prior to equipment delivery and delegate to the lessor the right to insert in the certificate the date of equipment delivery and/or acceptance. The certificate should then be returned to the lessor. The lessor is advised to confirm that the person signing the certificate has the authority to do so on behalf of the lessee and that the equipment has actually been delivered. After the lessor has received the certificate from the lessee and all other closing conditions have been satisfied, the lessor will normally arrange for payment of the vendor's invoice.

The lessor usually will not fund the lease until the delivery of the equipment has occurred and the lessee has returned the acceptance certificate. Otherwise, the lessee may refuse to perform under the lease because it claims that the equipment is not satisfactory. Further, if the lessor knows that the lessee has signed the certificate prior to the installation of equipment and the lessee later refuses to perform under the lease because of equipment nonperformance, the lessor may not be able to rely upon the certificate as a basis for enforcing the lessee's lease obligations.

IV. POTENTIAL AREAS OF CONCERN

Though some courts have held that the execution of a delivery and acceptance certificate may produce liability for the lessee even where the equipment was never actually delivered, others have found that a lessee's act of signing the acceptance certificate prior to delivery of the equipment did not constitute acceptance under the lease or applicable law, that the lessee must have a reasonable opportunity to inspect goods before acceptance and that a lessor is not entitled to rely upon an acceptance certificate that it knows to have been executed prior to actual inspection and acceptance. In such an event, the lessee can potentially avoid liability even where the lease agreement contains a "hell or high water clause" requiring the lessee to pay the rent unconditionally and under which the lessee waives any right that exists or may arise to withhold any rent from the lessor for any reason, including non-delivery of the equipment or any setoff, counterclaim, or other defense. Delivery and acceptance certificates are often included on one page lease forms for smaller transactions. The inclusion of a delivery and acceptance certificate on the lease heightens the issues discussed in this paragraph.

The lessor can avoid this type of problem by holding the form of delivery and acceptance certificate until the lessor is advised that the equipment has been installed and accepted. Though this procedure may result in delays in funding, it provides protection to the lessor against the possibility of having to bear the loss if the equipment is not ultimately delivered and installed to the lessee’s satisfaction.

4. LEASE AGREEMENTS

I. GENERALLY

Equipment lease transactions may be documented using one or more essential documents containing all of the economic terms and other provisions. Smaller transactions are more likely to be documented using short pre-printed forms, with blanks that are filled in with the economics of the transaction and other deal specifics. In lease transactions involving multiple fundings, the parties may use master lease agreements with each funding evidenced by a separate lease schedule. In larger transactions, especially those involving specialized equipment or complicated structures, the parties are more likely to use lease documents that include additional provisions applicable to the specific types of assets or structures.

If a master lease agreement ("MLA") is used, most MLA forms contain the general terms and conditions that will govern all of the lease transactions between the parties. The MLA will contemplate entering into one or more separate lease schedules (sometimes called equipment schedules or supplements), each incorporating the terms of the MLA The lease schedule usually sets forth the equipment description, rent amounts scheduled payment dates, the term, and may also include other economic or deal-specific provisions. The lessee's acknowledgment that it has unconditionally accepted the equipment under the lease may be included in the lease schedule or in a separate acceptance certificate. In either case, delivery of written confirmation from the lessee that it has accepted the equipment is typically required by the lessor before the lessor will fund the transaction.

These essential lease documents may be supplemented or amended by riders or addenda, or by other transactional documents that add to or modify the terms of the MLA to reflect the specifics of the particular transaction. This chapter will briefly discuss several of the types of provisions typically found in an equipment lease.

II. SEPARATING GENERAL DEAL TERMS AND ECONOMICS (MLA + SCHEDULE APPROACH)

In many equipment lease transactions the parties use a MLA to cover terms and conditions that will relate to all of the lease transactions to be entered into between the parties, and they enter into a separate lease schedule to document each transaction between those parties. Each lease schedule usually states that it incorporates and is governed by the terms and conditions of the MLA, and that it, not the MLA, is considered by the parties as being the lease agreement with respect to the equipment described in that lease schedule. The economic terms of that lease are contained in the lease schedule, and, if applicable, supplemented by any accompanying riders or addenda. Using this approach allows parties, which anticipate entering into a number of lease transactions, to solidify the terms and conditions of the leases up front and avoid re-negotiating each such lease and its respective terms and conditions.

Most MLAs provide that each lease schedule constitutes a separate lease transaction distinct from other lease schedules executed pursuant to the MLA. Carefully drafting the language contained in the MLA and lease schedule to evidence the stand-alone nature of each lease schedule is useful when selling or assigning a transaction because, by separating each lease transaction from transactions evidenced by other lease schedules, each transaction is better insulated from disputes, waivers, defaults or other concerns that may relate solely to other lease schedules. Some lessors designate a single manually executed original of the lease schedule as the "chattel paper" original, by including a statement to that effect in the MLA and by marking one copy of the lease schedule as being so designated. Designating a single executed original lease schedule as "chattel paper" in this manner is often considered essential when selling or assigning equipment lease transactions so that the assignee or purchaser's interest in the lease agreement as chattel paper can be perfected by possession under Article 9 of the UCC (which, depending on the facts, may help the assignee or purchaser to defeat others who may claim to have a lien or other interest in that lease agreement). Also, if the lease schedule alone constitutes the chattel paper with respect to a lease transaction an assignee or purchaser of the lease schedule will not need to take possession of the original of the MLA. A more thorough discussion of the importance and procedures relating to chattel paper is provided in Chapter 10 of this *Guide*.

III. TYPICAL LEASE PROVISIONS

1. Conditions Precedent To Lessor's Obligations

Equipment lease agreements often include conditions that the lessee must comply with before the lessor is required to fund. These conditions may include, among other things, receipt by lessor of the other lease documentation and related due diligence items such as evidence of authority and incumbency of the person who will sign agreements, insurance certificates, good standing certificates, evidence of delivery and acceptance of the equipment or down payments, lien searches and appraisals. Lessors rely on these conditions as part of their due diligence regarding enforceability of the lessee's duties and obligations as provided in the lease documentation, that the lessor will have good title to (or if a lease that is actually a secured transaction, a perfected, first priority security interest in) the equipment, and that the lessee has obtained all required insurance coverages. Confirming compliance with these conditions may also reduce the risk of fraud by the equipment vendor or the lessee, and satisfy specific requirements in a credit approval. In larger transactions, some lessors conduct additional due diligence such as verifying the existence and financial wherewithal of the equipment vendor and the accuracy of the financial information provided by the lessee to the lessor.

2. Delivery, Inspection, and Acceptance of the Equipment

The lessee and lessor must determine in advance what portions of the purchase price, related costs (such as shipping and installation) and any sales or similar taxes will be included in the amount being financed by the lessor (and repaid as rent) and which of those amounts the lessee will be required to pay separately outside of the lease financing (often, the related costs and taxes). Lessees are likely to be required to inspect and accept the equipment prior to the lessor's paying the supplier. If the equipment is not accepted, the lessor may expect to be relieved from its agreement to consummate the purchase and lease. Once the lessee accepts the equipment, the lessee's obligations typically become absolute and irrevocable. Therefore, to evidence such acceptance, the executed written acceptance certificate is usually a required document by the lessor. A more thorough discussion of the delivery and acceptance certificates is provided in Chapter 3 of this *Guide*.

3. Lessee's Absolute Obligation to Pay, No Defenses or Offsets, and Disclaimer of Equipment Warranties

A lessor who is not the supplier of the equipment will typically want the lease agreement to include provisions to minimize the chance of lessor being involved in any disputes between the lessee and the equipment supplier, to require that any problems or disputes relating to equipment be resolved with the supplier without the lessor facing any risk or liability, and requiring that the lessee make all payments to the lessor under all circumstances, even for example, if the equipment, after lessee's acceptance thereof, is later found to be defective. Most equipment lease agreements contain a disclaimer by the lessor of any responsibility for the delivery, condition or performance of the equipment. The UCC requires that a disclaimer of certain warranties drafted by the lessor in a lease is only effective if the disclaimer is "conspicuous". Therefore, such disclaimer provisions are usually capitalized or in bold text or in a different color font and clearly identify the implied warranties being waived by the lessee. The absolute nature of a lessee's obligations and the lessor's disclaimer of equipment warranties may also be accomplished by including certain different provisions in the lease and giving certain notices to the lessee with respect to its rights against the supplier as prescribed by Article 2A of the UCC. However, these Article 2A provisions will only apply if the lease is a "true" lease. Because there can be uncertainty as to whether a lease will be construed a true lease most lessors will not rely on these Article 2-A provisions, but rather will include the necessary disclaimers and waivers in the lease agreement.

The parties typically agree that although the lessor has no responsibility to the lessee or any other party with respect to the equipment, the lessee is often given the right to enforce the supplier's equipment warranties directly against the supplier during the lease term so long as the lessee is not in default.

4. The Lease Term

Each lease agreement will typically have a stated term, although there may sometimes also be provisions providing for early termination or renewals. The lessee may request specific provisions regarding the commencement of the term to suit the customer's arrangements with the supplier and its intended use of the equipment. Other considerations in determining the lease term may include the credit risk, equipment value over time and the accounting and tax, implications. The lease may have interim, base and renewal terms.

5. Rent

The lease will specify the amount and timing of rental payments, and may also set forth a specific payment methodology (that is, check, wire transfer or an automated debiting process). Interim or “stub” rent is often payable from the acceptance date through the day just prior to the first full rental period. This is particularly likely where not every item of equipment is accepted at the same time and the lessor has agreed to pay for equipment prior to lessee’s acceptance of all items. The lease will also specify how interim rent will be calculated. In anticipation of a sale or assignment of the lease transaction by lessor, the designation as to how and where payments occur could specify that the manner and address for payment may change at the direction of a lessor or its assignee.

Many lease agreements provide that “time is of the essence” to establish that a lessee’s failure to pay rent on the scheduled due date, even if it eventually pays, is a material breach entitling a lessor to some remedy, especially late charges. Lessees are sometimes afforded a grace period prior to incurring these charges. Applicable law is often considered by lessors to determine whether these charges should be capped, or not included at all, so as to remain in compliance with laws relating to limits on interest rates or perceived punitive charges.

6. Lessee’s Representations and Warranties

Most lease agreements include many of the same general representations and warranties by a lessee, although lease agreements used in larger transactions are likely to have more exhaustive coverage of certain issues. Representations and warranties in MLAs or in lease agreements that contemplate fundings being made after the execution date of that MLA or lease agreement are often made so that they are effective not only as of that execution date, but also as of the applicable funding date or dates. Although referred to as “representations and warranties” in many lease agreements, lessees not only make representations that they are compliant with certain organizational, transactional, governmental or other legal requirements, they often promise to remain in compliance with those requirements.

Typical representations and warranties (and related promises) might address some of the following: (a) lessee’s form of business organization, its being duly organized and in good standing under the laws of all relevant jurisdictions (to ensure that it can perform its obligations, especially protecting the lessee and lessor’s respective interests in the equipment, wherever it may be located), and its legal name and organizational number (to ensure that searches and filings are done correctly); (b) the enforceability of the lease documents, including their (i) having been duly authorized, (ii) not requiring any governmental approval or other undertaking with any governmental authority, and (iii) not violating any applicable law, or lessee’s organizational documents or material agreements; (c) the absence of lawsuits or claims against lessee, or defaults by it under material agreements, including any of the same that might have a material adverse effect; (d) the location of the equipment, and (if true) that it consists of personal property and not fixtures, and is easily removable from any premises or other equipment to which it might be attached; (e) the accuracy and reliability of any financial statements previously furnished to the lessor, and the absence of any material adverse change since the date of those financial statements; (f) lessee's agreement to keep the equipment free of liens, claims and other encumbrances, and (g) lessee's compliance with all applicable laws, regulations and ordinances. Many deal specific representations, warranties and promises may be included, especially in larger transactions. These representations, etc. might relate to, among other things, the nature of equipment (especially if it is equipment that is subject to regulation or has extraordinary, inherent risks), other obligors (*e.g.*, guarantors, sublessees or vendors), or matters related to the continued financial health of the lessee or other obligors, and the source of funds to cover the rent and other obligations.

7. Reports, Inspections and Further Assurances

Post-closing diligence is important to many lessors, and is often addressed in the reporting, notices and further assurance provisions in lease agreements. These provisions may require lessee to supply reports and notices regarding various extraordinary or periodic events or circumstances. For example, lessors often require reports with details of any equipment or executive office relocation, any name change or change in ownership, loss or damage to equipment or other events that might affect the lessor's rights relating to the equipment or the collectability of the lease obligations. In many lease transactions lessors request that financial statements be provided periodically during the term from the lessee, any guarantor or other party on whom the lessor is relying to pay the rent. These provisions sometimes permit the required financial statements to be prepared by the obligor's chief financial officer and other times require a public accounting firm to prepare the statements, and if the obligor is a public company, a lessor might choose to rely on Form 10-Q and 10-K filings with the Securities and Exchange Commission, if timely filed and made publicly available (that is, accessible by the Electronic Data Gathering, Analysis and Retrieval System).

Most lessors reserve the right to inspect the equipment and related records for various reasons, including as a fraud avoidance measure or in anticipation of a sale or assignment of its interest in the lease or as preparation for the exercise of a post-default right or remedy. Lessors often include comprehensive inspection rights prior to the lessee's return of the equipment at lease expiration to confirm that the equipment complies with the redelivery condition requirements in the lease. Lessees sometimes require notice, or impose some restrictions, with respect to non-default related inspections.

Leases often include "further-assurances" clauses that require the lessee to execute or deliver certain documents, or take other actions, relating to events or circumstances that might arise during the term, including protecting the lessor's interest in the equipment, or relating to the sale or assignment of lessor's interest in the lease.

