

**LMBC AVIATION TECHNICAL COMMITTEE COMMENTS ON**

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**THE EXPLANATORY NOTES ON AVN67C & AVN99**

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## EXPLANATORY NOTE ON AVN 67C ENDORSEMENT AND AVN 99 TAIL COVER (CONTINUING LIABILITY) ENDORSEMENT

*This note does not provide legal advice. It may not be relied upon for any purpose.*

### 1. INTRODUCTION

This note summarises the following new aviation endorsements:

- (1) Airline Finance/Lease Contract Endorsement AVN 67C (*see Appendix A to this note for full text, and Appendix B for redline against AVN 67B*);
- (2) Hull War version of AVN 67C (*see Appendix C*); and
- (3) Finance/Lease Continuing Liability Endorsement AVN 99 (*see Appendix D*).

Following detailed consultation under the aegis of the Aviation Insurance Clauses Group (AICG), these endorsements are now available to the market on the AICG website ([www.aicg.co.uk](http://www.aicg.co.uk)).

These endorsements are the outcome of discussions over a number of months between a working group that consisted of representatives from AICG, the Aviation Working Group (AWG) and the London Market Insurance Brokers Committee (LMBC).

AVN 67B has clearly served the insurance and financing communities well for a number of years, but it was felt that a number of improvements and clarifications could be made to it.

AVN 99 provides a new form of endorsement to evidence the “tail cover” for third party liability, which most financing documents require the airline to provide in favour of the financing parties for up to two years after expiry of the lease/financing.

### 2. KEY FEATURES OF AVN 67B

The following features of AVN 67B were innovative at the time of its introduction (all of these features have been preserved in AVN 67C):

- AVN 67B is a “stand-alone” endorsement that lists clearly the “Contract Parties” and the “Contracts”, and overrides any conflicting provisions in the underlying insurance policy, at least as regards the express provisions of the endorsement. Thus financiers do not need to review the underlying policy.
- Conversely, AVN 67B provides that (1) except as expressly stated in the endorsement, the Contract Parties are subject to the terms, conditions, limitations, warranties, exclusions and cancellation provisions of the underlying policy, and (2) the underlying policy is not varied by any provisions in the Contract(s) which purport to endorse or amend the policy. **Thus there is no need for insurers/brokers to review the lease/financing contracts.**
- AVN 67B provides robust breach of warranty and severability of interests provisions in favour of the financier.

Comment [DWM1]:

LMBC does not agree with this comment and recommends that Brokers continue with their current practice of advising Lessee on the impact on their insurances of the finance/lease provisions in general.

- AVN 67B requires the insurer to give the financier 30 days’ notice of cancellation or material alteration of the policy (except in case of provision for cancellation or automatic termination stipulated in the policy). In the hull war-only version of AVN 67B, this period is reduced to 7 days (again, subject to any shorter periods in the policy).

### 3. AIRLINE FINANCE/LEASE CONTRACT ENDORSEMENT AVN 67C

The following is a summary of the changes from AVN 67B to AVN 67C. Accompanying this note as Appendix B is a redline version showing these changes.

#### 3.1 DURATION OF ENDORSEMENT: PREAMBLE TO AVN 67C

##### Timing for Termination of Endorsement

The opening paragraph of the endorsement clarifies the date/time at which the Endorsement ceases to apply. In AVN 67B, the Endorsement falls away if any one of three events occur: (i) expiry of the Insurance; or (ii) expiry or agreed termination of the Contracts; or (iii) the obligations under the Contracts are terminated by any action of the Insured or the Contract Party(ies).

In AVN 67C, this is simplified and expressed as the earlier of two events. Limb (i) is the same as in AVN 67B – expiry of the Insurance. However, limb (ii) refers to *“the date and time at which the Insured has no further obligation to insure the Equipment under the Contract(s) (as amended or supplemented), as notified by the Designated Contract Party to the Insurers (via the Appointed Broker)”*.

Thus the Endorsement will endure until the relevant financing party (see below) is satisfied that the airline no longer has to provide insurance for the benefit of the financing parties. It is intended that this will protect the financing parties in the situation where either:

- there is a mid-term default by the airline and the financing parties have not yet repossessed the aircraft (and/or the airline otherwise has a continuing obligation to insure); or
- the lease reaches its expiry date but the airline agrees to continue the insurance coverage for the benefit of the financing parties for a “holdover period” of a few days beyond the expiry date, while redelivery issues are resolved.

