Aviation Finance & Leasing

In 27 jurisdictions worldwide

Contributing editor
Mark Bisset
Aviation Finance & Leasing 2015

Contributing editor
Mark Bisset
Clyde & Co LLP

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2015, be advised that this is a developing area.

© Law Business Research Ltd 2015
No photocopying without a CLA licence.
First published 2014
Second edition
ISSN 2055-7556

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2015
No photocopying without a CLA licence.
First published 2014
Second edition
ISSN 2055-7556

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

© Law Business Research Ltd 2015
<table>
<thead>
<tr>
<th>Country</th>
<th>Author(s)</th>
<th>Firm</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Global Overview</td>
<td>Mark Bisset</td>
<td>Clyde &amp; Co LLP</td>
<td>5</td>
</tr>
<tr>
<td>Aircraft Mortgages - English Law or New York Law?</td>
<td>Thomas A Zimmer and Dominic E Pearson</td>
<td>Pillsbury Winthrop Shaw Pittman LLP</td>
<td>8</td>
</tr>
<tr>
<td>Argentina</td>
<td>Maria Laura Maciel and Rogelio N Maciel</td>
<td>Maciel, Norman &amp; Asociados</td>
<td>11</td>
</tr>
<tr>
<td>Belgium</td>
<td>Giulia Mauri</td>
<td>Verhaegen Walravens</td>
<td>17</td>
</tr>
<tr>
<td>Brazil</td>
<td>Renata Iezzi</td>
<td>Basch &amp; Rameh</td>
<td>22</td>
</tr>
<tr>
<td>Canada</td>
<td>Donald G Gray and Jason MacIntyre</td>
<td>Blake, Cassels &amp; Graydon LLP</td>
<td>27</td>
</tr>
<tr>
<td>Cayman Islands</td>
<td>Matthew Stocker</td>
<td>Conyers Dill &amp; Pearman</td>
<td>33</td>
</tr>
<tr>
<td>Dominican Republic</td>
<td>Maria Esther Fernandez A de Pou and Raul E Rodriguez Pereyra</td>
<td>Russin Vecchi &amp; Heredia Bonetti</td>
<td>37</td>
</tr>
<tr>
<td>England &amp; Wales</td>
<td>Mark Bisset</td>
<td>Clyde &amp; Co LLP</td>
<td>43</td>
</tr>
<tr>
<td>France</td>
<td>Edward Campbell</td>
<td>Stephenson Harwood AARPI</td>
<td>49</td>
</tr>
<tr>
<td>Germany</td>
<td>Ulrich Steppeler and Katja Helen Brecke</td>
<td>Arneckie Siebold Rechtsanwälte</td>
<td>55</td>
</tr>
<tr>
<td>India</td>
<td>Ashwin Ramanathan, Zubin Mehta, Aditya Singh Chandel and Rustam Sethna</td>
<td>AZB &amp; Partners</td>
<td>61</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Wahyuni Bahar and Anggia Rukmasari</td>
<td>Bahar &amp; Partners</td>
<td>66</td>
</tr>
<tr>
<td>Ireland</td>
<td>Hilary Marren and Joe Fay</td>
<td>McCann FitzGerald</td>
<td>70</td>
</tr>
<tr>
<td>Italy</td>
<td>Laura Pierallini and Francesco Grasetti</td>
<td>Studio Pierallini</td>
<td>76</td>
</tr>
<tr>
<td>Malta</td>
<td>Malcolm Falzon, Steven Decesare and Tara Cann-Navarro</td>
<td>Camilleri Preziosi</td>
<td>82</td>
</tr>
<tr>
<td>Mexico</td>
<td>Javier Alegre and Carlos Campillo</td>
<td>Alegre, Calderón y Márquez Abogados</td>
<td>89</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Berend Crans and Thijs Elseman</td>
<td>De Brauw Blackstone Westbroek NV</td>
<td>94</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Frank Porter and Rishalat Khan</td>
<td>Buddle Findlay Lawyers</td>
<td>100</td>
</tr>
<tr>
<td>Nigeria</td>
<td>L Fubara Anga and Oluwasemiloore Atewologun</td>
<td>ÅLEX</td>
<td>104</td>
</tr>
<tr>
<td>Oman</td>
<td>Mansoor J Malik and Asad Qayyum</td>
<td>Al Busaidy, Mansoor Jamal &amp; Co</td>
<td>108</td>
</tr>
<tr>
<td>Panama</td>
<td>Maria de Lourdes Marengo</td>
<td>Patton, Moreno &amp; Asvat</td>
<td>115</td>
</tr>
<tr>
<td>Philippines</td>
<td>Aldous Benjamin C Camiso, Diana S Gervacio, Bhong Paulo A Macasaet and Maricar G Ramos</td>
<td>SyCipLaw Center</td>
<td>120</td>
</tr>
<tr>
<td>Portugal</td>
<td>Luis Soares de Sousa</td>
<td>Cuatrecasas, Gonçalves Pereira</td>
<td>125</td>
</tr>
<tr>
<td>Russia</td>
<td>Victoria Bortkevicha and Anna Nikulina</td>
<td>Clifford Chance CIS Limited</td>
<td>132</td>
</tr>
<tr>
<td>Sweden</td>
<td>Fredrik Wilkens, Emma Stuart-Beck and Malin Sund</td>
<td>Advokatfirman Vinge</td>
<td>138</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Frédéric Meyer, Raphaël Baeriswyl, Philippe Renz and Antoine Labaume</td>
<td>Meyer Avocats</td>
<td>143</td>
</tr>
<tr>
<td>Turkey</td>
<td>Serap Zuvin and Melis Oget Koc</td>
<td>Serap Zuvin Law Offices</td>
<td>148</td>
</tr>
<tr>
<td>United States</td>
<td>Thomas A Zimmer</td>
<td>Pillsbury Winthrop Shaw Pittman LLP</td>
<td>154</td>
</tr>
</tbody>
</table>
Preface

Aviation Finance & Leasing 2015
Second edition

Getting the Deal Through is delighted to publish the second edition of Aviation Finance & Leasing, which is available in print, as an e-book, via the GTDT iPad app and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Getting the Deal Through format, the same key questions are answered by leading practitioners in each of the 27 jurisdictions featured. Our coverage this year includes Indonesia, Italy, New Zealand, the Philippines and Turkey.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Mark Bisset of Clyde & Co LLP, for his continued assistance with this volume.

Getting the Deal Through
London
June 2015
Global Overview

Mark Bisset
Clyde & Co LLP

Introduction
Aviation is one of the world’s fastest-moving sectors, combining technology, innovation, entrepreneurialism, economic development, infrastructure support, demographic growth, contribution to globalisation and a touch of glamour. Progress in this sector is impressive in its speed and diversified in its nature.

Economic and traffic growth are two of the key indicators of growth in commercial aviation globally. Economic growth in a region generally has a strong impact on the increase in demand for air service. While in aggregate this is true, the degree to which air service grows in relation to gross domestic product (GDP) is not consistent throughout the world. Typically, in developing countries, air service grows at a much higher rate than GDP. Historic experience in Western Europe and North America shows that air traffic growth in a developed country with a mature air service market is less responsive to GDP than in a developing country. By way of illustration, Boeing’s worldwide forecast for the ratio of air traffic demand growth to GDP growth over the next 20 years is approximately 1:5, albeit with regional variation. At any time and any place, few airlines have the internal cash available to self-finance acquisitions of new or used commercial aircraft, and most airlines seek financing from a variety of sources, including traditional bank debt, export credit guarantees, tax leases, capital markets and operating leases.

There has been much commentary in recent years relating to the enormous aviation potential of the economies of Brazil, Russia, India and China. Recently, Africa and the Asia-Pacific region have been regularly added to this list, and we may add Latin America and the Middle East to the regions already mentioned. In other words, heady growth (more than 6 per cent) is predicted in almost every region of the world with the exception of Western Europe, which may be considered to have reached saturation point.

To cite growth forecasts from one of the two major manufacturers, Boeing predicts demand for 34,000 new aircraft in the next 20 years, valued at US$4.5 trillion. Half of these aircraft will replace existing aircraft, the rest will be used to expand capacity. However, it is expected that it is the areas of capital structure support, demographic growth, contribution to globalisation and economic development, infrastructure support, technology, innovation, entrepreneurialism, economic development, staffing and operating leases.

Historic experience in Western Europe and North America shows that air service grows at a much higher rate than GDP. In developing countries, air service grows at a much higher rate than GDP.

In this overview we shall look at:
• enhanced equipment trust certificates (EETCs);
• asset-backed securities (ABS);
• export credit agency (ECA) financing;
• commercial bank finance; and
• leasing.

Enhanced equipment trust certificates (EETCs)
An EETC is a publicly (but sometimes privately) issued, rated security that relies on the credit of a single issuer and is secured by aircraft. This is usually in the form of a special-purpose company or SPV, which is created with the sole purpose of owning the aircraft. While EETCs have traditionally been issued by United States airlines, because of the availability of section 1110 of the US Bankruptcy Code, the product should now be increasingly available to airlines in countries that have adopted the Cape Town ‘Alternative A’ insolvency regime (eg, recently, Air Canada, British Airways and Virgin Australia).

In June 2013, British Airways launched an EETC called ‘British Airways 2013-1’, which covered six Airbus A320s, two Boeing B777-300ERs and six Boeing B787-8s. This did not have the benefit of the Cape Town Convention or the Protocol’s Alternative A, but the rating agencies took the view that English law is sufficiently robust to allow for lender-friendly repossession of aircraft. Ireland has recently adopted a new insolvency regime equivalent to Alternative A, providing a similar level of bankruptcy protection to section 1110 of the US Bankruptcy Code and thereby facilitating EETC issuance in Ireland.

EETCs were effectively closed during the financial crisis, and re-opened in 2009 with an issuance by Continental. In 2013, US$8.5 billion worth of EETCs were issued (including US$2 billion by American Airlines alone), but we have seen fewer EETCs issued in 2014. This is because the small, but expanding, group of airlines able to access this market have less need. However, many of the new non-US carriers are expected to return to the market in 2015. In March 2013 both Turkish Airlines and Air Canada entered the market with EETCs. At US$328 million, Turkish Airlines’ EETC is smaller than most other securitisations. EETCs are well suited to small, but expanding, group of airlines able to access this market have less need. However, many of the new non-US carriers are expected to return to the market in 2015. In March 2013 both Turkish Airlines and Air Canada entered the market with EETCs. At US$328 million, Turkish Airlines’ EETC is smaller than most other securitisations. EETCs are well suited to EETCs were effectively closed during the financial crisis, and re-opened in 2009 with an issuance by Continental. In 2013, US$8.5 billion worth of EETCs were issued (including US$2 billion by American Airlines alone), but we have seen fewer EETCs issued in 2014. This is because the small, but expanding, group of airlines able to access this market have less need. However, many of the new non-US carriers are expected to return to the market in 2015. In March 2013 both Turkish Airlines and Air Canada entered the market with EETCs. At US$328 million, Turkish Airlines’ EETC is smaller than most other securitisations. EETCs are well suited to small, but expanding, group of airlines able to access this market have less need. However, many of the new non-US carriers are expected to return to the market in 2015. In March 2013 both Turkish Airlines and Air Canada entered the market with EETCs. At US$328 million, Turkish Airlines’ EETC is smaller than most other securitisations. EETCs are well suited to

Financing products
Commercial banks, lessors and export credit agencies account for the majority of aircraft financing, and the use of capital markets has expanded considerably over the past decade. Since the credit crunch of 2008 (indeed, since the liquidity crisis started in 2007), the availability of traditional debt has been severely constrained. To fill the subsequent funding gap, the export credit agencies (and, indeed, the manufacturers themselves) have stepped up to the plate. However, it is expected that it is the areas of capital markets and operating leasing which will see the most financing activity in terms of volume.

Asset-backed securities (ABS)
ABS are issued in the private and capital markets, secured by aircraft or lease rental cash flows. The predominant forms of ABS are transaction structures as collateralised loan obligations and collateralised debt obligations (EETCs are not characterised as ABS since they are reliant on the single issuer). The newly reopened ABS market provides an efficient means for lessors to sell off portions of their portfolios (eg, Castleton’s 2014 79-aircraft $516 million securitisation).
Export credit agency (ECA) financing

ECA guaranteed loan products cover about 25 per cent of new aircraft financings. This is a financing supported by an ECA, of which the primary ones are:

- Brazil – BNDES – supports Embraer;
- Canada – EDC – supports Bombardier;
- France – COFACE – supports Airbus and ATR;
- Germany – Euler Hermes – supports Airbus;
- UK – ECGD – supports Airbus and Rolls-Royce; and

ECA financings are currently regulated by the Organization for Economic Co-operation and Development (OECD) Aircraft Sector Understanding (ASU) arrangements; however, not all aircraft manufacturing countries are subject to the ASU rules (eg, Japan, China and Russia).

Having been of critical importance when filling the funding gap during the downturn in availability of traditional debt finance during the recent prolonged recession, ECA financing is likely to reduce over time in the light of the ASU’s requirements to impose market level fees and rates. The 2011 ASU requires each ECA to classify its borrowers into one of eight risk categories, based on these senior unsecured credit ratings. The new ASU thereby raises the export credit premium for all buyers and borrowers.

Commercial bank finance

Commercial banks currently fund approximately 28 per cent of new aircraft deliveries, however such funding has recently become more subdued as a result of the credit crunch. A number of European banks (especially in Germany) have exited the market following the financial crisis. The remaining European (mainly French and German) banks and US banks are now joined by new market entrants in Japan, Australia, the Middle East and (in the case of financing Chinese airlines) China. The adoption of Basel III is likely to raise the operational costs for banks, which will, of course, be passed on to customers in the form of higher margins.

As well as traditional mortgage finance, more specialised products that remain available to a greater or lesser extent are:

- French lease. A cross-border tax lease where the lessor is domiciled in France, this is traditionally the preserve of the French commercial banks.
- Japanese operating lease (JOL). Japanese investors put up equity and the balance of funding is provided by a bank loan. Since the debt must be booked in Japan to avoid withholding tax, this has historically been the preserve of Japanese banks such as BTMU. (A JOLCO is a JOL with a call option allowing the airline to purchase the aircraft.) The Japanese government is considering changes to the accelerated depreciation method, which threatens to reign in the JOLCO’s tax benefits significantly, or even kill off the structure entirely.
- Kommanditgesellschaft (KG). A product whereby the aircraft is acquired by a German limited partnership, financed by German investors and partly leveraging by bank loans from one of the banks specialising in this product (eg, NordLB).

Operating leases

Activity in the operating lease sector has restored momentum lost in the aircraft finance sector during the liquidity crisis, and the subsequent downturn in the finance sector and in the wider economy. About 40 per cent of new aircraft deliveries are currently facilitated by way of operating lease, and most analysts suggest that this proportion will rise to 50 per cent by 2020. In addition to traditional investors in aircraft equity, such as operating leasing companies (eg, ILFC, GECAS and AGC), hedge and private equity funds have recently become increasingly significant in this market.

Industry consolidation has continued, with two of the largest lessor mergers occurring in recent years. SMBC acquired RSR for US$7.7 billion in May 2012 and, in December 2013, AerCap acquired ILFC. The new AerCap has total assets of US$41 billion and a fleet of over 1,300 aircraft. As well as consolidation, a trend is new entrants into the market, especially in Asia and the Middle East, where traffic has been booming and plenty of capital is available. Of the top 25 aircraft lessors in the world in 2014, fewer than half were operating only a decade ago. Some are totally new, such as Indonesia’s Lion Group which has already leased out 737 NGs into the Chinese market.

The balance of lessor ownership continues to move eastwards following a natural expansion of the growth in commercial aviation in Far Eastern emerging markets, with lessors in the Asia-Pacific region now owning or managing 35 per cent of the global fleet.

Emerging market developments

Africa

The strong level of growth predicted for the African aviation industry over the next 20 years (5 per cent per annum) is higher than the world average (4.7 per cent), and provides a major opportunity. The African Airlines Association estimates that its member airlines will double their combined fleet of 600 aircraft to 1,210 aircraft.

Aviation in Africa is beset by hurdles to growth, the most notable relating to liberalisation, safety and infrastructure. With the exception of South Africa and, to some extent, Nigeria and Kenya, the banking system in much of sub-Saharan Africa is not well capitalised and local banks are not in a strong position to provide aircraft finance (with exceptions such as Investec, Nedbank and RMB in South Africa and FBN in Nigeria). The small size of most African airlines and the many difficulties in operating airlines means that many financial institutions are unwilling to invest in African airlines and charge higher rates, or will only do so if there is a government guarantee in place to cover default risk. The number of African airlines using finance or operating leases is still relatively low, at around 40 per cent, and tends to remain limited to top-tier airlines. The use of ECA financing has become common with development banks (Afrexim, Africa Development Bank, PTA Bank, Africa Finance Corporation) often used to fund the 15 per cent equity exposure.

Asia-Pacific and China

The increasing wealth and development of the region have created a burgeoning middle class, eager to travel. The increase in passenger demands has encouraged expansion, and to meet predicted passenger demands it is expected that China alone will need 3,400 aircraft in service by 2030, with a total asset value of US$400 billion; and 60 per cent of these aircraft will be leased. Low-cost carriers now account for over 50 per cent of total seat capacity in the region.

Increasingly, Asian banks are becoming more involved in aviation finance transactions, not just in the region but across the world, filling the gap where European and US banks are restricting their lending. There is also a shift in the traditional use of US dollars to finance transactions. BOC Aviation has completed its first aviation financial transaction in Chinese renminbi, with more than 50 per cent of the funds coming from private banks. China’s financiers have been active in the leasing market since 2008, when five major finance leasing companies were established, sponsored by the largest state-owned banks.

The Asia-Pacific region will be the dominant region in terms of passenger numbers, having overtaken the US market with 40 per cent global passenger kilometres.

India

India’s commercial aviation industry is rapidly expanding, with the Ministry of Civil Aviation predicting that by 2020 India will be the third largest aviation market in the world, and by 2030 the largest. Aviation accounts for 1.5 per cent of India’s GDP and serves around 150 million passengers per annum, with 90 million alone passing through Delhi.

Despite the growing demand for commercial flights and increasing passenger demand, commercial carriers are still suffering due to heavy taxation and strict government regulations. In addition, after the default of Kingfisher Airlines in 2013 and Spice Jet in 2014, foreign financiers are become more reluctant to lease aircraft to Indian airlines as strict regulations make it increasingly difficult to repossess aircraft, with some financiers withdrawing from the Indian market altogether. Although India is a signatory to the Cape Town Convention, the experience of Kingfisher/Spice Jet has been far from encouraging. This may have an effect on other airlines that rely on financing from foreign banks, as it becomes more commonplace for them to charge higher lease rentals or even require advance payments, which adds to the financial burden already on carriers.

Middle East

The Middle East is another region currently outpacing the global rate of growth of the aviation industry. Vast orders placed by the region’s airlines at the Dubai Airshow in December 2013 highlight the continuing aggressive growth of air carriers in the Gulf region. Over 600, mostly wide-body,
aircraft were ordered by Emirates, Etihad, FlyDubai and Qatar Airways, with an aggregate value of more than US$150 billion. The geographical position of the Gulf, acting as a bridge between the rapidly developing Eastern markets, and more established markets in the West, continues to support the growth of locally based airlines. As the established European finance providers find their exposure to the region at capacity, and their levels of liquidity are also squeezed, local Middle Eastern banks have increasingly been entering the market, viewing the airline industry as an attractive opportunity to diversify their loan books. The big state-owned airlines, viewed as strong credits, have been able to demand very reasonable pricing in the commercial debt market, and the attraction previously offered by more structured capital markets deals (epitomised by the Emirates EETC of 2013) has waned. Second-tier airlines, without perceived sovereign support, continue to access funding with ECA guarantees, but the increasingly high ECA fees for airlines carrying out these transactions are making commercial debt the preferred option where possible.

The Cape Town Convention
One of the most significant legal developments in recent years has been the introduction of the Cape Town Convention, which established a system of recognising international rights in aircraft and certain aviation assets. It came into force in 2006 and at this time, depending on whether a particular jurisdiction has ratified the relevant sections and absorbed the principle into local law, it gives genuine rights and the ability to give effective notice to third parties of ownership and security interests. This has, in certain circumstances, provided encouragement for prospective lessors and financiers considering the financing of aircraft and engines in jurisdictions which may hitherto have been viewed as difficult. An immense debt is due to the Aviation Working Group, and to all of those who have worked on the Convention over the past decade.

The Convention currently has 64 ratifications, and the Aircraft Protocol has been ratified by 58 contracting states (the Convention also applies to rolling stock and satellites and its applicability to aviation is governed by ratification of the Protocol). The Convention will become increasingly important in international aviation finance as it gains more universal coverage, and a crucial tipping point may well be imminent ratification by all of the EU member states. It is highly likely that within the next few years the Convention will be the standard reference point for the creation, recognition and enforcement of aircraft security interests in the vast majority of countries with any relevance to aviation (which, to a greater or lesser extent, means all countries in the world).

The United Kingdom, having published the results of its consultation in December 2013, is likely to ratify the Convention in 2015. The UK government has suggested that, following ratification, UK airlines may be eligible for the OECD ASU discount, granted by an ECA. (Eligibility for the discount is restricted by the ‘home country rule’, which is a de facto rule that prevents airlines in ‘producer nations’, such as the United Kingdom, France and Spain, from receiving export credit support from the ECAs for an aircraft that is manufactured in that country. This rule does not apply to, among others, Embraer or Bombardier aircraft. However, in a JOLCO transaction for an Airbus A380, British Airways was able to get Euler Hermes (the German ECA) to support its transaction in September 2013, and Air France has also availed itself of export credit finance.)

Conclusion
An annual financing requirement of US$125 billion is a daunting target by any standard, but the aviation finance community has proved itself capable of meeting the challenge in the past, and will no doubt do so again, especially with new entrant capital. This is a robust, innovative and entrepreneurial part of the global finance community, working in a fast-changing sector, and can look forward with confidence to the next 20 years. Each chapter of this book will examine the legal context within which this community works.
Aircraft Mortgages – English Law or New York Law?

Thomas A Zimmer and Dominic E Pearson
Pillsbury Winthrop Shaw Pittman LLP

Aircraft mortgages: English law or New York law?
When taking a mortgage over an aircraft, financiers will often be faced with a choice between expressing the document to be governed by either English or New York law. Both are equally popular, but while a validly created and properly filed mortgage governed by either law will provide financiers with broadly similar remedies, the validity and filing requirements themselves under the laws of each jurisdiction can vary significantly. Financiers may not always be aware of these differences and what cost implications may flow from them. This article explores and highlights some of those differences and the bumps in the road that exist when granting a valid mortgage in each jurisdiction.

Validity
Looking first to validity requirements, provided that the amount secured by a New York law governed mortgage against an aircraft (a New York aircraft mortgage) is more than US$250,000, a court located in New York will give effect to the selection of New York law to govern the enforceability of the contractual terms between the borrower and the financier. The vast majority of New York aircraft mortgages will easily meet this threshold. However, New York law and federal law impose certain requirements for the valid grant of a mortgage. New York law requires that the document granting the mortgage must be in writing – not a difficult requirement.

Additional requirements are imposed by US federal law, and treaties that pre-empt New York law in certain circumstances, in order for a New York aircraft mortgage to be valid.

Firstly, if the aircraft is registered in the United States, the validity of the mortgage is governed by the laws of the place where the document granting the New York aircraft mortgage is delivered, even though the contractual relations between the borrower and the financier remain governed by New York law. In this way, federal law distinguishes between the validity of the New York aircraft mortgage – in other words the creation of the rights the financier has in the aircraft (a ‘security interest’) – and the contractual rights the parties have against each other. In practice, this only becomes an issue for US-registered aircraft if the document granting the New York aircraft mortgage is delivered outside the State of New York, which the lawyers can usually manage without much difficulty.

Secondly, if the aircraft is registered in a country which, like the United States, has adopted the Convention on the International Recognition of Rights in Aircraft signed in Geneva on 19 June 1948 (the Geneva Convention), then there is a risk that a New York aircraft mortgage may not be valid under New York law unless it is also valid under the laws of that other country. As a practical matter such a formality represents additional costs, as it creates a requirement to engage foreign lawyers licensed in that other state to advise what additional steps, if any, are needed to ensure the New York aircraft mortgage is properly constituted in that country and is therefore valid as a matter of US federal and New York law.

An English law-governed mortgage against an aircraft (an English aircraft mortgage) may be granted orally without a written contract, although customarily and for evidentiary reasons it is executed and delivered as a deed – a special form of written agreement, allowing the financier to take advantage of additional legal protections. The selection of English law to govern the contractual relations between the borrower and the financier under the English aircraft mortgage will be given effect by the English courts. Unlike a New York aircraft mortgage, there is no interplay between different tiers of laws such as state law, federal law and international treaties. Like New York law, an English aircraft mortgage creates not only a set of contractual rights as between the parties to the mortgage instrument, but also a security interest in the aircraft in favour of the financier. As a general matter applicable to both a New York aircraft mortgage and an English aircraft mortgage, the difference between a contractual right and a proprietary right is important: a valid mortgage means the financier is treated as having property rights in the aircraft enforceable against a third party (ie, rights in rem). In contrast, a valid contract (without more) means the financier has very limited rights to the aircraft as against third parties and may resort only to enforce the contract against the borrower (ie, the financier has only a right in personam). As a result, it may not have priority in the assets of the borrower ahead of other unsecured creditors.

However, the nature of the security interest created under an English aircraft mortgage is different than the nature of the security interest created under a New York aircraft mortgage. Under English law, an aircraft mortgage operates by transferring ownership of the aircraft to the financier on the condition that it will be transferred back again when the debt is secured is paid off. While, therefore, both a New York aircraft mortgage and an English aircraft mortgage create for the financier a proprietary right in the aircraft, under an English aircraft mortgage this proprietary right takes the form of an ownership interest in the aircraft rather than creating a mere encumbrance.

While the financier’s ownership interest under an English aircraft mortgage gives rise to powerful remedies, this legal concept also gives rise to a serious drawback: the ‘lex situs’ or ‘Blue Sky’ problem. Put simply, English law requires that the law of the place where the aircraft was situated at the time the English aircraft mortgage was granted (the lex situs) also recognises the validity of the mortgage. If it does not, then the financier will not have a valid mortgage even though it may still have a valid contract with the borrower to grant a mortgage (in certain circumstances, something called an ‘equitable mortgage’ may still be created even though the ‘legal mortgage’ is invalid; however, discussion of when such a mortgage might arise is beyond the scope of this article).

The lex situs problem is potentially a very costly one in practice due to the inconvenience involved. At the time the mortgage is granted, the aircraft must be physically located in a jurisdiction whose domestic law recognises the validity of the English aircraft mortgage. This may require that the aircraft be flown into or over the airspace of a qualifying jurisdiction at the time of closing or that the grant of the English aircraft mortgage be delayed until such time that the aircraft is located in a qualifying jurisdiction. However, once the Convention on International Interests in Mobile Equipment and the associated Protocol to the Convention on Matters Specific to Aircraft Equipment signed on 1 March 2006 (the Cape Town Convention) comes into force in the United Kingdom, recent legislation indicates that there should be no lex situs requirement for the valid creation of any international interest created by the English aircraft mortgage, so long as an international interest has been validly created under the Cape Town Convention. However, it remains to be seen whether financiers would be willing to rely on a valid international interest alone, without also having the comfort of being able to rely on the valid existence of the underlying local law security interest (ie, the English aircraft mortgage).

Finally, both English and New York law impose one additional formality relating to the validity of the instrument creating the mortgage. Where an aircraft mortgage is granted by a foreign corporation or other foreign entity not being an individual (which will often be the case), the person...
executing it on behalf of that foreign entity must be authorised to do so in accordance with the law of that entity’s jurisdiction of incorporation.

Enforceability and priority against third parties

A New York aircraft mortgage and an English aircraft mortgage also impose different filing requirements to ensure they are, or will continue to be, enforceable (in the jurisdiction of its governing law) or take priority against third parties (such as a bankruptcy trustee, or competing creditors of the borrower). An important observation here is that while certain filings may be strictly required to ensure the mortgage is enforceable or takes priority against third parties in the courts of the jurisdiction of its governing law, other filings may be desirable to make sure it is enforceable or takes priority against the borrower and third parties, either directly or pursuant to an English or New York law judgment, in such other jurisdictions as the aircraft may be situated or registered.

While the costs of making all filings mentioned below are relatively low, in practice the making of such filings can present a bureaucratic and logistical hassle and can often require the assistance of specialised lawyers.

A New York aircraft mortgage must be filed in one or more of three different places, depending on the circumstances, to ensure it is enforceable or takes priority against third parties as a matter of New York law, as pre-empted by federal law and treaties.

In respect of aircraft registered in the United States, the document granting the mortgage must be filed with the Federal Aviation Administration (FAA) in order to be enforceable against any third party who does not have notice of it.

The United States has adopted the Cape Town Convention. The Cape Town Convention establishes an international registry where certain interests in aircraft, including mortgages, could be registered. If the aircraft mortgaged by a New York aircraft mortgage is registered in the United States or in any other Cape Town Convention contracting state, or if the borrower is situated in the United States or in any other Cape Town Convention contracting state, then the New York aircraft mortgage must be registered at the international registry as an ‘international interest’, in order to take priority over any unregistered interests or any subsequent registered interests. If the aircraft is registered in the United States, the New York aircraft mortgage must first be filed with the FAA before a filing can be made with the international registry.

Where a New York aircraft mortgage has been granted and the aircraft is neither registered nor the borrower situated in a Cape Town Convention contracting state, no filings are required at either the FAA or the international registry. If the aircraft is registered in a country that has adopted the Geneva Convention, the laws of such country should be examined to determine whether the New York aircraft mortgage is valid, and whether any filing in such country is necessary. Otherwise, a filing must be made in the applicable state or in Washington DC pursuant to article 9 of the Uniform Commercial Code (UCC) as implemented in New York, to ensure that the New York aircraft mortgage is enforceable as against third parties without notice. UCC filings need to be renewed every five years.

In practice, precautionary UCC filings for New York aircraft mortgages are made even though filings elsewhere may be sufficient. This practice also helps to establish imputed notice of the existence of the mortgage, which may be useful in foreign jurisdictions at the enforcement stage.

No filings need be made for an English aircraft mortgage to ensure it is enforceable in the English courts as a matter of English law, except in two circumstances.

Firstly, for aircraft registered in the United Kingdom the document granting the mortgage must be registered with the Civil Aviation Authority (the CAA) to ensure that it gains priority ahead of any subsequently registered mortgages and against any unregistered mortgages given in favour of third party creditors, and to ensure that it is enforceable against a bankruptcy trustee of the borrower.

Secondly, where the borrower is a UK company or a UK-registered limited liability partnership, and whether or not the aircraft is registered with the CAA, the document granting the mortgage must be registered with UK Companies House within 21 days of the date of execution of the mortgage, otherwise it will be void as against a bankruptcy trustee or competing creditor of the borrower.

Finally, even though the Cape Town Convention does not have any legal force or effect under English law, due to the likelihood of needing to enforce an English aircraft mortgage in other jurisdictions, either directly or pursuant to an English law judgment and until such time as the United Kingdom adopts the Cape Town Convention (see paragraph below), lawyers will ensure that the English aircraft mortgage is registered with the international registry where the English aircraft mortgage qualifies for registration under the Cape Town Convention.

It is also worth noting that the United Kingdom is now very likely to adopt the Cape Town Convention into English law during the course of 2015. Accordingly, once it comes into force, if the aircraft mortgaged by an English aircraft mortgage is registered in the United Kingdom or in any other Cape Town Convention contracting state, or if the borrower is situated in the United Kingdom or in any other Cape Town Convention contracting state, then the English aircraft mortgage must be registered at the international registry as an ‘international interest’, in order that it may also constitute a validly created and perfected international interest taking priority over any unregistered international interests or any subsequent registered international interests. Where the aircraft will be registered in the United Kingdom, it also seems likely that a filing at the international registry with respect to the international interest created by the mortgage will also be used to determine the priority of the English law aircraft mortgage, in lieu of registration with the CAA.

For both New York aircraft mortgages and English aircraft mortgages, lawyers will also seek to make any filings necessary and desirable in the country of registration of the aircraft and in the country of incorporation of the borrower, to ensure the mortgage is enforceable in such places to the greatest extent possible.

Which to choose?

So, given the issues outlined in this article, should financiers prefer one law over the other to govern the terms of an aircraft mortgage? As demonstrated, each jurisdiction has its own pitfalls, with the lex situs problem of an English aircraft mortgage arguably presenting bigger problems on validity requirements. However, when the UK ratifies and brings into law the Cape Town Convention, the creation of an international interest should mean that the lex situs problem becomes almost irrelevant, as financiers should be able to rely instead on the remedies under the Cape
Town Convention which are broadly the same as the remedies available to a financier with the benefit of a validly created English aircraft mortgage, although the lack of precedent on enforcing international interests in aircraft and aircraft engines under the Cape Town Convention may lead financiers, as a matter of prudence and as mentioned above, to continue to seek to ensure that a valid English aircraft mortgage exists. Also, while beyond the scope of this article, other considerations in choosing one governing law over the other might include litigation costs, choice of forum or venue for resolving disputes, and the relative likelihood of enforcing a judgment rendered by the court of one jurisdiction over the other in the country of registration or habitual base of the aircraft.

Whatever the relative benefits of one governing law over the other, it is likely that financiers will continue to rely on either an English aircraft mortgage or a New York aircraft mortgage as the predominant and most valuable form of security in aircraft finance transactions, as supplemented by any available local law security instruments.
Argentina

María Laura Maciel and Rogelio N Maciel
Maciel, Norman & Asociados

Overview

1 To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Argentina is a party to the following treaties:

- Law 12152 of 5 May 1955 ratified the 1919 Paris Convention on International Air Navigation (the 1919 Paris Convention);
- Decree-Law 13110 of 4 June 1946 (Law 13891) ratified the Convention on International Civil Aviation signed in Chicago in 1944 (the 1944 Chicago Convention) and its Transit Agreement on International Air Services;
- Decree-Law 12159 of October 1957 ratified the 1948 Geneva Convention on International Recognition of Rights in Aircraft (the 1948 Geneva Convention);
- Law 17240 of 1 September 1967 ratified the 1952 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (the 1952 Rome Convention);
- Law 21111 of 16 November 1984 ratified the 1933 Rome Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (the 1933 Rome Convention);
- Decree-Law 18730 of 7 August 1970 ratified the 1965 Tokyo Convention on Offences and Certain Other Acts committed on Board Aircraft (the 1965 Tokyo Convention);
- Decree 239 of 19 March 2007 and Decree 1770 of 3 December 2007 created the ANAC. The ANAC is the Argentine Civil Aviation Authority, which governs all civil aviation activities, with the exception of air traffic control services, which are provided by the General Directorate of Air Traffic Control, an entity under the jurisdiction of the Argentine Air Force (Decree 18,410 of 12 November 2011);
- Law 26,451 of 13 January 2009 ratified the Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999 (the 1999 Montreal Convention);
- Law 25,619 of 14 March 1989 ratified the Convention on Recognition and Enforcement of Foreign Arbitral Awards, signed in New York in 1958 (the 1958 New York Convention). Argentina also ratified the Inter-American Convention on International Commercial Arbitration, signed in Panama in 1975 through Law 24,322 and a number of other conventions and treaties previously signed in Montevideo (Uruguay). Furthermore, in the 1990s, Argentina signed more than 50 bilateral treaties on foreign investments whereby the jurisdiction of Arbitral Courts of the International Centre for Settlement of Investments Disputes was accepted. If the foreign award is not covered by any of those conventions, its enforcement will be subject to the requirements set forth by section 317 of the National Code of Civil and Commercial Proceedings (the Code of Proceedings);
- Decree 23,252 of 20 September 1983 on Aeronautical Offences;
- Decree 375 of 25 April 1997 which created the Regulatory Agency for the National Airport System;
- Law 26,102 of 31 May 2006 (Airport’s Security Act). The purpose of this law is to protect and guarantee internal security within an airport’s jurisdiction. Further regulations on this matter include Decree 145 of 22 February 2005, which created the Airports Security Police, Decrees 785 and 836 of 15 and 21 May 2008, respectively and Decree 1190 of 9 September 2009 related to airport security police personnel; and
- Argentina was also a signatory of the Convention on International Interest in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment signed in Cape Town on 16 November 2001 (the 2001 Cape Town Convention), but has not yet ratified this convention. There is a Bill of Law for ratification currently being reviewed by the Secretary of Transport.