8. Use of the Equipment

Although lease agreements typically recognize the lessee's right to use the equipment in the conduct of its business, there are often conditions requiring that this use comply with all applicable laws, supplier warranties and any insurance policies (sometimes subject to a "materiality" qualifier). If the type of equipment is regulated or has some inherent risks, specialized use and compliance clauses may be used to address specific concerns. For example, if any of the equipment is environmentally sensitive, related concerns may be addressed in specific representations, covenants and an indemnification. Generally, lease forms are likely to include use provisions that are intended to (i) preserve the residual or collateral value of the equipment, (ii) protect lessor's title and interest in the equipment and (iii) avoid liability.

Some lease agreements prohibit the lessee from terminating its use of the equipment so that it will continue to be maintained and serviced, and better preserve the residual value of the equipment. Some leases require the lessee to label each item of equipment, identifying the lessor as the owner, as a fraud-avoidance measure. Lessees might also be restricted from attaching the leased equipment to other items of equipment or real estate (to avoid competing claims if the equipment becomes a fixture or accession (a UCC Article 9 concept), attaching other items of equipment to the leased equipment, modifying the leased equipment, or relocating it, in each case, without the lessor's consent. Lessors sometimes permit the lessee some flexibility in changing the location of the equipment or making modifications to the equipment, so long as provisions are included to give the lessor the opportunity to protect its interest in the equipment by making appropriate filings, and determining whether there are any related tax or other legal consequences and limiting the changes that may be made. With respect to motor vehicles and other mobile equipment the location of the equipment is constantly changing so in those cases the lessee is usually required to designate the equipment's home garage or storage location when not in use. Because of the risks involved and the difficulty in insuring equipment, many leases will not allow the equipment to be removed from the continental United States.

9. Maintenance of the Equipment

Lessees will be using the equipment, and, accordingly, leases typically require the lessees to remain responsible for maintaining the equipment at their expense. Leases typically include various standards to which the equipment is to be maintained, repaired and serviced by the lessee, and in some cases, improved, such as schedules established by the equipment manufacturer, or up to industry standards or as required by insurance policies covering the equipment. In larger transactions or transactions involving regulated or other specialized equipment, special maintenance requirements are typically included, and might be covered by riders or other addenda to the lease. Although market practices will influence maintenance requirements for specialized equipment, lessors often rely on internal or outside equipment experts to determine which requirements may be essential to preserve the collateral and residual value of the equipment.

Some leases permit improvements to the equipment, subject to the satisfaction of various conditions, including that they be free of third-party liens, easily removable without harm to the equipment, removed upon return of the equipment, and that they do not reduce the value or marketability of the equipment. The terms of the lease may also require the lessee to make improvements required by law or as required by a manufacturer's warranty or a service provider contract, even if the obligation can be avoided or delayed by the lessee's discontinuing or altering its use of the equipment. If the lessee is excused from making mandatory improvements during the lease term, the improvements are likely to be required if the equipment is returned at lease expiration. Both mandatory and permitted improvements could have income tax implications in a true "tax" lease, and might be taken into account in the calculation of any fixed price purchase option.

Lessors might permit substitution of equipment suffering a casualty, or as a matter of flexibility to the lessee, on a few occasions during the term of the lease, and if the lessor is not harmed by reason of that substitution. In such event, the replacement equipment is often required to be of the same or better type and model, have at least the same fair market and residual value, utility and remaining useful life, and be in at least the same condition, as the replaced equipment (assuming it was in the required condition). In a true lease, substitution should be limited to qualified "like-kind exchanges" (complying with applicable federal income tax regulations) to avoid tax consequences. A lessee making a substitution might be required to pay an administrative fee, and to deliver bills of sale, UCC financing statements under Article 9, insurance certificates, a lease supplement, an appraisal and other deliverables typically required at closing.

The responsibility for all costs and expenses of any type relating to the use or maintenance of the equipment are likely to be allocated to the lessee.

10. Warranty of Quiet Enjoyment

Most lessees expect the lessor to warrant the lessor will not interfere with lessee's "quiet enjoyment" of the equipment. This warranty is implied by UCC Article 2A, but lessors typically include a version of this warranty that is narrower than this implied warranty. In a typical quiet enjoyment warranty, the lessor warrants that, so long as no default exists under the lease agreement, the lessee's possession and use of the leased equipment will not be interfered with by the lessor or anyone rightfully claiming an interest through the lessor. This warranty is usually given in lieu of all other warranties by the lessor with respect to the lease or the equipment. However, lessors often assign to the lessee all assignable warranties lessor received from the equipment manufacturer/supplier with respect to the equipment. These warranties are assigned to lessee as a matter of law if the lease is a UCC Article 2A finance lease, but lessors might condition the lessee's assigned warranty rights to its not being in default under the lease.

11. Equipment Related Costs, Fees, and Taxes

The typical equipment lease is often referred to as a “triple net” lease. This means that all costs relating to the equipment, its use, ownership, and any of the transactions or other circumstances relating to it, are to be the lessee’s (and not the lessor’s) responsibility. What this means, in most cases, is that the lessee pays all of the related operating costs, fees, taxes and other related charges, whether to the supplier, shipper, warranty or maintenance provider, third party operator, storage facility or landlord of the premises at which it may become located, or to governmental authorities, including those issuing permits or licenses, and tax authorities, having jurisdiction or taxing authority over the equipment or some other aspect of the transaction.

Consistent with this “triple net” treatment is the allocation to the lessee of all of the tax-related responsibilities that may legally be delegated to the lessee, either to perform itself, or to bear the cost and responsibility of the lessor’s performance on the lessee’s behalf. Most lease agreements require lessee to prepare and file all tax reports and returns, except where the law requires otherwise or if the lessor finds it advantageous to control the process. In any event, most lease agreements allocate to the lessee the ultimate liability for the payment of all fees and taxes (other than the net income taxes of the lessor) incurred in connection with the acquisition, ownership and leasing of the equipment, but reserving the lessor’s right to pay these amounts directly to the appropriate taxing authority and be reimbursed by the lessee. In some transactions, sophisticated lessees may request that they have the authority to contest the imposition or amount of the taxes. The lessor is unlikely to permit a contest if there is a pending default or any danger of the sale or impairment of the lessor’s interest in the equipment, and might require the lessee to establish that there is some validity to the contest or to post a bond. The lease may expressly provide that a lessee’s liability for taxes that accrue during the term of the lease or so long as the lessee has possession of the equipment will survive the expiration or termination or the term of the lease.

12. Preserving the Lessor’s Interest in the Equipment Free from All Liens or Encumbrances

Lessors file UCC financing statements and other filings in most lease transactions, without regard as to whether the transaction will be recognized as a “lease”. If the transaction constitutes a “lease” for the purposes of commercial and bankruptcy law, filings will not be necessary in most cases to afford the lessor priority over the rights of third parties, including the lessee’s bankruptcy trustee, because the lessor owns the equipment. In many transactions, the economics or structure of the transaction may result in a lack of certainty as to whether the transaction will ultimately be construed to be a lease transaction or a disguised secured transaction, notwithstanding that the parties used a lease agreement. For various reasons typically related to the lessee’s bankruptcy, the lessee, its trustee or its creditors, might find it useful to argue that the transaction is not a “lease” under commercial law. If challenged, a court might determine that, because of the economic realities of the transaction, the transaction is more like a secured transaction than a ”lease”. Vulnerable transactions often include leases with bargain purchase options, other transactions in which the parties do not reasonably expect the equipment to be returned at lease expiration with meaningful residual value, or where there are "puts" (a forced payment at the end of the lease for a specific price). If a lease is characterized by a court as a secured transaction, the lessor will not have the protections afforded a perfected secured party under Article 9 of the UCC unless it has made the filings or taken other steps to perfect the priority of its interest.

As a precaution, lessors typically make filings and take other steps so that their interest will have priority over third parties. Making these pre-cautionary filings should not prejudice a lessor’s argument that the transaction is a “lease”, and the cost of making these filings on a per deal basis is modest and often the obligation of the lessee to pay. However, some lessors elect not to make these filings in “small ticket” transactions, due to the cost and administrative responsibilities of making these filings, especially in a high volume financing business. Some lease agreements include the lessee’s “contingent” grant to the lessor of a security interest with respect to the equipment. The referenced “contingency” is that the lease might be “re-characterized” as a secured transaction. Some leases also include a non-contingent grant (*i.e.*, without regard as to whether the lease is “re-characterized”) covering certain related property or rights, including, among other things, related software, attachments, subleases and insurance and other proceeds relating to the equipment.

Because leasing is acquisition financing for the lessee, it is likely to have the responsibility for defending the lessor’s title to the equipment and to maintain the equipment free from all liens and encumbrances, except, of course, the lessor’s interest. In larger transactions, lessors will sometimes agree that the existence of certain liens arising by operation of law may not trigger a default so long as, if relating to unpaid taxes or other third party charges, such amounts are not yet delinquent, nor the subject of any collection action. Examples of these liens are tax liens, judgment liens and mechanics liens. Some lease agreements permit the existence of these liens without triggering a default if they are being contested in good faith, bonded, are subject to a stay of execution or do not involve any material risk to the lessor’s interest in the equipment.

Lessors often reserve the right to sell, assign, participate and grant security interests in the equipment, as well as the lessor’s other rights in the lease and payments there under (A more thorough discussion of these issues is provided in Chapter 10 of this *Guide.*)

13. Insuring Equipment-Related Risks

The requirement that the lessee obtains and maintains casualty and liability insurance is another of the “triple net” aspects of an equipment lease financing. Liability insurance is intended to protect the lessor against liability from claims of loss or damage to property, or injury or death to persons, resulting from the use of the leased equipment. Property insurance is intended to protect the lessor from the loss of its investment in the equipment resulting from any loss, damage, destruction, theft or governmental taking of the equipment. Even though other lease provisions typically provide that the lessee is liable for, and must indemnify the lessor against these types of risks lessors are especially concerned about the continuing existence of insurance coverage in transactions in which the lessee is not a strong credit risk or where the equipment has significant ownership liability risks that the lessee may not be financially able to cover on its own. Property insurance may be less important in transactions where the equipment has little value or the transaction includes a large "soft" cost component. Many leases provide that the lessor may obtain the insurance in the event lessee fails to do so, and be entitled to reimbursement from the lessee of the cost of doing so. (A further discussion of insurance issues is covered in Chapter 8 of this *Guide*.)

14. Loss of and Damage to the Equipment

Most "net" leases allocate to the lessee all risks of loss and damage to the equipment. If the equipment is merely damaged, the lessee is likely to be obligated to repair the damaged equipment at its own expense. If the equipment suffers a total loss, the lessee might be obligated to pay a scheduled casualty value or similar accelerated amount calculated to make the lessor "whole", so that it recovers not only its investment, but also its yield and any economic harm it might suffer by reason of this pre-payment. Some leases permit the lessee to replace the damaged or lost equipment, especially in multi-asset leases (*e.g.*, involving office equipment, machinery or containers). Substitution of equipment is covered in greater detail under Section 4.III.9 above.

Lessors typically require the lessee to complete repairs, pay the casualty value or replace the "lost" equipment within a specified time frame. Casualty to the equipment does not relieve the lessee from its obligation to pay rent, which continues until the casualty amount is received by the lessor in accordance with the lease terms. Lease agreements often provide that the lessor may retain property insurance proceeds until the lessee has completed any repairs or replacement, or paid the casualty payment, and the diminished collateral value has been restored. Many lease agreements reserve the lessor's right to retain any insurance proceeds in its possession if a default exists. Other lease agreements have a stipulated loss value and require the lessee to pay this stipulated loss value when the equipment is damaged beyond proper repair or destroyed.

15. Returning the Equipment

The lease agreement may contain equipment return requirements. These requirements might be covered in broad and generic terms in the body of the lease agreement. In larger transactions, or if involving specialized equipment, these requirements might be covered in riders or other supplemental documents relating to the specific type of equipment. The return provisions are often drafted with the assistance of the lessor's asset management group or outside equipment expert so as to be consistent with the lessor's residual value expectations, tax treatment and pricing. Return provisions must also comply with applicable state laws requiring that notice be given to the lessee before the auto renewal provisions of the lease may apply.

Return requirements typically specify the time and place for redelivery, and any condition requirements, of the various items of equipment, and might allocate to the lessee the responsibility for the risk of loss during transit and redelivery expenses (which are typically borne by the lessee.) The required redelivery condition may be generic or specific to the nature of the leased equipment, and may provide for compensation from a lessee for delayed redelivery of the equipment or delivery of the equipment in condition that does not conform to the specific return condition requirements. Some lease agreements obligate the lessee to pay “hold-over” rent at the same lease rate (or at a higher rate) during the period of any delayed, non-conforming redelivery. Many lease agreements also have an "evergreen" clause, which automatically renews the lease term for a year or some portion of the lease term (i.e. month to month, quarterly or semi-annually) if the equipment is not timely returned. Lessors sometimes require that the lessee store the equipment after expiration of the lease term, at the lessee’s risk and expense. In leases where the return is unlikely (*e.g.*, having a nominal purchase option), the return requirements are likely to be less particular.

16. Liability Indemnity

Lessors hope to avoid any liability to the lessee or any other person relating to the lease transaction, especially for claims made against them only because they own the leased equipment. Many legal theories might be offered as support for a lessor’s liability, including some based on imputed liability of property owners, sellers or lessors, whether based on “common law” or by statute or regulation, and in some cases, irrespective of any actual wrong doing by the lessor. Many lessors allocate those liability risks to the lessee by including indemnity provisions in their lease agreements. Some lessees negotiate “carve-outs” from that liability, including exclusions or conditions pertaining to the scope of the events or amounts payable under the indemnity. Most lessee indemnity provisions exclude liability resulting from the lessor’s gross negligence or willful misconduct.