##### Notification from Designated Contract Party

We have added provision for a “Designated Contract Party” to notify the Insurers (via the broker) that the Insured has no further obligation to insure. This party will be separately identified in the Schedule to the Endorsement. In other words, if there are multiple financing parties (as in a combined loan/lease structure) they will decide among themselves who is the primary contact point for dealings with the insurers/broker. If, on the other hand, there is just a single Contract Party, that party will be the Designated Contract Party in any event.

AICG is also publishing a standard form of notice (set out in **Appendix E** to this note), under which the Designated Contract Party will notify the Appointed Broker of the date and time at which the airline ceased to have any further obligation to provide cover for the Contract Party(ies) for purposes of AVN 67C, and from that date/time AVN 67C will fall away (for the current Contract Parties for that aircraft).

Comment [DWM2]: On receipt of notice by the Designated Contract Party (DCP) it is recommended that Brokers seek confirmation of the advised date from the Lessee.

Comment [DWM3]: To be clear on this point, the Endorsement can only continue for as long as the insurance obligations under the lease/finance contracts (as amended or supplemented) are in effect. A Contract Party cannot extend the duration of the Endorsement arbitrarily.

Comment [DWM4]: The Lessee’s obligations will be established by Lease condition, as will be the status of the Lease following a default.

Comment [DWM5]: Such an obligation should already be included in the Lease. If the Lease contains no such provisions, the Lessee will need to give his broker the appropriate instructions.

Comment [DWM6]: It is expected that new finance/lease contracts that have been agreed between the Lessee and Contract Parties on the basis of AVN67C will include the identity of the DCP. Underwriters agreement will be required unless slip provides for AVN67C.

Existing finance/lease agreement on the basis of AVN67B may need a formal lease amendment to change to AVN67C and the identification of the DCP should be done as part of this process. As above, Underwriters agreement may be required.

Where agreement to AVN67C is not subject to a lease amendment then the Lessee needs to be satisfied that the designation of one Contract Party to be the DCP is permissible under the terms of the finance/lease agreement and/or has been agreed by all Contract Parties. As above, Underwriters agreement may be required

AVN 67C requires the Designated Contract Party to notify Insurers “*promptly, and in any event within 30 days after such date*”. In any event, as noted above, the removal of cover will be retroactive to the date when the airline’s obligation actually ceased.

### **3.2 LIABILITY AS MANUFACTURER, REPAIRER OR MAINTAINER: PARAGRAPH 2.3 OF AVN 67C**

AVN 67B states that the Endorsement does not provide liability coverage for the Contract Party(ies) with respect to claims arising out of their legal liability as “*manufacturer, repairer or servicing agent*”.

We were concerned that the reference to “*servicing agent*” might cause confusion with the role of servicer or lease manager in many aircraft financings, despite the fact that it is clearly only intended to denote an active maintenance/repair role, as opposed to a lease management role.

So in AVN 67C, this phrase has been replaced by the clearer phrase “*manufacturer of, or performer of maintenance, repairs or other operational activities in respect of, the Equipment*”. The phrase “*other operational activities*” is intended to denote activities such as cleaning and refuelling.

See also section 3.5 below concerning **paragraph 3.3** of AVN 67C.

### **3.3 FINANCIER LIABILITY TO PILOTS AND CREW: PARAGRAPH 2.4 OF AVN 67C**

Some aviation policies exclude liability of the Insured (or in some cases, any Insured) to employees for bodily injury arising out of and in the course of their employment, or liability for injury or loss sustained by any member of the flight, cabin or other crew whilst engaged in the operation of the aircraft, or for liability under workman’s compensation legislation. The premise is that for such liability, the airline should protect itself by employer’s liability insurance rather than aviation insurance. The exclusion wording varies from policy to policy.

From the financier’s perspective, there is concern that in some cases the exclusion wording might be wide enough to exclude liability of the financier to pilots and crew, although in other cases the exclusion may only apply to the airline itself, and the financier may be able to rely on “*severability of interests*” to claim protection.

In many policies, the financier has the benefit of endorsement AVN 73 (if it is adopted for the particular policy). This states that the policy coverage for passenger liability will extend to include “*liability of the Insured to the pilots and operational crew of the insured Aircraft, but excluding liability required to be insured under employers’ liability or workman’s compensation legislation or any similar legislation*”.