2 What is the principal domestic legislation applicable to aviation finance and leasing?

The principal domestic legislation is as follows:

- Law 17285 of 23 March 1967 enacted the Aeronautical Code of the Republic of Argentina (the Aeronautical Code);
- Law 19030 of 27 May 1971 on National Policy on Commercial Air Transport;
- Decree 4907 of 28 June 1973, which established the jurisdiction and functions of the National Aircraft Registry (the Aircraft Registry);
- Law 25,148 of 10 May 2000, which deals with the finance lease of movable and immovable property; and
- Civil and Commercial Code Law 26994 (effective 1 August 2013) (sections 1227 to 1250) (Civil and Commercial Code).

3 Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Under Argentine law the parties to a private contract may agree that the contract will be governed by the law of a country other than Argentina, provided that the contract is international in character and the foreign laws to be applied do not give rise to any infringement of the principles that constitute public order in Argentina, or infringe certain other fundamentals of the Argentine legal system.

The jurisdiction of foreign courts or arbitrators may also be agreed in private contracts, provided that the case is:

- exclusively patrimonial (ie, involves property or money);
- international in character; and
- not one of those in which the Argentine courts have exclusive jurisdiction (Code of Proceedings, section 1; Civil and Commercial Code (section 2651)).

Foreign governing law and jurisdiction of foreign courts are normally agreed in contracts entered into by local lessors or mortgagees and foreign lessors or mortgagees, and the Aircraft Registry regularly accepts registration of those contracts.

As stated in question 1, even state entities and the national government have been authorised by law to accept a foreign governing law and the jurisdiction of international or foreign courts in certain cases.

Title transfer

4 How is title in an aircraft transferred?

Registration of an aircraft with the Aircraft Registry constitutes proof of ownership of (title to) the aircraft (Aeronautical Code, sections 45 (1) and 50). A form provided by the Registry with the purchase agreement or instrument and other pertinent information must be submitted for purposes of registration.
5 What are the formalities for creating an enforceable transfer document for an aircraft?

If entered into in Argentina, the purchase agreement must be executed as a public deed (Civil and Commercial Code, section 133) authorised by a notary public or a private document with signatures certified by a notary public. Stamp tax will apply depending on the jurisdiction where the document is executed.

If entered into abroad, the document must be executed in accordance with regulations applicable in the relevant jurisdiction and then consularised or apostilled and translated into Spanish by a certified translator for purposes of its registration or any other use in this country.

The transfer of ownership of an aircraft must be registered with the Aircraft Registry within 30 administrative days as from the date when the respective contract was entered into. For contracts entered into abroad, the term shall run as from the date of entry of the aircraft into Argentina (Decree 4907/73, section 23).

Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry.

In Argentina the registration of an aircraft or its engines is the responsibility of the Aircraft Registry, which reports to the Civil Aviation Authority. All private and state aircraft, with the exception of military aircraft, must be registered with the Aircraft Registry. As set forth by section 45 of the Aeronautical Code and by Decree 4907/73, the following must be filed at the Aircraft Registry:

- acts, contracts or resolutions that establish the ownership of the aircraft or aircraft engines, or that transfer, modify or annul such ownership;
- mortgages on aircraft and aircraft engines;
- attachments, precautionary measures and interdictions that encumber an aircraft or which may be ordered by a court against aircraft;
- licences containing an adequate description to identify each individual aircraft and certificates of airworthiness;
- the discontinuance of activities by aircraft, the damage to or loss of aircraft and any substantial modifications made to aircraft;
- aircraft leases;
- corporate documentation corresponding to individuals or corporations that own an aircraft; and
- in general, any justiciable fact or act that might alter, or be linked to, the legal status of aircraft.

Argentina has included aircraft in a system similar to the registration of immovable property, in order to make any commercial transactions involving such aircraft widely public and also to give greater security to the rights and interests of third parties.

The following may be provisionally registered with the Aircraft Registry:

- Aircraft acquired by means of a sale contract with a condition or agreement whereby the seller reserves the title to the aircraft up to the time when full payment is made. Within 30 days after the condition or agreement has been complied with, the buyer must request permanent registration, which will have retroactive effect from the date of the provisional registration (Aeronautical Code, sections 42, 43; Decree 4907/73, sections 36 to 40).
- Aircraft belonging to international public agencies of which Argentina is a member, when such aircraft have been assigned to the Argentine state or its provinces for their use on behalf of such agencies. These aircraft are registered as state aircraft and the registration will be valid for the term of the assignment of the aircraft (Law 17743).

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

As mentioned in question 6, an ownership or lease interest in or lease agreements over aircraft, as well as owners', operators' and lessees' interests in aircraft engines, can be all registered with the Aircraft Registry. An aircraft engine may be owned or encumbered separately from the host aircraft.

As for limitations, only individuals domiciled in Argentina and corporations incorporated and domiciled in this country can be recorded as owners of private aircraft.

8 Summarise the process to register an ownership interest.

Registration of ownership and the licensing of aircraft will be effected on the filing of the following documentation (Decree 4907/73, sections 4 and 19):

- an application form requesting registration;
- a certificate of the title proving ownership;
- particulars of the aircraft buyer;
- a certificate of deregistration if the aircraft was previously registered in another state;
- an airworthiness certificate issued by the appropriate authority of the relevant country;
- customs documentation covering the entry of the aircraft into Argentina (if applicable);
- evidence of payment of the registration fee (0.3 per cent in the price amount); and
- a certificate evidencing that the seller is not inhibited from selling its assets (if applicable).

Once the importation of the aircraft is approved by customs, there are no other approvals required for its registration, apart from the decision of the Civil Aviation Authority, which is automatic if all the documents required are filed.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration of an aircraft with the Aircraft Registry confers Argentine nationality on it. This registration also annuls any previous registration in another country. Similarly, any aircraft registered with the Aircraft Registry loses its Argentine nationality if subsequently registered in a foreign state (Aeronautical Code, section 38; 1944 Chicago Convention, section 18).

Registration does constitute proof of title, and third parties can rely on the accuracy of the public registration of the ownership interest, as recorded.

The system of ownership and all other rights over aircraft in Argentina are based on the public accessibility (publicity) of the Aircraft Registry’s records. The transfer of aircraft ownership, as well as the acts mentioned in (i), (ii), (iii), (vi) and (viii) of question 6, will not be effective as regards third parties if not registered with the Aircraft Registry.

10 Summarise the process to register a lease interest.

Registration of an aircraft lease with the Aircraft Registry has the effect of transferring the status of the aircraft’s operator from the owner to the lessee. If the lease is not registered, both the owner and the lessee will be jointly and severally liable for any infringement or damages caused by the aircraft under Argentine law (Aeronautical Code, sections 66, 67, and 68; Civil and Commercial Code, section 1234; Decree 4907/73).

Registration of an aircraft lease will be effected upon filing of the following:

- an application form requesting registration;
- the lease contract;
- the aircraft owner’s consent for registration;
- evidence of payment of the registration fee (0.3 per cent of the total amount of contract); and
- in case of lease of an aircraft registered in a foreign state, the authorisation for its operation in Argentina, granted by local Civil Aviation Authority, must also be filed.

All documentation issued abroad must be consularised or apostilled and translated into Spanish by a certified translator for purposes of registration.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

The Aircraft Registry normally issues certificates on all aviation contracts, acts and interests registered with it, and they can be requested by anyone who has an interest in the registered documents and acts (Aeronautical Code, section 47; Decree 4907/73, section 8). These certificates are normally provided jointly with copies of the documentation, and
contain precise details of other recorded acts as they may be asked for by those who request the certificate.

If engines not placed on an aircraft are registered, the Aircraft Registry will issue a certificate of registration which will include mortgages granted or any existing interests on this asset.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Owners, mortgagees and all other third parties having an interest in aircraft and engines registered with the Aircraft Registry must give their consent to any deregistration or export that may be required. Without such consent no deregistration or export will be allowed.

The aircraft operator (mortgagor or lessee) can only block a proposed deregistration or export if in full compliance with any and all their obligations under the respective contract, since in this case they have right to quiet enjoyment of the aircraft.

13 What are the principal characteristics of deregistration and export powers of attorney?

Granting of Deregistration and Export Powers of Attorneys to one or more attorneys is permitted under Argentine law. They can be granted for a definite or indefinite period of time.

They may also be irrevocable (Civil and Commercial Code, section 380, subsection (c), and sections 1126 and 1310) if granted for a particular transaction or matter; for a limited term and in relation to a legitimate interest emerging from a contract. An irrevocable power of attorney can be revoked for just cause which, as our jurisprudence has determined, will exist where the attorney in fact incurs in negligence or wilful misconduct.

Finally, the grantor will be liable to the attorney if the revocation occurs without notice or in an arbitrary manner.

Power of attorney must be granted in Argentina by means of a public deed authorised by a notary public. If granted abroad, it must be done in accordance with regulations or practices applicable in the relevant jurisdiction, and then certified by the Argentine Consulate or, alternatively, through the apostille procedure provided for in The Hague Convention of 5 October 1961, translated into Spanish by a local certified translator and notarised by a local notary public.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The 2001 Cape Town Convention has not yet been ratified by Argentina. As mentioned in answer to question 1, there is a Bill of Law for ratification currently being reviewed by the Secretary of Transport.

Security

15 What is the typical form of a security document over the aircraft and what must it contain?

Mortgages and all documents granted in Argentina must be created in Spanish. All those granted abroad may be created in the language the parties elect, but must be translated into Spanish if they are going to be used in this country. No specific form is required but, for registration with the Aircraft Registry, an aircraft mortgage must at least contain:

- the name and domicile of the mortgagor and mortgagee;
- the nationality, registration marks and serial number of the aircraft, engines and its component parts;
- evidence of insurance covering the aircraft or engines;
- the amount of credit guaranteed by the mortgage, interest rate, term of contract and place of payment;
- if the aircraft is under construction, the first two requirements above are applicable and the aircraft should be described by reference to the construction contract and the construction stage reached; and
- in case of a mortgage on engines, the engines must have been previously registered with the Aircraft Registry and duly identified.

All other terms of the deal that the parties may decide to agree may be added to the mandatory terms given above.

No maximum secured amount for security documents exists under Argentine law.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

If entered into in Argentina, the mortgage or security document must be made by means of a public deed (Civil and Commercial Code, section 299) authorised by a notary public or a private document with signatures certified by a notary public. Stamp tax will apply, depending on the jurisdiction where the document is granted.

Documentary costs will go from the minimum cost of certification of signatures to the notary public fees if a public deed is granted (1-2 per cent of total cost of contract). The stamping cost will depend on the jurisdiction where the document is created (generally 1 per cent of the amount of interest secured).

If entered into abroad, the document must be executed in accordance with regulations applicable in the relevant jurisdiction and then consularised or apostilled and translated into Spanish as mentioned above.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties?

Summarise the process to register a mortgagee interest.

No registration other than that with the Aircraft Registry is required.

Registration of an aircraft mortgage entered into in Argentina will be made upon filing of the following:

- an application form requesting registration;
- the title to the aircraft;
- the mortgage contract; and
- evidence of payment of the registration fee (0.3 per cent of the credit amount secured by the mortgage).

Registration of an aircraft mortgage entered into abroad can be made with the Aircraft Registry under the terms of the 1948 Geneva Convention. Requisites mentioned in (i), (iii) and (iv) apply.

18 How is registration of a security interest certified?

See question 11.

19 What is the effect of registration as to third parties?

Only security interests registered with the Aircraft Registry can be enforced by their owners or beneficiaries.

Priority of interests and claims is set forth by the Aeronautical Code sections 57, 58 and 60; and by Civil and Commercial Code, section 2582, subsection (f)). The order of priorities is as follows:

- legal expenses incurred for the benefit of the mortgagee;
- fees relating to the use of aerodromes or air navigation services limited to the period of one year prior to the date when the privileged claim is enforced;
- costs relating to operations for the search for, assistance to and salvage of the aircraft;
- costs corresponding to supplies or repairs to aircraft carried out other than at its destination, which allow the continuance of the flight;
- wages of the crew relating to the previous month;
- the first recorded mortgage;
- subsequent registered mortgages; and
- any remaining claims.

Privileged claims indicated in (i) to (v) only take priority over mortgages if they are registered within three months from the date of the operation, acts and services to which those claims correspond.

20 How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

For transactions entered into in Argentina, aircraft mortgages, sales with retention of title and finance leases are normally used. International finance of aircraft made by foreign lessors, lenders or financiers typically use finance leases (ie, lease contracts which include a purchase option that can be exercised by lessees under certain circumstances).
21 What form does security over spare engines typically take and how does it operate?

Spare engines, in other words engines not forming part of an aircraft, may be registered with the Aircraft Registry, and mortgages can be granted on them as a single item of property (Aeronautical Code, section 32 and Decree 4907/73, sections 24 and 27).

Enforcement measures

22 Outline the basic repossesson procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

At the end of the lease term, lessors or owners of the aircraft normally request from the Aircraft Registry the deregistration of the respective contract and, if the aircraft is going to be re-exported, they initiate customs proceedings. In the latter case, the Aircraft Registry will also cancel the Argentine licence of the aircraft and report this cancellation to the jurisdiction where this aircraft will be registered (1944 Chicago Convention, section 18).

If the lease contract term has ended, the lessee may not lawfully impede the owner to exercise default remedies under Argentine law. (Civil and Commercial Code, section 1249.)

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

If the respective contract is governed by a foreign law and subject to the jurisdiction of a foreign court, the proceedings set forth in that foreign legislation will apply. Even in those cases, some measures for a fast repossession may be requested from an Argentine federal court if this remedy is appropriately incorporated into the contract governed by the foreign law.

There are no self-help remedies available under Argentine law. On occurrence of an event of default, owners, lessors or holders of a security interest can only repossess the aircraft, engine or asset given as security by appropriate court action.

The only precautionary measure that could lead to detention (grounding) of an aircraft is an attachment that can be ordered at the beginning of court proceedings or while they are still pending. Even so, attachment will cause detention of the aircraft only in the following three cases:

- when attachment has been ordered by virtue of an enforcement of a judgment;
- in case of a loan granted for the realisation of a flight, even when the aircraft is ready to leave; and
- in case of a loan granted by the seller of the aircraft as a result of a breach of the purchase contract (Aeronautical Code, section 73).

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The following claims will have priority over aircraft ownership or security interest in the order that follows:

(i) legal expenses incurred for the benefit of the mortgagee;
(ii) fees relating to the use of aerodromes or air navigation services limited to the period of one year prior to the date when the privileged claim is asserted;
(iii) costs relating to operations for the search of, assistance to and salvage of the aircraft;
(iv) costs corresponding to repairs or supplies to aircraft carried out other than at its destination, which allow the continuance of the flight;
(v) wages of the crew relating to the previous month;
(vi) the first registered mortgage;
(vii) subsequent registered mortgages; and
(viii) any remaining claims.

Privileges corresponding to claims indicated in (i)–(v) only take priority over mortgages if they are registered within three months from the operations, acts and services to which those claims correspond (Aeronautical Code, section 57, 58 and 60; Civil and Commercial Code, section 1582, subsection (f)).

Other than the case of the preceding privileges, if the aircraft is confiscated or requisitioned for use by the state, due compensation must be paid to the owner or mortgagee in order not to harm their property rights, as set forth by the National Constitution, section 14.

Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

There are no specific tax rules for aircraft leases. Tax applicable to leases is, therefore, that applying under general tax rules which may apply to each particular type of lease. Basically, these rules are those corresponding to the lease and the bargain and sale of chattels.

Stamp tax

Stamp tax levies instruments containing onerous agreements executed within the territory of any province and the City of Buenos Aires, or which have effect in those jurisdictions. Consequently, stamp tax will apply on lease contracts registered with the Aircraft Registry, located in the City of Buenos Aires, even though those contracts were executed abroad. In this case the tax rate will be 0.5 per cent of the total value of the lease contract (CABA Law 4808, section 112; Fiscal Code, section 409).

Withholding tax

Under Argentine law, if the aircraft’s owner (lessor) is not a resident in Argentina there is a withholding tax of 14 per cent on rentals remitted abroad (Income Tax Law, section 93(g)). Should the lessor wish to receive the rentals free of such tax, a gross-up clause should be inserted in the contract.

If the aircraft’s owner (lessor) resides in Argentina and is a registered tax-payer, rentals will be subject to a 6 per cent rate and the lessor will be permitted to apply this towards the total income tax it will pay for the full fiscal year in which the transaction took place (AFIP Resolution 820/2000, Annex II (b) 1; Annex VIII Regime Code 30).

Capital allowances

For the purpose of determining the capital allowance available, all expenses incurred in consequence of the acquisition of the aircraft may be included in the purchase price.

Expenses comprise those incurred in the taking of all necessary steps to put the aircraft in a state of readiness for its effective utilisation in air operations (according to principles set forth in the Income Tax Law, section 17).

Capital allowances are available in Argentina to take account of the depreciation of certain assets. A lessor residing in Argentina, who purchases an aircraft for the purpose of leasing it, may discount from the profits earned an amount which results from dividing the purchase price of the aircraft by the number of years of its useful life.

In the case of hire-purchase contracts, the purchaser is entitled to claim capital allowances in the same fashion.

Value added tax

Value added tax (VAT) is not payable in the case of an aircraft lease where the lessor is domiciled abroad and the aircraft is used for international transport. This is due to the international nature of the transaction. In cases where both lessor and lessee are domiciled in Argentina, VAT provides for an exemption for the sale or lease of aircraft built for the purpose and effectively used for transport, defence or security (VAT Law, section 7(g)). The same exemption applies to the importation and sale of aircraft matching those requisites of purpose and destiny.

However, VAT is payable on the sale, import or lease of aircraft not matching those requirements, its rate currently being 21 per cent of the taxable base (ie, rental, price of sale or import).

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There are limitations on the acquisition of foreign currency by local residents. In the past four years, the Argentine government has tried to halt the flight of capital that is occurring for both political and economic reasons. In this respect, the government has enacted regulations that either ban or make it increasingly difficult for residents to buy foreign currency for a number of purposes (saving, tourism, cancellation of debts previously agreed in US dollars between parties domiciled in Argentina, etc).
This notwithstanding, regulations applicable to the acquisition of foreign currency (mainly US dollars), for payment of goods provided or services rendered by parties domiciled abroad, have not changed to date. And so it is currently possible for residents who rent or finance aircraft from parties domiciled abroad to be authorised by the Central Bank to acquire dollars to pay the rentals or other services under those contracts, as set forth by Central Bank Communications 5330/2012 (goods and services) and 5274/12 and 5307/12 (imports). Under these regulations, all local contractors must request authorisation from the Central Bank, showing the contract under which they have to transfer these monies, so that they are allowed to wire.

However, in the past few months, there have been problems with governmental decisions in this respect and, in many cases, the Central Bank officers have imposed de facto practices which avoid transfers of monies or, at least, create considerable delays that discourage locals from making such transfers, consequently disturbing the financial markets.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

No limitation exists on the amount of default interest that can be charged on lease or loan payments. The parties to contracts governed by Argentine law are free to select such terms as they may wish in order to determine the rights and obligations between them.

Eventually, at the request of a debtor, a local court might review the amount of a default interest in order to reduce same if it finds that that interest may qualify as usurious for being excessively high, but the possibility of this type of court decision is limited. In no case will a court object to the market rate for a default interest.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

The importation of brand new aircraft into Argentina is, at present, exempted from payment of import duties and statistic fee. Used assets (including aircraft) will pay import duties from 6 per cent to 28 per cent, depending on the weight of the asset (Resolution 909/94, section 1, as amended). Used assets will also pay a statistic fee of 0.50 per cent (Decree 2646/12).

The importation of aircraft may also be subject to other taxes such as VAT (11 per cent), income tax advanced payment (3 per cent) and gross income tax advanced payment (1 per cent). However, if the aircraft to be imported is to be used for air transport services, such importations are, at present, exempted from all these taxes.

Temporary importation of aircraft is not subject to any taxes or duties. The exporter must, instead, grant a guarantee in favour of the Customs Administration for the payment of such taxes in case that the temporary importation becomes definitive. The maximum term for an aircraft to remain on a temporary importation basis is three years, which can be extended up to three more years (Law 22415 (Customs Code) sections 265, 1(a) and 266.2). In cases where the lease term exceeds those terms, the aircraft must be imported definitively.

The exportation of aircraft is, at present, subject to a 5 per cent export duty. An exemption from payment of export duties may be requested by the exporter when it returns the aircraft to its creditor overseas owing to the anticipated termination of the lease contract by default of lessee.

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Under Argentine law, it is forbidden to insure abroad persons residing in Argentina and assets located or any interest therein existing in this country. Risks can be spread among more than one insurance local company (Law 12988, sections 12 and 13).

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Cut-through clauses are generally tailored to respond to specific events written into the insurance and reinsurance contracts, and they allow the original insured party to take direct action against the reinsurer. Under those terms, cut-through clauses are legally effective under Argentine law.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Reinsurance can only be contracted by local reinsurance companies with:
- corporations and other entities incorporated in Argentina with a permanent corporate domicile in this country; or
- foreign reinsurance companies, with branch offices duly registered and domiciled in Argentina.

If the existing local reinsurance market is not in a position to assume the risk due to the magnitude or the special characteristics of same, local insurance companies may contract reinsurance covering that risk with foreign companies, if they are duly authorised by the National Superintendency of Insurance (NSI) for doing so (NSI Resolution 35615).

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

The aircraft’s operator is the only party who is liable for the operation of such aircraft. The aircraft’s owner is normally the operator, unless it has transferred the capacity as operator to a third party and the respective contract is registered with the Aircraft Registry. If the contract is not registered, both the owner and the operator will be jointly and severally liable for any damages the aircraft operation may cause (Aeronautical Code, sections 66 and 67).

The lease contract transfers the capacity of owner from owner or lessor to lessee if the contract is duly registered with the Aircraft Registry (Aeronautical Code, section 68; Civil and Commercial Code, sections 1234 and 1243).
So, if there is a lease contract registered with the Aircraft Registry neither the owner, nor lessee or financier will be liable for the operation of the aircraft or the activities of the operator (lessee).

**33. Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?**

No. Under Argentine law, strict liability only applies to damages caused by an aircraft to third parties on surface, and the aircraft operator is the only party liable for these damages (Aeronautical Code, sections 155–162 and 170–174).

**34. Are there minimum requirements for the amount of third-party liability cover that must be in place?**

Yes, there are minimum requirements with respect to insurance for damages to third parties on surface. The operator is liable for damages caused in each accident by aircraft to third parties on surface up to the limits based on the weight of the aircraft, and it must contract an insurance to properly cover these damages. In case of mid-air collision to another aircraft, the operators of all aircraft involved in the accident will be jointly and severally liable for damages caused to third parties on surface with the same mentioned limitations and an insurance to cover these damages must also be contracted (Aeronautical Code, sections 155, 160, 170, 174 and 192). As mentioned in answer to question 1, Argentina also ratified the 1952 Rome Convention and the 1999 Montreal Convention.
Overview

1 To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Belgium has ratified the following conventions:

- the 1933 Rome Convention for the unification of certain rules relating to the precautionary arrest of aircraft. The convention was ratified by law of 11 September 1936 and became effective in Belgium on 24 February 1937;
- the 1944 Chicago Convention on international civil aviation. The convention was ratified by the law of 30 April 1947 and came into effect on 2 December 1948; and
- the 1948 Geneva Convention on the international recognition of rights in aircraft was ratified in 1993. The Convention entered into force on 20 January 1994, however, no implementation measures have been taken and, as a consequence, rights in aircraft cannot be registered in any public registry.

Belgium has not ratified the Cape Town Convention on International Interests in Mobile Equipment.

Belgium is a party to the New York Convention of 1958. The Convention entered into force on 25 November 1975. Belgium has made the reciprocity reservation (article I(3) of the Convention), and therefore Belgian courts will apply the New York Convention only to awards made in the territory of another contracting state.

2 What is the principal domestic legislation applicable to aviation finance and leasing?

The contract of leasing is not governed by any special provision of Belgian law.

A Royal Decree of 1967, concerning the status of companies offering financial leasing, contains a definition of what should be considered as a finance lease. To be considered as a finance lease under Belgian law, the contract must concern equipment exclusively used by the lessee for its professional needs. The equipment must be bought by the lessor in order to lease it to the lessee and the term of the lease should match the expected life span of the equipment. Moreover, the contract should provide for a purchase option in favour of the lessee at lease end and for a value that should match the expected residual value of the equipment at lease end.

3 Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

The Belgian International Private Law Code provides that rights in rem over an aircraft registered in a public registry are governed by the law of the state where the registration has taken place.

Under Belgian law, the parties to a sale agreement may freely choose the law applicable to the sale. No special formalities (such as registration in public registries) are required to complete the sale, and the parties are therefore free to choses the applicable law to the sale of the aircraft. However, Belgian law will determine if the aircraft can be sold, and the type of rights that should be transferred to the buyer.

As regards security over aircraft, the only form of valid security over a Belgian registered aircraft is a Belgian law pledge. It is highly unlikely that Belgian courts would recognise and enforce an English law mortgage over a Belgian registered aircraft.

4 How is title in an aircraft transferred?

Under Belgian law, there are no special formalities to be fulfilled in order to transfer title over an aircraft. Belgian law does not even require that the contract of sale be in writing.

However, a sale agreement is usually concluded between the parties. If the parties have not agreed otherwise, title is transferred and the sale is enforceable between the parties as soon as they have reached an agreement on the object of the sale and on its price, even if the aircraft has not yet been delivered or the price paid.

Most aircraft sales in Belgium are documented by an acceptance certificate or a bill of sale. However, under Belgian law these documents are not necessary.

5 What are the formalities for creating an enforceable transfer document for an aircraft?

Under Belgian law, a sale agreement does not need to be in writing to be valid and enforceable. However, a written document is needed as evidence of the agreement reached.

In case of litigation, and if Belgian courts are competent, they may require that the relevant agreement be translated in the language of the procedure, which could be French, Dutch or German depending on the competent Belgian court.

6 Identify and describe the aircraft registry.

The Belgian aircraft registry is an operator registry. The owner of the aircraft does not appear on the registry or on the registration certificate.

Aircraft used in private or commercial operations are registered under the name of the operator. No specific engine registry is available in Belgium.

We are not aware of any well-used 83-bis arrangements in place between Belgium and other jurisdictions.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

Aircraft are registered under the name of the relevant operator or the owner if this is the same as the operator. In order to register an aircraft, the operator must file several documents with the Belgian Aviation Authority to prove its title (ownership or lease) over the aircraft.

Even though these documents are needed for registration, they are not, strictly speaking, registered in the aircraft registry. The Belgian Civil Aviation Authority only issues a registration certificate under the name of the owner. The Belgian CAA does not issue any declaration or other form of acknowledgement of the identity of the owner, even if they are in possession of the relevant purchase or lease agreement.

As a general rule, the Belgian Civil Aviation Authority will only register aircraft owned by European citizens or companies having a domicile in
Belgium; or aircraft leased, under a finance lease, by a European citizen or a company domiciled in Belgium; or an aircraft leased, under an operating lease, for a term of at least six months.

There are currently no other registries where the right of ownership or the lease of an aircraft or an engine may be recorded in Belgium.

8 Summarise the process to register an ownership interest.
In order to register an aircraft in the Belgian registry, the operator (or the owner if the owner will operate the aircraft) must fill in a form available on the website of the Belgian Civil Aviation Authority, and provide the same authority with the following supporting information and documents:
- a full description of the aircraft and its habitual base;
- if the applicant is the owner or the lessee of the aircraft;
- identification of the applicant and, in case of a physical person, a copy of his or her identity card or, in case of a company, a copy of its articles of association;
- evidence of title on the aircraft (a copy of the invoice, the lease agreement, etc);
- a DL3 certificate showing that the aircraft has been duly imported into Belgium;
- if the aircraft was previously registered abroad, the deregistration certificate from the country of previous registration; and
- evidence of payment of the relevant administrative fee (a nominal amount).

Registration may be completed in a very short time if all of the documents are in order. The applicant usually liaises with the Belgian CAA in advance of delivery and, if all of the documents have been received in an appropriate form, registration is usually completed on the same day as delivery, or at the latest on the subsequent day.

The theory of accession exists in Belgian law, but it was created for, and is mainly applied to, real estate cases. We are not aware of any case law in Belgium considering that an engine accedes the airframe of another owner when it is installed on it. However, we cannot exclude that the accession theory may be applied to engines in Belgium. This is why, in practice, parties affix plates on the engines and enter into recognition of rights agreements or similar cooperation agreements in relation to engines.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?
The Belgian registry is not an ownership’s registry, but an operator’s registry. Registration in the Belgian aircraft registry has no effect on the underlying title.

If the owner and the operator are the same person, and the aircraft has been registered in the name of the owner, the registration certificate may be used as supporting evidence of ownership, but additional evidence will be needed to support any claim in this respect.

10 Summarise the process to register a lease interest.
It is not possible to register a lease interest in Belgium.

A copy of the lease agreement will usually be provided to the Belgian Civil Aviation Authority in order to proceed with registration, but the filing of the lease with the Aviation Authority cannot be considered as a registration.

11 What is the regime for certification of registered aviation interests in your jurisdiction?
A Belgian registration certificate contains information about the aircraft and about the operator. Until a few years ago, the Civil Aviation Authority accepted that the name of the lessor or the owner be indicated on the registration certificate. This is no longer possible.

The certificate does not contain any pledge or mortgage details for the aircraft, and no separate engine certificate is issued.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?
Only the operator is authorised to deregister an aircraft registered with the Belgian registry. The aviation authority does not usually give notice to the lessor or the mortgagee, as they do not appear on the registration certificate.

However, the law on air navigation provides that an aircraft is automatically deregistered from the Belgian registry if the relevant lease agreement is terminated. In such a case, the aviation authority must notify the operator. A deregistration certificate is delivered by the aviation authority to any interested party.

13 What are the principal characteristics of deregistration and export powers of attorney?
It is market practice to grant lessors or owners a deregistration power of attorney for Belgian registered aircraft. Various types of deregistration powers of attorney are possible, but as a general rule they grant to the lessee or the owner the possibility to deregister the aircraft from the Belgian aircraft registry, and to export the aircraft in case of default of the lessee.

Under Belgian law, a power of attorney, although expressed to be irrevocable, may nevertheless be revocable in certain circumstances including bankruptcy, going into administration or judicial reorganisation of the principal, and the powers of the attorney may be limited in cases of conflict of interest with the principal.

The validity of a deregistration power of attorney is, moreover, subject to Belgian law on air navigation, and in particular to the provisions of the law (relating to the application for registration) which explicitly enumerates the persons authorised to apply for registration (and deregistration) of an aircraft.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.
Belgium has not ratified the Cape Town Convention.

Security
15 What is the typical form of a security document over the aircraft and what must it contain?
Under Belgian law, the only available form of security over a Belgian-registered aircraft is a Belgian pledge.

The relevant pledge agreement may be concluded in English, and cannot be registered in any public registry.

For a Belgian pledge to be enforceable, the pledgor cannot be in possession of the asset (the ‘dispossession requirement’). This means that, in case of a loan coupled with a pledge, the borrower or owner of the aircraft cannot grant a pledge over the asset. The structure which is usually used is that of a loan to a special purpose vehicle (SPV) that then leases the aircraft to the operator. The SPV will grant a pledge in favour of the lenders, and the operator will agree to act as third party pledge-holder. This structure requires the drafting of an additional document which is a triparty agreement among the pledgor, the pledgee and the third party pledge-holder.

The law on security interests over movable goods has recently been changed in Belgium. The new legislation was meant to come into effect by 1 December 2014. However, new legislation has postponed the date of entry into force of this new regime until 1 December 2017. The new regime introduced by the law provides that a pledge over a moveable asset may be perfected without the need for dispossession. Instead of the dispossession, a Belgian pledge will now need to be registered in a national electronic registry, and therefore the owner of the pledged asset could also be the pledgor.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?
There are no special documentary formalities for the creation of a pledge over an aircraft.

However, as soon as the new electronic national registry becomes operational, pledges registered in such registry (or pledges meeting the dispossession requirement) will be enforceable.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties?
Summarise the process to register a mortgage interest.
Under Belgian law, it is currently not necessary to register the pledge agreement with any registry. However, as soon as the electronic national registry becomes operational, pledges should be registered there.
18 How is registration of a security interest certified?

This is currently not applicable in Belgium. As regards the future creation of an electronic national registry, the law indicates that future implementation rules shall determine the applicable formalities for registration.

19 What is the effect of registration as to third parties?

Not applicable.

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Under Belgian law, the only asset-based security available over an aircraft is a pledge. The structure used is that of a triparty agreement where the operator or lessee of the aircraft acts as a third party pledge-holder.

Belgian law does not recognise the concept of trust as a legal institution under domestic law. However, the possible recognition of a trust governed by foreign law must be reviewed on the basis of Belgian private international law rules, and therefore Belgian courts will recognise a foreign trust of this is valid under its applicable law. Under Belgian private international law, the trust is governed by the law chosen by the parties. Such law determines the rules applicable to the trust, the interpretation of the trust and its administration as well as the rights and obligations linked to its administration, the effects of the trust and its termination.

21 What form does security over spare engines typically take and how does it operate?

Two main types of security are available over spare engines: a pledge and a retention of title. As regards the object of the security, the parties are free to identify it and describe it. This entails that a pledge agreement must identify the asset over which it is created. If the description of the scope of a pledge over an aircraft does not include the engines, then they are not subject to the same pledge, which will only cover the airframe.

Given the current applicability of the dispossession requirement, it is quite rare to see engines pledged separately from the airframe. However, this may change with the coming into effect of the new law on security interests on moveable goods.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

Self-help remedies are not allowed under Belgian law. If the lessee does not voluntarily release possession of the aircraft, the lessor or lender will have to start court proceedings to obtain interim measures and to reposess the aircraft.

In our experience, the most common procedure to repossess an aircraft if the lessee does not cooperate is to proceed with a conservatory attachment and appointment of a custodian. Usually a court order is obtained after the lessee or lessee’s representative is notified by the lessor or lender. The Custodian (‘l’aide’ or ‘garde’) will then exercise the measure of repossession.

The attachment may be obtained by unilateral request. Usually a custodian is appointed at the same time. The custodian will ensure that the aircraft cannot be used and is properly maintained during the time necessary to obtain an order of repossession.

The attachment and appointment of a custodian may be obtained within a couple of days.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

Under Belgian law, the main security interest over an aircraft is a pledge. Under current applicable law, a pledge only gives to the pledgee the right to claim part or all of the proceeds of the sale of the aircraft. Under the new law on security interests on moveable goods, a pledge will give the right to the pledgee to sell or to repossess the aircraft.