Indemnity provisions are typically thorough and are not limited to harms resulting from the lessee’s acts or omissions but usually extend to liability arising from events beyond the lessee’s control. The indemnification will benefit the lessor and its successors and assigns. Indemnities often cover risks from claims based on laws that impose liability on owners, sellers and lessors merely because they own or are making the equipment available in the market place. Some lessees seek to control the defense of an indemnified claim, and a lessor might permit that control so long as the lessee is not in default, has the financial wherewithal to properly defend and indemnify the lessor, and the lessor can participate in the selection of the defense counsel. Most lease agreements provide that the lessor’s right to be indemnified expressly survives expiration of the term of the lease.

17. Default and Remedies

Although the parties could look to Article 2A of the UCC to determine whether the lessee is in default under a lease, lease agreements almost always include specific events of defaults. Lease agreements used in larger transactions might afford lessees more opportunities to avoid or "cure" defaults, including by providing more generous grace periods, or by requiring that the lessee receive notice of the occurrence of an event that could give rise to a default.

Some examples of common events of default include (i) a payment default of rent or other payment obligation under the lease; (ii) a cross-default to other material financial obligations, whether owed to the lessor or a third party, (iii) a change of ownership or control of the lessee or other obligor, (iv) a change in structure or condition of the lessee or any other obligor (such as termination of existence, merger or consolidation, or sale of all or substantially all of its assets); (v) bankruptcy or similar proceedings commenced by or against the lessee or guarantor; (vi) a default under or relating to any related guaranty or other credit support, including the death of a personal guarantor or an attempted termination by a guarantor of its guaranty; (vii) insolvency, an assignment for the benefit of creditors, receivership, attachment or execution on assets of the lessee or a guarantor; and (viii) transfer of the leased asset from the lessee to a third party. If a MLA is used, it is likely to provide that if a default occurs under one lease schedule, the lessee will be in default under the other lease schedules.

If the lessee is in default under the lease, the lessor has the rights and remedies provided in the lease agreement and may also have the remedies set forth in Article 2A of the UCC. A few of the remedies typically found in lease agreements include the lessor's right to (a) "cancel" or "terminate" the lease (provided that notwithstanding any cancellation lessor will preserve a claim for damages due to unpaid rents becoming due after cancellation); (b) accelerate the rent and demand other liquidated damages (including amounts attributable to lessor's unrealized tax benefits and impairment of its residual interest); and (c) recover and dispose of the equipment. It is important for the Lessor to include in the lease agreement a method for determining the monetary amount that will be due from the lessee for the damages that the lessor anticipates it will suffer upon the occurrence of a default. Among the common components in liquidated damages provisions are accelerated rents, discounted to present value (using a stated discount rate, an index rate that may be used to determine a discount rate or a stipulated loss schedule that does not set forth a rate). The lessee is typically credited for any disposition proceeds received by the lessor. Some lessors include a provision that allows them to recover the full liquidated amount without being required to proceed against the equipment and if the lessee pays the full amount due, the equipment may then be retained by the lessee. In addition, most lease agreements provide that the lessor is also entitled to the residual value of the equipment discounted to present value.

A more thorough discussion of typical lease remedies may be found in *The Executive's Guide to Remedies*.

18. Third Party Arrangements (Assignment and Subletting)

Many lease agreements prohibit any assignment or subletting by the lessee without the lessor's prior written consent. Some lease agreements permit the lessee to enter into subleases with affiliates or to unrelated parties subject to certain conditions. These conditions might include that the sublease be subject and subordinate to the lease and, perhaps, notice of the assignment has to be given to the lessor and sublessee's written acknowledgment of the lessor's superior rights. If the sublease is intended to constitute credit support for the lessee's obligations under the lease, the sublease can be collaterally assigned to the lessor, and various conditions might be included to perfect that assignment (such as delivery of the original sub-lease to the lessor), and assure the collectability by the lessor of those sublease payments.

Chapter 10 of this *Guide* discusses the lessor's typical assignment or sale rights, including the coverage of those rights in lease documents.

19. Income Tax Indemnification

If the lease has been priced by the lessor as a true "tax" lease, the lease agreement is likely to include a tax benefit indemnification. These provisions are often drafted as either an "all events" or an "acts or omissions" indemnity.

If the lease agreement contains an "acts or omissions" tax indemnification, the lessee will be required to indemnify the lessor only for those adverse tax consequences resulting from (i) the lessee's breach of its various tax representations or (ii) any act or failure to act by the lessee. Tax representations that could be required from the lessee may relate to, among other things, the equipment's value at lease expiration, eligibility for specified federal income tax deductions, and use being consistent with the lessor's anticipated tax treatment. The indemnity might also cover any adverse tax consequences resulting from the lessee's locating the equipment outside of the U.S. Permitted acts that might result in tax consequences to the lessor covered by such an indemnity might include adding an attachment to the equipment or exercising an early purchase option.

If the lease agreement includes an "all events" indemnification, the lessee will be responsible for all events and circumstances that result in the lessor's suffering adverse tax consequences. These events and circumstances would include not only the acts or omissions also covered by an "acts or omissions" indemnity, but any event or circumstance which results in a tax "loss." Examples of these triggering events could include a determination that the transaction has not been structured a true "tax" lease, or any governmental or interpretive change in tax laws or the lessor's assumed tax rate.

Indemnity provisions in larger transactions might also include "carve outs" from liability and other lessee protections. These exceptions sometimes include (a) the lessor's failure to either properly claim tax benefits, or to have sufficient taxable income to take advantage of these benefits, (b) the lessee's payment of the casualty value or similar stipulated amount, if that payment has been calculated to reimburse the lessor for the indemnified amounts or (c) tax losses resulting from the lessor's sale or assignment of the lease agreement. Some lessees negotiate contest rights that would allow them to avoid paying an indemnity so long as they can legally challenge the imposition of the related tax.

20. Miscellaneous Lease Provisions

Many lease agreements, especially those used in larger transactions, include various "boiler plate" (but important) provisions, including:

a. An "entire agreement" clause, essentially providing that the lease agreement and certain specified documents constitute the entire agreement between the parties, and can only be amended or modified in writing.

b. A "survivability" clause relating to representations, warranties and accrued obligations, as well as indemnities and other specified agreements, that are intended to survive the expiration, cancellation or termination of the lease.

c. An allocation of transaction expenses, whether relating to documenting and closing the transactions, or to various circumstances, not otherwise covered by the indemnity or remedies sections or performance obligations.

d. Jury trial waivers and choice of governing law and exclusive or non-exclusive choice of jurisdiction and courts where actions may be litigated if relating to the lease. Jury trial waivers should be conspicuous (such as in all capital letters, a larger font or bold font) in order to minimize the risk of lessee claims that the waiver is not enforceable. In some states, a jury trial waiver is not enforceable.

e. The manner in which notices are to be provided, and contact information.

f. Agreements relating to execution and delivery of the lease documentation, including that they may be executed in counterparts, delivered by facsimile and marked so as to designate the "chattel paper" copy for purposes consistent with Article 9 of the UCC.

g. Coverage of regulatory matters pertaining to legal or accounting requirements, including any required disclosures, acknowledgements and limitations (*e.g.*, interest rate disclosures or caps).

21. Lessee's Purchase and Renewal Options

Some transactions are structured to give the lessee a right to terminate the lease prior to expiration. Early termination provisions may be limited to only certain specified times and/or conditioned on the lessee paying specified amounts or agreeing to make up any short-fall if the lessor is unable to recover a specified amount from remarketing the equipment. The lessee's exercise of an early termination could have a significant impact on the lessor's economic position, including its residual value recovery. Therefore, many lessors condition the lessee's right to terminate on timely advance notices, acceptable documentation and an allocation to the lessee of costs, risks and taxes relating to its exercise of one of these options. Some leases treat the lessee's right to exercise an option as a privilege that the lessee forfeits if it is in default, and condition the lessee's purchase or early termination option rights on the lessee not being in default when electing or exercising that option.

Lessee's purchase and renewal rights are carefully structured and drafted so as to be consistent with the lessee's acquisition and operational needs, as well as the tax and accounting and commercial law expectations regarding the transaction. These provisions are sometimes contained in the lease agreement, and other times in riders or other supplemental documents. If the lessee anticipates that the equipment could continue to be meaningful to its operations after the scheduled lease expiration, it might ask the lessor to include very specific renewal and purchase options having economic and other terms that afford the lessee some certainty about the consequences of its continued use of the equipment. Many lease agreements allow the lessee to renew the lease at a fair rental value or purchase the equipment at lease expiration based on the then fair market value of the equipment. In leases with such provisions there are a variety of methods for determining the fair market rent or fair market value, including determination by the lessor, one or more appraisers, or by some other independent valuation procedure. Since the appraisal value of equipment will vary if the equipment is valued on a liquidation basis as opposed to replacement value or going concern value, it is important that method of valuation be defined in the lease. In larger transactions, the parties often stipulate certain assumptions regarding the condition of the equipment for the purposes of that valuation.

5. Financing Statements And Other Methods To Record Lessor's Interest In Leased Equipment

A lessor does not need to file a financing statement or take any other actions to "perfect" or provide third parties with notice of its interest in leased equipment (with the exception of notice to certain taxing authorities that is required to prevent the attachment of various liens against the leased goods) if the lease transaction qualifies as a "true lease under UCC Article 2A. However, if a lease transaction does not qualify as a true lease it will be deemed to be a secured transaction, and will be governed by UCC Article 9, which requires the filing of financing statements to perfect a security interest in most kinds of goods. Because of the difficulty in assuring the treatment of the lease as a true lease virtually all lessors file financing statements or take other actions required by applicable law to perfect their security interest in the leased equipment as a precaution in the event that the lease is deemed to be a secured transaction.

Although the most common method for providing third parties with notice of lessor's interest in leased goods is to file a financing statement, if the leased equipment consists of airplanes, boats, automobiles, trucks or other types of mobile goods, the lessor will need to note its interest on the certificates of title for such vehicles and/or file a copy of the lease agreement together with such filings as required by the appropriate state or federal governmental entity.

I. REQUIREMENTS FOR FINANCING STATEMENTS FILED ON GOODS

The legal requirements for a financing statement are described in Article 9 of the UCC but may vary slightly from state to state. Although the UCC provides for the use of a National "Form" Financing Statements, some states may still require additional information to be contained in a financing statement. Therefore, the readers of this Guide should consult with their attorneys regarding the requirements of a specific state before filing a financing statement in that jurisdiction.

Recognizing the caveats described in the preceding paragraph, the general requirements of a financing statement are:

a. the lessee's complete and exact legal name (do not use tradenames) as set forth in the records of the lessee's state of formation, and mailing address. If the lessee is a corporation, limited liability company or partnership, or limited partnership the financing statement should also set forth the type of organization, the state of organization, and any organizational identification number;

b. the lessor's or representative's legal name and address to which required notifications may be sent;

c. a description of the leased equipment, which is detailed enough to separate the particular equipment from other property in lessee's possession, and any accessions, accessories, attachments, modifications, or replacements thereto; and

d. if the financing statement covers equipment which could be construed to be fixtures; the legal description of the real property, the name of the record owner of those premises, and a statement that the financing statement will constitute a fixture filing and be filed in the real estate records.

The National Financing Form includes a box which may be checked to identify that the filing is a lessor/lessee filing. In addition, the UCC permits a lessor to add a legend after the description of the leased goods, which states that the financing statement covers leased goods and is being filed solely for precautionary purposes.

II. FINANCING STATEMENT NAME RULES AND DURATION OF FINANCING STATEMENT

It is very important for the lessor to insert the lessee's exact correct legal name in a financing statement. Otherwise, the financing statement may be deemed to be "seriously misleading" and invalid under applicable law. A prudent lessor will also verify the accuracy of any additional information that is contained in a financing statement including, but not limited to, the description of the leased goods.

Revisions in 2013 to the UCC require a lessor to determine the legal name of a lessee from the "public organic record." The "public organic record" is comprised of the organizational documents of the lessee filed with the Secretary of State or other appropriate official from the state in which the lessee was formed. Failing to use the "public organic record" can lead a financing statement to be found to be deficient.

Most states cannot issue certificates of good standing for general partnerships since the partnership agreements for such enterprises are not filed with any governmental authority. When dealing with a general partnership, a lessor can confirm the lessee's legal name by obtaining a copy of the partnership agreement and inspecting the lessee's books and records.

In most states, a financing statement is effective for a period of file (5) years. If a lease has not expired within five years or if the lease is renewed beyond five years, the lessor can file a continuation statement during the six (6) month period immediately preceding the expiration of the financing statement. A continuation statement will have the same duration as the financing statement and will be effective from the expiration of the latter document. A lessor may wish to file additional continuation statements if the term of the agreement exceeds the duration of the original or any subsequent continuation statements.

III. WHERE AND WHEN TO FILE A FINANCING STATEMENT

The UCC provides that each state shall designate one central filing office (generally the Secretary of State's Office) for the filing of financing statements. For lessees who are registered organizations (corporations, limited liability companies and partnerships, and limited partnerships) the financing statement is filed in the central filing office in the state where the lessee is organized. For lessees that are unincorporated entities such as a general partnership or joint venture, the financing statement is filed in the central filing office in the state where the lessee's chief executive office is located. Finally, for lessees that are individuals, the financing statement is filed in the central filing office in the state where the lessee resides.

The above rules for where to file a financing statement do not apply to fixtures (where the law will vary from state to state) and airplanes, boats, automobiles, trucks and other mobile goods (where other rules determining the state and location of filing and type of filing required will apply). A lessor and its legal counsel need to be familiar with the requirements of the UCC since a misfiled financing statement will be ineffective against third parties.