The approach adopted in AVN 67C is that the Endorsement should provide specific confirmation in all cases that the Contract Parties are covered for liability to pilots and crew. This is reflected in the new paragraph 2.4. However, two points should be noted:

- Paragraph 2.4 does not provide cover to the financier in cases where the pilots/crew are employed by the financier rather than the airline – so where a ferry flight is arranged at the end of the lease term using the financier’s pilots/crew, it is essential that the financier arranges its own cover.
- Paragraph 2.4 will only provide cover for liability to pilots/crew if and to the extent that the underlying policy provides cover for liability to passengers. So, for example,

Comment [DWM7]: This is a useful clarification of rôles and does not change the original intent.

Comment [DWM8]: Typo error: should be paragraph 3.4

Comment [DWM9]: This amendment to coverage will be welcomed by Contract Parties, and will be viewed by most Insureds to provide a measure of comfort knowing that an obligation they have under the Contract’s indemnity section is now expressly protected.

in the case of a policy for a pure cargo operator the Contract Parties should check that the policy does include such cover.

Comment [DWM10]: Brokers need to be mindful of this new provision.

### 3.4 THEFT: REFUSAL OR FAILURE TO REDELIVER: PARAGRAPH 3.2 OF AVN 67C

Comment [DWM11]: Typo error: should be paragraph 3.3

Insurers are concerned that a financier might seek to claim a hull total loss under the theft section of the hull policy, if the financing parties are unable to repossess the aircraft from the airline either at lease expiry or in case of mid-term default.

A financier might, it is thought, claim that: (i) a prolonged refusal to redeliver by the airline (perhaps combined with active steps to put the aircraft beyond reach) amounts to theft; (ii) the breach of warranty clause in the Endorsement means that misconduct by the airline does not vitiate the financier's coverage; and (iii) a loss has occurred, even though the aircraft has not suffered physical damage, because the aircraft is unavailable with no prospect of recovery.

Some aviation policies (at least in the general aviation field) have an express exclusion for "change in title or ownership of the Aircraft, or any theft or alleged theft of the Aircraft by any named insured or additional or joint insured".

Insurers consider that the theft cover was never designed to provide cover for financiers against airline misconduct / obstruction. In the present case, insurers' concerns have been met by adding a narrower exclusion in paragraph 3.2 of AVN 67C. This makes it clear that no Contract Party can claim a loss by theft or alleged theft in cases of dispossession or refusal or failure to deliver the aircraft by the Insured or any other Contract Party (as opposed to a third party), but that the Contract Parties are still covered for any other loss or damage to the aircraft during the period of the Endorsement.

Comment [KC12]: Typo error: should be paragraph 3.3

### 3.5 SERVICERS AND LEASE MANAGERS: PARAGRAPH 3.3 OF AVN 67C

Comment [DWM13]: Typo error: should be paragraph 3.4

AVN 67B states that the Endorsement applies to the Contract Parties solely in their capacity as financiers/lessors in the identified Contracts, and not in any other capacity. This sentence has been extended in AVN 67C to more clearly embrace lease servicers and managers, and we have added a sentence at the end of paragraph 3.3 to explain the meaning of these terms.

Comment [DWM14]: This continues the useful clarification of roles contemplated by 2.3 and does not alter the original intent.

Comment [KC15]: Typo error: should be paragraph 3.4

### 3.6 SCHEDULE TO AVN 67C

The main change to the Schedule is the addition of reference to a "Designated Contract Party" (see paragraph 1 above). Also, the previous AVN 67B notes in the text of the Schedule have been converted into footnotes, for greater clarity. Footnote 3 provides clearer wording on the meaning of "Effective Date".

Comment [DWM16]: Footnote 3 in fact should refer to the date from which the *Insured* assumes responsibility to insure the Equipment under the Contract(s) and not the Contract Parties

## 4. HULL WAR VERSION OF AVN 67C

The Hull War-only version of AVN 67C is identical to the comprehensive version (as summarised above in section 3 of this note), apart from the deletion of (i) those provisions relating to liability cover; (ii) the theft paragraph; and (iii) the notice period for cancellation or material alteration of cover (see below).

As in the previous Hull War-only version of AVN 67B, the new Hull War endorsement provides in paragraph 8 that Insurers will give not less than 7 days' notice to the Contract Party(ies) (via the Appointed Broker, if any) of cancellation or material alteration of cover. However, in AVN 67C the parenthetical "(or such lesser period as is customarily available)" has been deleted.