In order to enforce a Belgian pledge, after having given formal notice to the pledgor, the pledgee must apply to the president of the competent court to obtain the authorisation to sell the aircraft. This application must be notified to the pledgor, who may submit any defence it might have to the competent court. Once a decision is taken, the pledgee may proceed with the public sale of the aircraft.

With the coming into effect of the new law on pledges, this entire procedure may become obsolete. Indeed, under the new law (see ‘Update and trends’), the pledgee is authorised to sell or lease the aircraft without having recourse to a court proceeding. If this has been agreed in the pledge agreement, the pledgee may also repossess the aircraft.

The law provides that the pledgee must act in good faith and in a commercially reasonable manner. This means that, at least for the first implementation of the law, there might be court cases brought by the pledgor to stop the execution on the ground that the repossession of the aircraft has not been done in good faith or in a commercially reasonable manner. This type of litigation might then diminish as the case law better determines the cases where a repossession is considered to be made ‘in good faith and in a commercially reasonable manner’.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

If an aircraft is owned by a third party and then leased to the lessee, the aircraft will not be considered as part of the estate of the lessee and therefore, and as a general rule, creditors of the lessee will not be able to enforce their claims against the aircraft. The same applies to a pledge over an aircraft as, in order to respect the dispossession requirement, the pledgor is usually not the owner of the aircraft.

There are, however, exceptions where creditors of the lessee or pledgor may have a lien or a detention right over the aircraft. These are the cases where a right of detention is granted to the landlord of the hangar where the aircraft is stored, and to the repairmen who have carried works over the aircraft.

In both cases, the landlord and the repairmen may retain the aircraft until their debts have been paid. In order to be allowed to exercise a detention right, it is not necessary that the debtor be the owner of the aircraft. However, the landlord or the repairmen must be in good faith, in other words they must believe that the debtor had the power to conclude an agreement that could give rise to a detention right.

Moreover, in order to exercise a detention right, the claim of the landlord or the repairmen and the asset must be closely interconnected. There is a risk, however, that when works have been carried out on various aircraft on the basis of a global fleet maintenance agreement, the detention right could be exercised on a particular aircraft until outstanding payments relating to another aircraft are settled.

Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Lease rentals and loan instalments paid by a lessee or a borrower to lessors or lenders who are not tax residents of Belgium are, in principle, subject to withholding tax of 25 per cent. However, several exceptions are available under applicable double tax treaties concluded by Belgium with the country where the beneficiary of the payment has its habitual residence.

Belgian VAT is generally applicable to lease rentals and to the sale of an aircraft, when the aircraft is located on Belgian soil or in Belgian airspace. However, if the buyer or lessee is an airline carrying cargo or passengers chiefly on international routes, they will benefit from a VAT exemption and the sale or the lease rentals will not be subject to VAT.

The current rate of Belgian VAT is 21 per cent. In case of a purchase by a buyer that does not benefit from VAT exemption, delivery of the aircraft usually takes place outside of Belgium and the sale agreement is governed by the law of a country that allows transfer of title to occur upon delivery and not upon signing of the sale agreement.

Lease or loan documentation frequently contains gross-up clauses. These clauses are contractual obligations of the lessee or the borrower, and generally not enforceable against third parties such as tax or VAT authorities.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Belgium applies European law concerning free movement of capitals, as well as European rules on anti-money laundering.
The most relevant topic in Belgian aviation finance and leasing is the new legislation on security interests over aircraft and engines. The most important element of such new legislation was the creation of a National Pledge Register, an electronic, online filing system where security interests could be created by simple registration. The new law was meant to come into force on 1 December 2014, however, the National Pledge Register has not yet been created. On 20 November 2014, the Belgian parliament approved a new law that postponed the coming into effect of the new legislation on security interests from 1 December 2014 to 1 January 2017, unless the National Pledge Register should be finalised before such date.

The new regime for pledges over moveable goods, once such regime would come into effect, opens the doors to new ways of structuring aircraft finance deals. First of all, the law eliminates the dispossessory requirement that meant that Belgian pledges over aircraft were seldom used. A Belgian pledge will now be perfected by simple registration in the National Pledge Register.

Payments and transfers within Belgium and with foreign countries do not require any prior authorisation. Transactions may be executed in euros as well as in other currencies.

As regards exchange controls, in 1944 Belgium and Luxembourg set up the Belgian-Luxembourg Economic Union (BLEU) and the related Luxembourg Exchange Institute (BLEI) for foreign exchange control purposes. Until 1990, the year when the last foreign exchange control was abolished, the BLEI gathered data that were used to draw up the balance of payment statistics of the BLEU. As of 2002, when the BLEU was integrated within the European Monetary Union, Belgium and Luxembourg must provide separate balance of payments data, and the BLEI has been abolished. Its statistical function has, however, been taken over by the National Bank of Belgium.

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Parties to a leasing or loan agreement may freely fix the applicable rate in case of default of the lessee or borrower. However, under Belgian law, Belgian judges may reduce the applicable rate if this rate considerably exceeds the damage suffered by the lessors or lenders. As this is a mandatory rule, if a contract governed by a foreign law is judged by Belgian courts, they may apply this rule irrespective of the applicable contractual law.

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Aircraft used by airlines carrying cargo or passengers chiefly on international routes may be imported into Belgium free of customs duties. Compliance with customs formalities is, however, required. Compliance with customs duties is evidenced by the issue by the Ministry of Finance of a DL2 form in respect of the relevant aircraft. This form should be produced in order to register the aircraft with the Belgian registry.

If customs duties are due, the customs authorities will have recourse against any of the parties involved in the importation of the aircraft into Belgium. These include the owner, the lessor, the lessee, the holder and the consignor or consignee of the aircraft.

Insurance and reinsurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There are no legal requirements in Belgium that insurances be placed with insurers incorporated in Belgium. However, the insurance of Belgian-registered aircraft may be exclusively placed with insurers who are authorised to sell insurances in Belgium, namely Belgian companies, foreign companies acting from a branch in Belgium or EEA companies. The insurance may not be placed with a non-EEA insurer unless such insurer acts through a Belgian branch.

As regards reinsurance, this may be placed anywhere. However, non-EEA companies may only offer reinsurance in Belgium if they have notified the Belgian Financial Services and Market Authority (FSMA), and they have been registered for this purpose with the FSMA.

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Under Belgian law, reinsurance does not create any legal relationship between the insured and the reinsurer. Therefore, in principle, the insured cannot seek payment of indemnity from the reinsurer. Legal scholarship, however, seems to be preferable to the option of including cut-through clauses, enabling the insured to bring an action against the reinsurer in the event of insolvency of the insurer.

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

No. Assignment of reinsurances is usually provided in Belgian leasing and finance transactions.

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Except for specific cases listed by the law (for example, the liability of the parents for acts committed by their children), Belgian law does not have a general principle of vicarious liability.

The lessor or owner may be held liable for damages caused to third parties by its own actions or inactions on the basis of general principles of tort and extra-contractual liability. To be held liable, the lessor or owner must have committed a fault that caused damage to a third party.

The lessor or owner may also be held liable for any damages caused by the aircraft when it was in their custody.

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

There are two main types of strict liability that could be of interest in aircraft leasing transactions.

The first one is linked to the strict liability regime for ground losses. Indeed, Belgium is a contracting state to the Rome Convention of 7 October 1952, on Damage Caused by Foreign Aircraft to Third Parties on the Surface.

Under such Convention, as applied in Belgium, the operator of an aircraft is liable for damage caused by an aircraft in flight or for things or persons falling therefrom. The registered owner of the aircraft is presumed to be the operator and is liable as such unless, in the proceedings for the determination of its liability, it proves that some other person was the operator and, in so far as legal procedures permit, takes appropriate measures to make that other person a party in the proceedings.

If the person who was the operator at the time the damage was caused did not have the exclusive right to use the aircraft for a period of more than 14 days, dating from the moment when the right to use commenced, the person from whom such right was derived shall be liable jointly and severally with the operator, each of them being bound under the provisions and within the limits of liability of the Convention.
The second ground of strict liability is product liability. Under Belgian law, the manufacturer bears strict liability for defective products. According to the law, a product is deemed to be defective when it does not offer the level of safety one can legitimately expect from it. If the manufacturer is based outside the EU, this strict liability will also bear on the importer of the aircraft. Article 4, section 1 of the law describes the ‘importer’ as the person who, within the course of its economic activity, ‘imports’ the product within the EU in order to sell or lease it.

However, what is actually meant by ‘importing’ is not defined by this law. One could perhaps look at the definition of the concept for the purpose of import formalities, set out in the customs and VAT regulations, and how this would apply in the particular circumstances. According to these regulations, it seems that the owner or lessor must be regarded as the importer. However, there is an argument to the effect that the objective of article 4, section 1 is to impose liability on an entity established within the EU whenever the manufacturer is outside the EU and thus potentially out of reach for liability claims. The notion of ‘importer’ should thus be interpreted as referring to the first entity based in the EU which brings the goods within it. In this interpretation, the importer should be the operator based in the EU.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?
Belgium is bound by the provisions of European Regulation 785/2004 on insurance requirements for air carriers and aircraft operators (accidents with respect to passengers, cargo and third parties), and applies the minimum insurance requirements provided in such regulation.
Brazil

Renata Iezzi
Basch & Rameh

Overview

1 To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Brazil is a signatory to the Cape Town Convention (2001). At present there is some controversy over the effective date of the Cape Town Convention, which may have been over 1 March 2012, or 15 May 2013. The Brazilian regulations concerning the use of irrevocable deregistration and export authorisations (IDERAs) and filings of international interests with the International Registry were not promulgated until late March 2014. Consequently, many of those two features of the Cape Town Convention were not effective until that time. At present, no additional regulations or rules are needed to complete implementation of the Cape Town Convention, however, owing to the relatively new nature of the Cape Town Convention there are virtually no precedent cases of its use in Brazil. See question 14 for a description of the precedent uses of IDERAs during 2014.

Brazil was also a signatory to the Chicago Convention (1944) and the Geneva Convention (1948). Brazil is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

Brazil was a signatory to the Rome Convention (1939), however, when Brazil approved the Cape Town Convention the Rome Convention approval was superseded.

2 What is the principal domestic legislation applicable to aviation finance and leasing?

Legal authority concerning aircraft finance and leasing is contained in several laws. The principal domestic legislation is the Brazilian Aeronautical Code (1986). The Cape Town Convention is the most recent legal authority approved by Brazil relevant to aircraft finance. The Brazilian Bankruptcy Law contains a special article relating to aircraft leases, which may eventually be deemed revoked or amended by the Cape Town Convention. Laws relating to foreign exchange controls and import approvals also affect aviation finance and leasing, and the Brazilian Code of Civil Procedure still governs many aspects of aircraft repossession.

3 Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Contracts that deal with rights in rem over aircraft are governed by the law of registration of the aircraft. Consequently, mortgages and bills of sale over aircraft on the Brazilian registry are governed by Brazilian law. Parties have freedom to elect the governing law of their choice for other aircraft finance agreements such as leases and purchase and sale agreements. The Brazilian judiciary will apply the terms of foreign laws provided such terms do not violate Brazilian sovereignty, good customs or public morality. Two common provisions found in leases that are usually unenforceable in Brazil under these criteria are self-help remedies and unilateral option provisions that leave determinations to the discretion of one party.

Title transfer

4 How is title in an aircraft transferred?

In most cases title to aircraft is transferred by execution and registration of a bill of sale. The Brazilian Aeronautical Registry (RAB) has a few peculiar requirements, in particular a requirement that a bill of sale be signed by the transferor, the transferee and two witnesses. Mere delivery of a bill of sale does not effectively transfer title. A bill of sale must be recorded with the RAB to transfer title.

5 What are the formalities for creating an enforceable transfer document for an aircraft?

The general rules of documentary formalities (see question 16) apply to bills of sale subject to one important distinction, which is that bills of must be notarised by a notary who has witnessed all signatures. This makes the execution of undated bills of sale virtually impossible.

Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry.

The RAB is an owner register in the sense that ownership is obtained through registration with the RAB. Any change of ownership will be effective only upon registration with the RAB. A security interest is effective only upon registration with the RAB. The RAB is occasionally referred to as an operator register because the Brazilian operator makes most applications.

The RAB maintains an engine registration book, however, entry of an engine in that book does not carry the same significance as registration of aircraft. In practice, the book is used mainly for the registration of spare engines. The RAB accepts engine contracts for registration (eg, engine leases). Engines connected with leased aircraft are rarely entered into the engine registration book.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

Ownership interests in Brazilian-registered aircraft must be registered with the RAB. Equally, aircraft leases must be registered with the RAB. There are no limitations on the type of entity that may be registered as an aircraft owner. Operators must be Brazilian, however, owners may be non-Brazilian entities. The RAB is a centralised national register for aircraft. There are no other mandatory locations for registration.

Most leases and other aviation finance documents must be registered in general notarial offices (known as RTDs or RDDs). Such registration is necessary for purposes of admissibility in courts and official offices, and for validity of obligations.

8 Summarise the process to register an ownership interest.

Ownership interests are established by registration of a bill of sale with the RAB. The applicable notarisation and consularisation requirements and costs associated therewith are described in questions 7 and 16. Title to an aircraft presumes title to the engines associated with that aircraft unless agreements expressly contain provisions that override this general principle. For aircraft already on the Brazilian register, the date of title transfer is considered the date on which the bill of sale is filed for registration with the RAB.

The RAB requires incumbrancy documents for entities that are registering bills of sale. For non-Brazilian entities selling aircraft that are already registered with the RAB, this evidentiary requirement is usually
9 What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration of title with the RAB constitutes proof of title. At any time a third party can request a certificate (a registry extract) from the RAB that will confirm the name of the owner and the holders of registered liens, and will describe all documents and agreements filed in respect of a particular aircraft such as leases. Third parties are entitled to rely on the accuracy of ownership and lien information in such certificates. Although inaccuracies in such certificates arise from time to time, the RAB will correct manifest errors on request.

10 Summarise the process to register a lease interest.

The procedure and requirements to register a lease interest are similar to the procedures described in question 8 in relation to ownership interests. Aircraft leases must be recorded with the RAB. The applicable notarisation and consularisation requirements and costs associated therewith are described in questions 7 and 16.

As with bills of sale, the RAB requires incumbency documents for entities that are registering a lease. For non-Brazilian entities selling aircraft that are already registered with the RAB, this evidentiary requirement is usually satisfied by submission of consularised power of attorney, demonstrating that the signatory in Brazil had authority to sign the lease. Unlike powers of attorney for bills of sale, which must contain express powers, general powers of attorney are usually adequate for the execution of leases.

In rare cases where leases are signed outside Brazil, the leases must be notarised and consularised as described in question 16. Most cross-border leases are signed in Brazil by attorneys acting under consularised powers of attorney.

The costs to procure 'sworn translations' and to register leases are described in question 16. In most cross-border leases, lessees usually accept the responsibility for procuring translations of leases and registering leases with the RAB and RTDs.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

There are two types of certificates of interest to financing parties: a certificate of registration and a registry extract (see question 9). A certificate of registration is the document issued to comply with article 29 of the Chicago Convention. A Brazilian certificate of registration identifies the name of the owner and the operator of an aircraft. It should be maintained on board an aircraft during operations. If an aircraft is mortgaged, a Brazilian certificate of registration will usually contain a notation that a mortgage exists, however, it will not provide details or even the name of the mortgagee.

A registry extract is a statement from the RAB confirming the name of the owner and any lienholders, and a description of all documents filed in respect of a particular aircraft. Parties can request registry extract certificates as often as they wish. There is no need for an original to be on board an aircraft at any time. In fact, there is no absolute need for a registry extract certificate to be issued at all. Financing parties usually require them because they serve as 'bring down' certificates to show the latest registration information on an aircraft and because they are more detailed than certificates of registration.

The RAB does not issue certificates of registration for engines. It is possible to obtain a registry extract certificate in respect of a spare engine that has a lease or other document filed in respect of it. Such certificates, however, certify the status of registered agreements but do not carry the same weight as certificates issued in respect of an aircraft, which actually constitute aircraft ownership evidence.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

In normal circumstances, the Brazilian operator applies for deregistration and export authorisations. The RAB will not, however, deregister an aircraft without the express written consent of the owner and any registered mortgage. The RAB rarely (if ever) gives notice to foreign owners and mortgagees. It simply does not deregister if the requisite consents are not presented with the deregistration application.

In cases of repossession it is possible that a lessor, owner or mortgagee (acting as assignee of a lessor) may need to deregister an aircraft. In such cases, the RAB will accept an application from the foreign party (owner, lessor, mortgagee) provided the applicant demonstrates that it is entitled to deregister. In the past, such entitlement has usually been demonstrated in the form of a court order; however, there have been a few cases in which the RAB deregistered an aircraft at the request of owners that did not have court orders. In some of these cases the lessees had abandoned the leased aircraft. In principle, certain export authorisations from the Brazilian tax and customs bureau are necessary, and it can be difficult for foreign owners to obtain such authorisations since they are supposed to be requested by the importer of record, which will always be the Brazilian operator.

See question 14 for a description of the 2014 precedents involving deregistration by owners using IDERA.

13 What are the principal characteristics of deregistration and export powers of attorney?

Brazilian aviation finance transactions usually require the Brazilian lessee to issue a deregistration power of attorney. Most such powers of attorney purport to be irrevocable, and there is legal authority upholding the irrevocability of powers of attorney. But the revocability issue is not entirely settled. A power of attorney would survive a bankruptcy restructuring, however, it would not survive an order of liquidation. In practice, deregistration powers of attorney have been of limited utility; however, in a few cases they have been useful. Their utility has begun to diminish with the advent of Cape Town IDERAs.

The principal characteristics of deregistration are naming the lessor or owner as the lessee’s attorney-in-fact to act with the RAB and several Brazilian agencies involved in issuing export authorisations. It is prudent to mention the agencies by name.

Deregistration powers of attorney, if executed in English, should be registered with RTDs (see questions 7 and 16 for an explanation of RTDs).

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

In Brazil’s implementation of the Cape Town Convention the use of IDERAs was approved. No leave of a court is needed to exercise rights under an IDERA.

An IDERA should be filed and registered with the RAB. The RAB will not countersign an IDERA as prescribed by the Aircraft Protocol to the Cape Town Convention, however, the RAB will mention the registration of an IDERA in a registry extract certificate (see question 11).

The RAB applies its usual filing requirements to IDERAs (those requirements are described in question 16).

The RAB began accepting IDERAs for registration in late March 2014. According to the RAB’s regulations, an aircraft will be deregistered within five business days of receipt of a request by an authorised party or its designee. The applicant must certify to the RAB that it has the consent of the holders of any superior liens. During 2014 at least four aircraft were deregistered by owners using IDERAs. None of those deregistrations arose in contested repossession cases. Court orders were not required. The RAB respected the five-business-day period stipulated in its regulations.

15 What is the typical form of a security document over the aircraft and what must it contain?

Most Brazilian security agreements take the form of a mortgage. There are some other types of Brazilian security agreements, in particular a form of document called a fiduciary sale agreement, that occasionally attract the attention of financiers; however, most lenders are more comfortable with mortgages coupled with security assignments.
As mentioned in question 3, mortgages must be governed by Brazilian law. They may be executed in English and most mortgages are executed in English. The requirement of ‘sworn translations’, described in the first bullet point of question 16 applies to mortgages.

A mortgagee under a Brazilian law mortgage is not entitled to take possession of the mortgaged asset. The traditional remedy of a mortgagee is to prompt a court to take possession of the asset, auction it and then use the proceeds to satisfy the secured debt. This remedy is unattractive due to the relatively long period of time it would take to organise an auction and also to several other unknown factors in the process, such as whether the court would conduct the auction in US dollars or Brazilian currency, and the means to remit the sale proceeds from Brazil after the auction.

Brazil has a considerable number of aircraft lease repossession cases that have had fairly favourable results for lessors, including precedents from late 2014 and early 2015. Thus it is common to include security assignments enabling a mortgagee to ‘step into the shoes’ of a lessor and repossess an aircraft as the lessor’s assignee. Security assignments typically contain notices of assignment given to the Brazilian operator and acknowledgements or consent given by the Brazilian operator to a security trustee or the ultimate creditor. The Brazilian operator will usually agree to redirect payments to a security trustee and to recognise the exercise of lease remedies by the security trustee as assignee of the lessor.

There is a possibility that with the Cape Town Convention mortgagees will be allowed to repossess aircraft in their capacity as mortgagees, and not necessarily as assignees of lessors. Since most security packages include security assignments, there may be a need to test this issue in the near future.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The following are general rules that apply to all documents being registered with the RAB and not merely security documents:

- Documents that are not written in Portuguese must be registered with a ‘sworn translation’. A sworn translation refers to a translation prepared by a licensed Brazilian translator.
- Documents that are signed outside Brazil must be consularised by the Brazilian consulate responsible for the jurisdiction where the signature has taken place. In most cases the consulates require local notarisation as a prerequisite to consularisation. In some cases the apostille of a government officer is required for consularisation. The rules of the various Brazilian consulates vary. There are a few exceptions to the consularisation rule. The main exception applicable to aviation contracts is France. Based on a bilateral treaty between Brazil and France, documents executed in France require notarisation but not consularisation.
- Documents signed in Brazil by attorneys-in-fact pursuant to notarised and consularised powers of attorney do not require consularisation.
- The RAB usually requires the signature of two witnesses on all documents being submitted for registration.
- All signatures must be notarised. There is a notarisation method that allows for signatures to be notarised after execution, without the notary actually witnessing the signature. This allows for the submission of undated documents in custody pending a closing. This simplified notarisation procedure does not apply to bills of sale.
- Documents signed outside Brazil or in languages other than Portuguese must be registered with RTDs (see question 7).

Costs to comply with these documentary requirements vary. The cost to obtain a sworn translation averages US$30 per page; however, the actual cost is based on the number of characters in the Portuguese translation of the document. RAB registration costs are approximately US$7 per page. RTD filing costs vary the most depending on the contents of the document and the jurisdiction of the RTD. The usual basis for RTD registration costs is based on the value of the document. The RTD fees are subject to ceilings and aircraft leases usually exceed the ceilings. But even the ceilings can vary, sometimes being as little as US$2,500 or as much as US$8,500.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties?

Summarise the process to register a mortgage interest.

Similar to ownership interest and lease documents, security documents creating liens over Brazilian-registered aircraft must be filed with the RAB and should be filed with RTDs to ensure admissibility. The procedures described in questions 8, 10 and 16 apply to security documents.

18 How is registration of a security interest certified?

As stated in question 11, a certificate of registration will mention that an aircraft is subject to a mortgage but will not include any details such as the name of the mortgagee. A registry extract certificate confirms the full details of all mortgages and registered liens over aircraft (see questions 9 and 11 for an explanation of a registry extract certificate).

19 What is the effect of registration as to third parties?

Registration confers priority over security interests registered subsequently unless an express agreement such as a subordination agreement is executed and establishes different priorities.

A third party interested in ascertaining the terms of a security interest may rely on a registry extract certificate (see questions 9 and 11). In addition, all of the documents registered with the RAB are in the public domain, and third parties can obtain copies when necessary.

20 How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

Security interests over aircraft are usually structured as mortgages. The concept of trusts is not recognised in Brazil, and there are no ‘Brazilian trusts’. But trusts from other jurisdictions are recognised as entities in Brazil and are frequently used to hold title or mortgage interests over aircraft registered in Brazil. Thus, many aircraft are registered in the names of owner trustees, and many mortgages are registered in the names of security trustees.

In the case of owner trustees, there is no need to register changes in beneficiaries; however, since November 2013 the RAB has required the submission of trust agreements (which must be notarised, consularised and translated as described in question 16). Although the RAB regulation does not expressly mention amendments to trust agreements, parties should consider submitting trust agreement amendments to the RAB. Trust agreements are not registered with the RAB per se. They are submitted for and retained in the RAB’s internal records.

A security trustee may hold a mortgage interest for a large group of lenders or for a changing group of beneficiaries such as new lenders without affecting the security. Loan transfers would not affect the security. The only party with registered rights as a lienholder in Brazil would be the security trustee. The lenders’ recourse against the security trustee would not be a Brazilian issue and would be adjudicated outside Brazil.

21 What form does security over spare engines typically take and how does it operate?

For purposes of encumbrances, spare engines tend to be treated in the same way as aircraft. Spare engine mortgages should be registered with the RAB and RTDs for the reasons given above in respect of aircraft mortgages.

A security interest over a financed aircraft creates a security interest over the aircraft’s engines unless the security agreement expressly includes stipulations to the contrary. Engines should be described by model and serial number in aircraft mortgages. Whether an engine is installed on the aircraft at the time of creation is irrelevant to the creation of the lien (though location may have tax consequences).

It is generally understood that the installation of an engine on an airframe does not transfer title to that engine to the owner of the airframe. Equally, the removal of an engine from an airframe does not cause any title transfer. This principle has not been tested frequently, however, there have been a few challenges to this principle in past years. In the major bankruptcy case of Varig airlines in 2005 and 2006, this principle was upheld and disputes over engine ownership did not arise (disputes over other parts did arise in that case). With the introduction of engine registrations under the Cape Town Convention, the tendency is that this principle will be fortified in Brazil.

An engine that has been encumbered though registration of a mortgage or security agreement with the RAB will cease to be encumbered when a release is filed with the RAB.

Helicopter engines require special attention due to the frequency in which they are swapped from their airframes with the intention of title swaps. The general rules applicable to fixed-wing aircraft engines apply to helicopter engines as well, however, such rules do not always coincide with the commercial agreements relating to helicopter engine maintenance.
Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

Self-help remedies are not available in Brazil, even with the advent of the Cape Town Convention. If a lessee is in default under an aircraft lease, the lessor may seek an immediate repossession order from a Brazilian judge. Based on a high court decision it is usually advisable for the lessor to give the lessee written notice of the default, even in the absence of a contractual obligation to provide such notice. In prior aircraft repossession cases filed against airwriters that were not undergoing bankruptcy reorganisation procedures, the Brazilian courts have been fairly efficient in granting preliminary injunctions placing leased aircraft in the possession of the lessor. Such orders are not the equivalent to a summary judgment since they usually do not allow the lessee to export and deregister the aircraft until after the lessee has had an opportunity to present a defence. After the presentation of such a defence the court may grant the lessor definitive possession of the aircraft. At that point, such a ruling would be roughly equivalent to a summary judgment. In short, a lessor can obtain preliminary possession in a matter of a few days. A summary judgment could be obtained in a matter of a few weeks or months, though much would depend on the lessee’s defences.

The Brazilian Code of Civil Procedure currently in force provides many opportunities for parties to file interlocutory appeals so lessees can try to slow proceedings by appealing decisions, including decisions on non-substantive issues. A new Code of Civil Procedure, which will become effective in March 2016, is supposed to will reduce the number of opportunities for filing interlocutory appeals. The reply to this question summarises a complex area of practice, and the advice of local counsel should always be sought whenever a lessor contemplates repossession.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

For the reasons explained in question 15, enforcement of security interests over aircraft in Brazil is rare. It will almost always be advantageous for the mortgagee to repossess an aircraft as assignee of a lessor then to foreclose on a mortgage in an effort to force a court-supervised sale of the aircraft. Self-help remedies are illegal, and the basic remedy a mortgagee has under a Brazilian law mortgage is to take possession of the mortgaged asset.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

According to the Brazilian Aeronautical Code, an aircraft mortgage will prevail over the ownership rights of the aircraft of the mortgagor and of any other third party, other than the following:

- court costs;
- employee credits;
- taxes;
- airport fees;
- amounts relating to emergency services to the aircraft;
- amounts paid directly by a pilot while discharging his duties when the same are indispensable for continuation of the flight; and
- amounts spent on maintenance.

Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Operating lease payments

Lease payments made to lessors incorporated in jurisdictions that are not considered tax havens under Brazilian law are subject to Brazilian income tax withheld at source (ie, in Brazil), at the rate of 25 per cent of the amount of the payment. There is a possibility that a lessee would have to withhold income tax at the rate of 15 per cent on payments of interest (eg, default interest).

Finance lease payments

The interest portion of all payments would be subject to withholding tax of 25 per cent (or 25 per cent in the case of payments to tax havens), however, there is an exemption from this withholding tax that will remain in effect until the end of December 2016. The exemption applies to commercial airlines only.

Loan repayments

There are virtually no direct loan transactions for aircraft finance in Brazil. Payments would be subject to a 15 per cent withholding tax on the interest portion of each payment (25 per cent in the case of payments to tax havens).

Title transfers

If title to a Brazilian-registered aircraft is transferred between two non-Brazilian parties, the only tax that might be applicable would be capital gains tax on the sale. Although this tax has been applicable since 2004, the Brazilian tax authorities have not sought to impose it on sales between non-Brazilian entities. There are questions concerning the jurisdiction of the Brazilian tax authorities over sales that do not involve any Brazilian taxpayer. If a Brazilian party is involved in such a sale, several taxes such as a state VAT and federal excise tax would be applicable.

ICMS and IPI

There are two taxes that might be assessed on aircraft imports. These taxes provide the responsibility of the Brazilian airlines. The airlines rarely pay these taxes as there are a number of legal methods available to avoid their assessment. One such tax is called the ICMS tax. It is a state VAT-type tax. At least two Brazilian states do not apply it to commercial aircraft imports, and in other states there are arguments that allow airlines to obtain injunctions to avoid paying the tax.

The IPI is a federal excise tax. It has a zero rate for most commercial aircraft, so Brazil’s airlines are rarely concerned with it. For helicopter operators there is no exemption and importers usually pay it, though occasionally air taxi companies are able to obtain injunctions to avoid such payment. The rate is 5 per cent for air taxi companies and 10 per cent for other importers.

Gross-up

Gross-up provision of aircraft leases and other aviation finance agreements are usually valid.

Brazilian tax is complex and the foregoing explanation is a brief summary that should be verified with local counsel.

COFINS

This is an additional tax on imports, called COFINS, which was not applicable to aircraft imports in prior years. Based on a change in law that occurred in 2013 the Brazilian tax authorities began to assess the COFINS tax on aircraft imports beginning in the last quarter of 2014. Airlines have been challenging the assessment of the COFINS tax on the importation of commercial aircraft under lease agreement. To date most airlines have been able to avoid paying such COFINS tax; however, this has been based on interim judicial rulings and not final decisions on the merits of the applicability of the COFINS tax. If and when applicable the COFINS tax would be 01 per cent of the value of an aircraft at the time of importation. The COFINS tax is due from the Brazilian importer of an aircraft.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Brazil has strict foreign exchange controls. A Brazilian aircraft lessee must register the financial terms of a lease with the Central Bank of Brazil through a computerised system called SISBACEN. The Central Bank registration in SISBACEN is commonly referred to as the ROP (financial transaction registration). The only common exception to such registration applies to leases with terms of less than 12 months. The registration usually takes three business days, though this period can vary. In normal ROP registration procedures, the operator does not need to submit the
Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

There are usury rates in Brazil; however, there are questions as to whether such rates would apply to cross-border leases or loans. At present the limits are in the region of 20 per cent per annum so the issue does not arise frequently. Several years ago the Central Bank of Brazil limited default rates to 225 or 250 basis points over the regular rate of interest in a lease, however, those limitations have not been applied in recent years.

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Generally, lessors do not incur significant costs to bring aircraft into Brazil or to export them. In amicable situations the industry standard is that the Brazilian lessee bears all import-related costs. In a repossession scenario, a lessor will incur costs that can be significant; however, those costs are not charges of government agencies. The main costs in a repossession and export are legal costs, customs broker fees, court filing fees (usually 1 per cent of the value of a claim), storage and maintenance costs. For example, in a repossession action if a lessor obtains preliminary relief but has to wait for a final decision the storage and maintenance costs will be borne by the lessor. Such costs may be contractually chargeable to the lessee, however, in an adverse repossession case recovery of those amounts from a lessee may be difficult. Lessors or owners repossessing aircraft through the courts must also post bonds, however, such bonds are not costs per se since they are returned to the plaintiff at the end of the proceedings, assuming the plaintiff prevails. There is some variation in the bond. As a general rule 10 - 20 per cent of the amount of overdue rent is typical.

Insurance and reinsurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Brazilian aircraft operators are required to place all primary insurance with Brazilian insurers and Brazilian primary insurers are required to offer 40 per cent of all reinsurance risk to reinsurers registered in Brazil on a right of first refusal basis. Currently, the Brazilian reinsurance market does not take up all of the 40 per cent risk offered to it so the effective reinsurance percentages underwritten by reinsurers outside Brazil are higher than 60 per cent.

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Cut-through clauses are valid provided the primary insurer is insolvent. In the absence of such insolvency, cut-through clauses may be deemed unenforceable.

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance are legally effective and are typically included in aviation lease and finance transactions.

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Generally operators are liable for the operation of aircraft provided the agreement assigning operational responsibility is registered with the RAB. Therefore, in the case of leased aircraft lessees (or sublessees where applicable), and not owners, are liable. In the absence of registration of the lease or operational agreement (which is rare), an owner would be presumed to be liable. If an aircraft is leased pursuant to an unregistered lease then the owner and operator would be jointly and severally liable for the operation of the aircraft.

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

As explained in question 32, parties with no operational interest are not liable for the operational consequences of aircraft. In litigious situations there is always a risk of a victim lodging a claim against an owner, lessor or financier; however, the Brazilian Aeronautical Code places operational responsibility on the operator.

Are there minimum requirements for the amount of third-party liability cover that must be in place?

The Brazilian Aeronautical Code contains minimum third-party liability requirements commonly referred to as RETA. The RETA requirements are fairly low. The US dollar equivalent varies in accordance with currency fluctuations and other factors, but is in the region of US$30,000 per person. Virtually all lease or other aviation finance contracts contain insurance requirements in line with international practices in relation to insurances. RETA cover is rarely, if ever, relied on as adequate in an aircraft finance transaction.
Canada

Donald G Gray and Jason MacIntyre
Blake, Cassels & Graydon LLP

Overview

1  To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Cape Town Convention
Canada, and each of its 13 provinces and territories, have passed legislation implementing the Cape Town Convention and the Aircraft Protocol (collectively, the CTC). Canada deposited ratification instruments for the CTC, incorporating all OECD/Aircraft Sector Understanding qualifying declarations, such that the CTC took effect federally and in Ontario, Quebec, Alberta, Saskatchewan, Nova Scotia, British Columbia, Manitoba, the Northwest Territories and Nunavut on 1 April 2013, in Newfoundland and Labrador on 3 May 2013, and in Prince Edward Island and Yukon on 1 October 2014. The remaining province, New Brunswick, passed its implementing legislation in June of 2014. It is anticipated that Canada will deposit supplementary declarations with UNIDROIT soon, with the CTC taking effect in New Brunswick six months after such deposit.

Other major aviation treaties
Canada has ratified the Chicago Convention (1944) as of 13 February 1946, but is not a party to the Geneva Convention (1948) or the Rome Convention (1958).

Canada, however, has an interest in the recent developments that will replace the Rome Convention. On 2 May 2009, two conventions were adopted (although not yet implemented domestically) by Canada:
- the Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft; and
- the Convention on Compensation for Damage Caused by Aircraft to Third Parties.

New York Convention (1958)
Canada ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) on 12 May 1986. Pursuant to the Convention, application may be made to any superior, district or county court to seek recognition and enforcement of a foreign arbitral award.

2  What is the principal domestic legislation applicable to aviation finance and leasing?

Canada is a federal state consisting of a central federal government, 10 provincial and three territorial governments. Under Canada’s constitution, international and interprovincial transportation, aeronautics and bankruptcy and insolvency fall within federal jurisdiction, while property and civil rights remain the responsibility of the provinces. As such, there is not one piece of principal domestic legislation applicable to aviation finance and leasing.