A lease agreement that is actually a secured transaction will be a "purchase money" transaction if the lessor is providing the leased equipment to the lessee or supplying the financing that is needed for the lessee's acquisition of those goods. Assuming that the leased equipment will be used and not held for sale or lease by the lessee, a lessor will acquire a super-priority interest in the leased equipment vis-à-vis the lessee's other creditors if a financing statement is filed with the appropriate governmental authorities within 20 days from the delivery of the leased goods to the lessee.

The dependency of "purchase money" priority upon the delivery date of the leased equipment is one of the reasons why lessors require lessees to execute delivery and acceptance certificates. If the leased equipment is to be delivered in installments, many lessors file financing statements that contain a specific description of the initial leased equipment and a general description of the remaining leased goods within 20 days from the delivery of the initial property, and promptly amend the financing statements to describe the subsequent leased equipment upon the delivery of those goods.

IV. UCC AND LIEN SEARCHES

Many lessors do not (and, for sale/leaseback transactions, cannot) rely upon their ability to obtain a purchase money priority in the leased goods. Instead, those lessors can conduct UCC lien searches against the lessee and obtain and file UCC releases or termination statements for any financing statements that could constitute a prior security interest in the leased property. In conducting UCC and lien searches, a lessor should be careful to use the lessee's correct legal name and consult the UCC to ascertain the correct locations for such inquiries.

A lessor should remember that not all liens, security interests, and other encumbrances will be disclosed by a UCC lien search. The lessor will be required to take additional actions to confirm that no tax, mechanic's, materialman's, or other liens exist against the leased property.

V. POST-CLOSING CHANGES REQUIRING NEW OR AMENDED FINANCING STATEMENTS

The UCC requires a lessor to amend or file new financing statements if the lessee changes its legal name, structure or (in some situations) the location of its business. The rules with respect to these types of changes are complicated and lessors should consult with legal counsel as necessary. The lease agreement may require that lessee provide notice of any such change and some lessors will confirm the lessee's organizational standing on an annual or semi annual basis.

VI. LANDLORD/MORTGAGEE WAIVERS

Whenever leased equipment is affixed or otherwise attached to real property, the potential exists for a landlord or mortgagee to assert that the leased equipment constitutes a fixture and is subject to its interest in the real estate. To eliminate the possibility of a dispute with the lessee's landlord/mortgagee, the lessor should obtain waivers from them that subordinate to lessor any interest they could claim in the equipment. However, many landlords and mortgagees will refuse to sign waivers of their rights against the leased equipment or insist upon using their own agreements. Typically, a lessor does not possess any leverage against these parties and, in situations involving a difficult landlord or mortgagee, a lessor will need to determine whether it wishes to provide the lessee with the leased equipment in the absence of a landlord/mortgagee waiver.

6. GUARANTIES

It is very common for guaranties to be provided to lessors in connection with lease agreements. Such documents are used to enhance the acceptability of a transaction if the value of the leased equipment and/or the lessee's financial condition is insufficient to justify the requested amount of credit from the lessor. Besides providing the lessor with an alternative means of recovering the amounts owing under the lease agreement, a guaranty also will increase the likelihood of the guarantor's (and, possibly, the lessee's) cooperation with the lessor on a problem lease.

I. BASIC TERMS AND CONDITIONS

Under the laws of most states, guaranties are not binding unless they are written. No particular form of agreement is required to create a binding guaranty and a guaranty only commences once the guaranteed documents are both executed and delivered. A well-drafted guaranty will identify the relevant parties, specify the nature of the guarantied obligations, and recite the consideration for the execution of that document.

A guaranty typically covers: (a) the lessee's liabilities and obligations to the lessor under one or more specific lease agreements or (b) all of the lessee's present and future liabilities and obligations to the lessor of any kind. In addition, a guaranty may be unlimited or limited to a specific dollar amount or a specific transaction. If the guaranty covers any future extensions of credit to the lessee, it may state whether the lessor is required to provide the guarantor with any notice or obtain the guarantor's consent to such additional leases and loans. Increasingly, guaranties have a stated aggregate limit equal to the guarantor's net worth.

Most guaranties provide that the guarantor is "absolutely, unconditionally, and irrevocably" guarantying the prompt and full payment and performance of the lessee's obligations to the lessor. In addition, the guaranty often states that it will be enforceable against the guarantor irrespective of: (a) the genuineness, validity or enforceability of the liabilities or obligations of the lessee or any third party to the lessor including, but not limited to, those contained in the lease agreement and any related documents and (b) the existence, validity, or value of the leased equipment or any security for the guarantied obligations or any part thereof. Occasionally, a guaranty will be expressly contingent on the happening of an event such as the lessee's entering bankruptcy proceedings. Such a "springing" guaranty, however, poses the risk that the lessor may not be able to have the full benefit of the guaranty if the automatic stay is construed to prevent the springing rights from vesting.

A guarantor may seek to avoid liability under a guaranty by claiming that the execution of that document was induced by a fraudulent representation made by the lessor or another party. In an effort to bar or impede these claims, many guaranties require the guarantor to acknowledge that the guarantor has not received or relied upon any oral or written representations or other statements with respect to the guaranty that are not contained in that document. Also, assuming guarantors have the customary opportunity to examine the guaranty, guarantors cannot avoid liability by asserting that they failed to read the guaranty before signing.

A guaranty of “payment and performance” is different from a guaranty of “collection.” A “payment and performance” guaranty will enable the lessor to seek payment from the guarantor without first exercising any of its rights and remedies against the lessee, the leased equipment, or any collateral. However, a collection guaranty generally cannot be enforced until the lessor has obtained and sought to enforce a judgment against the lessee and, perhaps, disposed of the leased equipment and other collateral for the lessee’s obligations.

The general rule is that any guaranty must be given in exchange for a commensurate economic benefit to the guarantor. For instance, if the guaranty is entered into after the lease has been executed and the equipment delivered, then the guarantor must be given some additional benefit for its assumption of obligations in the transaction since the lessor already has provided the lease financing. Also, the benefit to the guarantor must be “fair consideration” for purposes of bankruptcy or fraudulent transfer laws. To avoid a fraudulent transfer under bankruptcy law, the guarantor must receive “reasonably equivalent value” for the cost to it of the obligations guaranteed. While consensus for determining “reasonably equivalent value” does not exist, relevant factors in making such a determination include the good faith of the parties involved, the difference between the amount paid and the fair market value of the guaranteed obligations, and whether the transaction took place at arm’s length.

Guaranties by a parent corporation of a subsidiary’s debt (“downstream” guaranties) tend not to be problematic because a lease to the subsidiary implicitly benefits the owner of the subsidiary by increasing the subsidiary’s value. Subsidiary-to-parent (“upstream”), affiliate-to-affiliate (“cross-stream”) and unaffiliated guaranties are susceptible to attack as a fraudulent transfer because it is less apparent how a lease to the parent or affiliate results in the subsidiary or affiliate guarantor receiving “reasonably equivalent value” in exchange for its assuming the guaranteed obligations. The corporate laws of some states, including Delaware, have been amended to authorize both upstream and cross-stream guaranties. Guaranties by the spouse of an owner of a lessee are problematic in light of Federal Reserve Board Regulation B. For more information regarding Regulation B and the impact on spousal guaranties, please contact your legal department.

It is common practice for the guarantor to pay all of lessor’s costs, expenses, attorneys’ fees and collection costs related to the enforcement of the guaranty. A guarantor is typically only discharged upon full payment of the guaranteed obligations.

II. CONSENTS AND WAIVERS

The general rule is that a guaranty may be rendered unenforceable by any change or modification in the guarantied obligations or any related collateral that is made without the guarantor’s consent. In an effort to remedy this problem, many guaranties contain broad consent and waiver language. An example of such language is set forth below:

> The Guarantor agrees that, without notice to or further consent from the Guarantor and without releasing or affecting its liability hereunder, the time for the payment or performance of the Guarantied Obligations may be extended or accelerated in whole or in part, any security may be exchanged, released, enforced, sold, leased or otherwise dealt with, the provisions of any document may be canceled, compromised, modified or waived, any other guarantor may be released in whole or in part, and any indulgence may be granted to the Lessee or any other party, as the Lessor may determine from time to time in its sole discretion.

Unless waived, the guarantor has a right of subrogation to the rights of the lessor against the lessee. This right is not to be confused with the guarantor's right to be reimbursed by the lessee after payment or performance of the lessee's obligations. The guarantor also has a right of contribution from any co-guarantors once payment has been made. In order to maximize their enforceability, many guaranties also may contain waivers of: (a) presentment; (b) notice of protest; (c) protest; (d) demand; (e) diligence; (f) notice of default; (g) notice of the sale, lease or other disposition of the leased equipment or any collateral; (h) any other notice or demand to which the guarantor otherwise would be entitled; (i) the right to assert any counterclaim or consolidate any other action with any legal proceeding for the enforcement of the guaranty; (j) the benefit of any statute of limitations that might exculpate the guarantor from its liabilities and obligations to the lessor; (k) the right to assert against an assignee of the lessor any of the claims, defenses, setoffs or counterclaims that otherwise could be asserted against the lessor; and (l) the right to demand a jury trial, in the event of any litigation pertaining to the guaranty.

Not all rights can be waived. For example, under UCC §9-602(7), all default and enforcement rules apply to guarantors, as well as secured creditors, and guarantors cannot, in a guaranty agreement signed prior to default, waive notice of any commercially reasonable foreclosure sale.

Some observers contend that it may be easier to enforce the guaranteed liability where the "guarantor" has "co-signed" the lease as a co-lessee. However, unless the co-lessee is a legitimate user of the leased equipment and enjoys all the same benefits of a true lessee, the co-lessee may be labeled an accommodation party under UCC §3-415. If the lease included none of the waivers or consents typically contained in a well-drafted guaranty, then the "co-lessee" could be excused from its obligations under the lease.

III. REPRESENTATIONS, WARRANTIES, AND COVENANTS

It is common for guaranties to contain a variety of representations and warranties regarding the guarantor's due organization and authority to execute the guaranty (if the guarantor is not an individual), the enforceability of the guaranty, the guarantor's investigation of and familiarity with the lessee and the guarantied obligations, the non-reliance by the guarantor on any information or documents provided by the lessor with respect to the lessee and the guarantied obligations, and the lack of any duress or coercion exerted by the lessor in connection with the execution of the guaranty. It also is not unusual for guaranties to require the guarantor to undertake a number of affirmative and negative financial and other covenants including, but not limited to, providing the lessor with its financial statements and other information on a periodic basis.

IV. MISCELLANEOUS PROVISIONS

Most guaranties provide that multiple guarantors will be jointly and severally liable for the payment and performance of the guarantied obligations. In addition, a well-drafted guaranty should contain many of the standard "boilerplate" provisions that are contained in a lease agreement (see Chapter 4 of this *Guide*).

7. EVIDENCE OF A LESSEE'S OR GUARANTOR'S AUTHORITY TO ENTER INTO A LEASE OR GUARANTY

I. EVIDENCE OF A LESSEE'S OR GUARANTOR'S AUTHORITY

In order for a lease agreement or guaranty to be binding on a corporation, partnership, or limited liability company, it must be duly authorized and executed by such entities. This means that the execution of the lease agreement or guaranty, as the case may be, must have been both properly authorized within the applicable framework of the signing party, and signed on behalf of the signing party by an employee that has been empowered to do so.

In general, a corporation, partnership, or limited liability company is empowered to take any action that is authorized by its charter documents. These documents are the certificate or articles of incorporation and bylaws for a corporation, the partnership agreement for general partnerships, the certificate of limited partnership and partnership agreement for limited partnerships, and the articles of organization and operating agreement for limited liability companies. Pursuant to the request of the lessor, it is common for the board of directors of a corporation also to adopt a resolution that authorizes the corporation to enter into any major transaction, and identifies the officers or other agents of the corporation who are permitted to sign the documents and take any other necessary actions on behalf of the corporation.

To confirm that a corporation, partnership or limited liability company is authorized to enter into a lease agreement or guaranty and to verify the authority of the individuals who are authorized to represent the relevant entity, a lessor may review the signing party's charter documents and related records. In addition, the lessee or guarantor may be required to provide the lessor with:

a. a certified statement which identifies the charter documents and any amendments or replacements thereto as well as the nature of any additional actions that have been taken to authorize the execution and performance of the lease agreement or guaranty; and

b. an incumbency certificate signed by someone who has knowledge of the books and records of the signing party and which certifies that the individuals executing the lease agreement or guaranty are authorized representatives of the signing party and which contains specimens of their signatures.

A lessor also may contact the appropriate governmental authorities and review the signing party's records to confirm that the lessee or guarantor is in good standing and qualified to conduct business in the appropriate states.

II. CORPORATIONS

1. Certificates and Articles of Incorporation

A corporation's certificate or articles of incorporation must be filed with the Secretary of State or other appropriate official of the state of incorporation. A lessor can obtain a copy of such documents from that governmental authority directly or by utilizing a documentation service. The certificate or articles of incorporation address a number of issues including, but not limited to, the nature of any permissible or prohibited activities for the corporation.

Most certificates or articles of incorporation will provide that the corporation is authorized to engage in any activity not prohibited by applicable law. Generally, if the certificate or articles of incorporation does not place restrictions on the activities that may be entered into by a corporation, there is no other legal limitation on the corporation's ability to enter into a lease agreement or guaranty. It should be noted that this general rule will not apply to corporations which are public authorities (such as joint power authorities and cities) or regulated entitles (such as banks, insurance companies, public utilities, and investment companies). Such entities are subject to a variety of special rules and regulations that may affect their ability to enter into a lease agreement or guaranty.

2. Bylaws

The bylaws of a corporation describe its internal procedures. They do not need to be filed with any governmental official and may be obtained directly from the corporation or its attorney.