This is because AICG considered that: (i) the phrase “customarily available” (which does not appear in the comprehensive version of AVN 67B or 67C) is too vague; and (ii) in any event, it conflicts with the opening words of paragraph 8 “*Except in respect of any provision for Cancellation or Automatic Termination specified in the Policy or any endorsement thereof*” which make it clear that notice periods specified in the particular policy will prevail over the 7-day notice requirement in AVN 67B and 67C.

## 5. FINANCE/LEASE CONTINUING LIABILITY ENDORSEMENT AVN 99

It is common for lessors and other financing parties to require the airline to provide ongoing third party liability cover in favour of the financing parties for up to two years after expiry of the lease/financing. However, there is currently no standardised London market form to evidence such cover. The aim of Endorsement AVN 99 is to provide such a standard form.

AVN 99 is based on AVN 67C, but with all references to hull and spares cover deleted. Thus it includes similar wording to paragraph 2 of AVN 67C, and those parts of paragraph 3 of AVN 67C which relate to liability cover.

The Schedule to AVN 99 is similar to that in AVN 67C, except that (1) there is no reference to Policy Deductible or **Additional Premium**, and (2) regarding the “Effective Date” for the Endorsement, footnote 2 makes it clear that this will be either (i) the date when AVN 67C falls away for the particular aircraft, for tail cover commencing midway through a policy year, or (ii) the policy renewal date, in case of subsequent tail cover renewal.

The timing relationship between AVN 67C and the AVN 99 tail cover endorsement will be made clear by a standardised system of notifications. In addition to the standard termination notice for AVN 67C (mentioned in section 3.1 above under *Duration of Endorsement: Preamble to AVN 67C*), AICG is publishing, as part of the new package, a standard form of notification from the Designated Contract Party to the Appointed Broker that the airline has no further obligation to provide continuing liability cover. The pro forma termination notice is set out in **Appendix F** to this note.

## 6. TRANSITION TO AVN 67C

When AVN 67C becomes available for market use, each lessor/financier will need to discuss with its brokers (or the relevant airline’s brokers) how best to transition from AVN 67B to AVN 67C for particular aircraft, should it wish to do so. (As a matter of policy, AWG does not make any recommendation as regards transactional practice, which is solely for the parties to determine).

Whether the lessor/financier is entitled to require improved market cover (that is, a new form of certificate evidencing AVN 67C), either at next policy renewal or at some other date, will depend on the insurance provisions of the **particular financing contract**. Lessors/financiers should review such insurance provisions with their own advisers.

However, the following points should be borne in mind:

- For **new financings**, the lessor/financier and its advisers may consider the potential desirability of stipulating use of AVN 67C coverage when drafting and negotiating the financing contracts.
- For **existing financings**, we anticipate that the existing insurance certificate (evidencing AVN 67B) will remain in place until the next policy renewal date. At that point, if a decision is taken to transition to use of AVN 67C, the lessor/financier

Comment [DWM17]: Comment has been made that the statement in AVN99 that “*the Legal Liability Insurance afforded by the Policy is in full force and effect*”, may not make it clear that that the Endorsement only applies to the extent of the Insured’s ongoing liability, indemnity and hold harmless undertakings under the Contract(s).

Comment [DWM18]: Contrary to the explanatory note, the Schedule does indeed incorporate such reference.

Comment [DWM19]: As previously stated, it is recommended that Brokers seek confirmation from Lessee on receipt of these termination notices.

Comment [DWM20]: The publication of AVN67C means that both AVN67B and C are available for use by the market. At this time, AVN67C is an alternative rather than an automatic successor to AVN67B.

- Any transition has to be agreed first by the Insured with the Contract Parties, in accordance with the entitlements under the finance/lease agreement, and then by the Insured’s Underwriters.
- As always, the broker remains the agent of his Insured and must have the Insured instructions to seek agreement from Underwriters.
- Where the broker does receive instructions from his Insured to use the endorsements, such instruction needs to include confirmation that all the Contract Parties have expressly agreed to the clauses and to the appointment of the DCP, in order for Brokers to comply with their letters of undertaking. The foregoing is particularly important where the lease/finance contract specifies AVN67B and does not permit any successor endorsement, express or implied.

may (if the financing contracts so entitle it) wish to position the broker to issue a certificate referencing AVN 67C - the main point being that the lessor/financier will need to notify the broker of a "*Designated Contract Party*" for the particular aircraft.

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END.