The laws of the Province of Quebec, in respect of property and civil rights, are derived from French civil law, while the laws of all other Canadian jurisdictions are based upon English common law. We have focused on the laws of the provinces of Ontario and Quebec and the federal laws of Canada applicable therein.

As the Geneva Convention is not in force in Canada, the filings or registrations necessary or advisable in Canada in order to ensure the validity, priority or enforceability of a lease, or to perfect the interests of any holders of security over an aircraft itself, are as follows:
- International Registry. The ‘international interests’ created under the financing documents must be registered.
- Personal Property Security Act (PPSA)/Civil Code of Quebec (CCQ). The registration (publication in Quebec) disclosing the leasehold or security interests of the lessor and relevant secured parties with the applicable provincial personal property security register should be made. Provincial registrations perfect security markets in collateral that is not defined as aircraft objects in the CTC.
- Uniform Commercial Code (UCC) Requirement for Foreign Air Carriers Operating to the United States. Under the US UCC system and US Transportation Code, it is our understanding that air carriers licensed as ‘foreign air carriers’, which includes most Canadian airlines, are ‘deemed’ located at their offices for Federal Aviation Administration (FAA) service (in most cases the District of Columbia). Accordingly, US law, in conjunction with the Canadian conflict of laws rules, requires that a US UCC filing be made in support of any PPSA/CCQ filings.
- The Canadian Civil Aircraft Register (CCAR). While the Aeronautics Act (Canada) does not deal with perfection issues, it does affect aircraft finance and leasing transactions. If there is a change in the basis for the operator’s legal custody and control of the aircraft, a copy of the bill of sale or other evidence of such change must be registered with Transport Canada Aviation (TCA) with a notice of the change. These registrations are mandatory and must be effected within seven days of such change.

The CTC will be applicable if the debtor is ‘situated’ in a contracting state (as defined in the CTC) or if the aircraft is registered in a national aircraft registry of a contracting state. The provincial conflict of laws rules refer to the laws of the location or domicile of the debtor or air carrier for the proper perfection of security interests in mobile assets such as aircraft. Accordingly, only the registration in the province of the location or domicile of the carrier would be strictly required.

Applying these conflict of laws rules to a mortgage given by a foreign lessor to its financiers on an aircraft leased to a Canadian airline, Canadian law states that it is necessary for the mortgage be properly perfected or protected in the location or domicile of the lessor (as debtor). However, we consider it advisable to also register notice of such interests in the relevant provincial personal property register of the Canadian airline.

3  Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

No, there are no restrictions on choice-of-law clauses, subject to the typical assumptions of the choice being bona fide and not contrary to public policy.

Title transfer

4  How is title in an aircraft transferred?

The delivery of a bill of sale by a seller to a purchaser is an effective method to transfer title to an aircraft to such purchaser provided that such mode would be effective under the laws chosen to govern the bill of sale and all formalities required under the laws of the lex situs of the aircraft on delivery have been observed. No further instrument or act is necessary under the laws of Canada to effect or ensure such transfer.
5 What are the formalities for creating an enforceable transfer document for an aircraft?
There are no specific formality requirements for the execution and delivery of a bill of sale under Canadian law.

**Registration of aircraft ownership and lease interests**

6 Identify and describe the aircraft registry.
The CCAR is the only federal registry that provides for the registration of aircraft in Canada. Air carriers operating under the authority of the Department of Transport Canada (TCA) must register all aircraft owned or leased in Canada with the CCAR. The registration of an aircraft with the CCAR is necessary for the enforceability of any rights of an owner or mortgagee before it deregisters an aircraft.

7 Can an ownership or lease interest be registered, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry?
No provision is made for the registration of aircraft title or security interests in the CCAR. There is no separate Canadian register for aircraft title or mortgages or other interests, other than the quasi-title registration provisions for 'contracts of sale' under the International Registry. See questions 10 and 17 for a discussion on provincial registrations.

8 Summarise the process to register an ownership interest.
Except for the filing of the bill of sale as a 'contract of sale' under the International Registry, there is no other method for registering an ownership interest.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?
Not applicable.

10 Summarise the process to register a lease interest.
A lease must be filed with TCA to evidence the Canadian operator's legal custody and control of the aircraft. A lease is defined in the regulations as an agreement in respect of the operation of an aircraft for hire or reward that specifies a commencement and termination date and, during the term of which, the lessee has legal custody and control and the right to exclusive possession and use of the aircraft. The regulations require that the responsibility for the airworthiness and maintenance of the aircraft must be clearly vested in the lessor during the term of the lease and that the lease is a dry lease. TCA, as the CCAR, is the entity entitled to apply for deregistration of the aircraft.

11 What is the regime for certification of registered aviation interests in your jurisdiction?
A TCA Certificate of Registration notes the aircraft type, serial number and registration marks as well as the 'registered owner' of the aircraft, being the Canadian operator. The certificate states on its face that it is not a certificate of title and such 'registered owner' notation does not bestow any ownership interest on the Canadian operator. The certificate does not reflect ownership or security interests in the aircraft.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?
As the CCAR is an operator registry, only the operator is entitled to deal with TCA in respect of the aircraft. As such, TCA does not consider the interests of an owner or a mortgagee before it deregisters an aircraft. TCA will not give notice to any party other than the operator before deregistering an aircraft. If, however, an operator has filed with TCA in respect of the aircraft, then TCA will deal with the party listed in such IDERA. See question 14.

13 What are the principal characteristics of deregistration and export powers of authority?
Following Canada's adoption of the CTC, the IDERA is the document necessary for an owner or mortgagee to cause deregistration of the aircraft. See question 14.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.
An owner or mortgagee who has an IDERA signed by the operator and filed with TCA is the entity entitled to apply for deregistration of the aircraft from the CCAR. The IDERA cannot be revoked without the consent of the named beneficiary, and consent of the operator need not be sought before the beneficiary exercises its rights thereunder. Pursuant to the terms of the CTC, TCA is obliged to expeditiously cooperate with the beneficiary in exercising such deregistration remedies. The IDERA must be filed with, and acknowledged by, TCA, and does not need to be translated, notarised, legalised or apostillised.

**Security**

15 What is the typical form of a security document over the aircraft and what must it contain?
A typical English-law or New York-law mortgage would be sufficient to create a security interest over a Canadian-owned aircraft. For common law jurisdictions, there are no unusual terms required in the document itself and the economic terms of the transaction need not be disclosed therein. If the debtor is domiciled in Quebec, the security document should take the form of a conventional moveable hypothec that secures bonds or other titles of indebtedness and should be in favour of a fille de pouvoir (roughly equivalent to a security trustee). The hypothec must state a maximum secured amount, which is typically an amount well exceeding the maximum underlying secured obligations and potential enforcement costs.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?
Except for a deed of hypothec, there are no documentary formalities for the execution and delivery of a security document over an aircraft from a Canadian debtor. A deed of hypothec should be notarised, governed by Quebec law and, if written in the English language, contain a French-language clause confirming that the deed is to be written in English.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.
The security document itself cannot be filed with TCA. Where the debtor is located or domiciled in Canada, the filings set out in question 10 in respect
of leases in the International Registry and the PPSA/CCQ should also be made for the security document.

18 How is registration of a security interest certified?
Following registration, a verification statement will be issued by the applicable PPSA/CCQ registry to ensure that the registrations are included in the results of a search on the debtor, equipment or both (as applicable).

19 What is the effect of registration as to third parties?
A security interest that is properly perfected and registered as set out in questions 10 and 17 will take priority over all other subsequently registered consensual security interests in an aircraft. It is therefore necessary to conduct searches in the International Registry and any applicable PPSA/CCQ registry prior to the consummation of a transaction to ensure there are no prior registrations affecting the aircraft. See question 24.

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?
Although Canada is a party to the Hague Convention on Trusts 1986, it has not been made applicable in, among other jurisdictions, the provinces of Ontario and Quebec. Nevertheless, the key principles in respect of trusts apply in Ontario and have been accepted into Quebec civil law. If a security trustee has been appointed to hold the security for the benefit of a pool of beneficiaries, changes to those beneficiaries should not impact on the grant of the security itself. A change in a security trustee or lessor by way of an assignment requires the assignment of any filings made under the International Registry, the PPSA/CCQ and the UCC to the new creditor. New filings should be made in the International Registry if such assignment creates a new international interest. A properly perfected security interest encumbers title to the aircraft itself, rather than simply creating a security interest in proceeds.

21 What form does security over spare engines typically take and how does it operate?
The form of security document or lease of a spare engine would contain no legally substantive differences from the documents used in aircraft financing transactions. The security interest over an aircraft extends to the engines, including when such engines are off-wing to the extent stated in the grant of the security interest itself.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?
Under the CTC, a lessor may, following a default, take possession or control of the aircraft in accordance with the terms of the lease. This right may be exercised without the need for court proceedings, but must be exercised in a commercially reasonable manner in conformity with the lease. Under the Ontario PPSA, self-help or repossession is permitted without court approval if it is pursuant to the terms of the lease. However, the act of physically seizing the aircraft cannot be done through the use of excessive force. If the lessee refuses to cooperate, or access to the aircraft or other equipment cannot be obtained, a receiver, court order or both can generally be quickly obtained. In Quebec, self-help is not ordinarily permitted under the CCQ. However, the adoption of the CTC overrules this position in relation to aircraft objects.

If the lease is in substance a conditional sales contract, containing a right to purchase or creating a security interest, the common law right to take possession of the aircraft is restricted by statute in some provinces. Subject to the self-help provisions of the CTC which should prevail to the extent applicable, only a civil enforcement agency may seize the aircraft in the event of default.

If a lessee initiates insolvency proceedings, the lessor’s rights to seek repossession of the aircraft will be subject to the 60-day stay period under Alternative A of the CTC. During such period, the lessee is obliged to preserve the aircraft and maintain it and its value in accordance with the lease. Unless the lessee then cures all defaults (other than a default constituted by the commencement of the insolvency proceedings) and agrees to perform all future obligations under the lease, the lessee would be required to return the aircraft to the lessor at the end of such 60-day period.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?
The responses outlined in question 22 in respect of a lease would apply to other security interests.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?
Canadian law provides for certain liens and possessory rights, or rights of seizure or detention in favour of third parties.

Aviation authority fees
The various Canadian airport authorities and NAV Canada have the statutory authority to impose fees on aircraft operators. The authorities’ seizure and detention remedy stems from these rights. Most major Canadian airports are governed by the Airport Transfer (Miscellaneous Matters) Act (Canada) (ATA). The ATA permits airport authorities to impose and collect charges for landing fees, terminal fees and airport use fees. Similarly, NAV Canada is governed by the Civil Air Navigation Services Commercialization Act (Canada) (CANSCA), which provides it with the authority to impose charges on an aircraft operator for the availability or provision of air navigation services. In general, the liability for charges under both statutes is limited to the person that incurred the charges. While neither the ATA nor CANSCA grants the authorities the right to place a formal lien or sell an aircraft for non-payment of aviation authority charges, the authorities do have the right to obtain, on an application to the applicable court on an ex parte basis, a seizure and detention order in respect of any aircraft operated by the debtor aircraft operator, as long as the subject aircraft is ‘operated’ by the debtor at the time of the seizure. Any one aircraft can be seized and detained for the total outstanding amount of the entire fleet operated by such debtor (the fleet lien or sister ship rule). The remedy can be maintained until full payment is received, regardless of whether the operator is the legal owner of the aircraft.

Customs duties
Aircraft can be detained, and in some cases forfeited, for breaches of the Customs Act (Canada) or its regulations. Where a customs officer believes on reasonable grounds that the Customs Act or its regulations have been contravened in respect of goods, he may seize the goods or any conveyance that was made use of in respect of the goods. Any conveyances that are seized as forfeit under the Customs Act within six years of contravention of the Customs Act are automatically forfeited from the time of contravention and no act or proceedings subsequent to the contravention are necessary to effect the forfeiture. This forfeiture is subject to the reviews and appeals available under the Customs Act.

Taxes and pension obligations
General
Aircraft may be seized, and sold, for unpaid taxes of the owner under a number of federal, provincial and municipal statutes.

Canadian federal taxes and pension obligations
Under the Income Tax Act (Canada) (ITA), all taxes, interest and other amounts payable under the ITA are debts due to the government and recoverable as such. For the purposes of collecting debts owed by a person to the government, including those under the ITA, the Employment Insurance Act (Canada), the Canada Pension Plan (Canada) or any act of a province with which the Minister of National Revenue (MNR) has entered into an agreement for the collection of taxes payable to that province, the MNR may acquire an interest in the person’s real or personal property. This acquired interest is restricted to property that the MNR could acquire in legal proceedings or under a court order or that is offered for sale or redemption and the MNR may dispose of such interest as it considers reasonable.

Where a person has failed to pay an amount required by the ITA, or the Excise Tax Act (Canada) (ETA), the MNR may give 30 days’ notice by registered mail to such person of the MNR’s intention to direct that
the person’s goods and chattels be seized and sold, and may, after non-payment by the person after the expiration of the 30 days, seize and sell the goods and chattels.

Exempt from seizure and sale are those goods and chattels that would be exempt from seizure under a writ of execution issued out of a Superior Court of the province in which the seizure is made. So long as the owner’s interest in the aircraft has been duly registered prior to the tax lien referred to in the foregoing paragraph under the ITA and ETA, such tax liens and associated sale rights would be subordinate to the rights of the owner in such aircraft.

The Bankruptcy and Insolvency Act (Canada) (BIA) and Companies’ Creditors Arrangement Act (Canada) also give ‘super priority’ in distribution of proceeds for ‘deemed trusts’ in respect of amounts due to the federal government (including income tax and Canada Pension Plan and employment insurance contributions) deducted from employees at source (hence the deemed trust) but not remitted to the Canada Revenue Agency (CRA). Statutory liens and deemed trusts with priority over secured creditors are also given for non-payment of federal goods and services tax or harmonised sales tax under the ETA.

The BIA also creates a super priority charge over ‘all assets of the bankrupt for normal course pension contributions and a super priority charge over the debtor’s ‘current assets on the date of the bankruptcy’ for unpaid employee wages and vacation pay.

Other deemed trusts may also be created under provincial legislation, including certain pension legislation that provides the remedy of a deemed trust for all outstanding deficiences under the pension plan.

Provincial and municipal taxes
The MNR has been appointed to collect taxes payable to the provinces as set forth above by the relevant income tax acts of all provinces except Quebec and Alberta. These two provinces have comparable enforcement provisions in their own statutes which are enforced by the provincial taxation authority. The rights of provinces to seize and sell property for the non-payment of other taxes, such as unpaid municipal business taxes, and certain employee-related obligations such as vacation pay, provincial pension plan contributions, workers’ compensation assessments and provincial retail sales taxes, varies across the provinces.

Some provinces have also enacted similar enforcement legislation in respect of seizing property for default in payment of, for example, revenue tax, employment tax, and property tax.

Foreign taxes
There is no provision in the ITA permitting Canadian tax authorities to act on behalf of foreign tax authorities to enforce tax liabilities imposed by jurisdictions outside of Canada. However, certain bilateral treaty arrangements, such as the Canada-US Income Tax Convention (1980), contain provisions that may require the Canadian tax authorities to enforce foreign tax liabilities.

Repair and storage
Most of the common-law provinces have legislation under which a repairer or storer of an aircraft will maintain a possessory lien for unpaid repair or storage charges in respect of that aircraft in priority to any other interest. Such liens normally only continue while the repairer or storer continues to maintain physical possession of the repaired or stored asset. However, if such lien is not discharged within the prescribed period of time, the repairer or storer has the authority to sell the aircraft.

In the province of Quebec, a party who, with the consent of the other party, has detention of property belonging to the latter has a right to retain it pending full payment of his claim against him, if the claim is exigible and is directly related to the property of which he has detention. Such right of retention may be set up against any third party. This right of retention is similar in effect to the common law mechanics’ lien.

Other lien and detention rights
Unsafe aircraft
TCA has limited authority to detain an aircraft that it believes, on reasonable grounds, to be unsafe or is likely to be operated in an unsafe manner. TCA can also take reasonable steps to ensure its continued detention, and has exercised such authority on occasion.

Other
Other relevant lien and detention rights in Canada include (without limitation):
- a landlord’s (eg, hangar keeper’s) right to distraint the goods of its tenant for unpaid rent, rights under the Criminal Code (Canada) to seize and detain ‘offence related property’ and to obtain forfeiture of property which is proceeds of crime;
- the Emergencies Act (Canada), in times of national emergency;
- rights under the Environmental Protection Act (Canada), Immigration and Refugee Protection Act (Canada), Liquor Licence Act (Ontario), Tobacco Tax Act (Ontario) and Antarctic Environmental Protection Act (Canada) for offences thereunder;
- salvage services rendered in respect of an aircraft under the Canada Shipping Act, 2001;
- the right to seize anything that is relevant to the conduct of an investigation of a transportation occurrence under the Canadian Transportation Accident Investigation and Safety Board Act (Canada);
- the right of a medical officer to detain an aircraft to investigate a potential health hazard or communicable disease under the Health Protection and Promotion Act (Ontario);
- the right of the Canada Border Services Agency, if a person fails to pay an amount required by the Customs Act (Canada), to give a notice to direct that the person’s goods be seized and sold; and
- rights under the Foreign Enlistment Act (Canada) to detain an aircraft, if the owner or the person having control knowingly takes on board any illegally enlisted person, until the trial or conviction of the person or owner and until all fines or penalties imposed have been paid.

Taxes and payment restrictions
25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Sales tax
Canada imposes a federal sales tax called goods and services tax (GST) under the ETA. In Ontario, the GST is replaced with the harmonised sales tax (HST), which adds a provincial sales tax component to the GST (currently at a combined rate of 13 per cent). Supplies of goods and services made in Canada are generally subject to GST or, if such supplies are made in Ontario, HST. There are exemptions for some supplies and some supplies are zero-rated.

In Quebec, the GST and the Quebec sales tax (QST) levied under An Act Respecting the Quebec Sales Tax (QSTA) are both administered by the Quebec taxation authority. In substance, the provisions of the QSTA materially mirror those of the ETA. As a result, in Quebec, the combined QST and GST system is substantively similar to, for example, the current Ontario HST system.

Mortgages
A mortgage or loan is an exempt financial instrument that is not subject to GST, HST or QST, so a financier should not be exposed to GST, HST or QST by virtue of entering into the financing documents.

Leases
Aircraft leases to Canadian operators are often structured using non-resident lessor owners that operate at arm’s length to the operator. Where a non-resident lessor provides the use of an aircraft to a Canadian lessee, and the lessor does not ‘carry on business’ in Canada for GST or HST purposes, the ‘supply’ for purposes of the ETA, will generally be considered to be made outside Canada and not be subject to GST or HST. Any GST or HST that may be assessed should, however, be subject to input tax credits (refunds) in favour of the Canadian lessee.

Sales
If title to an aircraft passes and delivery occurs outside of Canada, there will be no supply made in Canada, even if the seller is resident in Canada or is a non-resident carrying on business in Canada. If title passes and delivery occurs in Canada, the supply will be made in Canada and GST or HST will be payable unless the non-resident seller is not carrying on business in Canada for the purposes of the ETA and is not registered or required to be registered for GST or HST purposes.
Federal income tax and federal or provincial capital tax

A financier or foreign lessor should not be liable for the payment of federal income tax, unless it carries on business in Canada for purposes of the ITA, in which case it would normally be subject to Canadian income taxes on taxable income earned in Canada for purposes of the ITA. Ontario and some other provinces also impose tax on income if there is a ‘permanent establishment’ in that province.

Withholding tax

Interest paid on by a Canadian resident borrower to a non-resident lender should not be subject to non-resident withholding tax, provided that the interest is not ‘participating debt interest’ as defined in the ITA and the non-resident lender deals at arm’s length for purposes of the ITA with the Canadian resident borrower.

The ITA imposes non-resident withholding tax on the non-resident recipient of certain amounts and imposes an obligation on a resident of Canada that pays or credits such amounts to withhold and remit the tax. The ITA does not require a Canadian resident lessee to make any withholding for tax or a lessee to pay such tax in respect of any payments made by such lessee to a person with whom the lessee deals at arm’s length for purposes of the ITA, for the use of or right to use an aircraft, furnishings, fittings or equipment attached to an aircraft, or a spare part for an aircraft or such furnishings, fittings or equipment (not including simulators, or other non-attached equipment), and certain stipulated air navigation equipment and computer software necessary for the use of such equipment which is used by the lessee for another purpose.

Persons that are considered to be ‘related’ to each other as defined in the ITA are deemed to not deal with each other at arm’s length. Where persons are not related to each other, it is a question of fact whether they deal at arm’s length with each other. The ITA does not define or explain the concept of dealing at arm’s length as a matter of fact.

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

No, monies can be remitted out of Canada to aircraft lessors and financiers without any consents being required.

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Yes, pursuant to the Criminal Code (Canada), it is an offence to charge interest higher than the criminal rate, which is currently 60 per cent.

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

When the aircraft is imported into Canada, federal GST (currently at 5 per cent of the fair market value of the aircraft) will become payable by the importer of record at the time of importation. The importer should be entitled to claim a refund of such amounts paid, assuming it is registered for GST purposes. No fees are payable to export an aircraft from Canada, unless an export certificate of airworthiness is sought from TCA.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

All Canadian airlines are required to obtain their insurance from insurers licenced or registered in Canada or licenced or approved by a foreign government to issue aircraft insurance policies. The coverage may be provided on the basis of one captive insurer or spread among more than one insurance company.

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Reinsurance is not customarily used in the Canadian aviation industry. Cut-through clauses are, however, typically included in other reinsurance contracts and are viewed as being enforceable if properly drafted. However, one of the regulators supervising the insurance industry, the Office of the Superintendent of Financial Institutions, noted in a 2010 governmental policy paper issued that it ‘does not currently provide any guidance with respect to contract language and clauses increasingly common to reinsurance agreements that can also lead to coverage uncertainty, as well as adversely affect policyholders in the event of insurer insolvency’, which would include cut-through clauses.

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Not applicable.

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

An owner, lessor or financier will not normally assume any liability in respect of operation, maintenance or insurance of an aircraft unless it takes over or influences the charge, management or control of the aircraft at the time the damage occurred or has caused or permitted the damage to occur. Notwithstanding the foregoing, if a lessor leases an aircraft on a ‘wet lease’ basis, thereby maintaining legal custody and control of the aircraft, it may be held responsible for any action or inaction of the lessee in respect of the operation of the aircraft.

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Strict liability in the operation of aircraft does not regulate ordinary activities that cause accidents. The operator of an aircraft would not be held strictly liable for an ordinary activity that resulted in an accident. Similarly,
the owner or a financier would not be strictly liable for an operator’s actions in operating an aircraft and resulting in an accident.

In the circumstances of a lease or a mortgage, the operator does not act as agent of the owner or any financier. As a result, the owner and the finance parties should not be held vicariously liable for the actions of the operator because neither party retains the requisite control over the operator’s operation of the aircraft to impose liability. An owner or financier should only be at risk if it did, in fact, compel the operator to maintain or operate the aircraft in a negligent manner.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?

Under the Air Transportation Regulations enacted pursuant to the Canada Transportation Act, Canadian air carriers are required to carry liability insurance in the minimum amount of $300,000 per passenger seat on board the aircraft engaged in the service.
Cayman Islands

Matthew Stocker
Conyers Dill & Pearman

Overview
1. To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Cayman is not a signatory (or a party by extension from the UK) to the Rome Convention, the Geneva Convention, the Chicago Convention or the Cape Town Convention.

In relation to the Chicago Convention, however, certain provisions of that Convention with which the United Kingdom is obliged to ensure that its overseas territories (including Cayman) comply are reflected in the Air Navigation (Overseas Territories) Order, 2013 and Overseas Territories Aviation Requirements, applicable in Cayman.

In relation to the Cape Town Convention, the Cayman Islands has now passed the enabling legislation to have the Convention on International Interests in Mobile Equipment and the associated Protocol to the Convention on International Interests in Mobile Equipment on matters specific to aircraft equipment come into force in the jurisdiction. The Cape Town Convention will directly apply to the Cayman Islands, although this will occur only following ratification of the Convention by the United Kingdom and extension to the Cayman Islands at its request (which we understand may take place in the next few months). Pending such ratification and extension of the Convention by the United Kingdom, the Cayman Islands Cape Town Convention Law 2009 will remain in force. The aim of this legislation was to mimic the principles and framework for the registration, recognition and enforcement of international interests contained in the Convention in the absence of the Convention actually being in force in the Cayman Islands. At a date to be appointed by the Governor of the Cayman Islands, the International Interests in Mobile Equipment (Cape Town Convention) Law, 2015 (the Implementation Law) which will implement the Cape Town Convention in the Cayman Islands, will be brought into force and repeal and replace the Cape Town Convention Law, 2009.

The Cayman Islands is, by Order-in-Council from the United Kingdom, a party to the New York Convention.

2. What is the principal domestic legislation applicable to aviation finance and leasing?

The principal domestic legislation is:
- the Air Navigation (Overseas Territories) Order, 2013 as amended;
- the Mortgaging of Aircraft Regulations, 1979 (which will be superseded by new regulations to be issued pursuant to the Cayman Civil Aviation Authority Law – see below);
- the Cape Town Convention Law, 2009 (see above); and
- the International Interests in Mobile Equipment (Cape Town Convention) Law 2015.

3. Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Save for public policy considerations, there are no restrictions under Cayman Islands law on the parties’ freedom to choose the governing law of such arrangements.

Title transfer
4. How is title in an aircraft transferred?

While there are no specific Cayman formalities, title is invariably transferred by way of bill of sale.

5. What are the formalities for creating an enforceable transfer document for an aircraft?

Save for general enforceability considerations, there are no specific formalities. Note that a document executed in, brought in original form to, or produced before the courts of the Cayman Islands may be subject to Cayman Islands stamp duty.

Registration of aircraft ownership and lease interests
6. Identify and describe the aircraft registry.

The aircraft registry is the Civil Aviation Authority of the Cayman Islands (CAACI). Registration may be effected by a qualifying owner or charterer by demise of an aircraft (see question 7). In general terms, this is a ‘private use’ register although the CAACI will look at applications that do not fit such criteria on a case-by-case basis.

The CAACI has an 83-bis arrangement in place with Saudi Arabia. There is no specific engine register.

7. Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

The following persons are qualified to hold a legal or beneficial interest by way of ownership or by charter by demise in an aircraft registered in Cayman (or a share therein):
- the Crown in right of Her Majesty’s government in the United Kingdom or in right of the government of the Cayman Islands;
- United Kingdom nationals;
- Commonwealth citizens;
- nationals of any European Economic Area state;
- bodies incorporated in any part of the Commonwealth and which have their registered office or principal place of business in any part of the Commonwealth;
- undertakings formed in accordance with the law of an European Economic Area state and which have their registered office, central administration or principal place of business within the European Economic Area.

There is no ability to register interests in an aircraft on the Cayman Companies Register or any other register in the Cayman Islands, save that a mortgage over an aircraft registered on the Cayman Islands Aircraft Register may be registered in the Aircraft Mortgage Register maintained by the CAACI. Additionally, where a Cayman Islands company creates a mortgage or charge over any of its assets (including an aircraft), the details of such security shall be recorded in its register of mortgages and charges.

The CAACI has a discretion to cancel a registration on a change of ownership, or if an unqualified person otherwise becomes entitled to a legal or beneficial interest by way of ownership of the aircraft or of a share
therein, in which latter case the registration will become void and the Certificate of Registration must be returned to the CAACI.

There is no ability separate from that relating to the airframe to register interests in engines on the Cayman Aircraft Register or Aircraft Mortgage Register. Once the Cape Town Convention is in force in Cayman, however, relevant parties will be able to register their interests with the International Registry against aircraft engines separately from the airframes.

8 Summarise the process to register an ownership interest.

The registration process may be initiated by completing and submitting all of the relevant application forms, and returning them to the CAACI for the approval of the Director General of Civil Aviation. The CAACI has established an online facility for doing so. The application forms must be accompanied by, inter alia, the company’s certificate of incorporation or comparable document, a list of authorised company signatories and a general description of the company’s activities and main base of aircraft operations. Where applicable, a statement must also be included that states the aircraft will only be operated within the definition of ‘private category’. Private category is defined as being ‘any purpose other than public transport or aerial work’ and, therefore, an aircraft registered in the private category may not be used for the purposes of ‘hire and reward’.

Persons wishing to register an aircraft must first prove eligibility to hold a legal or beneficial interest by way of ownership or charter by demise in an aircraft registered in Cayman (or a share therein) as described above.

Subject to receipt of an acceptable ‘due diligence’ report, an airworthiness survey will then be scheduled. Thereafter, subject to the surveyor making a recommendation for the issue of a Certificate of Airworthiness and receipt of an Export Certificate of Airworthiness or similar document, the deregistration process may be initiated.

Once accepted for registration, a registration mark prefixed with ‘VP-C’ will be assigned or the applicant may request a specific registration mark which (if available) will be allocated.

Upon receiving notification from the existing state of registry that the aircraft has been removed from that register, a Cayman Certificate of Registration must be returned to the CAACI.

Certificate of Airworthiness and all required documentation will be issued.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

While registration and the issue of a Certificate of Airworthiness and receipt of an Export Certificate of Airworthiness or similar document, the deregistration process may be initiated.

10 Summarise the process to register a lease interest.

See question 7, in the context of charterers by demise. In general terms, the CAACI will not concern itself with the specifics of the lease itself.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

The Certificate of Registration is issued by the CAACI. It sets out the following information – registration mark, aircraft type and serial number, name of registered owner (and whether such registered ‘owner’ holds a charter by demise interest) and the nationality of the registered owner.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Where the aircraft is subject to a mortgage registered on the Cayman Aircraft Mortgage Register, the aircraft will not be deregistered without the consent of all parties registered as mortgagees.

Although not a legal requirement, as a matter of practice, where there is a charter by demise over the aircraft, the CAACI will agree, if requested, not to deregister the aircraft without the consent of the registered owner. The CAACI will, if requested, provide the lessor or owner of the aircraft with a ‘comfort letter’ whereby the CAACI acknowledges the ownership and leasing structure of the aircraft and confirms that it will not remove the aircraft from the Aircraft Register without receiving written authorisation from the lessor or owner. The CAACI will place a notation on the Aircraft Register of the undertaking so provided and of the ownership or leasing structure.

13 What are the principal characteristics of deregistration and export powers of attorney?

Under Cayman Islands law, a deregistration power of attorney when granted to secure an obligation owed, typically, to the finance parties will be irrevocable until that obligation is discharged and will survive the insolvency of the grantor. The power of attorney may be granted to more than one attorney-in-fact on a joint or several basis, or both.

Further, under Cayman Islands law, a power of attorney is required to be executed as a deed.

A deregistration power of attorney need not, however, be governed by Cayman Islands law. It will frequently have the same governing law as the other transaction documents – for example, English law or New York law. It is possible to send the deregistration power of attorney to the CAACI and obtain an acknowledgement from them with respect to it.

With regard to the deregistration process itself, there is no specific form of deregistration request and deregistration will, therefore, typically consist of the return to the CAACI of the original of the Certificate of Registration endorsed at section (iii) on the back and signed by the owner of the aircraft or an officer of the company (or by the relevant attorney-in-fact). The aircraft cannot be deregistered until the CAACI receives the original of such signed certificate.

In addition, the other principal requirements for deregistration of the aircraft are:

- that any balance on the account for the aircraft is paid in full; and
- where a Certificate of Airworthiness for Export is required, the relevant party will need to make a request to the CAACI for such certificate and make arrangements for one of the CAACI surveyors or its agents to inspect the aircraft.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Cayman Cape Town Convention Law provides that, where such law applies, the CAACI shall, under applicable regulation, and subject to any applicable safety legislation, honour a request for deregistration and export in accordance with the relevant provisions of the Cape Town Convention.

The Cape Town Convention Law provides that the relevant creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in such agreed provisions and subject to applicable aviation safety regulations:

- procure the deregistration of the aircraft; and
- procure the export and physical transfer of the aircraft from the territory in which it is situated.

The creditor shall not exercise such remedies without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor. Additionally, a chargee proposing to procure the deregistration and export of an aircraft under such provisions otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed deregistration and export to:

- any interested person who is a debtor or a guarantor; and
- any other person having rights in or over the aircraft object who has given notice of his rights to the chargee within a reasonable time prior to the deregistration and export.

The Air Navigation (Overseas Territories) Order, 2013, as amended, provides for the Cape Town Convention IDERA regime to be recognised and take effect in Cayman once the Cape Town Convention is in force in Cayman.

Security

15 What is the typical form of a security document over the aircraft and what must it contain?

There is no statutory format with which the mortgage must comply. The mortgage itself need not be governed by Cayman Islands law. The original mortgage deed need not be provided to the CAACI (and, indeed, it is advisable that the original mortgage not be brought to the Cayman Islands in order to avoid the possibility of triggering a liability to Cayman Islands stamp duty (about which, see question 16)).
How are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

There are no specific documentary formalities under Cayman Islands law, save that where the original mortgage is brought to the Cayman Islands, applicable Cayman Islands stamp duty may be payable (which may be up to US$610 at current rates).

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

With respect to a mortgage over an aircraft registered on the Cayman Aircraft Register, it is possible to register such mortgage on the Cayman Aircraft Mortgage Register. Such registration will go to priority but not validity.

The procedure to effect registration of a mortgage is simple and straightforward, requiring an application by the mortgagor. The mortgagor must provide the CAACI with a short registration form summarising the principal points of the mortgage (ie, date, aircraft description, mortgagor contact details and confirmation of sum secured). An original of the registration form (although, in certain circumstances the CAACI may proceed on the basis of a pdf), signed by either the mortgagor or his agent or legal counsel, must be submitted to the CAACI together with a copy of the mortgage certified by the applicant to be a true and correct copy. The mortgage registration fee should also be submitted upon registration, which fee is calculated on an ad valorem basis depending on the sum secured, up to a maximum amount (at current rates) of approximately US$6,000.

How is registration of a security interest certified?

The CAACI will issue a notification of registration, which is generally available on the date of registration. The notification states the date and time of registration, whether it is the first or a subsequently registered mortgage with respect to the relevant aircraft, the principal details of the mortgage and acknowledges receipt of the relevant registration fee.

What is the effect of registration as to third parties?

A registered mortgage is given statutory priority over subsequently registered mortgages and unregistered mortgages. The priority of the registered mortgage will not be affected by the bankruptcy of the mortgagor, and the security interest will rank in preference to any right, claim or interest of other creditors. It should be noted, however, that possessory liens for work done on the aircraft (whether before or after the mortgage was created), or over persons lawfully entitled to possession of the aircraft, or with a right to detain the aircraft, will have priority over a registered mortgage. In addition, a previously registered mortgage or a mortgage created prior to 9 October 1979 would have priority over a subsequently registered mortgage.

Registration of the mortgage cannot take effect until the aircraft is registered, but the mortgagor may secure its interest prior to registration of the aircraft by submitting a priority notice to the CAACI. Lodging of a priority notice will prevent any other security interests over the aircraft. A priority notice is a simple form, along the same lines as the mortgage registration form, and must be accompanied by the applicable nominal priority registration fee.

All registered mortgagees must provide their consent to removal of the aircraft in question from the Aircraft Register before such removal can take place, and a registered mortgage will continue to exist despite removal of the aircraft from the Aircraft Register. Moreover, by law the Cayman Islands government is required to indemnify a mortgagor for loss suffered due to an error or omission in the Mortgage Register or any inaccuracy in any entry which is made.