Sometimes, the bylaws of a corporation prohibit it from entering into certain types of transactions or require that certain procedures be followed (such as the execution of any contracts by more than one officer). Accordingly, a lessor may wish to examine a corporation’s bylaws before entering into a lease or guaranty with that corporation.

3. Board of Directors Resolutions

A corporation can expressly authorize the execution and delivery of a lease agreement or guaranty by: (a) adopting appropriate resolutions at a board of directors meeting which has been noticed and attended in accordance with the corporation's bylaws and applicable law; or (b) requiring all of its directors to execute a written consent in lieu of such a meeting. If a written consent is used, the lessor may confirm that such consents are permitted by the corporation's charter documents and the laws of the state of incorporation.

The corporate resolutions or consent often will address a number of issues pertaining to the lease agreement or guaranty. These issues may include:

a. the authorization of and consideration for the transaction;

b. the approval of the general or actual terms of the lease agreement or guaranty and related documents;

c. the authorization of one or more officers' execution on behalf of the corporation and delivery to the lessor of the lease agreement, guaranty and any other instruments, certificates or agreements which may be necessary or appropriate to consummate the lease transaction, guaranty or any amendments, extensions, modifications, replacements or substitutions thereto; and

d. the authorization of any other actions necessary to carry out the foregoing resolutions and the ratification of any actions taken by the authorized officers prior to the adoption of such resolutions by the board of directors of the corporation.

A sample of the resolutions that might be adopted by a corporation in connection with the execution and delivery of a lease agreement or guaranty are set forth below:

> RESOLVED, that any one (1) of the president, vice president or treasurer is hereby authorized and directed for and on behalf of this Corporation to execute and deliver to the Lessor the [lease agreement] [guaranty] with such changes therein as may be approved by such executing officer, such approval to be conclusively evidenced by such officer's execution thereof, and to execute and deliver to the Lessor such other schedules, instruments, certificates, and documents as may be necessary or appropriate in order to consummate the transactions contemplated by the [lease agreement] [guaranty];
>
> RESOLVED FURTHER, that each of the foregoing officers of this Corporation is hereby authorized and directed for and on behalf of this Corporation to execute any amendments, modifications, replacements or substitutions to the [lease agreement) [guaranty) and any related documents which he or she may deem to be in the best interests of the Corporation;
>
> RESOLVED FURTHER, that each of the foregoing officers of this Corporation is hereby authorized and directed for and on behalf of this Corporation to take any and all other actions and do any and all other things which he or she may deem necessary or advisable in order to effectuate the purposes of the foregoing resolutions; and
>
> RESOLVED FURTHER, that any of the actions described in the foregoing resolutions that have been taken by any of the foregoing officers prior to the date of such resolutions are hereby ratified, confirmed and approved as the valid and enforceable acts and deeds of this Corporation.

It is common for the secretary or assistant secretary of the corporate lessee or guarantor, as the case may be, to provide the lessor with a certificate that confirms that the board of directors has properly conducted a meeting or executed consent minutes to adopt the resolutions authorizing the corporation's execution and performance of its obligations under the lease agreement or guaranty and any related documents. In many instances, this certificate is combined with the incumbency certificate discussed below.

4. Incumbency Certificate

It is important for a lessor to be able to confirm that the officer who will sign the lease agreement or guaranty on behalf of a corporation is an officer of the corporation who is authorized to act on its behalf. Frequently, the lessor obtains such confirmation by requesting an incumbency certificate from the secretary or assistant secretary of the corporation.

An incumbency certificate identifies the officers of the corporation and contains specimen signatures of those officers so the lessor can compare the specimen signatures against the actual signatures contained in the transaction documents. Some lessors attach a copy of the corporation's certificate or articles of incorporation and bylaws to the incumbency certificate and request the secretary or assistant secretary to verify the accuracy and completeness of those documents.

5. Good Standing and Licenses to Conduct Business

It is common for a lessor to confirm that a corporate lessee or guarantor is in good standing in the state of its incorporation and licensed to conduct business in all of the relevant states. In a very few jurisdictions, a contract executed by a corporation that is not in good standing or has not been qualified to conduct business in that state may present some enforceability problems.

A lessor can confirm the good standing of a domestic corporation and its license to conduct business in a foreign state by contacting the Secretary of State or other appropriate official. Besides being able to obtain oral confirmation of such facts, a lessor should be able to request a written certificate from the Secretary of State or other official for a relatively modest fee. Often times this information can be obtained from the state's website.

III. GENERAL PARTNERSHIPS

Many of the actions that are taken by a lessor or guarantor, as the case may be, to confirm the authority of a corporation and its officers to execute a lease agreement or guaranty also can be taken with respect to a general partnership.

A general partnership can be formed simply by the execution of a partnership agreement or the actions of two or more parties. Since a general partnership, unlike a corporation, generally does not need to file any certificate or a copy of its partnership agreement with any governmental authority, most state officials will not issue a certificate of good standing for such entities. On the other hand, if a state requires any business association to obtain a license to conduct business within its borders, the Secretary of State or other appropriate official should be willing to advise a lessor if a general partnership is licensed to conduct business in its state.

A general partnership usually is legally permitted to engage in any lawful activity that is permitted by its partnership agreement. In addition, any partner can act as the authorized representative for the partnership and the partnership agreement may identify the partners.

Any restrictions on the ability of a general partnership to enter into specific types of transactions will be included in its partnership agreement and its other books and records. Notwithstanding the foregoing, many lessors require the partners of a general partnership to execute a certificate, which contains the same types of information as the corporate resolutions and incumbency certificates that are obtained from the secretary or assistant secretary of a corporate lessee or guarantor.

IV. LIMITED PARTNERSHIPS AND LIMITED LIABILITY COMPANIES

Most states require limited partnerships and limited liability companies to file certificates of limited partnership or articles of organization with the Secretary of State or other appropriate official as a condition precedent to the formation of those entities. Accordingly, the state official usually is willing to provide a lessor with a certificate of good standing for a limited partnership or limited liability company and to confirm whether or not such parties are licensed to conduct business in its state.

Like a general partnership, a limited partnership or a limited liability company usually is able to take any lawful actions that are authorized by its limited partnership agreement or operating agreement. However, only the general partners of a limited partnership may execute any documents and take any actions on behalf of a limited partnership. A limited liability company may be managed either by its members or by managers that are appointed by its members. To determine whether the limited liability company is member-managed or managed by managers, the operating agreement has to be reviewed. If the members of the limited liability company have delegated management to managers, the members may have retained for themselves the authority to make some decisions, usually the most important ones.

In seeking to confirm the authorization of a limited partnership or limited liability company to execute a lease agreement or guaranty and the identities of the persons authorized to sign such documents, a lessor may examine the certificate of limited partnership, limited partnership agreement, articles of organization, and operating agreement and the relevant books and records. In addition, many lessors require the general and/or limited partners of a limited partnership and the managers and/or members of a limited liability company to execute a certificate verifying certain information pertaining to the organization and structure of those entities.

8. INSURANCE POLICIES, ENDORSEMENTS, CERTIFICATES & BINDERS

Most lease agreements require a lessee to maintain and cause the lessor to be named as an additional insured or loss payee on at least two types of insurance coverage: property damage insurance and liability insurance. Although there are additional types of insurance (such as hull insurance and war risk insurance) which often are required for special types of equipment such as aircraft and vessels, a discussion of such types of insurance is beyond the scope of this *Guide*.

I. PROPERTY DAMAGE INSURANCE

Property damage insurance is intended to provide the lessee and lessor with compensation for any loss of or damage to the leased equipment. The importance of this coverage will vary depending upon the nature and value of the leased equipment and the financial strength of the lessee. Depending on credit quality of the lessee the lessor may permit the lessee to "self-insure" and not obtain insurance from an insurance company.

Most lease agreements require the lessee to maintain "all risk" insurance or a combination of fire insurance and extended or supplemental coverage. Generally, the insurance industry uses one the following terms to describe the physical damage coverage provided: (i) ***Basic or Standard*** form, which covers losses resulting from basic perils. For example, a standard fire policy covers only two perils – fire and lightning; (ii) ***Broad*** Form which is a named perils policy that provides the same coverage as the basic form plus numerous other perils specific to the property covered, usually windstorm, hail, smoke, riot or civil commotion, and explosion; and (iii) ***Special*** Form is an "all risks" policy that covers all risks of direct physical loss unless the event causing the loss is specifically excluded from the policy. Special Form insurance covering motor vehicles is often referred to as "comprehensive physical damage" coverage.

If a lease agreement contains a "stipulated loss value" provision, the lessee usually will be required to obtain property insurance in an amount not less than the applicable stipulated loss value. In some instances, the lease agreement may require the lessee to maintain property damage insurance in an amount equal to the greater of the stipulated loss value or the replacement value of the leased goods.

The property damage insurance policy may contain a loss payable endorsement designating the lessor as the sole loss payee and requiring any insurance proceeds to be paid solely to the lessor or its assignee. The lease agreement often will address whether the insurance proceeds will be used to repair or replace the leased equipment or applied against the lessee's outstanding obligations to the lessor under that document.

II. LIABILITY INSURANCE

A liability insurance policy can protect the lessee and lessor against liability for personal injury and/or property damage that is caused by the conduct of the lessee's business and/or the lessee's use of the equipment. The lessee's maintenance of such insurance coverage is important to the lessor because it protects: (i) the lessor against claims that may arise as a result of its ownership of the leased equipment; and (ii) the lessee from potentially substantial litigation and damages which could adversely affect the lessee's financial position and ability to pay its obligations to the lessor under the lease agreement.

Most lease agreements will require the lessor to be named as an "additional insured" on the lessee's liability insurance policy. By virtue of its status as an additional insured, the lessor usually is covered for certain of its own acts or omissions. The acts of the lessee do not affect the coverage provided to the additional insured. Adding the lessor as an additional insured for liability coverage can increase the cost of the insurance policy for the lessee.

III. ENDORSEMENTS

The endorsement is an amendment to an insurance policy written to cover unique items or special circumstances. An endorsement can also be a change to a policy that is made during the policy's term and attached to the policy to modify the terms of the insurance contract. Additional insureds and loss payees, including lender's loss payees, can be added by endorsement.

In addition to the "loss payable endorsement" for property damage insurance policies, most lease agreements require the lessee to obtain endorsements to all of its property damage and liability insurance policies which prohibit the insurance company from modifying or canceling any policy (even for the lessee's failure to pay its premiums) without prior notice being given to the lessor.

Many lessors also request the lessee to obtain "breach of warranty" endorsements to their insurance policies. These endorsements protect the lessor's right to be paid the insurance proceeds under the property damage coverage, or be protected by the insurer under the liability coverage, despite the occurrence of any act or omission by the lessee which violates the terms and conditions of the insurance policy.

IV. CERTIFICATES AND BINDERS

Often the lessee's insurance agent will provide a "certificate" or a "binder" to the lessor in order for the transaction to fund. The "certificate" is a description of the insurance in effect on the date of the certificate. Ordinarily, the certificate does not confer any rights on the holder, and the certificate cannot alter or supersede the terms and conditions of the actual insurance policy. A "binder" confirms that the described insurance has been applied for and is in effect as of the date of the binder and for a specified time thereafter. While a certificate confers no rights under the lessee's insurance policy, a binder does confer rights to the insurance on the lessor, but only for a limited period of time. If the insurance policy or applicable endorsement is not issued by the expiration of the time period shown on the binder (usually 30 days) the lessor's rights to coverage expire.

9. AN INTRODUCTION TO LEGAL OPINIONS

I. INTRODUCTION

Legal opinions are not usually required in a typical equipment lease transaction. However, where the dollars involved are large enough, or where the lessor is concerned about the laws of a jurisdiction with which it is not familiar, or where there are aspects of the underlying transaction raising new and/or uncertain legal issues (at least from the lessor's perspective), the lessor may require that the lessee's counsel supply a legal opinion. For purposes of this chapter "legal opinions" or "opinions" are written opinions tendered by lessee's counsel at the closing of an equipment leasing transaction. A legal opinion addressed to the lessor is submitted at closing in letterform. The legal opinion is lessee's counsel's legal analysis of how a court would evaluate the issues addressed in the opinion letter as of the date of the opinion. The opinion addresses specific legal issues under the laws of one or more specified jurisdictions. The opinion addresses these issues in light of the facts and the law known to the counsel as of the date of the opinion. The opinion is not a guaranty of a certain outcome, and should the opinion be wrong, a claim may be brought against the counsel only if the opinion is unreasonable in light of the facts as applied to the law as of the date of the opinion. Where the law is not clear most counsel will either refuse to give an opinion as to the particular issue or limit the opinion to an explanation of the issue and advise of the potential impact on the transaction should the resolution of the issue have an adverse effect on the transaction. Further, counsel is not required to update the opinion should a law upon which the opinion was based changes as a result of new statutes or new case law. In addition, the opinion is based in part on information provided by persons other than lessee's counsel and if that information is incorrect or should the facts change, the opinion will not later be modified. Also, the opinion is an opinion as to the law and should the opinion state that some action is lawful or some document provision enforceable but such action or provision is nonetheless found by a court to be invalid on public policy grounds lessee's counsel will not be liable as opinion letters typically exclude the impact of public policy considerations.

In certain cases, lessee's counsel may rely upon another counsel's opinion in rendering its own opinion. This occurs when the client is located in one jurisdiction and counsel retained for the particular transaction is located in another jurisdiction (such as would be the case were a Delaware corporation to retain California counsel to assist it with an equipment lease subject to California law). The counsel retained for the particular transaction may be unable to issue an opinion with respect to its client's formation and continued existence under the laws of the state of formation. This is a reasonable practice provided the lessor ensures that in their totality the opinions delivered cover the issues the lessor deems necessary.

