

RESTRUCTURING & INSOLVENCY

The five key points arising from the Norwegian Air Shuttle Examinership

Earlier today, 26 May 2021, the final condition to the restructuring plan for the Norwegian Air Shuttle group was met, allowing the Examiner's scheme to become effective: confirmation that the business has successfully raised 6bn NOK.

The resulting "New Norwegian" sees a significant scaling back on its operations and material changes to its capital structure including: (i) a shift in focus to the Nordics market; (ii) discontinuation of the Norwegian Group's long haul operations; (iii) a reduction in its fleet from 140 to c. 50 aircraft (now using just narrow bodied aircraft (787-800's)); (iv) new Power by the Hour lease arrangements until March 2022; (v) a reduction in headcount to c. 2,800; and (vi) a cutting of aircraft debt by c. 85% resulting in total debt across the group of less than NK20bn (c. €2bn).

5 MIN READ

The ALG Aviation Finance and Restructuring Groups have worked closely together in advising a number of creditors to NAS during the Examinership. There have been only two examinerships of airlines in the Irish High Court before Norwegian so the case was watched closely by the aviation community around the world. This is a snapshot of the principal points arising out of this restructuring:



- **Irish Judges continue to endorse Dublin as a key restructuring venue:** Both the manner in which the case was dealt with and the outcome of the key applications, is further evidence of the Irish judiciary's expertise and its willingness to endorse the use of both Examinerships and Schemes of Arrangement to deliver complex, cross-border restructurings in tight timeframes. The implementation of Norwegian's restructuring via Examinership follows the successful Irish Schemes of Arrangement involving Ballantyne Re (2019) and Nordic Aviation Capital (2020) plus the restructuring of CityJet in August 2020 by way of Examinership.

- **Guidance on the Sufficient Connection test for non-Irish companies seeking to access Examinership as a "related company":** Five of the companies which petitioned for Court protection were Irish incorporated and domiciled. One of the challenges faced by the holding company Norwegian Air Shuttle ASA (**NAS**), a Norwegian incorporated company, was that it needed to access the Irish Examinership process for a range of operational and structural reasons. Although it is generally accepted that the legislation contemplates that a non-Irish company can avail of the Irish Examinership process as a related company, this was the first material non-Irish company to look to avail of Court protection in an Irish Examinership. Judge Quinn held that the commercial operations and the range of legal transactions entered into by the Norwegian Group were "so closely linked and inter-dependent that NAS has a real and deep connection" to Ireland. Whilst

the Court was prepared to permit a non-Irish company avail of Court protection on this occasion, it is unclear whether a similar approach would be taken by the Court in another case, absent the level of inter-dependency with Irish companies, as demonstrated by NAS in this case.

- **Ability to repudiate a broad range of obligations in Examinership:** The Irish High Court exercised its discretion to accede to the companies' request to repudiate a wide range of contracts including: (i) operational contracts relating to ground handling and fuel line services; (ii) head leases with aircraft lessors and associated sub-leases; and (iii) guarantees given by NAS or Arctic Aviation Assets DAC relating to the obligations of OpCos within the Norwegian Group in favour of lessors or other finance parties. While various counterparties objected, the Court ultimately concluded that termination of the contracts was necessary to allow the Examiner to formulate proposals to facilitate the survival of the group. What this means is that if a company in

Examinership (supported by the Examiner) can demonstrate that it has shared sufficient information with the relevant counterparty (and the Court) to show the necessity of repudiation, then the Court is likely to accede to the application.