Although registration of a mortgage does not constitute evidence of its validity, it does constitute express notice of all facts appearing on the Mortgage Register.

Additionally, under the new aircraft mortgage regulations to be issued pursuant to the Cayman Islands Airports Authority Law of the Cayman Islands, the Cayman Aircraft Mortgage Register and on the IR will have their priority determined in accordance with the priority rules set out in the Convention. The Cayman Islands Airports Authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

With respect to a mortgage over an aircraft registered on the Cayman Aircraft Register, it is possible to register such mortgage on the Cayman Aircraft Mortgage Register. Such registration will go to priority but not validity.

The procedure to effect registration of a mortgage is simple and straightforward, requiring an application by the mortgagor. The mortgagor must provide the CAACI with a short registration form summarising the principal points of the mortgage (ie, date, aircraft description, mortgagor contact details and confirmation of sum secured). An original of the registration form (although, in certain circumstances the CAACI may proceed on the basis of a pdf), signed by either the mortgagor or his agent or legal counsel, must be submitted to the CAACI together with a copy of the mortgage certified by the applicant to be a true and correct copy. The mortgage registration fee should also be submitted upon registration, which fee is calculated on an ad valorem basis depending on the sum secured, up to a maximum amount (at current rates) of approximately US$6,000.

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

A typical security package for a financing involving the Cayman Islands will consist of an aircraft mortgage, a security assignment of the borrowing party’s contractual rights – for example, under the relevant lease arrangements, the lease rentals or insurances – and a deregistration power of attorney. It is often the case that the lenders will take security over the shares of the (often Cayman) owner or borrower. These documents will usually not be governed by Cayman law but by, for example, English or New York law, save that a share mortgage over the shares of a Cayman company is often governed by local law.

The secured party is often a security trustee or collateral agent for the financing parties from time to time.

What form does security over spare engines typically take and how does it operate?

A registered mortgage may cover any store of spare parts (including engines) for the aircraft, but does not include a mortgage created as a floating charge or a mortgage of spare parts on their own. Parts which in the future may become attached to the aircraft can be part of a registered mortgage provided they are sufficiently identifiable when acquired by the mortgagor and value is given.

Enforcement measures

Outline the basic repossesson procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

Subject to enforceability considerations under the governing law, the lex situs and any other relevant laws (other than Cayman Islands law), the Cayman courts will typically recognise and enforce contractual arrangements such as lease termination provisions created under foreign laws. The Cayman courts would also generally recognise self-help remedies by which the counterparties may take possession of the aircraft, for example by dealing directly with the CAACI pursuant to a deregistration power of attorney to effect a deregistration.

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

Similarly, the Cayman courts would typically recognise self-help remedies in the context of an enforcement of security interests over the aircraft (and often over the shares of the aircraft owning vehicle). Cayman Islands law will generally also respect the secured parties’ security interests in the event of the insolvency of the relevant obligor.

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

See question 19. Further, for aircraft present in or which are brought to the Cayman Islands itself, the relevant fees prescribed pursuant to the Airports Authority Law of the Cayman Islands shall be paid with respect to such aircraft. Under such Law, the Cayman Islands Airports Authority has a lien on every aircraft for the recovery of airport dues, fees and other charges imposed. Such Authority may enter, take control of and arrest and sell by public auction or private arrangement in compliance with applicable rules and regulations to that effect any aircraft over which it has a lien. The Authority shall not be a bailee for reward and has no liability for loss or damage occasioned thereby and thereto unless such loss or damage is due to the wilful neglect or default of the Authority.

Generally, issues of compensation for detention, requisitioning, etc are typically also dealt with contractually in the transaction or insurance documentation.
Taxes and payment restrictions
25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

The Cayman Islands currently has no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax.

Additionally, Cayman Islands exempted companies (as well as exempted limited partnerships and exempted trusts) are entitled to obtain an undertaking as to tax concessions from the Governor-in-Council of the Cayman Islands exempting such entity from the effects of any changes to the Cayman Islands tax regime for a period of (in the case of an exempted company) 20 years from the date of such undertaking.

26 Are there any restrictions on international payments and exchanges controls in effect in your jurisdiction?

There is no international exchange control legislation under Cayman Islands law, and accordingly there are no international exchange controls imposed under Cayman Islands law.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Arrangements which provide for a penalty rate of interest may be unenforceable under English common law principles, which are of persuasive, if not binding, authority before the courts of the Cayman Islands.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Aircraft registered on the Cayman Aircraft Register are almost invariably located and operated outside of the Cayman Islands.

Were an aircraft to be imported into Cayman, it would be subject to Cayman Islands import duty.

Insurance and reinsurance
29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

The Cayman Islands is the second largest jurisdiction for captive insurance after Bermuda, with 750 captive insurance companies regulated by the Cayman Islands Monetary Authority. Cayman Islands insurance legislation has been updated recently, inter alia, to contemplate the use of portfolio insurance companies.

In relation to aircraft insurance, save where the relevant aircraft is ‘ordinarily based’ in the Cayman Islands, Cayman insurance legislation does not apply and it is typically the case that insurance is placed in the principal aviation insurance centres of London and New York.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

There are no Cayman statutory provisions in relation to such clauses. The position under Cayman law will reflect English common law principles (which are of persuasive, if not binding, effect before the courts of the Cayman Islands).

Update and trends
The most significant Cayman development, as noted above, is the impending extension of the Cape Town Convention to the Cayman Islands. Cayman has taken a creditor-friendly approach to the implementation of the Convention, and has enhanced its position in the forefront of offshore financial centres involved in financing structures for commercial aircraft. The declarations that will be adopted for Cayman, including those relating to insolvency, are in line with those recommended under the OECD Aircraft Sector Understanding for the purposes of qualifying for the Cape Town Discount. We anticipate that this move will be welcomed by lenders, ECAs, lessors, airlines and other parties participating in the aircraft finance industry.

One further development has been the expansion of the categories of qualifying registrants with respect to the Cayman Aircraft Register, as described in question 7.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Subject to usual enforceability qualifications, such arrangements are effective under Cayman law and are common in aircraft finance transactions.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

With respect to an owner, section 76(4) of the UK Civil Aviation Act, 1982 is extended to the Cayman Islands to the effect that loss or damage caused by an aircraft in flight or by a person in, or an article, animal or person falling from, such an aircraft, is transferred to the person to whom the owner has demised, let or hired out the aircraft if the demise, let or hire is for a period of more than 14 days and no crew member is employed by the owner.

In general terms, a lessor or financier would not otherwise be liable solely by operation of Cayman Islands law.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Save as noted in question 32, the owner of the aircraft would be subject to strict liability by virtue of section 40(2) of the UK Civil Aviation Act, 1949, extended to the Cayman Islands.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?

There are no specific Cayman law requirements.

Matthew Stocker
Cricket Square
PO Box 2681
Grand Cayman, KY1-1111
Cayman Islands

Matthew.stocker@conyersdill.com
Tel: +1 345 814 7382
Fax: +1 345 943 3902
www.conyersdill.com
The Dominican Republic has neither signed nor ratified:
• the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, dated 7 October 1952, to which it is one of the original signatories, but has not yet ratified;
• the Chicago Convention on International Civil Aviation, dated 7 December 1944, ratified on 25 January 1946 and in force since 4 April 1947. Protocols have been ratified regarding article 45 on 28 December 1954; articles 48(a), 49(e) and 61 on 28 December 1954; article 50(a) on 24 November 1961; article 50(a) on 2 October 1976; article 56 on 30 May 1972; article 83-bis on 21 March 2006; article 93-bis; and the Authentic Quinquilingual Text, with reservation, on 29 September 1995. All of these articles are in force with the exception of the last;
• the Geneva Convention on the International Recognition of Rights in Aircraft, dated 19 June 1948, to which it is one of the original signatories, but has not yet ratified;
• the Montreux Convention for the Unification of Certain Rules for International Carriage by Air, dated 28 May 1999, ratified on 21 September 2007;
• the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, dated 14 September 1963, ratified on 3 December 1970;
• the Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, dated 10 September 2010, ratified on 27 November 2012. The Supplementary Protocol of the same date was ratified on 22 March 2013. Neither have entered into force.

The Dominican Republic has neither signed nor ratified:
• the Rome Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft, dated 19 May 1933; or

What is the principal domestic legislation applicable to aviation finance and leasing?
In addition to the generally applicable provisions contained in the Civil and Commercial Codes, the key domestic statute applicable to aviation-related finance, leasing and property in general is Civil Aviation Law No. 491-06, dated 22 December 2006, as amended by Law No. 67-13, dated 24 April 2013 (the Civil Aviation Law).

Are there any restrictions on choice-of-law clauses in contracts to transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?
While the choice of foreign law by the parties is not expressly prohibited, a distinction must be made between the law of perfecting the mortgage and the law of its enforcement procedure. As to the law of perfecting title or security interest over aircraft in the Dominican Republic, Dominican law must govern.

Pursuant to section 47.7(c) of Dominican Aeronautical Regulation RAD-47 (RAD-47), all documents through which title or security interest over locally registered aircraft are incorporated, transferred or modified must be executed before a Dominican notary public, be it as an authentic act declared before and drafted by the notary public or a privately drafted document executed before and certified by said notary public.

In the specific case of mortgage agreements, these can only be incorporated via authentic act, declared before and drafted by a notary public in the presence of two witnesses as per the specific standards provided for under Dominican law.

Concerning the law that will govern the procedure for its enforcement, assuming that such a choice was valid under the applicable foreign laws and not contrary to public order, Dominican courts will, in principle, uphold such a clause.

How is title in an aircraft transferred?
With regards to transfer, two scenarios must be taken into account:
• transfer of locally registered aircraft; and
• transfer of aircraft registered abroad.

On the one hand, pursuant to articles 92 et seq of the Civil Aviation Law and section 47.7 of RAD-47, title in locally registered aircraft is transferred via notification of the corresponding transfer contract before the National Aircraft Registry (RNA), which is the purview of the Dominican Institute for Civil Aviation (IDAC), an autonomous public entity created by the Civil Aviation Law and responsible for the supervision and control of civil aviation in the Dominican Republic. Upon registration, IDAC proceeds to issue a registration document in favour of the new proprietor. The corresponding documentation must be registered before IDAC and the RNA within 10 days of their execution pursuant to section 47.7(g) of RAD-47.

On the other hand, while Dominican law does not regulate the transfer of aircraft registered abroad, it does require that documents executed abroad comply with minimum requirements in order to be considered valid in the Dominican Republic. In this sense, transfer or title documentation related to aircraft being imported to the Dominican Republic for the purposes of local registration need to comply with the following requirements:
• it must be valid pursuant to the laws of the jurisdiction of origin;
• it must be duly apostilled or certified by consular authorities as applicable; and
• if it is drafted in a language other than Spanish, it must be accompanied by a Spanish translation certified by a locally accredited judicial interpreter.
Additionally, to the extent that the seller of such aircraft is registered in the Dominican Republic as an air operator and the sold aircraft is registered in its corresponding operations specifications (OpSpecs), it would have to declare to IDAC that it no longer owns said aircraft and request that it be excluded from its OpSpecs. Likewise, the buyer, to the extent that it is locally registered as an air operator, will have to update its OpSpecs correspondingly before IDAC in order to operate said aircraft in the Dominican Republic.

5 What are the formalities for creating an enforceable transfer document for an aircraft?

As with question 4, this matter must be looked at from the standpoint of both locally registered aircraft and aircraft registered abroad. Pursuant to section 4.77(c) of RAD-47, to the extent that any such transfer document pertains to locally registered aircraft, it must be executed before a Dominican notary public, which in turn entails that said document be signed in the Dominican Republic. It may take the form of an authentic act, declared before and drafted by the acting notary public in question, or a privately drafted agreement, executed in the notary public’s presence and certified as such.

Pursuant to section 4.77(p) of RAD-47, the acting notary public’s signature would need to be certified by the Office of the Attorney General prior to filing before IDAC. Given that it is technically possible for a privately drafted document to be generated in a language other than Spanish even if it is locally executed and notarised, such a document would have to be accompanied by a Spanish translation certified by a locally accredited judicial interpreter, whose signature would also require certification by the Office of the Attorney General.

Schedule A, section 1 of RAD-47 requires that all locally generated transfer documents be recorded before the corresponding Civil Registrar’s Office prior to registration before the RNA.

With regards to any transfer or title documentation required in order to record an aircraft registered abroad under a locally registered air operator’s OpSpecs, said documentation would need to comply with the same requirements set forth for documents executed abroad (see question 4). We note that these requirements would also apply to any and all support documentation filed with regards to any request being made before IDAC. Additionally, pursuant to section 4.71 of RAD-47, any requests made before IDAC regarding the RNA as well as any documentation filed in support of said requests, must be physically signed, in ink, by a duly authorised representative of the requesting party.

Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry.

Pursuant to articles 85 and 92 of the Civil Aviation Law, the RNA, administered and maintained by IDAC, is a system whose purpose is to record all Dominican aircraft; that is, aircraft owned by either: Dominican individuals or corporations; foreign individuals or corporations that have established domicile in the Dominican Republic; and, where the owner of the aircraft is an individual, he or she must have his or her residence or domicile in the Dominican Republic.

The RNA includes:
- nationality and registration marks and adequate specifications for the purposes of identifying individual aircraft;
- titles or instruments that incorporate, transfer, recognise, modify, extinguish or in any way affect the rights over an aircraft or aircraft engine that is being used or is intended to be used in Dominican aircraft;
- judicial decisions that recognise, transfer, modify or extinguish property over aircraft or liens over aircraft, aircraft engines, etc;
- foreclosures, injunctions or any other preventative or cautionary measures that may affect aircraft;
- contracts for the use of aircraft;
- cessations in the activities of aircraft;
- disabling or loss of aircraft and any substantial modifications that aircraft may be subject to;
- documentation regarding the owners of Dominican aircraft;
- insurance policies over aircraft or aircraft engines; and
- any event or document that may alter or be linked to an aircraft’s legal status.

As confirmed under RAD-47, the information contained in the RNA is in the public record, and may be requested by third parties.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

As indicated above, ownership or lease interests or lease agreements over aircraft can be registered with the RNA. In this sense, the concept of ‘owner’ statutorily encompasses:
- Dominican individuals or corporations;
- foreign individuals or corporations that have established domicile in the Dominican Republic;
- the Dominican State; or
- persons with a legitimate interest over the corresponding aircraft, aircraft engine or individual parts (lessees, creditors, guarantors, etc).

Interests over aircraft engines are also subject to registration before the RNA. We note that, pursuant to article 1(i) of the Civil Aviation Law, the concept of aircraft engine includes:
- engines being used in aircraft;
- engines that are intended to be used in aircraft; and
- individual parts of said engines, excluding propellers.

Aircraft registered in another state may obtain registration in the RNA upon cancellation of the prior registration.

8 Summarise the process to register an ownership interest.

The registration of ownership interests is carried out via written request addressed to the General Director of IDAC. Supporting documentation must necessarily include:
- personal identification document (ID) of the petitioner, if a national individual;
- where the petitioner is a foreign individual, he or she must have his or her residence or domicile in the Dominican Republic;
- where the petitioner is a corporation, it must submit copies of its current valid Mercantile Registry and its corporate by-laws, duly registered before the Mercantile Registry via the Chamber of Commerce for petitioner’s domicile. To the extent that the by-laws do not expressly provide for it, express corporate authorisation as contemplated under the bylaws must be provided for the representative signing the request and for the specific task being requested, also duly registered before the corresponding Chamber of Commerce;
- the petitioner must hold title or possess an instrument asserting its ownership of the aircraft. This must comply with all legal requirements concerning its validity (see question 5);
- a completed form IDAC 2000–24, from the Airworthiness Department;
- a Certificate of Airworthiness for the aircraft seeking to be registered;
- a Certificate of Export for the aircraft, in the event that it comes from a foreign country;
- whenever applicable, a Certificate of Deregistration of the aircraft issued by the state of last registration of the aircraft in question;
- original certificates of the aircraft insurance policies taken out by the aircraft’s owner covering the established legal amounts (50,000 Dominican pesos for injuries to passengers and crew and 300,000 Dominican pesos for injuries to third parties on the ground);
- payment of all corresponding fees which are collected administratively by IDAC;
- receipts showing payment of all applicable Dominican taxes and fees; and
- whenever the owner of the aircraft is an individual, he or she must provide a certificate indicating the absence of criminal record, issued by the national police. Corporations must provide this certification with regard to its shareholders.

While the request itself would not require notarisation or certification, supporting documentation would require it as indicated in question 5. This includes any necessary certified translations to the extent that the documents in question are drafted in a language other than Spanish.
In addition to IDAC’s service fees of 100 Dominican pesos and the yearly cost of the corresponding Certificate of Airworthiness provided for in the table included above, there are costs associated to the request as a result of notarisations, certifications and apostilles that may be required as applicable.

The cost per document for each of these related services tends to be relatively small (less than US$100). There is, however, one notable exception in the specific case of locally generated transfer documents. The required prior registration before the Civil Registrar’s Office entails administrative and tax costs of approximately 2 per cent of the sums involved in the corresponding document.

Unless otherwise specified, the owner of an aircraft is presumed to have title over said aircraft’s engine. As indicated in question 7, the interests of third parties over said engine may be registered separately. Registration requests before IDAC have an average processing time of 15 calendar days.

The fees referenced herein are current as of the date of publication but are subject to change as is the prerogative of the corresponding authorities.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

The effect of registration is declaratory in nature, establishing legal presumption of the registered owner’s liability with regards to statutory and regulatory obligations stemming from the operation of the aircraft in question or any damages caused by it. It also provides prima facie, not definitive, evidence of ownership. Pursuant to article 91 of the Civil Aviation Law, registration of an ownership interest in the RNA does not represent proof of title and may be challenged in the event of absence of or defective title.

10 Summarise the process to register a lease interest.

The registration of lease interests over locally-registered aircraft is carried out via written request addressed to the General Director of IDAC. Supporting documentation must include:

- a personal identification document (ID) of the petitioner, if a natural individual;
- where the petitioner is a foreign individual, he or she must have his or her residence or domicile in the Dominican Republic;
- where the petitioner is a corporation, it must submit copies of its current valid Mercantile Registry and its corporate bylaws, duly registered before the Mercantile Registry via the Chamber of Commerce for petitioner’s domicile. To the extent the by-laws do not expressly provide for it, express corporate authorisation as contemplated under the bylaws must be provided for the representative signing the request and for the specific task being requested, also duly registered before the corresponding Chamber of Commerce;
- possession of an instrument asserting lease interest over the aircraft. This must comply with all legal requirements respecting its validity (see question 5);
- payment of all corresponding fees which are collected administratively by IDAC;
- receipts of having paid all applicable Dominican taxes and fees; and
- whenever the owner of the aircraft is an individual, he or she must provide a certificate indicating the absence of criminal record, issued by the national police. Corporations must provide this certification with regard to their shareholders.

While the request itself would not require notarisation or certification, supporting documentation would require it as indicated in question 5 above, including any necessary certified translations to the extent that the documents in question are drafted in a language other than Spanish.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

Pursuant to article 86 of the Civil Aviation Law, the General Director of IDAC shall issue registration certificates in favour of eligible owners that successfully obtain registration. The registration certificate includes the following information with regard to the aircraft in question:

- nationality and registration marks;
- manufacturer and model;
- serial number;
- owner’s name and domicile;
- date of issue;
- signature of the certificate’s issuer; and
- any other information deemed relevant to IDAC.

Registration certificates do not include fields expressly dedicated to liens or mortgage interests over the registered aircraft. And although this information may be included in registration certificates under the label of ‘relevant information’, it is generally not the case. Nevertheless, this information is in the public domain and may be requested from IDAC by third parties with regard to specific aircraft. We note that registration certificates are not issued with regards to aircraft engines or spare parts, although certifications of ownership may be requested from IDAC on a case-by-case basis.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Pursuant to Schedule A of RAD-47, deregistration or export of registered aircraft requires either evidence of the cancellation of any registered liens; or the express, written consent of the person or entity in whose favour the lien in question was established. Applicable statutes and regulations do not expressly require IDAC to give notice of any such requests to potentially interested parties.

Pursuant to article 232 of the Civil Aviation Law, an interested party may oppose the amendment, suspension or cancellation of a registration certificate via written protest addressed to the Civil Aviation Board, an advisory entity to the executive branch which oversees IDAC’s activities.

13 What are the principal characteristics of deregistration and export powers of attorney?

The corresponding party is free to provide power of attorney for the purpose of deregistration or export. Such a power of attorney is generally required to make express mention of the authorised task before which entities said task would be carried out, although local authorities reserve the right to request that these powers of attorney comply with specific guidelines on a case-by-case basis. These powers of attorney may be revoked by one of two means:

- express revocation via written document indicating said revocation, and its extent; and
- tacit revocation, via new power of attorney indicating a different attorney-in-fact. Such a power may be granted to more than one attorney insofar as the multiple attorneys are contemplated via a single document; additional documents would only result in tacit revocation of prior powers granted.

Assuming said power of attorney contains the necessary consents (see question above) and does not condition deregistration or export in any way, the person granted proxy would be able to carry out said deregistration or export as long as he or she has the required support documentation.

The power of attorney itself would not, in principle, be affected by the grantor’s insolvency per se. Any deregistration or amendment carried out via that power of attorney would still be subject to opposition by third party, however, and if insolvency were to lead to a transfer in property, that transfer in property would indeed invalidate powers of attorney granted by the prior owner.

### Type of aircraft | Certificate cost (Dominican pesos)
--- | ---
Private aircraft, one to five passengers | 100
Private aircraft, five or more passengers | 150
Commercial aircraft, one to nine passengers | 250
Commercial aircraft, 10–20 passengers | 300
Commercial aircraft, 21–45 passengers | 750
Commercial aircraft, 46 or more passengers | 1,000
Training aircraft | 50
Aircraft for aerial works | 100

www.gettingtheedgeforthrough.com
14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

As indicated in question 1, the Dominican Republic is not a party to the Cape Town Convention on International Interests in Mobile Equipment dated 16 November 2001.

Security

15 What is the typical form of a security document over the aircraft and what must it contain?

Pursuant to articles 93, 103 and 104 of the Civil Aviation Law, notwithstanding the fact that they are moveable property, aircraft and aircraft engines are subject to mortgage as provided under the Civil Code for real estate. As a result, the corresponding documents must be authentic acts, declared before and drafted by Dominican notary public and drafted in Spanish.

Pursuant to article 2132 of the Civil Code, the secured amount must be included in the mortgage document itself in order for it to be deemed valid for registration. While the economic terms of the deal do not have to be expressly included, it is recommendable to include reference to the corresponding loan document (eg, loan agreement executed on a date by the parties) in order to more readily ensure the application of relevant provisions in a potential foreclosure.

Other security interests that may be recorded over aircraft or aircraft engines in the National Aircraft Registry are privileges and seizures. Pursuant to articles 102 and 105 of the Civil Aviation Law, the following are privileged creditor rights that may directly encumber registered aircraft as a result of the corresponding certified court order:

- fees and duties on air transport;
- attorneys' fees and court costs;
- sums owed to the prior owner of registered aircraft; and
- due salaries and severance payments.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

Depending on the type of security in question, different formal requirements will apply. As mentioned beforehand, mortgages over aircraft or aircraft engines can only be incorporated via authentic act declared before and drafted by a notary public in the presence of two witnesses, which in turn must be certified by the Office of the Attorney General prior to filing before IDAC.

Much like the case discussed in question 8, the costs involved in obtaining prior certifications and registrations for securities are generally minimal, although they can certainly add up whenever a large volume of documents is involved.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

Assuming all documentary requirements discussed above have been met, perfection is obtained via registration before the RNA as indicated in article 104 of the Civil Aviation Law. The registration of security interests is carried out via written request addressed to the general director of IDAC, which must include:

- a description of the aircraft or engine in question;
- nature, amount and status of the lien;
- designation of the court issuing the order, whenever applicable;
- designation of the court file to which the order corresponds, whenever applicable;
- transcription of the corresponding court order, whenever applicable;
- personal particulars (individual or corporation) of the person against whom the measure has been ordered; and
- if the requesting entity is a corporation, a duly authorised representative must make said request. If the request is made in-house, it must be printed on the corporate letterhead and be stamped with the company seal.

Supporting documentation, in turn, must necessarily include:

- the document validly incorporating the security interest in question; for example, a faithful, certified copy of the authentic act containing the mortgage agreement or a certified court order, as applicable;
- a copy of the registration certificate for the corresponding aircraft; and
- in the case of corporations, the corporate authorisation required by the corresponding bylaws for both the representative signing the request and for the specific task being requested. If these documents are foreign, they must be:
  - valid pursuant to the laws of the jurisdiction of origin;
  - duly apostilled or certified by consular authorities as applicable; and
  - to the extent that they are drafted in a language other than Spanish, accompanied by a Spanish translation certified by a locally accredited judicial interpreter.

With regard to costs, IDAC charges a service fee of 200 Dominican pesos for the registration of security interests. As in the case of transfer documentation, prior registration before the corresponding Civil Registrar’s Office is required, with its approximately 2 per cent ad valorem cost. Additional costs are limited to the generally minor expenses represented by required notarisations and certifications. Again, the fees referenced herein are current as of the date of publication, but are subject to change as is the prerogative of the corresponding authorities.

18 How is registration of a security interest certified?

Registration of the security interest can be certified by requesting and obtaining a legal status certificate from IDAC for the aircraft or engine in question. No registration certificate is issued for the security interest in particular, and the aircraft’s registration certificate does not necessarily include registered liens.

19 What is the effect of registration as to third parties?

Registration makes the security interest in question opposable to third parties, such as unsecured creditors, as of the date and time of its registration. Based on section 47.29 of RAD-47, registrations are deemed to have been made on the date and time in which the corresponding request was completed and duly filed before IDAC. Priority operates based on this date and time with regards to other registered security interests over the same aircraft.

The National Aircraft Registry’s main purpose is to allow third parties to transparently obtain information on the legal status of aircraft. However, third parties should not rely on the information contained in a given aircraft’s registration certificate, due to the fact that it may not include all relevant information on security interests or may be outdated. A legal status certificate from IDAC is the recommended source of information, since it should provide all current data.

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Under Dominican law, security interests are in rem rights and, as a result, pursue the asset itself, not the person that owns it. In the event of novation, a new registration would be required given that, under Dominican law, the original loan would be deemed terminated, along with all accessory obligations, such as the security interest. Hence a new security interest would have to be incorporated and registered with regard to the new loan generated as a result of novation.

We note, however, that transfer of the loan to a new debtor is not considered to have novatory effect over said loan and hence would not strictly require a new registration. The obligation remains the same and the new lender is deemed to have rights of subrogation with regards to the original lender’s prerogatives both under the loan and its accessories.

With regards to trusts, we note that Dominican law has only recently recognised and implemented the concept of the trust via the enactment of Law No. 189-11 and its corresponding regulations on 16 July 2011 and 2 March 2012, respectively. The use of a trust would effectively allow for more flexibility with regard to being able to make structural changes without the need to make new registration of security interests.
21 What form does security over spare engines typically take and how does it operate?

Given that the definition of 'aircraft engine' provided under the Civil Aviation Law covers spare engines (eg, engines intended to be used in aircraft), these may also be the object of mortgage agreements registered before IDAC.

Unless otherwise specified, a security interest over an aircraft includes security interest over its installed engines. An effective security interest would not be created over an engine that is not installed on the aircraft in question or specifically referenced in the corresponding mortgage agreement.

Whenever an engine is encumbered as a result of being installed in an encumbered aircraft, we understand that said engine would cease to be encumbered upon being replaced by another engine or upon being expressly released from encumbrance by the corresponding parties. If that engine has been encumbered individually (eg, spare engine), then as a result of the in rem nature of the encumbrance, it would only become unencumbered when the parties expressly release it.

**Enforcement measures**

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Following the lease's termination or in the event of a default under the lease, if the lessee does not voluntarily hand over control of the aircraft, the lessor cannot take possession of it without judicial intervention. In order to obtain possession, the lessor must procure a judgment for the delivery of the aircraft in question pursuant to the corresponding lease agreement. It must then issue a writ for specific delivery once the term established in the judgment for such delivery has expired.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

Enforcement requires the mortgagee to perform the immoveable asset seizure process provided for under articles 673 et seq of the Civil Procedure Code. The courts of the Dominican Republic will be involved in this execution process.

Where the mortgagee's credit is additionally guaranteed by collateral guaranties such as authentic promissory notes, drafted by and before notary public, which are of an executive nature, then an ex parte proceeding is technically available via executive seizure, pursuing the collection of debt owed in respect of the debtor’s assets in general, including the mortgaged aircraft. This procedure is much less tedious than an immoveable asset seizure and (in principle) only one judicial officer is involved (the bailiff), without the need for court intervention.

The aircraft is the asset in respect of which the guaranteed credit will be collected – through its sale pursuant to a public auction, both in the immoveable assets seizure process as well as in the executive seizure process. These processes, once executed, do not automatically authorise the seizure – through its sale pursuant to a public auction, both in the immoveable assets seizure process as well as in the executive seizure process. These processes, once executed, do not automatically authorise the seizure – through its sale pursuant to a public auction in accordance with article 1480 of the Civil Procedure Code. The courts of the Dominican Republic will be involved in this execution process.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Liens as a result of due and unpaid taxes or unpaid salaries and severance benefits shall have priority over all other security interests.

**Taxes and payment restrictions**

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Lease payments are subject to VAT, known as ITBIS in the Dominican Republic, at the current applicable rate of 18 per cent, which is to be reduced to 16 per cent as of 2015. Lease payments and interest accrued are subject to annual income tax at the current, applicable rate of 29 per cent. If these payments are made abroad, they are subject to a 10 per cent withholding tax (WHT) which replaces applicable income tax.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There are no exchange controls in place in the Dominican Republic. Nevertheless, with the exception of principal payments in the context of a loan, international payments are subject to a 10 per cent WHT.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

No.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Neither importing nor exporting aircraft currently have any associated costs.

**Insurance and reinsurance**

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Dominican law does not currently provide for a captive insurance regime.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Cut-through clauses are not legally effective given reinsurers’ statutory obligations (under article 148 of Insurance and Bonds Law No. 146-02, which is a public order statute) to pay their corresponding transfers to the amounts they would be responsible for under a claim.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

As implied in question 30, Dominican law recognises and regulates reinsurance contracts, which are indeed often involved in civil aviation matters in the Dominican Republic.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Assuming the operator in question and the aircraft being operated by it are all appropriately registered, no.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Strict liability is adopted with regards to the owner or lessee, as applicable and as evidenced by the corresponding records before the RNA. Financiers and other third parties with no operational interest in the aircraft are not presumed directly liable for any damages.
Are there minimum requirements for the amount of third-party liability cover that must be in place?

Yes. Air operators are required to have a general liability policy encompassing the entirety of their operations, which must remain valid for the duration of their licence and have coverage of at least one million Dominican pesos or its US dollar equivalent to respond for any damages they may be liable for.

Maria Esther Fernandez A de Pou  
Raul E Rodríguez Pereyra

Monte Mirador Building, 3rd Floor  
No. 2 El Recodo St  
Bella Vista, Santo Domingo  
Dominican Republic

Tel: +1 809 535 9511  
Fax: +1 809 535 6649  
info@rvhb.com  
www.rvhb.com
England & Wales

Mark Bisset
Clyde & Co LLP

Overview

1. To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

The United Kingdom is a signatory to, and has ratified, the Chicago Convention (1944), which came into effect in the United Kingdom on 4 April 1947.

The United Kingdom is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

The United Kingdom is a signatory to but has not ratified the following, and therefore the terms of these Conventions do not apply to domestic UK law:
- the Rome Convention (1933);
- the Geneva Convention (1949); and

The European Union acceded to the Cape Town Convention on 28 April 2009 (it became effective on 1 August 2009), however it has been left to each member state to decide on its approach to ratification at the national level. The United Kingdom has undertaken an economic impact assessment in relation to the Cape Town Convention, and it is highly likely that the Convention will be ratified by, and therefore enter into force in, the United Kingdom in 2015.

2. What is the principal domestic legislation applicable to aviation finance and leasing?

The main legislation in the United Kingdom on aviation is the Civil Aviation Act 1982 and Air Navigation Order 2009. European legislation has direct application in the United Kingdom.

3. Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Subject to the relevant provisions of the Rome I Regulation (EC) No. 593/2008 and Rome II Regulation (EC) No. 864/2007, a contract may be governed by the law chosen by the parties thereto provided that such choice is made clear or expressly demonstrated by the terms of the contract or the circumstances of the case. It is, of course, standard for contracts in relation to aircraft to contain an express governing law clause.

Following the Blue Sky case (Blue Sky One Limited and Others v Mahan Air and Another (2010) EWHC 631 (Comm)), the position of the English courts in relation to the taking of a mortgage over an aircraft that is governed by English law (in the sense that the parties have chosen English law as the lex contractus) is that, in relation to its proprietary aspects, such mortgage must be created in accordance with the domestic laws of the jurisdiction where the aircraft is located when the mortgage is executed, in other words without regard to international conflicts of law rules and the doctrine of renvoi. Otherwise, the mortgage may be declared void (in relation to its proprietary aspects) by the English courts. To take the example considered in the Blue Sky case, an English law mortgage was held to be void against third parties because such mortgage had not been created in accordance with the domestic laws of the Netherlands, where the aircraft was physically located when the mortgage was created.

4. How is title in an aircraft transferred?

Title to an aircraft may be transferred by a bill of sale or contract of sale. Title reservation agreements, in terms of which ownership of the aircraft does not pass until fulfilment of the condition or conditions stated in the agreement, are also possible. Title may be transferred by physical delivery, or any other mechanism that evidences the intent to transfer title, but a bill of sale is the most common form of title transfer mechanism, not least because a future purchaser will expect to be provided with evidence of chain of title in the form of back-to-birth bills of sale (ie, bills of sale showing a continuous chain of title back to the original equipment manufacturer). For certain types of equipment (eg, engine life limited parts), an inability to produce back-to-birth documentation will almost certainly render such equipment valueless.

5. What are the formalities for creating an enforceable transfer document for an aircraft?

The bill of sale or contract of sale referred to in question 4 must be in writing and must contain an obligation whereby one of the parties, having the power to dispose of the identifiable object specified therein, binds himself to transfer to the other the said object for a price (or other consideration) which the latter binds himself to pay to the former. The document must be duly executed (signed and delivered). There is no need for the document to be translated, stamped, notarised, apostilled or legalised for use in the United Kingdom, although there may, of course, be requirements if the document is to be used in another jurisdiction.

Registration of aircraft ownership and lease interests

6. Identify and describe the aircraft registry.

The body responsible for the registration of aircraft in the United Kingdom is the Civil Aviation Authority (CAA), which maintains the register, called the UK Register of Civil Aircraft. The rules on registration are contained in the Air Navigation Order 2009.

Registration may be made in the name of either the owner or the operator of an aircraft, provided that such person is a ‘qualified person’. In this respect, the operator may register as a ‘charterer by demise’ and its status as such will be recorded in the Certificate of Registration issued by the CAA (without the name of the actual owner appearing on the certificate). This is pursuant to Part 1 article 5(4) of the Air Navigation Order (2009), which provides that, if an aircraft is chartered by demise to a person qualified under paragraph (1), the CAA may register the aircraft in the United Kingdom. This is true whether an unqualified person is or is not entitled as owner of a legal or beneficial interest in the aircraft.
Under Part 1 article 4(3) of the Air Navigation Order (2009), an aircraft cannot be registered in the United Kingdom if it appears to the CAA that:

- the aircraft is registered outside of the United Kingdom, and that such registration does not cease by operation of law upon the aircraft being registered in the United Kingdom;
- an unqualified person holds any legal or beneficial interest by way of ownership in the aircraft or any share therein (unless the aircraft is chartered to a qualified person who effects the registration as charterer by demise);
- the aircraft could more suitably be registered in some other part of the Commonwealth; or
- it would not be expedient in the public interest for the aircraft to be or continue to be registered in the United Kingdom.