II. SCOPE OF THE OPINION.

Generally, opinions provided in typical equipment leasing transactions address two broad concerns. First, an opinion provides the lessor with some comfort that the transaction does what it purports to do and that each document will be enforceable against the lessee (at least in all material respects) if challenged in court, subject to any caveats, exceptions and qualifications contained in the opinion (and some of these caveats, exceptions and qualifications may be implicit). This does not mean that obtaining an opinion is a guarantee that each and every term of the documents will be valid, binding and enforceable but it should provide some comfort as to overall enforceability because the lessee's counsel should have reviewed the documents, researched applicable law to the extent necessary and raised in the opinion any legal risks inherent in the transaction structure or the documents.

The second purpose served by an opinion is to confirm that the lessee's counsel has undertaken a due diligence review of both the facts and the law to ensure that the lessee is a validly existing entity with the power to enter into the lease, the authority to undertake the actions required of it, that the persons acting for lessee are authorized to act on its behalf and to otherwise confirm that there are no prohibitions, restrictions or conditions precedent to the lessee's performance that have not been disclosed and addressed.

In those transactions involving a guarantor or other obligor, the lessor may require an opinion from counsel for the guarantor and other obligor if it is requiring an opinion from the lessee. These opinions will be limited to the documents to which the guarantor or other obligor is a party and will not address directly the lease or other transaction documents.

III. WHO SHOULD PROVIDE THE OPINION

Some lessors require opinions from certain types of counsel (for example, qualified outside counsel rather than in-house counsel). The realities of the particular transaction will dictate whether lessor has the leverage to establish criteria and if so, what the criteria ought to be. Some factors that might be considered (depending upon the jurisdiction and market environment) include (i) where counsel is licensed; (ii) counsel's experience with leasing transactions or any unique issues in this particular transaction; (iii) the length of counsel's relationship with lessee; (iv) any third party recommendations, ratings or evaluations that may be available; and (v) the extent to which counsel has malpractice insurance coverage. If the lessor does have any requirements as to the lessee's counsel it is important that these requirements be communicated to the lessee as soon as possible.

The lessee, if in-house counsel is available, will usually prefer to use in-house counsel to the extent such counsel was involved in the deal and can give the opinion. The Lessor, however, might prefer external counsel, whether due to the expertise required by the legal issues raised in the transaction and the extra due diligence required or otherwise. In certain situations the opinion may come from both. An opinion from lessee's in-house lawyers would be appropriate, for example, with respect to corporate matters such as the lessee's structure, governance documents, and obligations outside the scope of the transaction. The lessee's in-house attorney may opine as to the lessee's valid existence, authorization of the transaction and the impact the transaction may have on other agreements to which the lessee is a party. Opinions from outside counsel may be limited to enforceability of the documents (which is appropriate where external counsel was retained for this transaction only) and should a specialist outside counsel be required (especially in cross-border deals) its opinion may be limited to the more technical aspects such as the enforceability of documents or security interests, satisfaction of regulatory requirements and non-establishment of a taxable presence.

IV. POLICIES AND PROCEDURES AFFECTING OPINION PRACTICES.

Several bar associations have issued policy and procedure statements regulating opinion practices. The most notable is the Legal Opinion Accord published by the American Bar Association's Section of Business Law (the "ABA Accord"). Many state and local bar associations have also published their own accords or reports. These accords and reports may set forth policies and procedures or outline customary practices regarding legal opinions, and in certain instances these policies and procedures apply even if not referenced in the opinion (although the ABA Accord states that it must be referenced in the opinion if it is intended to apply to the opinion). It is worthwhile to point out that the Restatement (Third) of the Law Governing Lawyers provides that customary practice of lawyers similarly situated to the lessee's counsel is an important factor in determining the counsel's responsibilities in issuing the opinion. The lessee's counsel is not required to undertake due diligence that exceeds local practice nor is the lessee's counsel required to opine as to matters not normally addressed by similarly situated counsel. If the lessor requires counsel to undertake extra due diligence or to expand the scope of its opinion beyond local custom, the lessor should make these requirements clear at the outset of the transaction. The lessor should understand how the applicable opinion accords and local opinion practices impact the scope of the opinion and in requesting an opinion keep in mind the relative costs and benefits.

V. EXCEPTIONS AND QUALIFICATIONS.

It is not uncommon for an opinion letter to include exceptions and qualifications to the opinions that run for many more pages than the actual opinion items. From a lessor's perspective these myriad qualifications and exceptions may significantly limit the value of opinion letters. Lessors commonly review with a critical eye the qualifications and exceptions found in opinion letters and where appropriate demand from the lessee's counsel an explanation for the qualification or exception or even its removal.

There are two kinds of qualifications and exceptions. There are standard qualifications and exceptions that have become so customary that they apply to the opinion letter even if not expressly included. These standard qualifications and exceptions may be set forth in the local bar association's policies and procedures or derive from local customary practice. Although standard qualifications and exceptions do not have to be contained in the opinion, many counsel include them in order to ensure beyond any doubt that they will apply to the opinion. These qualifications and exceptions have become standard because they are generally considered to be non-controversial. The other type of qualification or exception is non-standard and it typically arises from the facts of the transaction. These qualifications and exceptions have to be expressly set out in the opinion letter. Often the non-standard exception or qualification arises from case law or a statute limited to the applicable jurisdiction (for example, some states prohibit waivers of jury trials).

VI. STANDARD OPINION PROVISIONS

Most opinions provided in commercial lease transactions contain some of the following provisions:

1. The Date

The opinion normally is dated the date the underlying transaction closes. This remains the case even if the documents are dated a different date. If the underlying transaction consists of a series of transactions that occur on different days (such as a series of lease schedules subject to a master lease), the lessor will determine if opinions for each individual transaction are required or if one opinion delivered in connection with execution of the master documents would be adequate.

2. The Addressee

Opinion letters usually state that they *“may not be relied upon by any person other than the addressee without our prior written consent.”* Therefore, it is very important to ensure that the lessor has been named as an addressee.

3. Non-Addressee Reliance

If, for some reason, the lessor is not named as the addressee yet still wishes to rely upon the opinion letter, the lessor should cause the opinion letter to provide that *“the lessor may rely upon this opinion letter in connection with the transactions contemplated by the transaction documents as if this opinion letter were also addressed to it.”*

4. Successors and Assigns

If the lessor plans to sell or assign (or buy) an interest in a lease transaction either as part of a securitization or otherwise, it should ensure that any of its successors and assigns, or it, as a successor or assign, may also rely upon the opinion. This can be done simply by inserting “and its successors and assigns” after the named addressee (“T*his opinion letter may not be relied upon by any person other than the addressee and its successors and assigns”.)*

5. Documents Reviewed

Opinion letters often include a list of transaction documents reviewed by the lessee’s counsel in issuing the opinion. Unless this list is exhaustive (and it usually is not), lessors will require that the opinion letter states that lessee’s counsel “*has reviewed such other documents and made such other investigations as I/we have deemed appropriate*.” In any case, it is important that lessor ensure that all the documents it considers important are included in the list of reviewed documents. If the opinion letter states that "*we have reviewed only the following documents*" and otherwise indicates a limited review, lessee's counsel will not be charged with considering matters outside of those documents.

6. Remedies/Enforceability Opinion

A remedies opinion may be phrased as: *Each lease document constitutes the legal, valid and binding obligation of Lessee and is enforceable against Lessee in accordance with its terms; except as enforceability thereof may be limited by bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally and by general principles of equity."* The remedies opinion means that generally courts will enforce the terms of the underlying documents and to the extent the documents set forth remedies in the event of the lessee's breach, a court will generally permit enforcement of those remedies. However, as a general rule, the lessee's counsel is not opining on areas of the law not usually recognized as being germane to the underlying transaction or to the lessee. For example, in a typical leasing transaction, the enforceability opinion alone does not cover whether the lessor has all necessary licenses to enter into the lease transaction. Likewise, this opinion does not usually cover anti-trust law or tax or other specialty areas of law. On the other hand, if the lessee is in a regulated industry, such as gaming or banking, lessor probably may request the lessee's counsel to opine on the enforceability of the lease documents in light of state gaming statutes and regulations or Federal Reserve Board regulations, as the case may be. In addition, the remedies opinion does not cover transaction document provisions that by their terms do not require an action or undertaking. For example, breaches of warranties and representations are not covered although the remedy provision for such a breach would be covered by the opinion.

The quoted language above includes two standard exceptions to the remedies opinion, which are commonly referred to as the bankruptcy and insolvency exception and the equitable principles exception. The bankruptcy and insolvency exception provides that federal and state insolvency laws may limit the enforceability of the transaction documents. The exception relates not only to proceedings commenced under the specific insolvency statute but includes any insolvency claim regardless of the type of proceeding. The equitable principles exception addresses the situation where enforcing a particular provision (usually a remedy) in a particular case would be inequitable and thus the provision might not be enforced. For example, a court may not allow enforcement of a liquidated damages provision because the remedy far exceeds the damages suffered by the enforcing party. However, should lessee's counsel know that as of the date of the opinion some equitable principle will more than likely prevent enforcement of a particular provision (or the entire lease) then lessee's counsel will probably not opine that the lease is enforceable, or it will qualify the opinion to state that despite the unenforceability of certain provisions, the lessor still has adequate remedies to "practically realize" the benefits of the lease agreement.

7. Duly Formed and Validly Existing Opinion

A version of this opinion states that *"Lessee has been duly organized and is in good* *standing and validly existing under the laws of its State of formation."* Usually, the lessee's counsel is entitled to rely upon the publicly filed documents, if any, pertaining to the formation and continued existence of the lessee (such as a good standing certificate). If the lessee is a general partnership or joint venture, public records may not exist as to its formation, the lessee's counsel will review the organizational documents and may also rely upon certifications from its client.

8. Qualified to do Business in Other Jurisdictions

Often seen as an additional provision to the duly formed opinion, this opinion often reads that *"Lessee is duly qualified to do business in and is in good standing as a foreign [Type of Entity] in [Name of State]."* Naturally, this opinion becomes more important as the extent of lessee's activities in foreign jurisdictions increases. Because this opinion is typically based largely on good standing certificates obtained by lessee's counsel, it is of little value as an opinion matter.

9. Lessee's Power

A fairly common version of this opinion provides that: *"The Lessee has all requisite corporate [or partnership or limited liability company] power and authority to conduct its business, to own its property and to execute and deliver, and to perform all of its obligations under the transaction documents and all related agreements."* This opinion affirms that the lessee's organizational documents do not limit its power to enter into the underlying transaction. However, the opinion is generally understood not to address other laws that may limit the lessee's actions. This opinion relates only to those activities typically conducted by an entity similar to the lessee. Acceptable language making this implicit limitation explicit may read as : "*In the opinions expressed herein, we have not conducted any investigation into the types of businesses and activities in which Lessee engages or the manner in which Lessee conducts its business as would enable us to render any opinion (and, accordingly, we express no opinion) as to the applicability to Lessee of any federal or state law or regulation not of general applicability to business corporations [or partnerships or limited liability companies] ."* This means, for example, that the opinion does not address license or permit requirements that may be required with respect to specific activities (unless the nature of the lessee's business is such that permits and licenses are typically required as a condition of doing business, such as the gaming industry).

10. Lessee Action

Sample text includes: "T*he execution and delivery by Lessee of, and the incurrence and performance by Lessee of its obligations under, the lease documents have been duly authorized by all necessary corporate[or partnership or limited liability company] action on the part of Lessee and each lease document has been duly executed and delivered by Lessee."* This opinion addresses the question of whether the persons acting on the lessee's behalf in signing the transaction documents and undertaking all related acts have been duly authorized by the lessee to do so. This opinion is limited to ensuring that the signatory complies with the relevant provisions of the lessee's governance documents (such as an operating agreement or by-laws) and the applicable governance statutes. The opinion does not address whether the persons acting on behalf of the lessee are acting within their fiduciary obligations to the lessee.

11. No Breach of Other Agreements or Violation of Laws

Sample text includes: "*The execution and delivery by Lessee of, the incurrence and performance by Lessee of its obligations under, and the consummation by Lessee of the other transactions contemplated by, the lease documents do not and will not (a) violate any provision of the [organizational documents] of Lessee, (b) violate any provision of [Lessee's governing statute-if applicable], (c) violate any applicable law, rule or regulation of the United States of America or the State of ________, (d) violate any order, writ, injunction or decree of any court or governmental or regulatory authority or agency or any arbitral award applicable to Lessee of which we have knowledge (after due inquiry) or (e) result in a breach of, constitute a default under, require any consent under, or result in the acceleration or required prepayment of any indebtedness pursuant to the terms of, any agreement or instrument of which we have knowledge (after due inquiry) to which Lessee is a party or by which Lessee is bound or to which Lessee is subject.*" As to clauses (d) and (e), the lessee's counsel will rely upon certifications made by the lessee and the lessor should expect that the opinion will be expressly limited by some form of knowledge qualifier. It is important to note that the opinion does not address an adverse consequence of entering into the transaction such as loss of a permit or license right. There may be a good deal of negotiation over the scope of clause (e) due to the time and expense involved in review by counsel of all agreements and contracts of the lessee. From time-to-time the reference to other agreements and instruments is limited to those that are "material" although materiality is inherently subjective and any opinion subject to materiality would be of uncertain scope. It is generally preferable to list those specific agreements covered by the opinion rather than accept a materiality qualifier.

Unlike the other provisions in an opinion letter this opinion is prospective to the extent it states that the lessee's performance under the transaction documents will not violate law or breach other contracts. This provision requires a careful analysis of lessee's existing contracts. It is very possible that under these contracts the lessee may have inconsistent obligations and performing under one agreement may breach another agreement. The important consideration is whether the inconsistent obligations are contingent upon the occurrence of other events the occurrence of which cannot be foreseen as of the date of the opinion letter or if the inconsistent obligations are not subject to a contingency. The breach has to flow directly from entering into the lease. If breach is not a direct consequence of entering into the lease then the opinion will be correct to the extent it states the lessee's performance under the lease documents will not breach other contracts.