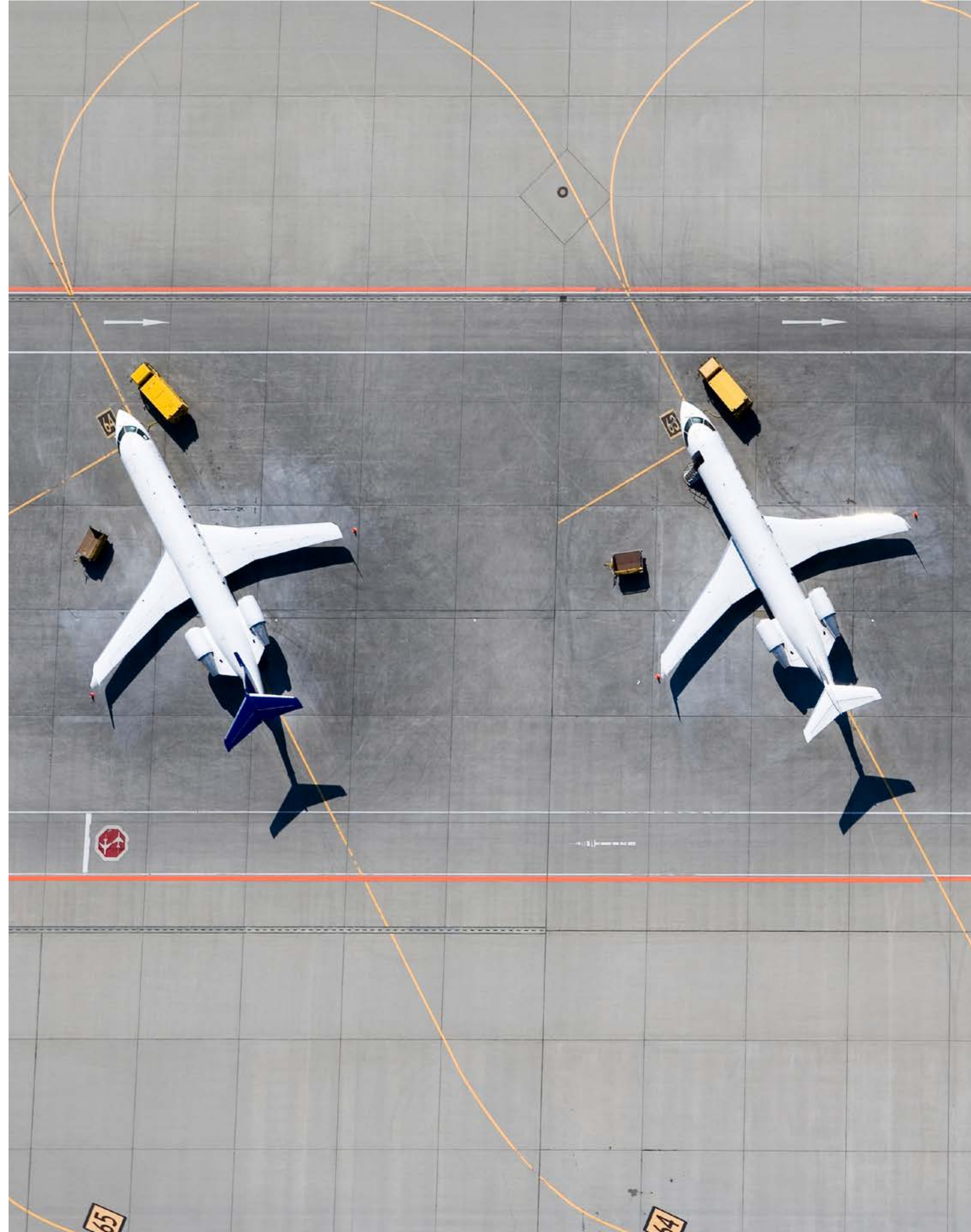
This was also the first Examinership in which guarantees were repudiated. It reflects the Court's willingness to take a broad approach to the types of contracts which may be terminated, assuming that the Examiner and company can demonstrate that such a step is necessary to facilitate the survival of the companies in question. However, the Court did conclude that it should hold a hearing to determine the quantification of damages flowing from the order for repudiation. While ultimately that was not needed in this Examinership, as the creditors and company came to an agreement on the quantum, the Court was persuaded (in this case) that it should not allow the quantification of damages to be held over and dealt with by an expert appointed to deal with unagreed claims under the Examiner's proposals.



- **Cape Town Convention Protocol rights apply in Examinership:** While the issue of whether a Scheme of Arrangement is an “insolvency proceeding” under the Cape Town Convention remains undecided, it seems increasingly clear that Examinership will be accepted by the Irish courts as an “insolvency proceeding” for such purposes. This means the protections set out in the Protocol to the Cape Town Convention on matters specific to Aircraft Equipment (the Aircraft Protocol) should apply in the context of an Examinership of a CTC “debtor” such that: (i) no obligations of the CTC obligor under the relevant lease or security agreement may be modified without the consent of the relevant CTC creditor; and (ii) no exercise of remedies permitted by the Cape Town Convention (including repossession) may be prevented or delayed after the end of the 60 day waiting period.

- **Examinership works as a lead process with an ancillary, foreign restructuring processes:** It became clear early in the Examinership that the holding company, NAS, would need the support of the local Norwegian Reconstruction process, primarily because of a lack of local law recognition of foreign insolvency processes. The Examiner and Norwegian Reconstructor worked closely to ensure that the processes operated in tandem and that what was being done in one jurisdiction did not cut across the other. The Irish Court agreed that Examinership should be the primary restructuring process and, critically, agreed to delaying the Effective Date for the Examiner's scheme until: (i) the Reconstruction process was approved in Norway and (ii) the group's capital raise was successfully concluded.

The UK's withdrawal from the European Union and the automatic recognition regime under the European Insolvency Recast Regulation did not impede the effect of the Examinership in circumstances where the Court was satisfied that the repudiation of English law governed contracts and the Examiner's scheme would be recognised in England under Section 426 of the UK Insolvency Act 1986. Recognition was also sought and obtained under US Chapter 15.



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