For the purposes of the Air Navigation Order (2009), pursuant to Part 1 article 5(1) a ‘qualified person’ comprises:

- the Crown in right of HM Government of the United Kingdom;
- Commonwealth citizens, including British subjects;
- nationals of any EEA state;
- British protected persons;
- bodies incorporated in some part of the Commonwealth, having their principal place of business in the Commonwealth;
- undertakings formed in accordance with the law of an EEA state, having their registered office, central administration or principal place of business within the EEA; and
- firms carrying on business in Scotland.

However, an unqualified person holding a legal or beneficial interest by way of ownership of an aircraft may still obtain registration if he resides or has a place of business in the United Kingdom and the CAA is satisfied that the aircraft can be properly registered.

The rules on qualified persons date back to when Britain had colonies which did not have their own registration system. Nowadays, if the CAA receives an application from a Commonwealth citizen it may refuse the registration on the basis that it would be more practical to register the aircraft in the relevant national aircraft register.

The United Kingdom is not party to any ICAO 83-bis arrangements.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

An ownership interest can be registered as described in question 6. It should be noted that the UK Register of Civil Aircraft, maintained by the CAA, is not a register of legal ownership, and therefore registration does not constitute proof of ownership of a particular aircraft.

It is not possible to register an ownership interest against engines only, for example, engines that have been removed from the airframe to which they were previously attached, or spare engines.

A lease cannot be registered on the Registry for UK Civil Aircraft, and a lease interest in the aircraft or aircraft engines cannot be registered.

8 Summarise the process to register an ownership interest.

To register an aircraft on the UK Register of Civil Aircraft, a CAI form is submitted either by the owner or the ‘charterer by demise’ eligible to register in accordance with the Air Navigation Order 2009 (see question 6).

Full guidance can be obtained at www.caai.co.uk.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

The registration of title to the aircraft constitutes prima facie evidence of ownership of the aircraft. However, such evidence is not conclusive and registration of title is not necessarily proof of title.

10 Summarise the process to register a lease interest.

The CAA does not allow for the registration of leases in the UK Register of Civil Aircraft.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

The UK Registry of Civil Aviation will issue the Certificate of Registration, which will include the following particulars:

- the registration certificate number accorded to the aircraft;
- the nationality and registration mark of the aircraft;
- the manufacturer’s name and designation of the aircraft;
- the serial number of the aircraft;
- the name and address of every person entitled as owner to a legal interest in the aircraft or a share therein;
- in the case of an aircraft which is the subject of a charter by demise, the name and address of the charterer. In such a case, CAA will retain the name of the owner on file but will not make it available to the public; and
- in the case where the aircraft is registered by virtue of the fact that an unqualified person resides or has a place of business in the United Kingdom, an indication that it is so registered.

The Certificate of Registration does not indicate whether the aircraft is mortgaged or not.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The CAA can cancel registration of an aircraft, if appropriate. As a matter of practice, cancellation of the registration requires the consent of all the parties registered as mortgagees in the Aircraft Mortgage Register. In the case of an aircraft subject to a charter by demise, the CAA may notify the owner before deregistration is effected. If, after an aircraft is registered in the UK Registry of Civil Aviation, an unqualified person becomes entitled to legal or beneficiary ownership of the aircraft, the registration of the aircraft will become void and the Certificate of Registration must be returned to the CAA.

13 What are the principal characteristics of deregistration and export powers of attorney?

A power of attorney must be created in accordance with the provisions of the Powers of Attorney Act 1971, which (among other things) provides that a power of attorney must be executed as a deed. A power of attorney is revocable unless it is ‘connected with an interest’, which means a security interest. An irrevocable power of attorney will survive the insolvency of the creator of the power. There is no guarantee that the CAA, or any other relevant body such as an airport authority, will recognise a deregistration power of attorney, but it is nevertheless standard for a lessor or mortgagee to take such power of attorney in the expectation that it will be effective.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

As mentioned in question 1, the Cape Town Convention is not yet ratified in the United Kingdom, though it is likely to come into force in 2015.

Security

15 What is the typical form of a security document over the aircraft and what must it contain?

Under English law, a mortgage over an aircraft comprises two things:

- a personal contract to pay the debt; and
- the creation of a security interest over the aircraft to secure the repayment of the debt.

Mortgages of aircraft may be either legal or equitable and should be distinguished from the other forms of security available under English law (charges, pledges and liens).

There are no statutory requirements relating to the terms of the aircraft mortgages in England and, in practice, aircraft mortgages are ‘tailor-made’ to suit the parties’ requirements. It is not necessary to stipulate a maximum amount that may be secured by the mortgage, and almost invariably mortgages secure ‘all monies’ owed by the mortgagor (or other party) to the mortgagee. It is not necessary for the economic terms of the deal (principal, interest or repayment terms) to be reflected in the mortgage itself, though these will of course need to be ascertainable on enforcement
What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The mortgage does not require notarisation, apostillation, legislation or stamping. It is common for the mortgage to be made by way of deed and the formalities for the creation of a deed should therefore be complied with. There are no stamp or other documentary costs as such.

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties?

The CAA maintains the Aircraft Mortgage Register, pursuant to the Mortgaging of Aircraft Order 1972. There are no restrictions as to who can be registered as a mortgagee.

Applicants for registration of a mortgage must complete and provide to the CAA a CA1330 form, together with a certified copy of the mortgage. The registration fee varies according to the aircraft’s maximum take-off weight (MTOW). Further detail is available on the CAA website (www.caa.co.uk).

A potential mortgagee of a registered aircraft can ‘preregister’ a mortgage with the CAA by entering a priority notice utilising CAA's CA1377 form and paying a registration fee, which varies according to the MTOW of the relevant aircraft. The priority notice remains valid for 14 working days from and including the date of entry. During this period either the relevant aircraft mortgage must be registered or a further priority notice entered, securing a further 14 working days priority. The relevant mortgage, once registered with the CAA, will then take its priority from the date of registration of the original priority notice.

If the mortgagor is a company incorporated in England and Wales, it will be necessary to also register the mortgage at Companies House pursuant to the provisions of the Companies Act 2006, within 21 days of the creation of the mortgage. Otherwise the mortgage will be void against an administrator, liquidator or secured creditor of the insolvent mortgagor.

How is registration of a security interest certified?

The CAA will confirm in writing to the applicant once an aircraft mortgage application has been successful. This will not state the priority of the mortgage, which is determined by the date of registration.

What is the effect of registration as to third parties?

An aircraft mortgage registered on the UK Aircraft Mortgage Register will take priority over all other unregistered or subsequently registered mortgages. Registration constitutes notice of the mortgage to all third parties, who are deemed to have express notice of all of the details appearing in the Mortgage Register.

A search of the UK Aircraft Mortgage Register for entries made against an aircraft can be made by submitting a CA1350 form to the CAA and paying the search fee. The result is usually available within a few hours (it being noted that the CAA is open 10am-4pm on working days).

It should be noted that certain interests may take priority over a registered mortgage, namely ‘liens for work done’ (ie, the right to retain an aircraft that may be exercised by an unpaid repairer of the aircraft) and statutory detention rights (eg, the CAA for unpaid Eurocontrol charges and the UK Environment Agency for unpaid Emission Trading Scheme (ETS) penalties). There is limited case law in England relevant to the priority of liens and detention rights, but the general view is that liens and detention rights will take priority over a registered aircraft mortgage, notwithstanding that liens and detention rights are not registrable.

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

The concept of a security trustee is recognised in England and is commonly applied in granting of security over aircraft. A mortgage may be granted in favour of the beneficiary or in favour of a security trustee appointed or acting under a trust for the benefit of persons to whom a debt or other obligation is due.

The security trustee would be recognised as the mortgagee, and will be entitled to exercise all the rights in relation to the mortgage accorded to mortgagees. Accordingly, the mortgage will only refer to and recognise the security trustee as the person in whose favour the mortgage is registered, without any reference to the underlying lenders. The lender syndicate may therefore vary without any necessity to amend the mortgage.

What form does security over spare engines typically take and how does it operate?

A mortgage may be created over a spare engine; however, it is not possible to register such a mortgage at the UK Register of Aircraft Mortgages. If the mortgagor is a company incorporated in England and Wales, it will be necessary to register the spare engine mortgage at Companies House. As with a mortgage over a whole aircraft, a spare engine mortgage is tailor made by the parties to it.

When the spare engine is installed on an airframe located in England, the separate interests of airframe and engine owners or mortgagees will continue to be recognised, in other words England does not have a ‘doctrine of accession’ whereby title to a spare engine would automatically transfer to the owner of the airframe on which such engine is installed.

Enforcement measures

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

English law permits a lessor to repossess an aircraft without the need to obtain a court order (the ‘self-help’ remedy). In such circumstances, the lessor may only exercise such rights as have been granted to it under the lease, peaceably and lawfully. Accordingly the exercise of such rights on a self-help basis usually requires the lessee to accede to the exercise of the rights, and the more common course of action, in the more usual case where the lessee objects to repossession, is for the lessor to apply to court for a possession order.

The majority of cases arising out of the finance or lease of an aircraft are likely to be heard by the Commercial Court of the Queen’s Bench Division of the High Court in London. The court fees incurred in issuing an application or a claim are not usually large (the maximum is about £1,640 plus £465 if an injunction is sought). The lessor’s costs can be claimed procedurally and pursuant to express indemnity provisions in the transaction documentation as damages. We would expect there to be an element of irrecoverable costs; as a rule of thumb these would be approximately 25-30 per cent of total costs incurred.

While it is dependent on the court’s schedule, there is a good prospect of having the lessor’s claim finally decided within two months from service of the Claim Form. However, there are three court procedures which may be used to obtain swift judgment:

- failure to acknowledge particular claim. In this case, judgment can be obtained in 14 days;
- failure to file a defence. If the lessee fails to file a defence then judgment may be obtained in 28 days; and
- no arguable defence. The lessor may proceed to summary judgment.

Many of the points made in question 21 will also be relevant to enforcement by a lessor.

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

Similarly, the mortgagee of an aircraft registered with the CAA may take peaceful possession of an aircraft following a self-help remedy. The mortgagee will have the power to sell the aircraft if such power is set out in the mortgage.
However, there are circumstances where it may be safest for the mortgagor to proceed by way of court order. For example:

- where the mortgagor opposes repossession;
- where there is uncertainty as to whether or not an event of default has occurred; or
- where there may be competing third party interests.

Self-help remedies, because they do not involve a court’s judgment on the rights of the mortgagor, leave open the risk of later claims by the mortgagor (or other parties having an interest in the aircraft) for wrongful interference with the aircraft. More particularly:

- in the event of wrongful taking of possession by the mortgagor exercising a self-help remedy, damages may be very high;
- the taking of possession may involve the mortgagor in the civil offence of trespass;
- a private sale by the mortgagor (as ‘mortgagor-in-possession’) may be challenged on various grounds such as the authority of the mortgagor to pass good title, the right to sell, and the lack of sale at the best price reasonably obtainable; and
- a judicial order will assist in demonstrating to third parties, such as airport authorities, that the bank’s right to seize the aircraft has arisen.

With respect to trespass, a standard mortgage will contain a right to enter premises to repossess the relevant aircraft. However, the right to enter upon any premises where the aircraft may be located is a right granted only by the mortgagor. It would not permit the mortgagor to enter the premises of third parties. This is a strong argument for proceeding by way of court order, unless whoever has possession of the aircraft is willing to grant the mortgagor access to it (and the aircraft’s technical records).

In a case of urgency, an injunction may be sought preventing the movement of the aircraft, before the issue of the mortgagor’s claim form. An injunction will be granted if the mortgagor satisfies the court of the following:

1. the existence of an interest in the aircraft;
2. that the aircraft has been wrongfully taken into possession; and
3. that an immediate remedy is necessary to prevent irreparable loss or damage.

In order to succeed in such an application, it is essential that the mortgagor is able to show that the immediate remedy is required to prevent irreparable loss or damage. The mortgagor must establish that there are no alternative means of preventing irreparable loss or damage.

A completely private sale (ie., without any court involvement) of the aircraft is not generally possible except by exercising self-help remedies or by appointing a receiver. The mortgagor is obligated by law to obtain the best price reasonably obtainable. Judicial sale of the aircraft would be made pursuant to a court order and the court will specify the procedural requirements. A sale by public auction will often be required with certain notice requirements, for example publication in the national press and certain aviation publications. It may be possible for the mortgagor to request a private sale if it can be shown that a higher price would be obtained by such a sale.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagor?

The following aircraft-related charges are given priority by law:

- airport charges;
- air navigation charges (such as NATS and Eurocontrol charges);
- unpaid customs duties; and
- unpaid EU ETS penalties.

In certain circumstances, the CAA may have the right to detain and sell an aircraft for non-payment of these charges. In one case involving the non-payment of such charges, the High Court found that the relevant aircraft was owned by a third-party lessor. If an operator, a maintenance provider, a repairer or an outfitter has, in its lawful and continuous possession, an aircraft on which it has bestowed labour, enhancing the aircraft’s value, that person will have a common law lien on the aircraft to the extent it remains unpaid for its labour. There are a number of prerequisites for such a lien to exist. Liens may also be created by contract.

It is believed by the main authorities in this area that the order of priority in respect of liens and detention rights will be as follows:

- statutory detention rights, for example, in relation to Eurocontrol charges;
- contractual liens created prior to the date of registration of a registered mortgage;
- possession liens;
- registered mortgages in order of registration; and
- unregistered mortgages.

Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Corporation tax

Broadly speaking, a company carrying on a trade of leasing in the United Kingdom will be subject to UK corporation tax on the profits of that business. Rents will generally be taxable, although only the interest element of any receipts under a ‘long funding lease’ will be considered taxable income for these purposes. Deductions against rental income will generally be available for revenue expenditure incurred wholly and exclusively for the purposes of the trade, including for the interest (but not the principal) element of payments under any borrowing incurred on the provision of the aircraft.

Additionally, a UK lessor purchasing an aircraft for leasing could be entitled to claim capital allowances which it can deduct in computing its taxable profits. Capital allowances are intended to reflect depreciation of an asset on which capital expenditure has been incurred and may generally be claimed by the lessor in the case of operating and finance leases and by the user in the case of hire purchase, conditional sale and credit sale agreements.

VAT

The UK VAT regime with regards to the supply of aircraft is codified in the Value Added Tax Act 1994. In order to be zero rated for VAT purposes, aircraft must fall under item No. 2 of Schedule 8 of the Value Added Tax Act 1994, which was itself implemented by section 21 of the Finance (No. 3) Act 2010. This item No. 2 says that: ‘[t]he supply, repair or maintenance of a qualifying aircraft…’ will be zero-rated for VAT purposes.

The VAT rules (HMRC Notice 744C, December 2010) therefore apply to the supply of an aircraft or aircraft equipment. HMRC considers that the word ‘supply’ in this context includes:

- sale, import or acquisition of an aircraft or aircraft equipment;
- charter of an aircraft or aircraft equipment, including hire or lease.

While the supply of ‘qualifying aircraft’ is zero-rated, supplies of all other aircraft will be standard rated (at the current rate of 20 per cent).

In note (A1)(b) to Schedule 8 of the Value Added Tax Act 1994, a ‘qualifying aircraft’ is described as any aircraft which ‘is used by an airline operating for reward chiefly on international routes’.

Following the decision of the Court of Justice of the European Union in the Comber case (C-382/02), the test of a ‘qualifying aircraft’ is whether the airline itself operates chiefly on international routes and not whether a particular aircraft operates chiefly on international routes. In essence this means that supplies of aircraft will be zero-rated even if the aircraft operates only on domestic routes, providing it is used by an airline operating for reward chiefly on international routes.

In note (C1) to Schedule 8 of the Value Added Tax Act 1994, an ‘airline’ is defined as ‘an undertaking which provides services for the carriage by air of passengers or cargo (or both)’. The undertaking concerned may be a sole trader, partnership or company or other entity, but it is not necessary for the undertaking to be a single entity. For example, a VAT or corporate group of companies may be considered as an airline.

An airline will need to operate at least one aircraft, which it may own, lease or hire. This definition includes commercial business jet operators. However, HMRC states that if the business does not have an Air Operators Certificate (AOC) this will provide an indication that the business is unlikely to be considered as an airline for this purpose (HMRC Notice 744C, December 2010). Where a business does not hold an AOC they will likely be asked for evidence of how they are operating as an airline.

The airline must be providing passenger or freight transportation on scheduled or unscheduled flights (or a mixture of both), and receiving...
consideration for that supply. This must be a business operation in nature for VAT purposes. There is a significant body of case law in relation to the requirements for a taxpayer to be operating a business for VAT purposes. However, there is no requirement for an airline to be operating at a profit.

An international route is any route that is not a domestic route within UK airspace. A non-UK airline that mainly flies between airports in its own territory should therefore be regarded nonetheless as international for these purposes.

Therefore, any UK airline which flies even only one route that is not a UK domestic route will be operating on international routes.

For an airline to be operating ‘chiefly’ on international routes, the non-domestic or international route operations of an airline must exceed its domestic route operations. The European Court of Justice in Cimber left it open to the national courts to assess the extent of domestic and international operations. They made it clear that ‘in doing so [the national courts] may take account of all information which indicates the relative importance of the type of operations concerned, in particular turnover’.

In the United Kingdom, HMRC has given advice to airlines in applying the test. They have stated that the test can be based on the value of turnover attributable to international routes compared to that attributable to domestic routes, the relative number of passengers carried, mileage or any other method that produces ‘a fair and reasonable’ result capable of verification by HMRC’ (HMRC Notice 744C, December 2010). In line with the advice of the Court in Cimber, HMRC notes that turnover will be particularly significant when comparing the operations of an airline.

When considering whether an airline meets this test, HMRC will allow airlines to base their current position on a ‘backward look over [the] last financial year’. Airlines may also base the test on a shorter or rolling period if they prefer, but the period, frequency and parameters of the test must be consistent and must not be frequently changed so as to ‘manipulate a particular outcome’. In some cases, a forward-looking test may be allowed where material changes in the business have occurred or where business plans and projections support such a view.

Most aircraft are owned by special purpose companies, whose sole purpose is to own the aircraft. Such companies are often set up by leasing companies or banks. As such, many supplies will be to such special purpose companies, rather than ‘airlines’. However, HMRC considers that where supplies are provided through such ‘intermediaries’, as they term them, the supplier may ‘look through’ the transaction (or series of transactions) and treat their supply as zero-rated. This will only be possible if the ultimate consumer of the supply of either goods or services is an airline operating a qualifying aircraft, and if the entities in the supply chain are fully taxable for the purposes of the transaction so that no deduction would occur at any point in the chain (ie, so that there would be no recoverable VAT).

Withholding tax

Lease rentals and instalment payments under hire-purchase agreements do not attract withholding tax and it is generally accepted that it will not apply to the ‘finance charge’ element of payments under conditional or credit sale agreements. Nonetheless, there remains a risk that payments under hire-purchase agreements could in some circumstances be regarded as annual payments for tax purposes and, for that reason, a lease will normally provide that the lessee will bear any withholding tax that may be imposed by ‘grossing up’ payments due to the lessor. It is standard from the lessor’s point of view to include such a provision, in order to cover the risk that withholding tax could arise as a result of a change of law, or of its interpretation.

Stamp duty

No stamp duty is payable in respect of the creation of an aircraft lease.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

No restrictions apply except in relation to sanctions legislation.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

As a general rule, in the aviation finance and leasing context there are no such limitations, though case law suggests that an amount in excess of 8 per cent may be considered a penalty.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

No import or export duty is payable in respect of civil aircraft used for commercial purposes.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There are no requirements that insurances be placed with local insurers.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

While there is limited case law in this area, cut-through clauses are considered to be legally effective.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance are legally effective, subject to usual prerequisites on the creation of any legally enforceable contract. An assignment of
reinsurance will typically be provided where the insurers are located in a jurisdiction where a cut-through clause is legally ineffective.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator? Apart from independent liability in respect of their own acts and omissions, the only relevant circumstance is strict liability as discussed in question 33.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft? Under section 76(2) of the Civil Aviation Act 1982, the owner of an aircraft has strict liability for loss and damage caused by the aircraft to third persons and property on the surface, although by section 76(4), liability will pass to a charterer by demise where the aircraft is chartered for a period of more than 14 days. The owner or lessor may be entitled to a contractual indemnity from the lessee.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place? EU Regulation 785/2004 (as amended by 285/2010) implemented in the UK by the Civil Aviation (Insurance) Regulations (2005), imposes insurance requirements on all air carriers and aircraft operators flying within, into, out of or over the territory of a member state. Air carriers (ie, air transport undertakings with a valid operating licence) must have aviation-specific insurance cover in respect of passengers, baggage, cargo and third parties (including property and persons on the ground). The insured risks must include acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion.

An air operator is defined as ‘the person or entity, not being an air carrier, who has continual effective disposal of the use or operation of the aircraft; the natural or legal person in whose name the aircraft is registered shall be presumed to be the operator, unless that person can prove that another person is the operator’.

Air carriers and operators must ensure that there is cover for every flight, whether or not the aircraft is owned, leased or operated through joint or franchised operations such as code-sharing or similar agreements. Penalties are imposed for non-compliance including fines and imprisonment.

Commercial operations must obtain the following minimum levels of cover:
- passengers: 250,000 special drawing rights (SDR) per passenger;
- baggage: 1,131 SDR per passenger; and
- cargo: 19 SDR per kilogram.

Third-party minimum insurance limits vary depending on the maximum take-off mass of the aircraft. There are 10 categories ranging from under 500 kilograms (750,000 SDR) to over 500,000 kilograms (700 million SDR).
France

Edward Campbell
Stephenson Harwood AARPI

Overview

1 To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

France is a party to the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1931), the Chicago Convention on International Civil Aviation (1944), and the Geneva Convention on the International Recognition of Rights in Aircraft (1948). France is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). It should be noted, however, that although France has signed the Cape Town Convention on International Interests in Mobile Equipment (2001), it has not yet ratified it, and therefore it is not in effect in France.

2 What is the principal domestic legislation applicable to aviation finance and leasing?

The Transport Code (the Code), in particular Part VI in respect of civil aviation, is the principal piece of domestic legislation in France that governs aviation finance and leasing. Also of relevance are the Civil Code, the Commercial Code, the Customs Code and the General Tax Code. National legislation is supplemented by international conventions and European regulations.

3 Are there any restrictions on choice-of-law clauses in contracts to transfer interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

As a very general principle, there are no such restrictions on choice-of-law clauses for such contracts in France. Therefore, as a general rule, aircraft purchase agreements, bills of sale and leases can be, and often are, governed by a foreign law. We would, however, recommend that for French registered aircraft the mortgage would be governed by French law.

In addition, there are a few exceptions to this general principle, particularly relating to public order policy in France. The most relevant exception for day-to-day aircraft finance transactions would be that bank account pledges and pledges over a company’s shares where such accounts or companies are domiciled in France need to be governed by French law.

Title transfer

4 How is title in an aircraft transferred?

Title to an aircraft is generally transferred through a bill of sale, which is an effective mode of title transfer in France. Generally, it should be noted that for purposes of the registration of the ownership of an aircraft on the French aircraft registry (the Register) maintained by the French civil aviation authorities (the DGAC), a bill of sale would either need to be countersigned or accepted by the buyer or be accompanied by a separate certificate of acceptance.

It should be noted that the Register is an owner register, and therefore the owner must apply for the registration with the DGAC. Article L.6121-1 of the Code provides that inscription of the aircraft on the Register serves as proof of title. In order to effect a change in ownership of an aircraft, the following documents would need to be submitted to the DGAC, along with the necessary French government administrative form (CERFA):

- an original bill of sale from the previous owner to the new owner. It should be signed by the buyer as well as the seller, and if it does not reflect the purchase price or include an acknowledgment of the receipt of consideration, a duly acquitted invoice showing the price may also be required by the DGAC;
- if applicable, a power of attorney and relevant chain of authority from the new owner in favour of the person completing the registration formalities;
- a certified copy of the certificate of incorporation of the new owner (or equivalent document);
- a certified copy of the by-laws (or equivalent document) of the new owner;
- a document evidencing the registered office of the new owner (in the event that this information does not already appear in the certificate of incorporation or by-laws or articles of incorporation);
- a list of the authorised representatives of the new owner (directors, executive officers, etc) together with samples of their signatures;
- Customs Form 846A, or a Certificate of Acquisition of Means of Transport from the European Union, if the aircraft is located outside of France;
- a Certificate of Airworthiness (though if the aircraft is already registered on the Register and the existing certificate is current, no new certificate will be required);
- a Certificate of Noise Limitation (though if the aircraft is already registered on the Register and the existing certificate is current, no new certificate will be required); and
- if the aircraft has been previously registered on another civil aircraft registry, a certificate of deregistration from the previous registry will also be required.

In practical terms, while a bill of sale is an effective mode of transfer of title to an aircraft, if the aircraft is registered or is to be registered in France, to make such title enforceable against third parties the aircraft must be registered with the DGAC using the process outlined above.

5 What are the formalities for creating an enforceable transfer document for an aircraft?

For a comprehensive list of documents required to register the ownership or change in ownership of an aircraft in France, see question 4. It should be noted, however, that there are no requirements that these documents are legalised or pre-stamped in order for there to be an effective registration, and it is generally acceptable to submit these documents in English without providing a French translation. However, as a matter of good practice, it is advisable that powers of attorney in favour of the person completing the registration process are notarised.

Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry.

As discussed in question 4, the Register of civil aircraft is maintained by the Aircraft Registration Office at the DGAC. The Register is a public register for civil aircraft, and is an ‘owner’ registry. In accordance with article L6111-3 of the Code, an aircraft can only be registered in France if it has a valid certificate of airworthiness and it fulfils one of the following conditions:
it is owned by a physical person that is a French citizen or a citizen of either another member state of the European Union or of another member state of the European Economic Area;
• it is owned by a legal entity organised under the laws of a member state of the European Union or another member state of the European Economic Area having its registered office or principal place of business in France or another member state of the European Union or the European Economic Area; or
• it is operated by a French airline with an operating licence issued by the French aviation authorities.

Furthermore, in accordance with article L6111-3 of the Code, the DGAC has the authority to issue an exemption to the above rules under certain limited circumstances.

The French DGAC has good relationships with a number of civil aircraft registries throughout the world and for any new aircraft being registered in France or for any aircraft being deregistered from the French Register and transferred to a new jurisdiction, there are a number of mechanisms in place for communications as between the DGAC and such other civil aviation authorities.

It should be noted that there is not a specific engine register in France. However, for engine leases, it is possible to register ownership over engines and spare engines against a French airline with the Commercial Court in the jurisdiction where the airline has its registered office. Such registration would serve as proof of title against a bankruptcy administrator or trustee in the event of any bankruptcy or liquidation procedures against the airline without the need for protracted litigation to prove ownership of the engine.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

As discussed above, the Register is an owner registry, and therefore it is required that the ownership interest in an aircraft is registered with the DGAC. An ownership interest in an aircraft can also be registered with another registry, for example the Companies and Trade Registry, however it is not necessary as the registration with the DGAC serves as proof of title.

In respect of the ability to register a lease interest, it is possible (and also recommended) to register a lease over aircraft with the DGAC, as this will shift the burden of liability in the event of an incident involving the aircraft from the joint liability of the owner and the operator to the operator. Pursuant to article L611-4 of the Code, in respect of a leased aircraft, the owner and the operator are jointly liable as regards third parties; however, if the lease is registered with the Register, the owner will only be responsible if the third party can prove fault on the part of the owner. Although the public record of the Register will only reflect the owner and the operator of the aircraft, where there is a head lease and a sublease (and any further sub-subleases) in place over an aircraft, the lease chain must also be documented to the DGAC as proof of the authority of the operator to lease the aircraft and linking the lease to the actual owner of the aircraft.

As noted in question 6, although there is no separate register for engines, and the engines belonging to an aircraft will not be reflected on the Register, it is possible to register ownership over engines and spare engines against a French airline with the commercial court in the jurisdiction where the airline has its registered office.

8 Summarise the process to register an ownership interest.

As discussed in question 4, there are a list of documents and forms which are required to register an aircraft or effect the change of ownership over a French-registered aircraft with the DGAC. In terms of timing, it largely depends on the ability of the owner and lessee to provide the relevant documents. We generally recommend that such documents are prepositioned with the DGAC in advance of the proposed date of registration (or change of title). We would also recommend that as much advance notice as possible is given in order to make an appointment with the DGAC to effect the registration. It should be noted that the DGAC is open during regular business days in France (Monday to Friday to the exclusion of public holidays) from 9am to 4pm (Paris time). It is not generally possible to effect the registration (or deregistration) procedure outside of these hours. It is possible to preposition documents with the DGAC, who will then be able to effect registration at a predetermined time and date without attendance in person by the owner or its attorney. The actual cost charged by the DGAC for registration is nominal.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

As described above, registration with the DGAC serves as proof of title in relation to third parties. Third parties can therefore rely on the accuracy of the Register at the DGAC.

Regarding absent or defective title, third parties can challenge registration at the DGAC in the courts, though they will be asked to prove whether title is missing or defective.

10 Summarise the process to register a lease interest.

In order to effect the registration of a lease interest with the DGAC, the following need to be submitted:
• an original of the relevant lease to the operator of the aircraft;
• if applicable, a power of attorney and relevant chain of authority from the owner in favour of the registering person;
• a certified copy of the certificate of incorporation of the owner (or equivalent document);
• a certified copy of the by-laws (or equivalent document) of the owner;
• a document evidencing the registered office of the owner (in the event that this information does not already appear in the certificate of incorporation or by-laws or articles of incorporation);
• a list of the authorised representatives of the owner (directors, executive officers, etc) together with samples of their signatures;
• evidence of the authority of the various representatives of the signatories of the lease, together with samples of their signatures;
• an original or certified copy of the Acceptance Certificate or other document showing the effective date of the lease; and,
• a completed DGAC filing form.

In addition, proof of the authority of the signatory of the lease on behalf of the lessee will also need to be submitted including any powers of attorney or chain of powers of attorney in favour of the relevant signatory.

As indicated in question 7, where there is a chain of leases, proof of the chain of leases (either providing certified copies or originals of each of the leases in the lease chain or an original lease summary duly executed by each of the parties in the lease chain and setting out a summary of relevant information) must be submitted to the DGAC. Furthermore, proof of signatory authority of each party in the lease chain must also be provided.

It is not necessary that these documents be notarised, and generally the DGAC will accept documents in English or in French. It is good practice, however, for powers of attorney pursuant to which documents are being signed or actions are being taken before the DGAC to be notarised. As with the registration of the ownership, the cost of the registration of the lease is minimal.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

The Certificate of Registration is issued by the DGAC instantly upon completion of the registration process. The certificate contains the following information:
• nationality and registration mark of the aircraft;
• details of the manufacturer and the manufacturer’s designation of the aircraft type;
• aircraft serial number;
• name and address of the owner;
• home aerodrome of the aircraft;
• certification that the aircraft has been duly entered on the aircraft register in accordance with the Chicago Convention on International Civil Aviation of 1944 and with the relevant provisions of the Code;
• date of issue; and
• a list of interests, charges or both including the lease and any mortgages that are registered in respect of the aircraft, including the date on which such interests have been registered.

In respect of the lease and mortgage interests, the Certificate of Registration will reflect the name and address of the operator of the aircraft, and the name and address of the relevant mortgagee, if any.
As indicated previously, there is not a separate registration in respect of the engines and engine references are not reflected on the Certificate of Registration.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

In order to deregister an aircraft, a request for deregistration must be presented to the DGAC in the name of the owner. This can be completed by an attorney-in-fact through the issuance of a power of attorney, however, proof of the signatory authority of the person issuing such power on behalf of the owner would be required if such person is not already ‘known’ to the DGAC (ie, where such person is different from the person who has previously been presented to the DGAC at the time of registration of the aircraft as having signatory authority for the owner).

Before the owner would be allowed to deregister an aircraft over which a mortgage has also been recorded, the consent of the mortgagee and the release of any recorded mortgages would be required. The mortgagee would not be able to deregister and export the aircraft without the owner’s consent, and to exercise rights over the aircraft the mortgagee would need to enforce its rights under the mortgage through legal proceedings which would ultimately result in a public sale of the aircraft. Generally, this can be avoided through co-operation of the owner and the mortgagee for the deregistration and export of the aircraft.

Deregistration can be effected immediately upon the presentation of a request to the DGAC (together with any required supporting evidence of signatory authority) to deregister the aircraft and related lease, provided all mortgages have been released. The deregistration of the mortgage can also be effected immediately upon presentation of the relevant documentation.

The consent of the lessee or operator is not required, and generally the operator would not be able to block the deregistration or the export of the aircraft. However, it should be noted that where the aircraft is in the possession and control of the operator, the owner would not be able to take possession and control of the aircraft without the operator’s consent. Self-help remedies are not permitted in France, and therefore the owner would not be able to take redelivery or repossession of the aircraft without the assistance of the courts.

13 What are the principal characteristics of deregistration and export powers of attorney?

As the Register is an owner registry, it is not necessary to obtain a deregistration power of attorney from the lessee or operator. Furthermore, powers of attorney as a matter of French law are generally revocable, even if they state that they are irrevocable. Where deregistration powers of attorney are issued, these are not registered with the DGAC, however, an original of any power of attorney to deregister the aircraft would need to be filed with the DGAC at the time of the deregistration of the aircraft.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Cape Town Convention is not applicable in France. Although France is a signatory to the Cape Town Convention it has not yet ratified it, and therefore it is not in effect in France.

Security

15 What is the typical form of a security document over the aircraft and what must it contain?

An aircraft mortgage is the usual form of security over a French registered aircraft. Generally, it is recommended that a French law mortgage be entered into by the parties. In accordance with article L6122-2 of the Code, the mortgage must be in writing or will otherwise be void. Article L6122-3 provides that the mortgage covers the entire aircraft, its engines, components and spare parts which belong to the aircraft and which are intended to be or part of the aircraft whether they are incorporated thereon or temporarily separated. Further, to be effective as against third parties, the mortgage must be registered with the Register in accordance with article L6122-8 of the Code.

Although the mortgage must be in writing and specify the items to which it is intended to apply, there is no prescribed form. Generally, a French mortgage will be in French, and if required by the parties, will be accompanied by an English translation. The mortgage must usually state the principal amount and the interest and, according to the provisions of article L6122-12 of the Code, the registration of the mortgage secures, with the same priority as the capital, the payment of interest for the year in which enforcement proceedings with respect to the mortgage are commenced, and the amount of interest for the three years which preceded such year.

In accordance with articles L.6122-1 et seq of the Code, there is where more than one recorded mortgage, ranking will be determined by the order of the dates of registration. A recorded mortgage is generally valid for a period of 10 years from the date of its recordation with the DGAC, and must otherwise be renewed in order to continue after such date.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

There is no requirement for a security document such as a mortgage to be notarised, legalised, consularised or apostilled in order for it to be registered with the DGAC. The mortgage must be registered in order to be valid as against third parties, but there are no other required formalities. The cost of registration of the mortgage is a minimal fee. It is not based on the amount of the secured obligation.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the Debtor and third parties? Summarise the process to register a mortgage interest.

An aircraft mortgage must be filed with the DGAC in order for it to be effective as against third parties in France. The mortgage should be registered with the DGAC along with the other necessary documents as set out below.