12. Approvals and Filings Opinion.

In an effort to determine whether governmental approval of a transaction is required, the following may be requested: "*No authorization, approval or consent of, and no filing or registration with, any governmental or regulatory authority or agency of the United States of*

America or the State of [STATE] is required on the part of Lessee for the execution or delivery by it of, or for the incurrence or performance by Lessee of any obligations under, any of the lease documents." Some versions of this opinion do not address the performance by the lessee under the transaction documents but are limited to execution of the transaction documents. Provided the lessor receives adequate remedies/enforceability and no violations opinions this limitation is typically acceptable. Another acceptable modification is that the opinion provides that no such authorizations, approvals or consents are required except for those that have already been obtained. An exception for the filing of a UCC financing statement is also quite common.

13. No Litigation

A typical version of this opinion provides that: "*Except for the matters referred to in Schedule [ ] to the lease, we have no knowledge (after due inquiry) of any legal or arbitral proceedings, or any proceedings by or before any governmental or regulatory authority or agency, now pending or threatened against or affecting Lessee or any of its properties that draws into question the validity of the lease documents."* Here is an example of where materiality is often used. In this case, the concept is defined according to the lease documents. Note also the scheduling of litigation that meets the materiality standard. As this opinion is based on information available to the lessee, it is common for in-house counsel to render this opinion even though outside counsel is active in the transaction. Even if outside counsel does render this opinion, it will be based on information provided by the lessee and lessor should understand that its value is limited by the completeness of information supplied by the lessee.

14. Governing Law

The lessee's counsel will limit their opinions to the laws of the jurisdictions in which it is licensed to practice law or is otherwise qualified. The opinion letter may state, for example, that "*the foregoing opinions are limited (except as otherwise expressly provided above) to matters involving the Federal law of the United States of America, the General Corporate Law of the State of Delaware and the law of the State of __________________ and we do not express any opinion as to the law of any other jurisdiction (except as otherwise expressly provided above).*" Also, as noted above in "Remedies/Enforceability Opinion", the opinion does not cover all laws of the specified jurisdictions but only those germane to the transaction and those for which a specific opinion is requested. If the laws of a state other than a state in which the lessee's counsel is qualified to issue an opinion govern the transaction documents the lessor may require the lessee to obtain counsel in such other state. This option is usually unacceptable to the lessee due to the delay in finding acceptable counsel and additional cost for such counsel outweighs, at least in lessee's opinion, the benefit of obtaining such counsel. Instead lessors may allow the lessee's counsel to opine that the transaction documents would still be legal, valid and binding obligations of the lessee enforceable in accordance with their terms under the laws of the jurisdiction of lessee's counsel.

VII. CONCLUSION

There is an inherent and unavoidable tension between the lessee's counsel and the lessor (and its counsel) over the scope of the opinion. Lessee's counsel wishes to limit the scope of the opinion while the lessor is usually looking for more. As the ABA Accords and other similar efforts make clear, this is a complicated issue and one where the policies and practices vary from jurisdiction to jurisdiction and continue to evolve over time. Although the facts and circumstances of each lease transaction will determine the relative importance to the lessor of the lessee's counsel's opinion, in general, opinions serve a beneficial purpose for both the lessee and the lessor. The lessee benefits because the due diligence undertaken by its counsel mitigates the need for the lessor to do its own due diligence to a certain extent resulting in more timely and less-expensive leases. The Lessor benefits because it does not have to allocate resources to do the same due diligence the lessee's counsel is doing, thus freeing up resources for other tasks and reducing its costs of doing business.

10. ASSIGNMENTS OF LEASE AGREEMENTS AND RELATED DOCUMENTS

It is very common for a lessor to assign some or all of its right, title and interest in and to lease documents and the leased equipment. Such assignments can be absolute, as in a syndication, or for security purposes, such as collateral for a loan. A well-drafted assignment will identify the parties, specify the nature of the assigned rights and property, contain a number of representations and warranties, and cover a wide variety of issues pertaining to the respective rights and obligations of the lessor and assignee following the closing date. The provisions of assignment documents may vary depending on the nature of the assignment, the relationship between the respective parties, and the circumstances of the specific transaction.

I. ABSOLUTE ASSIGNMENTS

An absolute assignment constitutes a sale of some or all of the lessor's interest in the lease documents and leased equipment. Such assignments may be "with recourse", "without recourse", or with "limited recourse."

In a "with recourse" assignment, the lessor will: (a) provide the assignee with a guaranty of the payment and performance of the lessee obligations under the lease documents; or (b) agree to repurchase all of the assigned rights and equipment from the assignee upon the occurrence of an event of default under the lease documents. A formula for calculating the repurchase price may be included in the assignment documents.

The lessor, upon honoring its obligations to the assignee, usually acquires (by way of subrogation) all of the assignee's rights with respect to the lease documents and lease equipment. In some instances, the assignment agreement provides for the reconveyance to the lessor of the previously assigned rights and equipment upon the assignee's receipt of the repurchase price for those assets. It is common for such reassignments to be conducted without recourse and with limited representations and warranties from the assignee.

Conversely, "without recourse" assignments do not contemplate any payments from the lessor to the assignee upon the occurrence of an event of default under the lease documents. The lessor's only liability to an assignee would arise from a breach of its representations, warranties, or other obligations set forth in the assignment documents. A sample clause identifying an assignment as a "without recourse" transaction is set forth below:

> This Assignment is made without recourse. The Assignor shall not be liable to Assignee, except as provided herein, for any breach by the Lessee of the terms, conditions, and provisions of the Lease on the Lessee's part to be performed (including the payment of rent therein provided) and nothing

> contained in this Assignment shall be construed as an assumption by the Assignor of any obligations or indebtedness of the Lessee pursuant to the Lease.

An assignment of a lessor's rights in the lease documents and equipment also can be accomplished on a "limited recourse" basis. Pursuant to such assignments, the lessor, if it has not itself breached representations, warranties or obligations under the assignment documents will be liable to the assignee only for a portion of the remaining obligations from the lessee upon the occurrence of an event of default under the lease documents.

It is not unusual for "limited recourse" assignments to decrease and, eventually, terminate over a certain period. In addition, an assignee may wish to reserve and hold back a portion of the purchase price for the assigned assets as security for the payment of lessor's obligations under a "limited recourse" (or "with recourse") assignment.

Regardless of the recourse agreement, if the assigned lease is a lease that is actually a secured transaction under Article 9, the assignment transfers to the assignee all rights under the documents and the assignor's security interest in the leased equipment. If the assigned lease is a true lease, the assignee receives the lease rights and ownership of the equipment.

Either way, it is customary for all rights associated with the lease to be assigned, including the right to receive rents, the right to enforce defaults and rights in any guaranties, insurance proceeds or additional collateral. If the parties desire for the assignor to service the lease, collecting rents and taking other actions, a fiscal agency or servicing agreement is required. This raises the issue of blind assignments, discussed below.

II. ASSIGNMENTS FOR SECURITY PURPOSES

An assignment for security purposes is made in connection with a loan to the lessor from a funding source whereby the lessor grants to the funding source or assignee a security interest in some or all of its rights in the lease documents and leased equipment. Rent payments are applied against the lessor's liability to its assignee and will continue until full payment has been received upon the loan. Like absolute assignments, assignments for security purposes can be with or without recourse or with limited recourse.

As with absolute assignments, assignments for security purposes may transfer interests in true leases or leases that are actually secured transactions. In the latter, the security interest in the equipment that the lessee has granted to the lessor is also assigned by the lessor to the assignee. Although it is customary for the assignee to exercise all rights from the time of assignment, the parties may arrange for the lessor to collect rents or otherwise administer the lease until the occurrence of a default or other triggering event.

One significant distinction between absolute assignments and assignments for security purposes is that, where a true lease is assigned, the lessor retains ownership of the residual interest in the leased equipment and the assignee only has a security interest in it.

This valuable property is subject to the assignee's right and unless the parties craft some limitations on the assignee's exercise of its rights, the lessor may suffer if the lease term is extended or the assignee makes other changes in the lease terms. This issue commonly creates disputes between lessors and assignees unless the assignment documents are clear as to each party's rights.

The lessor may be required to deliver to the assignee the sole original counterpart of the lease agreement and related documents and either its original or copies of other records relating to the lease transaction. Possession of the sole original counterpart of the lease is one way to perfect the lessor's security interest in the lease (which should generally be considered chattel paper for UCC purposes), although most assignees also file UCC financing statements listing the lessor as debtor and take assignment of any lessor-lessee filing as well. In most transactions, the UCC filings generally describe both the assigned lease and the leased equipment as collateral covered by the UCC financing statement.

III. REPRESENTATIONS AND WARRANTIES

The assignment may require the lessor to provide the assignee with a number of representations and warranties. Some such representations are made without qualification by the lessor; however, some are limited to the extent of lessor's actual knowledge of the facts being warranted. Although their nature and number may vary due to the circumstances of a specific transaction, some of the representations and warranties that often are found in assignments are:

a. the lessor is duly organized and validly existing under the laws of the state of its formation and licensed to conduct business in all appropriate jurisdictions;

b. all of the parties to the lease documents and assignment documents (except for the assignee) and the persons executing such documents on behalf of the foregoing parties were duly authorized to execute such documents and enter into the transactions contemplated thereby (with respect to the lessee and guarantor, this representation is usually limited "to the best of assignor's knowledge") ;

c. the lease documents and assignment documents are valid, binding, genuine and enforceable in all respects (with respect to the lessee and guarantor, this representation is usually limited "to the best of assignor's knowledge");

d. the lessor has provided the assignee with all of the original and duplicate originals of the lease documents and, except as disclosed to the assignee in writing by the lessor, such materials constitute the entire agreement between the lessee, lessor and any third parties in connection with the lease transaction;

e. the lessor has not entered into any oral agreements with the lessee or any other party to the lease agreement and related documents;

f. the lessor has not waived any of its rights or released any other party from its obligations described in the lease documents;

g. the lessor is the sole owner of the lease documents and related property;

h. the right, title or interest in and to the lease documents and related property that is being assigned, conveyed, sold and transferred to the assignee are free and clear of any liens, security interests, encumbrances or claims of any kind created by or through the lessor; and

i. the amounts payable to the lessor and any security deposits, retention, or similar amounts provided to the lessor under the lease documents are accurately stated in the lessor's books and records that have been provided to the assignee.

IV. SERVICING AGREEMENT, RESIDUAL SHARING AGREEMENTS AND REMARKETING AGREEMENTS.

Frequently, a lessor and its assignee will execute a servicing agreement, residual sharing agreement or remarketing agreement as part of the assignment documents. These agreements require the lessor to maintain a level of involvement and responsibility with respect to the lease transaction.

Pursuant to a servicing agreement, the lessor may act as the assignee's agent in (a) inspecting the leased equipment; (b) reviewing the financial statements and other information submitted by the lessee and guarantors on a periodic basis; (c) billing the lessee for and collecting the amounts due under the lease agreement; (d) maintaining accurate books and records in connection with the lease agreement; and (e) performing the lessor's obligations and enforcing the lessor's pre-default and post-default rights and remedies with respect to the lease documents and leased equipment. The types of duties and authority delegated by an assignee to the lessor and the amount of compensation provided to the lessor will be the subject of negotiation between those parties on each transaction.

A residual sharing agreement is used to provide the lessor with a portion of the monies paid to the assignee under the lease documents or as a result of the sale or re-lease of the leased equipment following the expiration or earlier termination of the lease agreement. In many agreements, the lessor and/or assignee are permitted to recover their out-of-pocket expenses before any monies are divided between those parties.

A typical remarketing agreement will require the lessor to take all of the actions necessary to advertise, repair, and dispose of the leased equipment following the surrender or repossession of those goods. The monies received from the sale or re-lease of the leased equipment may be divided between the lessor and assignee as described in that document. In some remarketing agreements, the lessor has obligations or rights only with respect to remarketing after the expiration of the lease term. In others, the lessor may be called upon (or permitted) to remarket the equipment in the event of a lessee default or upon early termination of the lease for any other reason. Other variations include agreements under which the lessor is obligated to purchase the equipment if it is unsuccessful in the remarketing or is granted an exclusive right to remarket for a specified period of time.

V. NOTICE TO LESSEE AND BLIND ASSIGNMENTS

In many assignment transactions, the parties will notify the lessee of the assignment and request that the lessee acknowledge assignment and agree to respect the assignee's rights. This will be done despite the fact that most lease agreements expressly permit lessor assignment without notice to or consent by the lessee (the assignee checks the lease agreement for this provision).

Among other things, a lessee notice ensures that the lease has not been assigned to others, that no dispute exists between lessee and lessor and that the equipment has been accepted and is operational. The lessee either agrees to pay rent to the assignee or acknowledges that it will continue to make payments to the lessor under a fiscal agency arrangement. Each guarantor is notified and required to acknowledge the assignment.

The lessee notice, when signed by the lessee and guarantors creates an obligation to respect the assignment that can cure potential defects in the lease itself. In many transactions, the lessor does not wish to notify the lessee of the assignment. If supported by proper language in the lease agreement, this practice is not necessarily risky but it does add an element of uncertainty, particularly where the possibility of a lessor bankruptcy exists.

VI. TRUE SALES

In recent years, absolute assignments have been scrutinized for qualification as "true sales" as opposed to unintended credit transactions. One reason for this scrutiny is that a vendor-lessor (captive) must sell the leased equipment and assign the lease outright in order for its parent to book the sale; if the transaction is an assignment for security, then only a security interest is transferred or created and ownership remains in the vendor group.