To complete the registration of the mortgage, the following documents would need to be lodged with the DGAC:
- an original of the mortgage agreement;
- the necessary power of attorney to the individual effecting registration on behalf of the mortgagee;
- evidence of the authority of each of the signatories to the mortgage agreement; and
- CERFA for the registration of the mortgage at the DGAC.

It is neither possible nor necessary to register other forms of security assignments such as an assignment rights under a lease agreement. However, it should be noted that under French private international law, any assignment of rights must be perfected as regards the assigned debtor in accordance with the governing law of the relevant assigned rights, and as regards third parties in accordance with the laws of the state in which the assigned debtor is domiciled. An assignment of rights which relates either to rights arising under a contract governed by French law, or to rights against an entity domiciled in France, will therefore only be fully enforceable in France if notified to the assigned debtor by a French bailiff or process server in accordance with French procedural rules. It should be noted that French law does not provide a time limit to effect such notification. On the basis of these rules, an assignment of a lease by a lessor where the lessee is a foreign entity would only be enforceable in France against the lessee once it has been notified to the lessee in accordance with such procedural rules.

18 How is registration of a security interest certified?

A registered security interest, such as an aircraft mortgage which is a lien on the aircraft, would be recorded with the DGAC and reflected on the Certificate of Registration issued by the DGAC (see question 11). In addition, following the registration, the DGAC can issue an extract of information regarding the status of the registration of the aircraft which would reflect all registered liens against the aircraft. Any security interests registered would be reflected immediately upon registration. Although the extract would not necessarily state the rank or priority, in accordance with article L6122-10, if there is more than one mortgage filed in respect of an aircraft, their rank will be determined by the order of the date of registration. Therefore, it would be possible to determine the rank of any mortgages filed against an aircraft through the public records available at the DGAC.
19 What is the effect of registration as to third parties?

As mentioned above, as a general rule under French law the order of priority is conferred by the order in which such interests are registered. Registration of a security interest would be valid as against third parties. As discussed in question 14, there are, however, certain rights and interests that would have priority over prior recorded liens, and such liens or interests may not be reflected on the Register.

20 How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

Although French law has, in recent years, introduced a concept of ‘trust’, as is common with most other civil law jurisdictions, the concept is not analogous to the concept of a trust as they operate in common law jurisdictions. Generally, they are not used as a means of granting security; however, the concept of a security agent, acting on behalf of lenders, is a common mechanism for granting security on behalf of a syndicate of lenders for mortgages, bank account pledges and charges over other assets.

However, French courts will most likely give limited recognition to foreign trusts in the sense that a validly constituted foreign trustee, who is considered by the law applicable to the trust to be the legal owner of the right in question (such as the lease rights to an aircraft as assigned), should be recognised under French law as having the right to enforce in its name the assigned right. There is no clear jurisprudence on this point, but the generally accepted view is that a validly constituted foreign trust which does not have the effect of avoiding a rule of French public policy (for example if the trust could be deemed to alter the rights of succession under French family law or if the trust related to immovable property located in France) will be recognised in France.

If there were a change in the security agent, then generally, an amendment to the mortgage to reflect the new beneficiary would need to be registered with the DGAC. In addition, if there is only one lender who is also the beneficiary of the mortgage, then a transfer of the lender’s interest in the loan and the security documents to another lender would also require the filing of an amendment to the registered mortgage. On the other hand, if there were only a transfer of interest in a loan by one or more lenders in a syndicate, but the security agent or registered beneficiary does not change, while it may be recommended to reflect the change in lenders in the form of an amendment to the mortgage (to the extent such a transfer is not anticipated under the mortgage), it would not be necessary to file each such transfer or amendment to the loan or mortgage agreement unless the interest of each lender under the mortgage has also been registered and is reflected on the Register.

A mortgage in France (including an aircraft mortgage) is considered to be a right in rem rather than in personam as it attaches to the asset itself and not to the beneficiary.

21 What form does security over spare engines typically take and how does it operate?

As indicated above, there is no separate engine register in France, and it is not possible to take a mortgage over an engine separate from the aircraft or over a spare engine which is leased in France. Generally, the engines form part of the aircraft, and the registration of the aircraft and any mortgage granted in respect thereof would also cover the engines. However, where there is a separate engine lease, as discussed previously, it would be prudent to record the lease with the Commercial Court of the jurisdiction of the lessee which provides notice to third parties (including an eventual bankruptcy trustee of the lessee) that the property is not owned by the lessee. In the context of a separate engine lease, this is particularly important as the ownership right in the engine is not otherwise recorded with the DGAC. An aircraft mortgage would make reference to the separate engines and would be effective to create a security interest over an engine that is not installed on the aircraft at the time of creation (assuming that the non-installed engine is also in France or is in a jurisdiction that would recognise the creation of the security interest in France).

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

As a general rule, self-help remedies are not available in France, and in the event of non-co-operation of the lessee, a lessor would require the assistance of the courts. It is, however, possible to obtain an ex parte court order if a prima facie case can be demonstrated that by the terms of the lease agreement, the lessor is entitled to terminate the lease of the relevant equipment due to defaults or following the expiration of the lease. 

Such an action does not entitle the owner to repossess the equipment but rather it results in the equipment being arrested and placed under the control of the court. This is the first step of the process which must be followed by an action on the merits, which does not necessarily have to take place in France. At the subsequent litigation on the merits, the lessee would have the right to present its case in respect of any arguments it might make regarding the owner’s exercise of default remedies.

23 Outline the basic measures to enforce a security interest.

How may the owner lawfully impede the mortgagee’s right to enforce?

As with the termination of a lease, self-help remedies in respect of a security interest are not available. Similar to the procedure above, a court order authorising the arrest will be required, and the aircraft or other equipment, when arrested, would remain under the jurisdiction of the court.

As a prerequisite to enforcing a security interest such as a mortgage, it is necessary to make a formal demand for payment on the counterparty which can only be made on the basis of an enforceable order to pay a sum of money which means, in practice, a final judgment from a French court or a foreign judgment that has been made enforceable in France. Once the demand is made and sufficient time for payment has elapsed, the equipment can be arrested by a bailiff and the equipment would be subject to a judicial sale. The sale proceeds would then be applied to the debt of the counterparty to the lender in preference and priority, subject to any liens and mortgages having preference.

As there would be the need to obtain a court order, the debt counterparty would be entitled to raise any defences it might have in respect of the mortgagee’s right to enforce the security interest.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

There are certain statutory liens which can attach to an aircraft with respect to compensation due:

- for court costs incurred in the forced sale of an aircraft;
- for the salvage of an aircraft; and
- for expenses necessary for preservation of the aircraft which would have priority over other security interest and the rights to proceeds following the enforcement of a mortgage.

In addition, in certain situations, airport authorities and companies who have repaired the aircraft have the right to cause the aircraft to be detained if certain charges or costs of repairs are not paid. The possessor right of retention applicable to the provider of services is a powerful right which would be enforceable against the owner or lessor if the lessee has relinquished possession of the aircraft to the service provider, but such rights do not give rise to sell the aircraft and ceases to exist once the aircraft or equipment is no longer in the possession of the service provider. Furthermore, there are a number of services for which airport authorities are entitled to charge including landing charges, aerial navigation service charges, parking fees, passenger and baggage installation charges, etc which would give rise to retention rights in respect of an aircraft.

Although Aéroports de Paris (ADP), the publicly owned company that runs Paris, three main airports, regularly exercises its retention rights for unpaid airport charges, it should be noted that only charges with respect to a particular aircraft, however, will give rise to the right of detention of that aircraft (ie, there is no right to detain one aircraft for charges with respect to another aircraft operated by the same airline). Furthermore, a decision rendered on 2 July 2003 by the State Council, France’s highest Administrative Court, and indirectly confirmed in a similar case before the Disputes Tribunal decided on 19 January 2004, held that after the termination of a lease of an aircraft, ADP cannot exercise its detention right against the owner of the aircraft for unpaid airport charges incurred by the operator.

There are provisions under French law relating to the requisition of title and requisition for use as codified in the French Code of Defence. Although the owner or lessee would be entitled to requisition indemnities,
There is no set statutory amount, and the sufficiency of any such indemnities could be contested before the French civil courts.

**Taxes and payment restrictions**

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

In respect of transfer taxes, the general rule is that pursuant to articles 256 et seq. of the French General Tax Code, value added tax (VAT) is assessed on the supply of goods (including aircraft) delivered in France. This would apply to:

- the sale or transfer of title to aircraft, engines and spare parts;
- the supply of maintenance services; and
- rental payments under an aircraft lease.

The current rate of VAT for the supply of such services is 20 per cent. However, there is an exception to VAT liability, both with respect to the sale and exchange of aircraft, parts and supplies as well as in respect of lease payments where the aircraft or the parts and supplies are destined for use on aircraft which are operated by airlines that meet the international service test set out in article 262 II of the French General Tax Code. This exception provides that no VAT is due on either the supply of aircraft, spare parts to, or rental payments with respect thereto, by an airline whose services between France and foreign destinations represent at least 80 per cent of its services. This test is applied on a fleet-wide basis and not just by reference to the individual aircraft in question. It should be noted that in this regard, French overseas territories and departments are considered to be foreign destinations.

A number of French airlines and all but a few non-French airlines benefit from this exemption. The French tax authorities publish a list of French airlines which benefit from the exemption, as well as a list of the non-French airlines which do not benefit from the exemption.

In the event that VAT were applicable to a particular sale or transfer of title to an aircraft, it would be prudent to transfer title while the aircraft is located outside of France or over international waters. Where VAT is applicable to a leasing operation with a French lessee, it would not be possible to avoid VAT which would be payable by the lessee to the lessor.

No other transfer taxes (such as stamp duty) would be payable in respect of the transfer of title or leasing of an aircraft, engine or parts.

In respect of withholding taxes, rental payments made by a French lessee to a foreign lessor are, as a matter of French domestic law, subject to withholding tax under article 182B of the General Tax Code at a rate of 33.33 per cent, unless such rate is reduced or eliminated under any applicable double taxation treaty. There are a number of such treaties in place as between France and other countries which effectively reduce the withholding tax to zero, and lease transactions can often be structured such that no withholding tax would be applicable.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Currently, there are no approvals or consents necessary in France for the remittance of lease or loan payments in US dollars, which is the most common currency used for aircraft finance and lease documentation. A framework for exchange controls is still in existence under French law whereby the government could under special circumstances, notably in times of crisis to assure the defence of national interests, impose pre-authorisation and reporting requirements for financial operations between France and foreign countries.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

While there is generally no specific limitation in the amount of default interest that can be charged on a lease or loan payments, it should be noted that pursuant to article 1244-1 of the French Civil Code, a judge has the power:

- to postpone payments by a debtor after taking into account the state of affairs of the debtor and the needs of the creditor provided such postponements do not exceed two years in the aggregate;
- to reduce the interest rate in respect of any amount for which such French court has granted to a debtor to delay to pay such amount, provided that such lower interest rate shall not be less than the legal rate in France;
- to order that any amount thereafter paid by a debtor be allocated to the payment of principal in priority to any other amounts owed by such debtor; and
- to grant any such measures subject to the debtor’s granting security to assure the payment of the overdue indebtedness or taking measures to facilitate the payment of such overdue indebtedness.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

There are certain customs formalities that must be completed upon the import of an aircraft and registration of the aircraft in France. VAT may be payable at the time of import but, as indicated in question 25, aircraft on lease to airlines which meet the international flight exemption would be exempted from any VAT on importation. The DGAC will generally require a completed customs import form where an aircraft is imported from outside the EU. Although certain documents may be required to be completed in the name of the owner, it is generally the operator or lessee that would be required to complete these formalities and who would be responsible for any importation costs.

There would not be any taxes or fees payable on export of the aircraft.

**Insurance and reinsurance**

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There are no captive insurance regimes applicable to aviation in France, and there is no minimum or maximum percentage of insurance that must be retained in France. Generally, insurances for French airlines are placed on the international aviation insurance markets.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Yes, generally cut-through clauses under insurance and reinsurance documentation are legally effective in France.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

As with any assignment of rights against a French debtor (and as seen in question 17), any assignment of rights must be perfected by notification of the assignment to the French debtor by a French bailiff or process server in accordance with French procedural rules. Assignments of insurances and reinsurances, if any, are often used in aviation leasing and finance transactions in France.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

French law will not impose responsibility with respect to the operation, maintenance or insurance on a lessor or financier. Such responsibilities stay with the operator. As discussed in our response to question 33, however, there is a presumption of liability on both the owner and the operator of an aircraft, provided that where the lease has been registered with the Register the presumption of liability is shifted to the operator, and the owner could only be held liable where the claimant can prove fault on the part of the owner.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

The concepts of strict liability and vicarious liability do exist under the laws of France. As indicated in question 7, pursuant to article L6233-4 of the Code, where an aircraft is leased, the owner and operator are jointly liable as regards third parties. However, if the lease is registered with the Register, the owner will only be responsible if the third party can prove fault on the part of the owner. Hence, registration of the lease shifts the presumption of liability to the operator. There would be no presumption of liability in respect of financiers and others with no operational interest in the aircraft, and they would not be liable under the regime of strict liability.
Update and trends
As with other mature banking markets, in Europe generally the airlines appear to have an increased interest in alternative financing arrangements, notably the capital markets, following the success of certain airlines in accessing these markets. In addition, there appears to be an increasing demand for pre-delivery payment financing as larger orders are placed with the manufacturers for future aircraft deliveries. Still to be seen and watched will be the impact of the new engine options on the values of the current generation of aircraft.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?
The European Parliament has put in place certain minimum insurance requirements for air carriers and aircraft operators. Regulation (EC) No. 785/2004 of the European Parliament and of the Council of 21 April 2004 sets forth the relevant minimum passenger, baggage, cargo and third-party liability requirements for air carriers and aircraft operators flying within, into, out of, or over the territory of a member state of the European Union. There are no further or more stringent minimum insurance requirements in place in France.
Germany

Ulrich Steppler and Katja Helen Brecke
Arnecke Siebold Rechtsanwälte

Overview

1 To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Germany has ratified the International Conventions of Warsaw (1929, effective 29 December 1933), including the Hague Protocol for the amendment of the Warsaw Convention (1955, effective 1 August 1963), the Conventions of Chicago (1944, effective 8 June 1956), Geneva (1948, effective 5 October 1959) as well as Montreal (1999, effective 28 June 2004). The Conventions of Rome (1959, amended 1951 and effective 4 February 1958), including the Montreal Protocol (1978, effective 15 July 2002) and the Cape Town Convention (2001, effective date 1 March 2006) have not been ratified by Germany. It is a signatory to the New York Convention (1958, effective date 7 June 1959).

2 What is the principal domestic legislation applicable to aviation finance and leasing?

The Air Traffic Act is the German basic law on aviation, modelled after the Chicago Convention, containing provisions on registration, operation, conduct and liability in regard to aircraft, personnel, air carriers and airports. It is, inter alia, supplemented by the Air Traffic Licensing Regulation on the prerequisite for aircraft to be allowed to fly in Germany.

The Aircraft Mortgage Act concerns aircraft used as collateral for loan agreements by way of a registered mortgage, and contains numerous specific regulations on registered liens (general, procedure of registration and contents, execution, transfer, change and expiry, extension on spare parts, organisation of register).

3 Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

In the interest of legal security, German international private law restricts the parties’ choice of law regarding property. Whereas commonly the rule of lex situs (the place where the property is situated) is applied on immovables as well as moveables, this is highly impractical for aircraft that, being means of transportation, typically cross borders several times a day. Therefore, by specific statutory rule, any interests in airborne vehicles are governed by the law of the country of origin, meaning their nationality (article 45 para 1, No. 1 Introductory Act to the (German) Civil Code). According to article 17, Chicago Convention aircraft have the nationality of the state in which they are registered. For example, registration of an aircraft in the Aircraft Register (see question 6) results in making the aircraft a German one and consequently making German substantive law applicable on any interests in the aircraft. The nationality of unregistered aircraft may be more difficult to determine. Nevertheless, with regard to internationally agreed legal principles, an aircraft owned by a national will have the same nationality (see section 5(1)(1) Air Traffic Act for the corresponding prerequisite for registration; see question 7).

The applicable law on securities over aircraft (see question 15) follows its property status. The law applicable on a secured claim is usually determined by the law of the country where the party required to effect the characteristic performance of the underlying contract (for example, the seller in a contract of sale) has its habitual residence (article 4(2) Rome I Convention). However, if the contractual status differs from the property status, the latter also may be applied on the secured claim itself to avoid splitting up the statutes between security and secured claim.

Title transfer

4 How is title in an aircraft transferred?

Title in an aircraft is transferred following general rules of German civil law on the transfer of ownership of moveables. Thus a bill of sale alone is not sufficient, as a sale and purchase agreement only imposes a contractual duty on the seller to transfer the ownership of the aircraft to the buyer (see section 433(1)(1) German Civil Code). To actually transfer title in an aircraft, the owner – in execution of the underlying contract of sale – usually has to deliver the aircraft to the buyer while both parties agree that the change of direct possession also results in a change of ownership (see section 929(1) German Civil Code). Other forms of transfer are permissible, especially if the aircraft is to be used as collateral security. In this case the former owner (debtor), while effectively making the acquirer (creditor) the new owner of the aircraft, will only provide him with indirect possession and remain in direct possession himself (see section 930 German Civil Code). This enables him to still use the aircraft and eventually pay back the loan from the proceeds of operation.

Registry of an aircraft in the Aircraft Register (see questions 6 and 9) does not have any legal impact on the transfer of title, it still follows the general rules for transfer of ownership of moveables (section 88(1)(1) the Aircraft Mortgage Act).

5 What are the formalities for creating an enforceable transfer document for an aircraft?

There are no such formal requirements in German law. The registration of aircraft ownership serves other purposes (see question 6).

Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry.

German aircraft are only allowed to fly in Germany when they are licensed for traffic after their airworthiness is proven, and when they are properly registered by the Federal Aviation Office, according to section 14 Air Traffic Licensing Regulation. In a narrow sense, the Aircraft Register is maintained at the Federal Aviation Office as one of two registers (see section 64(1) Air Traffic Act, the other one on ‘aerial sports equipment’ being irrelevant in this context). The registration serves the public purpose of supervising air traffic safety, identifying individual aircraft (compare section 2(5) Air Traffic Act) and enables the Federal Aviation Office to use the stored data to provide information in statutorily specified situations (see section 64(2)(7–9) Air Traffic Act). The data to be registered is comprehensive and encompasses type, design, identification number of the airframe, as well as the marks regarding nationality and unique code of the aircraft. In addition, the page number of the register, and in case of existing security the page number of the mortgage register (see question 17), as well as the name and address of the owner have to be put down (section 64(3) Air Traffic Act). Regarding planes as the most common type of aircraft, even more data has to be recorded, for instance concerning their usual location, liability insurance and design of engines installed (see section 64(4) Air Traffic Act).

In contrast to the German land register or ship register, the Aircraft Register does not have a comparable significance in private law (see
question 9), even if the data stored in the register under certain conditions may be used to facilitate enforcement of private claims (see section 64(8) Air Traffic Act).

Certificates and licences of foreign aircraft registered in a contracting state of the Chicago Convention are usually recognised in Germany (see article 33 of the Convention). In case such aircraft is operated pursuant to a lease or similar agreement by an operator residing in Germany, according to article 83-bis, together with section 32(2) and (3) Air Traffic Act the state of registry may, by agreement with Germany, transfer to it certain functions and duties as state of registry in respect of that aircraft, for example, regarding its operation, airworthiness and the competency of its personnel as well as general ‘rules of the air’. Germany has so far closed five bilateral agreements, with Italy (18 July 2007), Austria (1 January 2010), Sweden (3 November 2010), Spain (17 December 2010) and Denmark (6 September 2012).

There is no separate registry for aircraft engines (section 64(4)(3) Air Traffic Act; see question 7).

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

In order not to misunderstand the mechanics of the German Aircraft Register, it should be noted that following its main public function to provide for air traffic safety (see question 6), the register is not a ‘table’ to record existing ownership or lease interests as proof towards third parties. On the contrary, these interests are a prerequisite for registration in the first place.

Basically, an aircraft may only be recorded in the German Aircraft Register if it is not already registered in any other Aircraft Register in a foreign country and if it is wholly owned by a German or EU member state national, or at least by a national of a country where EU aviation law applies (section 3(1)(1) Air Traffic Act, together with phrase 2 and 3 respectively). ‘Wholly owned’ means that ownership may be divided between several individuals, but all of them have to be German or EU nationals. This also applies if several owners are members of a private partnership or an association without legal personality.

Should the aircraft be owned by a corporation (for example, a limited liability company or a stock corporation) or by a company according to commercial law (general partnership or limited partnership), following the provision’s wording, the administrative seat of the company has to be in Germany, thus ‘EU area’ is not sufficient. In addition, more than 50 per cent of its assets have to be in the hands of German or EU nationals and the majority of its authorised representatives or persons personally liable have to be German or EU nationals.

Aircraft not owned in the manner described above may still be recorded in the German Aircraft Register, if German or EU nationals are entitled to acquire ownership of the aircraft following a contract of sale, for example, in the case of a hire-purchase agreement or mortgage in installations with reservation of title. Likewise it is sufficient that they have a right to possession of the aircraft according to a rental or similar agreement with a minimum duration of six months (section 3(1)(1)(2) Air Traffic Act); compare article 1 No. 1 of the Geneva Convention). Thus all typical kinds of leasing contracts are covered (for example, dry- or wet-lease agreements). The Federal Aviation Office may allow for exceptions in singular cases (section 3(2) Air Traffic Act), for example, if the rental agreement falls short of the statutory minimum duration by just a few days.

Ownership of an aircraft can additionally be registered in a German or EU Commercial Register in order to show it as an asset of a merchant or a company. Having a different function to the Aircraft Register (financial versus safety reasons), there is no conflict. The legal basis for both the registries is still to be found in general property law, meaning the registering entity has to be owner of the aircraft or at least must be entitled to it in a comparable manner.

How to deal with the legal relationship between the aircraft and its engines still is much discussed in Germany. However, the independent economic value of the engines, their intentionally ‘loose’ connection with the aircraft in order to facilitate quick exchange and the statutory regulation of security interests in the aircraft and possible spare parts (see question 21) points to a classification of the engines not as an integral part, but as an accessory of the aircraft as the so-called ‘main object’ (section 97 German Civil Code). Therefore engines do not automatically share the legal fate of the aircraft itself (airframe, fuselage, etc), but may be the object of independent rights or claims of a third party. Nevertheless, as the Aircraft Register only asks for German or EU ownership of the aircraft itself as precondition for its registration, and merely mentions the engines as part of the data on the aircraft that has to be recorded in the course of registration (section 64(4)(3) Air Traffic Act), any legal interest in the engines by a third party cannot be registered separately.

8 Summarise the process to register an ownership interest.

There is no specific procedure for the registration of ownership interests in an aircraft. As German or EU ownership of the aircraft is a prerequisite for its registration (see question 7), the registering party has to prove its ownership in relation to the Federal Aviation Office. This may be done without regard to specific formalities, and even by only establishing prima facie evidence, for example, submitting the contract of sale or any other purchase certificate.

The title to an engine is not automatically vested in the owner of a host aircraft, but it may not be registered separately (see question 7).

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

The registration of an aircraft in the Aircraft Register aims to facilitate the supervision of air traffic safety and to disseminate selected information to certain authorised recipients (see question 6), so it remains without effect on private law rights or claims and does not provide any proof of title against third parties (section 98(1)(1) Aircraft Mortgage Act). In contrast, for example, to the land register, a registration in the Aircraft Register does not allow for an acquisition ‘in good faith’ (see section 931(2) German Civil Code) by a third party that erroneously believes the registered entity to be the owner of the respective aircraft. However, in the opposite case where the prospective acquirer knows that his contractual partner differs from the registered party, he usually will not be ‘in good faith’ and thus unable to receive title to the aircraft if his contractual partner actually did not own the aircraft.

10 Summarise the process to register a lease interest.

There is no specific procedure for the registration of lease interests in an aircraft. As certain lease interests in the aircraft by German or EU nationals are an alternative prerequisite for its registration besides ownership of the aircraft (see question 7), the registering party has to prove such interests as regards the Federal Aviation Office, usually by way of submitting the respective lease contract or another comparable certificate.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

After registering an aircraft in the German Aircraft Register, the Federal Aviation Office issues a certificate of registration following international (ICAO) usage (according to section 14 of the German Air Navigation Certification Order, Annex 1, Sample 1). As part of the ‘ship’s papers’ it must be carried on board the aircraft at all times. With nomenclature in German and English, it contains information on the register itself (volume, page), on the aircraft (class, nationality and registration marks, manufacturer, designation, serial number) as well as on the owner (name, address, possible entries on change of ownership on the backside) and certifies that the aircraft has been duly registered in the Aircraft Register and to which rights it are registered by the Local Court Braunschweig at the seat of the Federal Aviation Office. As there is no exclusive register for engines, no separate engine certificate of registration is issued.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The owner of the aircraft has to apply for deregistration, including cases of export, at the Federal Aviation Office, using a standard form (Federal Aviation Office-No. 13). The mortgagee does not have the authority to have the encumbered aircraft deregistered or exported. On the other hand, he also does not have to consent to such action by the owner, as a registered mortgage does not expire in case of change of ownership (see question 19). The operator may block deregistration or export only if he is contractually empowered to do so.
13 What are the principal characteristics of deregistration and export powers of attorney?

A representative of the owner with proper deregistration power of attorney, presenting the standard form signed by the owner (see question 12), may have an aircraft deregistered and exported. Powers of attorney usually are revocable, it seems, they still may be revoked for good cause. They are grantable to more than one attorney but cannot be registered. If the grantor becomes insolvent, the power of attorney commonly expires (section 117(1) Insolvency Act) as the agent otherwise could unlawfully extract the aircraft from the insolvency assets by way of deregistration.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Not applicable, as the Cape Town Convention has not been ratified by Germany.

15 What is the typical form of a security document over the aircraft and what must it contain?

When using registered aircraft (see question 6) as security, the German Aircraft Mortgage Act provides for an exclusive (compare section 9 Aircraft Mortgage Act) registered mortgage (according to section 1 Aircraft Mortgage Act). The act resembles a mixture of general regulations on common mortgages on immovable property and pledges on moveables. While in many legal aspects being similar to the latter, the debtor does not have to part with direct possession of the aircraft, as the content of the register assures the necessary legal certainty.

Because of the registration requirement that asks for extensive information to be provided in the process (see question 17), the security document itself is not subject to specific formalities. Its language typically will be German, but is subject to the envisaged use and context of the security. The document will at least contain a description of the secured claim, as the mortgage, being a strictly accessory collateral, in every aspect follows the claim like a 'mirror image' in existence and amount (compare section 4 Aircraft Mortgage Act). To create a registered mortgage, the owner of the aircraft – in case of aircraft financing usually also being the debtor of the claim to be secured – has to agree with the creditor to procure such mortgage and register the mortgage with the Aircraft Mortgage Register (section 5 Aircraft Mortgage Act). The parties may limit the liability of the mortgaged aircraft to a certain fixed amount (section 3 Aircraft Mortgage Act), which is usually documented.

Only German aircraft in the aforementioned statutory sense can be encumbered with a registered mortgage (see questions 6 and 17). Securities on foreign aircraft follow different provisions, even if enforcement rules are similar (see sections 103 ff Aircraft Mortgage Act).

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

In order to properly register a mortgage on an aircraft, the approval of registration by the owner of the aircraft has to be notarized at the very least (section 86(1) Aircraft Mortgage Act together with section 37(1) Ship Register Regulation). As the agreement to procure a mortgage does not become binding on the parties before registration (section 5(2) Aircraft Mortgage Act), the agreement itself, as well as the application for registration are commonly also notarized. Documentary costs vary in regard to the amount of the secured claim. (see sections 3(1), 3(1), 97, 98 Act on Court and Notary Fees).

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties?

Summarise the process to register a mortgage interest.

Registering an aircraft mortgage may be a lengthy process that asks for several steps to be taken one after the other:

- After the parties have agreed on procuring an aircraft mortgage, either of them (owner or debtor, or creditor) may apply for its registration (section 86(1) Aircraft Mortgage Act together with section 23 Ship Register Regulation). Like the Aircraft Register itself, the Aircraft Mortgage Register is maintained by the Braunschweig local court at the seat of the Federal Aviation Office (section 78 Aircraft Mortgage Act). It will only carry out the registration if the person whose right is affected by the registration of the mortgage itself is already registered as legitimate party.

- In order to authorize himself in the aforementioned sense (compare section 86(1) Aircraft Mortgage Act together with section 46 Ship Register Regulation), the owner has to apply to have his aircraft registered in the Aircraft Mortgage Register before he can have the mortgage registered (section 79(1) Aircraft Mortgage Act). For every aircraft registered, a new page is reserved which is divided into two parts, one for the aircraft itself and one for any mortgages it might be encumbered with (section 81(1) Aircraft Mortgage Act together with section 2 Aircraft Mortgage Register Regulation). The aircraft owner has to prove to the authority or any other registry as a condition to its effective registration.

- Only the person or entity that is registered as owner in the Aircraft Register is entitled to have an aircraft registered in the Aircraft Mortgage Register (section 79(2) Aircraft Mortgage Act, see question 6). The application has to contain the page number of the Aircraft Register, the marks regarding nationality and unique code of the aircraft, type and design of the aircraft, identification number of the airframe, as well as the name and address of the owner according to the Aircraft Register. The applicant has to prove that the data to be recorded corresponds with the data from the Aircraft Register. When applying as owner himself, ownership has to be substantiated with prima facie evidence (section 80 Aircraft Mortgage Act).

- Once the aircraft is registered in the Aircraft Mortgage Register, its now ‘legitimate’ owner may finally have the mortgage itself registered by approving his or the creditor’s application for registration. The latter has to cover – as usually already covered in the (notarised) approval – the name of the creditor, the amount of the secured claim as well as any applicable interest rates or similar accessory performances due. In case of a mortgage with limited amount (section 3 Aircraft Mortgage Act), the respective limit has to be noted instead of the face value of the claim (section 24(1) Aircraft Mortgage Act). Registration costs vary in regard to the amount of the secured claim (see sections 34(1), 35(1), 55(2) Act on Court and Notary Fees).

18 How is registration of a security interest certified?

Concerning certificates about records in the Aircraft Mortgage Register, there is no equivalent to the official Certificate of Registration for the Aircraft Register (see question 11). In contrast to the Ship Certificate (as defined in Annex 4 to section 39(a) of the Implementing Regulation regarding the Ship Register Regulation), there is no designated space to record any encumbrances in the document. However, as the Aircraft Mortgage Register is public, the register court may be asked for (certified) copies of any registrations that serve as evidence (section 85(1)(2) together with section 15 Aircraft Mortgage Act).

The rank (absolute and relative) of a security interest which indicates its priority is clearly visible from the register’s pages. A mortgage always is recorded in part 2 of the register (part 1 being reserved for the aircraft itself), starting at the top with no. 1 and continuing further downward if any additional mortgages are registered. Where a single aircraft is encumbered with more than one mortgage, their relative rank is discernible from the respective pages, as older mortgages have priority over newer ones (section 23(1)(1) Aircraft Mortgage Act). For example, an earlier registered mortgage at ‘upper’ position 1 outranks a later registered mortgage at ‘lower’ position 2, 3, etc. Should a registered security be deleted for whatever reason, any ‘lower’ entries will move up one position, so if no. 3 were deleted, nos. 1 and 2 remain untouched, but no. 4 becomes 3 and 5 becomes 4, etc.

Subsequent changes of rank as well as reservations of certain positions are permissible, but such alterations again have to be recorded in the register and thus are easily recognised (compare sections 26, 27 Aircraft Mortgage Act).

19 What is the effect of registration as to third parties?

Registration of a security interest usually confers priority over other securities that might be registered subsequently (section 25(3)(1) Aircraft Mortgage Act; see question 18).

Third parties can rely on the accuracy of the public registration of the security interest, as it is presumed by law that the person who is registered as the mortgage’s beneficiary in the Aircraft Mortgage Register is actually entitled to such right as long as there is no proof to the contrary (section 15(2) Aircraft Mortgage Act). A potential buyer of the mortgage is protected
as long as he does not know that the registered seller of the security actually is not entitled to such right (section 16(1)(1) Aircraft Mortgage Act). Should the ownership of the aircraft be transferred on a third party, the registered mortgage does not expire as would any other encumbrance following general property law, but remains intact and the buyer only acquires encumbered ownership (section 98(1)(2) Aircraft Mortgage Act).

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

In German law the concept of trust is well known, and according to modern statutory regulation (see sections 68 ff Aircraft Mortgage Act).

The registered mortgage as laid down in section 1 Aircraft Mortgage Act is a right in rem, as it rests on the ownership of the aircraft it encumbers, regardless of the owner’s identity. Regarding changes to the security or its beneficiaries, several constellations have to be differentiated:

• Changing the aircraft’s substance, in other words value, will generally just affect the proceedings resulting from a possible foreclosure (see question 23). Only in cases of severe degradation of the aircraft or its being extensively damaged by the owner, thus endangering the security in the sense of recoverability of the secured loan, may the creditor be granted an extraordinary right to immediately have the aircraft auctioned in order to provide for compensation (section 39 Aircraft Mortgage Act).

• Changing the aircraft’s ownership leaves the encumbering security untouched (section 98(1)(2) Aircraft Mortgage Act, see question 19).

• Changing the secured claim, be it in amount or regarding the beneficiary, generally results in corresponding changes to the security (compare sections 4, 51 Aircraft Mortgage Act). Nevertheless, by agreement between owner and beneficiary, a novation is permissible as an exception which has to be recorded in the Aircraft Mortgage Register (section 55(1) Aircraft Mortgage Act). If the old claim not only is replaced by a new one, but the beneficiary is changing as well, the owner and the new beneficiary have to conclude an agreement registered with the previous one consenting, before the change can be registered (section 55(2) Aircraft Mortgage Act).

21 What form does security over spare engines typically take and how does it operate?

Engines are to be seen as an accessory of the aircraft (see question 7), so that a security interest in the aircraft itself also covers the engines installed at the time it is created, provided they are also owned by the owner of the host aircraft as recorded in the Aircraft Register (section 31(1)(1) Aircraft Mortgage Act). Though the qualification as an accessory is not precluded by the fact that the object in question is only temporarily used for a single course of business, namely when being swapped with another engine because of their regularly being swapped between different aircraft – the engine is an accessory of a specific host aircraft as long as it is dedicated to it, which necessitates some kind of close spatial connection (compare section 97(1)(1) German Civil Code). In other words, the engine must at least be in the course of being installed in the host aircraft at the time of creating the security.

An engine is released from joint liability as collateral together with the aircraft:

• if it is transferred on a third party and removed from the aircraft before it is seized by the mortgagee (section 31(2)(1) Aircraft Mortgage Act);

• if it loses its classification as accessory of the aircraft (‘during the ordinary course of business’, namely when being swapped with another engine following a typical maintenance schedule (section 31(3)(1) Aircraft Mortgage Act); and

• if it is placed in a spare parts storage (section 31(3)(2) Aircraft Mortgage Act).

To avoid the two latter cases of release, the owner of the aircraft may agree with the creditor to extend the mortgage to all spare parts in the inventory of a specific domestic or foreign spare parts storage and have the extension recorded in the Aircraft Mortgage Register. The extension depends on the existence of the aircraft mortgage itself and is subject to a comprehensive statutory regulation (see sections 68 ff Aircraft Mortgage Act).