The various elements of a true sale are beyond the scope of this chapter, but they generally require that the economics and obligations of the parties are consistent with absolute assignments as opposed to those intended as security. Servicing, residual sharing, remarketing and certain recourse arrangements may impair true sale treatment.

11. INVESTIGATION OF FINANCIAL CONDITION

I. CONFIDENTIALITY AGREEMENTS

Prior to entering into a lease or taking an assignment of a lease from a vendor or broker or entering into other arrangements with a third party in connection with lease financing, a lessor may conduct an investigation of the financial condition of the relevant parties. Before providing its financial statements (audited or unaudited) a company may request that lessor sign a confidentiality agreement to restrict disclosure of the lessee's financial information. In reviewing a confidentiality agreement, a lessor may want to consider the following issues: (1) the length of the obligation of confidentiality, (2) whether confidentiality applies to present and future public information and information that is already in lessor's possession, (3) whether lessor is permitted disclose the information to its funding sources and accounting, tax and financial advisors, applicable regulatory examiners and, in the event of litigation, adversaries making discovery requests, and (4) the type and scope of information covered by the confidentiality agreement.

II. GOVERNMENTAL SOURCES

Public companies are required to file periodic financial and other reports with the Securities Exchange Commission and other governmental authorities. The SEC reports are available to the public and contain a broad range of information regarding the status and operations of the company. Copies of a company's SEC filings and reports are available at www.sec.gov under *Filings and Forms.* Certain states require private companies to submit periodic financial statements to maintain their licenses to conduct business in those jurisdictions. This financial information may be available to the general public or accessible with consent from the relevant party. Most governmental authorities will provide an investigating party with copies of the tax returns and other reports submitted by an individual, partnership or company so long as a request for such information is accompanied by a written consent from the taxpayer.

A creditor could also research good standing, tax and UCC liens to get a better understanding of the debtor's financial condition.

III. RATING AND CREDIT REPORTING AGENCIES

Rating agencies (such as Moody's or Standard & Poor's) provide credit ratings, research and financial information about certain companies to lessors that subscribe to their service. Prior to rendering such ratings, these agencies will conduct an investigation of the financial condition of that entity. Dun & Bradstreet and other credit reporting agencies also offer information about a company's credit relationships and payment history. If the investigating party is concerned regarding the accuracy of the information contained in such reports, it can contact the creditors listed on a report and attempt to verify the reported facts.

IV. AUDITED AND UNAUDITED FINANCIAL STATEMENTS

A common method of investigating a company's financial condition is to request and review the financial statements, balance sheets, profit and loss statements, tax returns, and other information contained in its books and records. Most well-established companies hire accounting firms to issue audited financial statements. If the lessee is a subsidiary of a larger company, the audited financial statements may only be available on a consolidated basis and thus do not show the stand alone financial condition of the lessee.

V. INDIVIDUAL'S CREDIT REPORT

The current Federal Fair Credit Reporting Act ("FCRA") may permit a lessor to obtain an individual's consumer credit report in connection with a business credit transaction under certain circumstances where the individual is or will be personally liable on the lease, such as in the case of an individual proprietor, co-signer, or guarantor, however, it is generally required to obtain an individual's written consent before obtaining a credit report on the individual for any reason. If a credit report is obtained and credit is not extended, a denial letter complying with the FCRA is required unless one of the limited exceptions is available under the circumstances.

12. CHECKLIST FOR DOING BUSINESS ABROAD

As our world shrinks lessors are becoming more inclined to consider investing in foreign markets, and lessors looking for consistent growth ignore markets outside of the United States at their peril. Even if a lessor is not actively seeking to grow its business overseas it may find that its clients are already doing business in other countries. Thus, even the most reluctant lessor may find that it has to go overseas to serve existing clients. Whether these other markets are as near as our neighbors in North America or as exotic as the countries arising from the fall of the Soviet Union, certain common issues might have to be addressed. Some are very basic such as whether you need a visa to enter a foreign country and some are more complicated such as the tax implications of establishing a subsidiary in a foreign country. This chapter provides a checklist of some of the issues a lessor might consider as it contemplates entering a foreign country.

At some point in the process of evaluating whether to start offering leases in a foreign country, the lessor would probably want to send representatives to visit the country. There are several reasons why the lessor may wish to send representatives to visit the foreign country. Obviously, if the lessor is going to establish a presence in the country such visits might be frequent, culminating with the relocation of employees from the United States. However, even if the lessor intends to administer from the United States its activities in the foreign country there are still reasons for a visit. Lessor might wish to meet with the lessee's local representatives and/or inspect the facility at which the equipment will be maintained. Lessor may also wish to meet with local financial institutions to discuss establishing some sort of relationship (e.g. to enable the local financial institution to administer lessor's local tax and reporting obligations). Of course, local counsel and other professional services may be required in the country and a visit to their offices may be part of lessor's due diligence. Before visiting the other country lessor's representatives might wish to consider:

a. Doing some basic research about the country's history, culture, customs and politics.

b. Making sure you have all your immunizations and shots and if anyone has a pre-existing medical condition bringing a doctor's letter describing the condition and any medication currently being taken.

c. Obtaining a visa if one is required.

d. Making sure your passport has not expired.

e. Determining if there are any fees that have to be paid upon entering country.

f. Determining if there are any special requirements for clearing customs.

g. Finding hotel accommodations that suit your needs.

h. Arranging for a car rental, car insurance and temporary license, if necessary.

i. Hiring a translator, if necessary.

j. Bringing electrical adapters and computers cords and attachments.

k. Ensuring you have United States embassy or consulate contact information.

l. Ensuring that your cell phone works in that country or bring another or an acceptable phone card.

I. COUNTRY DUE DILIGENCE

Regardless of lessor's expected involvement in the foreign country, whether a permanent physical presence is anticipated or whether the lessor's involvement will be more limited, lessor should probably conduct some basic due diligence on the country. The United States government maintains several websites that provide information on countries. Both the State Department and the Central Intelligence Agency provide useful information on their websites. In addition, private entities maintain websites as well. A lessor should also utilize the foreign country's web-based resources. In certain circumstances this due diligence should probably be done before visiting the country. For example, if the tax laws of the foreign country impose prohibitive taxes on cross-border leasing a lessor interested in leasing cross-border into that country should probably know the tax implications of cross-border leasing prior to visiting the country. Among the issues that might be considered are:

a. What types of limitations are imposed on equipment leasing as a matter of law, business practices or cultural customs?

b. Does this country present political risk?

c. What type of insurance is available for lessor's equipment?

d. What is the local currency's exchange rate against the U.S. dollar?

e. What is the country's current and projected inflation rates?

f. What types of business entities exist in this country?

II. BUSINESS DUE DILIGENCE

It goes without saying that the most important task a lessor has to address prior to entering a new market is to define its business plan. What does the market need, why do these needs exist, what will lessor offer to meet these needs, and what other lessors are trying to meet these needs? When considering entering a new foreign market these decisions are complicated by lessor's unfamiliarity with local business conditions, financial and regulatory structures and the legal system. Among the factors to consider:

a. Lessor has to decide what products its wants to offer and as part of its legal and tax due diligence it can examine the consequences of offering those products.

b. Does lessor wish to offer its products cross-border from the United States or does it think the opportunity is great enough to open a local branch or establish a local affiliate?

c. Depending on the structure selected by lessor, what are the licensure requirements?

d. If the lessor elects to open a local branch or establish a local affiliate, lessor should determine whether local laws require some degree of local ownership or management.

e. What kinds of insurance might be available to insure not only any assets that might be in the country but to insure against political risks?

f. Are there other United States-based lessors operating in that country, and if there are, what business models do they use?

g. How stable is the currency exchange rate with the U.S. Dollar? Is there a marketing advantage to offering products payable in the local currency?

h. What generally accepted accounting standards are commonly used in the country? Can they be relied upon? If different than the United States' standards are they translatable into something that can be understood by accountants familiar with the United States' standards?

i. What is the current political climate? Is it conducive to leasing?

j. What are the current economic conditions?

k. Is central bank or other local government approval required for all or certain leases?

l. Are there any cultural or local customs issues that would prevent lessor from using its standard business practices?

m. Are business credit reports available in this country on business entities, confirming such items as ownership details, borrowing history and amounts, payment history, tax liens, judgments and bankruptcy history, and, if so, from what source(s)?

n. Are credit reports available in this country on persons in their individual capacity, confirming such items as identity number, borrowing history and amounts, payment history, tax liens, judgments and bankruptcy history, and, if so, from what source(s)?

o. Are there any regulations in this country prohibiting banks or credit reporting agencies from releasing credit information on businesses or individuals?

p. What kind of consent, if any, is required of the lessee or guarantor for lessor to collect credit information?

q. If lessor decides to establish an affiliate with an office in this country other due diligence has to be undertaken including:
   i. gathering information on local compensation, benefits and labor laws;
   ii. engaging a real estate broker and determining where to locate the office(s) and whether to buy, rent or build office space;
   iii. determining the new office's equipment and furnishing needs;
   iv. determining the technological needs of the new office and how to integrate those systems into the lessor's existing technological infrastructure;
   v. reviewing lessor's existing staff to determine who, if anyone, should relocate to the new office;
   vi. establishing a banking relationship and open the necessary accounts; and
   vii. determining how it will fund the operations of the new affiliate, whether by a capital infusion or otherwise.

III. LEGAL DUE DILIGENCE

The lessor should undertake legal due diligence. Among the issues that might be addressed are:

a. What are the relative advantages and disadvantages of doing business through (i) an in-country subsidiary, (ii) an in-country branch office or (iii) cross-border leases?

b. If the lessor elects to open a local branch or establish a local affiliate, it has to understand the local employment and labor laws.

c. What kinds of licenses are necessary for lessor to do business?

d. Can lease payments be made in U.S. dollars or does foreign currency have to be used?

e. Whether lessor can use its standard documents in the foreign country and what modifications, if any, would be necessary to make those documents enforceable under local law?

f. Can documents in English be enforced in local courts or will the foreign language have to be used?

g. Under what circumstances will a court in the foreign country enforce a choice of law provision that specifies a law other than the law of that country?

h. Under what circumstances will court in the foreign country enforce a forum selection clause that selects a forum other than the courts of that country?

i. Are contracts and a party's interest therein being sold, pledged or assigned and would such sale, pledge or assignment require the consent of or notice to other contract parties or a government authority?

j. What is the quality of local counsel:
    i. do they speak and write in English;
    ii. do they understand equipment leasing and are they able to explain lessor's perspective to lessee;
    iii. do they regularly represent sophisticated financial institutions; and
    iv. do they have adequate technology (such as e-mail) to allow communication despite being in different time zones?

k. Should lessor give local counsel a power of attorney to undertake certain acts, such as filing documents, obtaining and releasing liens and, executing documents on behalf of lessor (assuming lessor does not establish a presence in the country)?

l. Does the lease have to be filed with a government agency?

m. To the extent lessor might enter into secured transactions it might wish to research whether and what types of, liens are permitted on personal property, and:
    i. how long does it take to have a lien recorded;
    ii. what is the cost;
    iii. what is the benefit of having a lien;
    iv. where are liens filed;
    v. what is the duration of a lien and are they renewable;
    vi. how are liens released and who can release a lien;
    vii. are there any alternatives;
    viii. are there public records of recorded liens and what are they used for;
    ix. how are the public lien records searched and how long does a lien search take; and
    x. are the lien records comprehensive and trustworthy?

n. Local counsel should provide a summary of relevant local law including:
    i. what are lessor's rights upon a lessee default;
    ii. can lessor use self-help to repossess equipment upon lessee default or is a court order required;
    iii. does lessor have to post a bond in order to seize equipment;
    iv. what are lessor's rights vis-à-vis repossessed equipment;
    v. what types of bankruptcy are allowed under local law;
    vi. what is the typical time period for a bankruptcy proceeding to reach final adjudication;
    vii. what are the costs of a typical bankruptcy proceeding;
    viii. what are the rights of a guarantor in the event of lessee's bankruptcy;
    ix. what are the alternatives to bankruptcy; and
    x. if a judgment is obtained in the United States against the lessee can lessor enforce the judgment in the country?

o. What kinds of documents need to be notarized or otherwise approved by a third party or by a government official?

p. Can interest be charged at a variable or floating rate?

q. Can lessor own property in the foreign country if it is not an organization formed under local law?

r. Are there any data privacy or other privacy laws that may apply to lessor's business activities in this country?

IV. TAX DUE DILIGENCE

The tax implications inherent in any decision to enter a new market are obviously very important. The tax risks are significant when entering a new market country and lessors should carefully consider their options and analyze the implications of any decisions they reach. Among some of the issues to consider:

a. What are the local tax rates?

b. What is the tax effect of having a presence in this country either by establishing a subsidiary or opening a branch office as compared to doing cross-border leasing?

c. What kinds of taxes and/or duties might apply to the products lessor might offer:
    i. withholding tax (payable on entire lease payment or only on implicit interest component);
    ii. income tax;
    iii. value added tax; or
    iv. other?

d. What will be lessor's tax status and will it have to register in the country?

e. What tax reporting requirements will lessor have?

f. Is there any stamp, duty, documentary, or equivalent tax requirement in this country? If stamp duty is required, can these be legally avoided and if so, how?

g. Is there a mechanism in the country to determine whether tax returns have been submitted to the tax authorities and whether there are any unpaid taxes?

h. In a default, repossession and equipment auction/sale, what tax implications, if any, are triggered if lessor credit bids and acquires the equipment?

i. Will lessor create a taxable presence in this country if it credit bids, take title, and sells the equipment locally?

The foregoing is a high-level review of some of the issues that might have to be addressed by a lessor exploring new foreign markets. It is by no means exhaustive and should be used only as a starting point for the lessor's due diligence analysis. Naturally, the due diligence for any particular country may vary and lessor will have to consider its potential investment in foreign markets on a case-by-case basis.