An independent security interest in the engines cannot be created; thus if the engine in question is neither owned by the host aircraft’s owner nor is the engine (about to be) installed in the aircraft at the time of creating the security, the engine is not covered by the mortgage at all.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

There are no self-help remedies available to the owner or lessor. In order to repossess his aircraft, he has to proceed in accordance with the German laws of debt enforcement. That necessitates obtaining an enforceable title for this claim from the relevant German civil court. The title has to contain the necessary enforcement clause and needs to be duly served on the debtor. The owner can then apply for the enforcement title with a bailiff, who will put him in possession of the aircraft. However, as this procedure can be rather lengthy, in the lease agreement the lessee already may submit to subjecting the aircraft to immediate enforcement proceedings in case of default on his part. This allows the owner to directly apply for enforcement of his claim.

Requirements for terminating the lease agreement by the owner or lessor, as well as possibilities for the lessee to object against possible claims for damages by the owner, very much depend on the details of the respective agreement and the reasons giving rise to termination in the first place. Skipping contractual provisions because of their near endless variety, litigation over the repossession of the aircraft only will follow an extraordinary termination of the leasing agreement by the lessor which as severe interference with an ongoing contractual relation in turn requires a so-called ‘good cause’. These typically are misuse of the leased object, repeated delays of payment or other serious breach of contract by the lessee. Thus it will be difficult for him to impede any claims put up by the owner, let alone denying willful misconduct on his part.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

To enforce an aircraft mortgage, the beneficiary is limited to execution according to statutory regulations (section 47(1) Aircraft Mortgage Act) and may not avail himself of any self-help remedies or similar private measures of enforcement. Execution procedure follows slightly modified provisions on moveables, typically leading to a compulsory auction of the aircraft (section 99(1) Aircraft Mortgage Act together with sections 86(1), 870a(1)(1) Code of Civil Procedure). Competent for any execution is the Local Court Braunschweig at the seat of the Federal Aviation Office (section 171b(1) Act on Compulsory Auction and Administration). Initiation compulsory auction action procedures by the court results in seizure of the aircraft in favour of the creditor or mortgagee (section 20(1) together with section 171a(1) Act on Compulsory Auction and Administration). It encompasses all objects that are covered by the aircraft mortgage, for example, accessories like the engines mounted on the aircraft (section 20(2) Act on Compulsory Auction and Administration together with section 31 Aircraft Mortgage Act, see question 21). The aircraft then is delivered into custody and may not be operated anymore (section 171c(2)(1) Act on Compulsory Auction and Administration). As this measure usually is very detrimental to a lessee of the aircraft, the mortgagee by statutory order legally replaces the previous owner or lessor of the aircraft and thus will have to grant the lessee further use of the aircraft for the time being, if he was already in possession of the aircraft (sections 171f, 169 Aircraft Mortgage Act together with sections 578a(1), 567(1), 566(1), 533(1) (1) German Civil Code). On the other hand, the lessee may not demand for the execution procedures to be suspended.

The auction itself is organised by the court and follows common practice (see sections 66 ff Act on Compulsory Auction And Administration). The mortgagee is entitled to the proceeds according to the yet unpaid amount of his secured claim, but among other things certain other costs will have to be settled first (see section 10 Act on Compulsory Auction and Administration). The highest bidder obtains ownership of the aircraft through public authority (section 90(1) Act on Compulsory Auction and Administration). He will automatically become party to an existing contract of lease (see above), but may exceptionally terminate the agreement subject to statutory notice periods (section 57a Act on Compulsory Auction and Administration). All other rights resting on the aircraft expire,
however they may continue in regard to the proceeds (sections 91(1), 92(1) Act on Compulsory Auction and Administration). Loss of a right to possession of the aircraft based on rental or leasing agreement of a duration of more than six months (compare section 3(b)(1) Air Traffic Act, see question 7) is compensated by regular payments corresponding to the contractual period as agreed upon (sections 17a(1), 92(1) Act on Compulsory Auction and Administration).

Should the debtor be insolvent, the insolvency administrator in certain limited cases may suspend conflicting execution measures for an interim period (section 30d Act on Compulsory Auction and Administration). In turn the creditor or mortgagee may apply for continuation of execution procedures if the reason for suspension has ceased to exist or if the administrator or the debtor respectively assents to continue (section 30f(1)(1) Act on Compulsory Auction and Administration).

Anyone risking losing a right to the aircraft as a result of its compulsory auction, for example, the owner or even the party in possession of the aircraft, may prevent impending execution measures by fulfilling the creditor’s claim through payment, set-off or deposit, in this way also legally stepping into the creditor’s shoes (section 50 Aircraft Mortgage Act).

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Any existing security interests because of salvage or inevitable maintenance measures by third parties will have priority (section 76(2) Aircraft Mortgaging Act). Seizure of Aircraft). Such seizure by specific provisions (see section 1 Act on Inadmissibility of Seizure of Aircraft).

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

The sale (including the transfer of title) of aircraft is generally subject to German VAT of 19 per cent whenever:

- the delivery of the aircraft originates in Germany, regardless of its final destination (section 13a(1) together with section 3(6) VAT Act). The tax burden rests on the seller (section 13a(1)(1) VAT Act); or
- the delivery of the aircraft, originating in another EU member state, according to the terms of contract ends in Germany (sections 1(1)(5), 14(1), 14(2) VAT Act). The tax burden rests on the purchaser (section 13a(1)(2) VAT Act).

The sale is subject to German import VAT whenever the delivery of the aircraft ends in Germany, originating in a non-EU member state (section 1(4) VAT Act). The tax burden rests on the person who legally owes duties for a customs debt incurred on importation, namely the applicant (sections 13a(2), 21(2) VAT Act together with article 21(3)(1) Community Customs Code).

However, sales of aircraft benefit widely from tax exemptions, so that in all three cases no VAT is commonly due (sections 4(2), 4b(2), 5(1)(2), each together with section 8(2)(1) VAT Act). To be precise, delivery, refurbishment, repair, maintenance, chartering and leasing of aircraft is tax free, if intended for a company that in its everyday business mainly is engaged in non-gratuitous cross border or purely foreign transportation. Regardless of such business, no VAT applies in case of an aircraft’s export from Germany to a third, in other words non-EU member state (section 4(1)(4) together with section 61(1)(4) VAT Act).

German VAT does not apply to lease payments or loan repayments as they do not constitute a performance in a fiscal sense. Also there is no withholding tax on lease payments or loan repayments from the German jurisdiction to another.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Germans, in other words ‘natives’ (according to section 63 Foreign Trade Ordinance together with Appendix A, Chapter 2, No. 1.05 of the Regulation (EC) No. 2223/96), have to report all international payments executed or received in an amount over €12,500 to the German Central Bank within seven days of the transaction (section 67(1) and (4)(1) together with section 71(5) Foreign (Trade) Ordinance) using a specific document (Z5) that, inter alia, contains information on the reporting party as well as on the purpose and the amount of the payment.

There are no exchange controls in effect in Germany, as imposing any payment restrictions is prohibited for EU member states (article 65(2) Treaty on the Functioning of the European Union).

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

The statutory default interest rate is 5.75 per cent as of 1 January 2014, if none of the parties qualifies as consumer (sections 288(2), 247(3) German Civil Code). There is no statutory limit for individual agreements on higher interest rates, but if contained in (the more commonly used) general terms and conditions the rate is limited by the amount of damage actually suffered because of delayed payment (see section 309(3)(b) German Civil Code).

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

No. According to the (European) Community Customs Code that governs exchange of goods between EU member states like Germany and third countries (article 1), the duties legally owed where a customs debt on importation or exportation is incurred (see articles 201 and 209 respectively), are based on the EC Customs Tariff (article 201(1)). In its ‘combined nomenclature’, civil aircraft are declared exempt from duty.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

The most common specific insurances in German aviation practice are:

- aviation hull insurance, covering damage to aircraft from the outside because of adverse weather conditions, crashes or forced landings, etc;
- aviation casualty insurance, covering damage to persons’ health on board an aircraft because of accidents; and
- aviation liability insurance, covering damage to third parties on the surface and on board of an aircraft in the course of its operation.

Liability insurance is of special importance as it is compulsory under EU law and a prerequisite for an aircraft to be operated in Germany (see question 34). The respective insurance company has to be licensed for business in Germany (section 105(1) Air Traffic Licensing Regulation) to ensure that it is properly supervised by German or EU authorities.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

The answer to this question depends on content of the specific agreement.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Generally, such assignments can be effective. It depends, however, on the specific clauses of the agreement.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

No. Liability for any damage resulting from the operation of an aircraft according to EU and German law is limited to the aircraft operator for damage to third parties on the surface (article 1 ff Rome Convention and sections 31 ff Air Traffic Act) and to the air carrier for damage to third parties on board of the aircraft itself (article 17 ff Montreal Convention and sections 44 ff Air Traffic Act). Thus a lessor or financier never will be liable, and the owner only in case of simultaneously being aircraft operator or air carrier (compare article 4(2) Regulation (EC) No. 785/2004).
Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

No. See question 32.

Are there minimum requirements for the amount of third-party liability cover that must be in place?

EU, as well as subsidiary German, law (see sections 43(1), 44 Air Traffic Act and section 101 Air Traffic Licensing Regulation) again distinguishes between liability for damage suffered on board of the aircraft itself, resting on the air carrier, and liability for damage suffered on the surface, resting on the aircraft operator:

- Insurance for (inside) passengers, baggage and cargo. According to article 6 Regulation (EC) No. 785/2004 as amended by Regulation (EU) No. 285/2010, minimum insurance cover is 150,000 Special Drawing Rights (SDR) per passenger, equalling €280,498 (conversion date: 28 March 2014) or 1,131 SDR (€1,269) per passengers’ baggage and 19 SDR (€21) per kilogramme of cargo.

- Insurance for (outside) third parties. According to article 7 Regulation (EC) No. 785/2004, minimum insurance cover per accident for each aircraft operated is determined by its maximum take-off mass or weight (MTOM or MTOW). Operators of common aircraft within the ‘heavy’ class (ICAO/FAA) with a MTOM usually between 50 and 200 or 200 and 500 tons have to provide insurance amounting to 300–500 million SDR (€337 million–€561 million). Only the Airbus A380–800, with a MTOM of over 500 tons, falls into the top bracket necessitating an insurance cover of at least 700 million SDR (€785 million).

German provisions contain the same amounts for German aircraft (see section 103(2)(1) Air Traffic Licensing Regulation; section 103(2)(3) Air Traffic Licensing Regulation together with section 47(4) Air Traffic Act; section 104(3)(1) Air Traffic Licensing Regulation and section 102(2) Air Traffic Licensing Regulation together with section 37(1) Air Traffic Act respectively).

A foreign aircraft entering German airspace has to carry a certificate proving the existence of equivalent liability insurance for third parties to avoid being grounded on its first landing on German surface (section 99(4) Air Traffic Licensing Regulation). When taking on board additional passengers in Germany, the existence of liability insurance for such passengers must also be proven by certificate in order to continue the journey (section 99(5) Air Traffic Licensing Regulation).

Update and trends

Pension funds suffer from the notoriously low interest rate environment. The expected interest rate increase for the US market may cause an absorption in the Eurozone of the capital market interest rate which could result in a decline in the federal bond price level. In absence of a risk buffer when looking at margins of 0.2 per cent many funds will face serious troubles when honoring contracts based on a 4.0 per cent level. Institutions such as pension schemes, social security entities or municipal retirement facilities will be forced to leave their alleged comfort zone and consider investments in alternative asset classes. Aircraft finance transactions (senior and/or junior secured) could mean a robust and sustainable investment for such institutions that will have to diversify their exposure in terms of geography, economy and finally currency. German DekaBank (www.dekabank.de) seems to be at the forefront as the central asset manager of ‘Deutsche Sparkassen’ when it comes to sourcing and structuring such transactions as well as managing the asset beyond the cycle time of the investment.

- Insurance for (inside) passengers, baggage and cargo. According to article 6 Regulation (EC) No. 785/2004 as amended by Regulation (EU) No. 285/2010, minimum insurance cover is 150,000 Special Drawing Rights (SDR) per passenger, equalling €280,498 (conversion date: 28 March 2014) or 1,131 SDR (€1,269) per passengers’ baggage and 19 SDR (€21) per kilogramme of cargo.

- Insurance for (outside) third parties. According to article 7 Regulation (EC) No. 785/2004, minimum insurance cover per accident for each aircraft operated is determined by its maximum take-off mass or weight (MTOM or MTOW). Operators of common aircraft within the ‘heavy’ class (ICAO/FAA) with a MTOM usually between 50 and 200 or 200 and 500 tons have to provide insurance amounting to 300–500 million SDR (€337 million–€561 million). Only the Airbus A380–800, with a MTOM of over 500 tons, falls into the top bracket necessitating an insurance cover of at least 700 million SDR (€785 million).

German provisions contain the same amounts for German aircraft (see section 103(2)(1) Air Traffic Licensing Regulation; section 103(2)(3) Air Traffic Licensing Regulation together with section 47(4) Air Traffic Act; section 104(3)(1) Air Traffic Licensing Regulation and section 102(2) Air Traffic Licensing Regulation together with section 37(1) Air Traffic Act respectively).

A foreign aircraft entering German airspace has to carry a certificate proving the existence of equivalent liability insurance for third parties to avoid being grounded on its first landing on German surface (section 99(4) Air Traffic Licensing Regulation). When taking on board additional passengers in Germany, the existence of liability insurance for such passengers must also be proven by certificate in order to continue the journey (section 99(5) Air Traffic Licensing Regulation).

Pension funds suffer from the notoriously low interest rate environment. The expected interest rate increase for the US market may cause an absorption in the Eurozone of the capital market interest rate which could result in a decline in the federal bond price level. In absence of a risk buffer when looking at margins of 0.2 per cent many funds will face serious troubles when honoring contracts based on a 4.0 per cent level. Institutions such as pension schemes, social security entities or municipal retirement facilities will be forced to leave their alleged comfort zone and consider investments in alternative asset classes. Aircraft finance transactions (senior and/or junior secured) could mean a robust and sustainable investment for such institutions that will have to diversify their exposure in terms of geography, economy and finally currency. German DekaBank (www.dekabank.de) seems to be at the forefront as the central asset manager of ‘Deutsche Sparkassen’ when it comes to sourcing and structuring such transactions as well as managing the asset beyond the cycle time of the investment.

Update and trends

Pension funds suffer from the notoriously low interest rate environment. The expected interest rate increase for the US market may cause an absorption in the Eurozone of the capital market interest rate which could result in a decline in the federal bond price level. In absence of a risk buffer when looking at margins of 0.2 per cent many funds will face serious troubles when honoring contracts based on a 4.0 per cent level. Institutions such as pension schemes, social security entities or municipal retirement facilities will be forced to leave their alleged comfort zone and consider investments in alternative asset classes. Aircraft finance transactions (senior and/or junior secured) could mean a robust and sustainable investment for such institutions that will have to diversify their exposure in terms of geography, economy and finally currency. German DekaBank (www.dekabank.de) seems to be at the forefront as the central asset manager of ‘Deutsche Sparkassen’ when it comes to sourcing and structuring such transactions as well as managing the asset beyond the cycle time of the investment.
India

Ashwin Ramanathan, Zubin Mehta, Aditya Singh Chandel and Rustam Sethna
AZB & Partners

Overview

1. To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

India has ratified the Chicago Convention, but has opted not to ratify article 3 (Civil and State Aircraft) and article 83 (Transfer of Certain Functions and Duties) thereunder. India has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York in 1958 (the New York Convention). An award made in a country which is a party to the New York Convention, and which has further been notified as a reciprocating territory by the government of India, is treated as a 'foreign award' under Indian law.

India acceded to the Cape Town Convention on International Interests in Mobile Equipment (CTC) and the Protocol to the Cape Town Convention on International Interests in Mobile Equipment (Protocol) on 31 March 2008. However, only specific provisions of the CTC and the Protocol have become effective from 1 July 2008. It is pertinent to note that although the CTC has been ratified, the government of India has not yet enacted legislation implementing the opt-in declarations of the provisions of the CTC in India.

India is a party to the Warsaw Convention (1929), Hague Protocol (1955) and Montreal Convention (1999) and the provisions provided therein, subject to the provisions of the Carriage by Air Act 1972 (Carriage Act), have the force of law in India in relation to any carriage by air irrespective of the nationality of the aircraft performing the carriage.

India has not signed the Geneva Convention on the International Recognition of Rights in Aircraft (1948) or the Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (1933).

2. What is the principal domestic legislation applicable to aviation finance and leasing?

There is no principal domestic legislation applicable to aviation finance and leasing. However, various aspects of an aircraft leasing and financing transaction are governed inter alia by the Indian contract laws, Indian company laws, and Indian foreign exchange regulations.

3. Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Indian law, in general, recognises the freedom of the parties from different jurisdictions to choose the proper law of contract. Therefore, Indian law will generally recognise a title transfer that is valid under the governing law of the contract, unless such recognition is against public policy in India, or unless the choice of law appears to have been made with a view to avoid any mandatory requirements under Indian law.

Title transfer

4. How is title in an aircraft transferred?

Title in an aircraft can be transferred by execution of a sale agreement or a bill of sale between the seller and the buyer of the aircraft. If such agreement is executed outside India and is then brought into India, whether by way of physical delivery or fax, e-mail or any other electronic means for any purpose, the same will have to be stamped within the statutorily prescribed period in accordance with the stamp laws in force in the relevant state in which the transaction documents are brought.

5. What are the formalities for creating an enforceable transfer document for an aircraft?

As mentioned in question 4, documents that are executed outside India, and are subsequently brought into India, must be stamped within the statutorily prescribed period in accordance with the stamp laws in force in the relevant state in which the transaction documents are brought. In addition to the stamp duty requirement, the transfer documents should be notarised and apostilled for submitting to governmental authorities, essentially the Directorate General of Civil Aviation (DGCA).

Registration of aircraft ownership and lease interests

6. Identify and describe the aircraft registry.

The aircraft register in India is maintained by the DGCA. This register contains details in relation to the aircraft such as:

- type of aircraft;
- year of manufacture;
- full name and address of the owner; and
- full name and address of the operator.

This register is open for inspection by members of the public.

India has acceded to article 83-bis of the Convention on International Civil Aviation and has also suitably amended the Aircraft Rules (1937) (Aircraft Rules).

There is no engine-specific register in India.

7. Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

As stated above, the DGCA’s aircraft register is an owner’s registry although it also includes details of the operator, if different from the owner. There is no separate register for leases and aircraft engines maintained in India. Further, once registered with the DGCA, there is no requirement to have the aircraft ownership registered at any other registry in India. In case of a leased aircraft, in addition to the details mentioned above, details (names, nationalities and address) of the lessor and lessee, including the period of validity of the lease agreement, will also be required to be mentioned.

8. Summarise the process to register an ownership interest.

The owner of the aircraft is required to register his interests in the aircraft with the DGCA by filing a prescribed form, along with providing supporting documentary proof in relation to the details mentioned therein together with the prescribed fee (calculated on the basis of the maximum permissible take-off weight of the aircraft). It generally takes approximately 10-15 working days from the receipt of the form and documents for an aircraft to be registered and a certificate of registration to be issued to the owner.

As mentioned above, there is no separate registration of title to the engine of an aircraft.
9 What is the effect of registration of an ownership interest as to proof of title and third parties?

The register of the DGCA is merely a ‘notation’ register; courts in India would accept the certificate of registration, issued by DGCA, as prima facie evidence of lessor, lender or owner interest in the aircraft. It would be difficult to defend a case in the courts against third parties if the owner has no or defective title as per the records of the DGCA.

10 Summarise the process to register a lease interest.

See question 7.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

The DGCA issues the certificate of registration for the aircraft. The following details are recorded in this certificate:
- the type of aircraft;
- the manufacturer’s serial number;
- the year of manufacture;
- the nationality and registration marks of the aircraft;
- the full name, nationality and address of the owner or lessee;
- the full name, nationality and address of the operator or lessee;
- the usual station of the aircraft;
- the date of registration of the aircraft and the period of validity of such registration; and
- the name of security interest holder, if any.

There is no separate engine certificate of registration in India.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Under Indian law, the registration and deregistration of an aircraft may only be done by the owner or the owner’s authorised representatives. Such deregistration may be done by applying to the DGCA for cancellation of registration. In the normal course of things, it is not possible for the operator to block any proposed deregistration or export by an owner or mortgagee. However, there have been instances in the past where the operator has delayed the deregistration or export of the aircraft by raising disputes regarding the termination of the underlying lease agreement before the Indian courts.

13 What are the principal characteristics of deregistration and export powers of attorney?

A valid deregistration power of attorney (DPOA) executed by the lessee or operator in favour of the owner or lessor enables such owner or lessor to deregister the aircraft without the need for judicial intervention. Further, Indian law provides for both revocable and irrevocable powers of attorney, the distinction being that for a power of attorney to be irrevocable it must be coupled with an interest of the attorney being appointed in exercising the power under the power of attorney. Based on our experience, it is advisable that a duly stamped and notarised copy of a DPOA (executed by the operator in favour of the owner) be filed with the DGCA in addition to the IDERA (discussed in more detail below), as this expedites procedures at the time of enforcement.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

An IDERA can be filed with the DGCA and the acknowledgement of the DGCA can be obtained. While there is no requirement that an IDERA be countersigned by the aviation authority (ie, the DGCA) it is advisable that the acknowledgement of the DGCA be obtained as this ensures that the DGCA will note the fact of issuance of the IDERA by the operator and that the owner or lessor is entitled to exercise its rights under the IDERA. While the DGCA does not have any preferred way to deal with a financier as the beneficiary’s ‘certified designee’, they may at the time of making any filing ask for any further supporting documents relating to such financing arrangements.

The IDERA process exists in parallel with the DPOA, and the courts have recognised the IDERA as an instrument similar to the DPOA.

15 What is the typical form of a security document over the aircraft and what must it contain?

The security document is not required to be in any specified format or in any particular language. In practice, such security documents generally record the maximum secured amount and the underlying economic terms of the deal such as principal, interest and repayment dates.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The documentary formalities for creation of an enforceable security are similar to the formalities in relation to the title transfer documents. In this regard, see questions 4 and 5. If the owner of an aircraft is an Indian company or a company with a registered place of business in India, then additional requirements to perfect the security will apply, such as filing of charges (discussed in more detail below).

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties?

Summarise the process to register a mortgagee interest.

There is no separate register of aircraft mortgages in India. Despite the absence of any requirement, it is advisable to file a notarised and apostilled copy of the mortgage documents evidencing the creation of the charge with the DGCA, which will endorse the name of the mortgagee on the certificate of registration.

As per law, if the mortgagor is an Indian company or a company with a registered place of business in India, the mortgagor must, within a prescribed period, register any charge (which includes a mortgage) created with the relevant Registrar of Companies (ROC) in the prescribed form. The Indian company laws require such filing to be made within 30 days of the creation of the charge, in the prescribed form, along with the complete particulars of the charge, including the instrument creating such charge.

18 How is registration of a security interest certified?

The registration of a security interest is certified by an acknowledgement given by the ROC at the time such registration is done by filing the prescribed forms along with the supporting documents. The ROC maintains a register of charges which evidences the existence of the charge over the aircraft, records the nature and details of the instrument creating the charge. The register of charges is a public document and constitutes notice to third parties of the existence of such charge. Only charges created by Indian owners of aircraft are required to be registered with the ROC. There is no requirement to do so for a foreign owner of an aircraft operated in India. In respect of filings made with the DGCA, an acknowledgement of the same may be obtained at the time of making the filing.

19 What is the effect of registration as to third parties?

See question 18. Priority of charges is based on the date of creation of charges, not on the basis of date of registration of charges, provided the charges are in fact registered within the statutorily prescribed period.

20 How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

The concept of trust and security trustee is recognised in India. Typically, in financing transactions involving one or more lenders, the security over aircraft and leases is structured through a security trustee who holds and enforces the security interests on behalf of the lenders.

As per law, a mortgagee’s right in an aircraft is a right in personam. Indian law also facilitates arrangements whereby a security trustee may hold the security for a changing group of beneficiaries. When the underlying loan is transferred or if the lenders change, although there is no security register in India it is advisable to intimate the DGCA about such changes.

21 What form does security over spare engines typically take and how does it operate?

There is no requirement or regime in India for registration of a lease or mortgage of an engine, separate from that of the aircraft. In relation to leased aircraft, typically the engines are not considered as separate items.
In our experience, provisions in relation to title, security and obligations or restrictions in relation to spare parts are set out in the lease agreement, which also records evidence of owner’s title and beneficial interest in relation to the parts (present and future) and also on the spare parts (present and future), whether such spare parts are repaired or replaced.

Enforcement measures

22 Outline the basic repossessions procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

An aircraft may be repossessed through the DGCA (DGCA Process); or by initiating legal action (Court Process).

DGCA process

Under Indian law, the validity of the certificate of registration is co-terminus with the validity of the lease deed. Hence, after termination of the lease, all parties with an interest in the aircraft are required to submit to the DGCA separate plain-paper applications along with the necessary documents seeking the deregistration of the aircraft. Thereafter, an approval from the Bureau of Civil Aviation Security is required to obtain physical custody of the aircraft.

In the case of a hostile repossession, the owner, lessor or security trustee may repossess the aircraft on the basis of a duly stamped and notarised DPOA, an IDERA or both, if such instruments have been issued by the lessee in their favour.

Court process

In the event that the lessor chooses not to follow the DGCA process or the DGCA fails or refuses to deregister the aircraft, the lessor may initiate legal action to repossess the aircraft.

The DGCA being a government body, the lessor can file a writ petition in the High Court, within whose jurisdiction the DGCA’s order was passed, seeking to quash the DGCA’s order and asking for a direction to be issued to the DGCA to reher the application for deregistration and repossess.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

The manner of enforcement of a security interest largely depends upon the type of interest to be enforced.

Immoveable property

Creditors in India can take security over immoveable property by way of mortgage. In India, mortgages are commonly in the form of equitable mortgage or English mortgage. A mortgagee’s right depends on the type of mortgage in question.

Equitable mortgage

In an equitable mortgage, the mortgagee may enforce his security by filing a civil suit for either sale of the mortgaged property, or to sue the mortgagor personally for the mortgage money subject to the fulfilment of certain conditions. A mortgagee may also request the court to appoint a receiver for the mortgaged property in certain circumstances.

English mortgage

In an English mortgage, the mortgagee may enforce his security by filing a civil suit for either sale of the mortgaged property, or to sue the mortgagor personally for the mortgage money subject to the fulfilment of certain conditions. In addition, in an English mortgage, a mortgagee may also have the power to sell the mortgaged property without the intervention of the court if certain conditions are satisfied.

Moveable property

Moveable properties are most commonly charged by way of execution of a ‘Deed of Hypothecation’. A Deed of Hypothecation usually contains provisions entitling the creditor (beneficiary of the hypothecation) to appoint a private receiver (to take possession of the hypothecated properties) and sell the hypothecated properties without requiring the intervention of a court. Courts in India have by and large been consistent in upholding the lender’s right to thus take possession of hypothecated properties and sell the same, provided the Deed of Hypothecation so empowers the lender.

Cash or bank accounts

Cash and bank accounts are charged in the same manner as moveable properties, namely by way of execution of a deed of hypothecation. Upon default, if the bank accounts being charged are maintained with the lending bank itself, the lending bank shall have the right to appropriate monies lying credited in the account towards its dues. A charge by way of hypothecation may be created over account balances and bank accounts maintained with banks other than the lending bank as well. The manner of enforcement of a hypothecation created over bank accounts maintained with banks other than the lending bank will depend upon the process and procedure which had been followed at the time of creation of the hypothecation.

Securities

There are two separate regimes under which securities are pledged under Indian law, depending on the form of securities (ie, whether the securities are evidenced by physical certificates, or whether the securities are electronic or dematerialised). In the event physical securities have been pledged, the lender has the right to sell the pledged securities and adjust the consideration received against its dues. In the event, dematerialised securities have been pledged, then the lender must first acquire the securities in its own name and thereafter transfer the securities to a buyer and appropriate the consideration for the sale towards its dues.

Effect of insolvency

In case of a winding up petition, any disposition of the property of the company, made after the commencement of the winding-up, without leave of the court, is void unless the court directs otherwise. Moreover, once an order of winding-up has been made or an official liquidator has been appointed, no legal proceedings can be instituted, or in case the proceedings have already been instituted, the legal proceeding cannot continue except with the leave of the court. The official liquidator would take possession of the property of the company (including the aircraft, if he so decides) only after he is appointed.

Indian law also provides for ‘claw-back’ of transactions in certain instances. A court may set aside any transfer of property, payment effected six months prior to the commencement of the winding-up order if such transaction was made with the intention of preferring a particular creditor. Further, any transfer of property, made by a company not being a transfer made in the ordinary course of its business; or in favour of a purchaser or encumbrancer in good faith and for valuable consideration, and if made within a period of one year before the presentation of a petition for winding up is void as against the liquidator.

Irrespective of the enforcement method, an owner may, at any stage of the enforcement proceeding initiated by the mortgagee, file for an injunction in a court citing irreparable loss if the enforcement is not stayed.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The laws of India recognise the following liens in favour of third parties:

- airline employees for unpaid wages;
- repairers for repairs of aircraft in the repairers’ possession, to the extent of service or services performed; and
- governmental or other unpaid statutory dues.

In the event an aircraft has been detained by any authority for the non-payment of dues by the operator, the owner of the aircraft may be required to seek relief from the courts. There have been numerous instances where the courts have held that the aforementioned liens are to be borne by the operator and their failure to pay cannot result in the detention of the aircraft.

In addition, Indian laws permit the central government to empower any authority to detain an aircraft if such detention is necessary to secure compliance with a domestic legislation or when such detention is necessary to prevent a contravention of any such legislation or to implement any order made by any court. For instance, the Airport Authority of India has been authorised to detain an aircraft until all fees owed to it by the operator have been paid.

In addition, the central government has the power to give directions to detain or requisition either foreign-owned or local-owned aircraft in the interest of public safety and security. There is no statutory requirement for the central government to compensate the affected parties. However, as
India has entered to bilateral investment agreements with several countries, a foreign investor could resort to legal protection accorded under such agreements, against the government of India for any discriminatory treatment and claim adequate compensation for any such detention or expropriation.

Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Lease rentals payable to a non-resident for use of aircraft for the purpose of a business carried on in India by the payer (whether by resident or non-resident) is taxable in India as royalty under the domestic tax law, and is subject to tax withholding at the rate of 25 per cent (plus applicable surcharge and education cess) on gross basis. The Finance Bill 2015 (the Finance Bill) has proposed a rate of 10 per cent (plus applicable surcharge and education cess) with effect from 1 April 2015. The Finance Bill has been passed by the Indian parliament and is likely to be enacted upon Presidential assent by the end of May 2015. However, the various provisions shall take effect from the dates mentioned in the Finance Bill as approved.

The loan repayments to non-residents may comprise two components – principal and interest. The principal amount of loan would not be taxable in India and would not be subject to tax withholding in India. However, the interest element would be taxable in India under the domestic tax law if the loan is borrowed for the purpose of a business carried on in India by the payer (whether by resident or non-resident) and would be subject to tax withholding in India at the applicable rate, which may vary from 5 to 30 per cent (plus applicable surcharge and education cess) depending on the nature of debt instrument. Further, the gain, if any, arising to a non-resident from a transfer of an aircraft registered and operated in India may be subject to capital gains tax in India under the domestic tax law. The rate of tax would depend upon the period of holding of the aircraft. If the aircraft is held for a period exceeding three years, then the capital gains, if any, would be taxed at the rate of 20 per cent (plus applicable surcharge and education cess), otherwise the same would be taxed at the rate of 40 per cent (plus applicable surcharge and education cess). The same would be subject to tax withholding accordingly. However, all three above-mentioned tax liabilities may be subject to any benefits available under the applicable tax treaty.

There may not be any way to minimise the aforesaid tax liabilities. The capital gains tax, if any, applicable on sale of an aircraft registered and operated in India, would not be impacted by whether the aircraft is on the ground or in the airspace of the jurisdiction.

Further, grossing-up provisions are recognised under Indian income-tax laws. However, in case of gross-up, for the purposes of deduction of tax, the amount on which tax is required to be deducted and deposited to the account of the central government shall be increased to an amount such that after the deduction of tax thereon, the net income is equal to the actual amount paid to the recipient of payments. Typically, value added tax is not payable on lease payments made under lease agreements executed outside India.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

India is an exchange-controlled jurisdiction, and matters relating to remittance or repatriation of foreign exchange are governed by the provisions of the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder.

Under law, Indian operators do not require any approval of the Reserve Bank of India (RBI) for any remittance of operating lease rentals, opening of letters of credit, payments towards security deposit, etc., in respect of import of aircraft, aircraft engines or helicopters on an operating lease basis. However, for other payments (for example, rentals in financial lease transactions, indemnity payments and payments towards insurance premia), the prior approval of the RBI might be required.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

While there are no express limitations on the amount of default interest that can be charged on lease or loan payments, the courts have been active to ensure that such interest is not usurious or excessive. In determining if the rate of interest charged is excessive, the courts may consider the market rate, inflation and also a fall in the bank rate. In the absence of any agreement or statutory provision or mercantile usage, the courts may also defer to the market rate upon establishment of a totality of circumstances justifying the exercise of such equitable jurisdiction.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Import

To import an aircraft into India, the owner of the aircraft will need to apply for a temporary certificate of registration. The fee payable in respect of a temporary certificate of registration for an aircraft is 25 per cent of the fee payable for applying for a certificate of registration (which varies depending on the maximum permissible take-off weight of the aircraft). In addition to the temporary certificate of registration, the owner of the aircraft will also need to apply to the Director-General of Foreign Trade (DGFT) for an import licence. The custom duty payable for an import licence is waived for import of aircraft by operators who have been approved by the Ministry of Civil Aviation to provide non-scheduled (passenger) and non-scheduled (charter) services. However, in certain cases a ‘no objection certificate’ may be required from the DGCA for import of the aircraft prior to availing such exemption.

Export

Except where an exemption has been granted by the DGCA and DGFT, no owner can export an Indian-registered aircraft from India without obtaining an export licence. The costs for obtaining this licence vary from case to case. In addition to obtaining the export licence, the owner of the aircraft will need to obtain a ‘ferry flight permit’, for flying the aircraft outside India. An application for a ‘ferry flight permit’ can be made along with the request for deregistration. There are no costs involved in obtaining a ‘ferry flight permit’.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

As per law, an operator of aircraft in India has an obligation to maintain adequate insurance to cover its liability towards passengers and their baggage, crew, cargo, hull loss and third-party risks in compliance with the requirements of the Carriage Act, or any other applicable law. In aircraft lease financing transactions, the lessee is required to obtain such insurance from an Indian insurer which is generally reinsured with an offshore re-insurer subject to satisfying certain requirements, including that such re-insurer shall maintain a prescribed credit rating of an international credit rating agency.

However, an Indian insurer must also re-insure 30 per cent (or such other sum prescribed by the regulatory authority) of the sum assured on each policy with an Indian insurer.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

In our view, the prior approval of the RBI is likely to be required to be obtained by the Indian insurer in order to include a cut-through clause. However, several insurers in India take the view that the approval of the RBI is not required for including a cut-through clause. In any event, this is a compliance item for the Indian insurer and not for any other party.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

In our view, a prior approval from the RBI is likely to be required in connection with assignment of re-insurances. However, several Indian insurers tend to take the view that no prior approval from the RBI is required. That said, we have seen that the assignment of re-insurances in favour of lenders is an Indian industry standard in aircraft financing transactions.
Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?
No. Under Indian law, the liability for damages is imposed only on the carrier and the owner is not liable for the operator’s actions as long as ownership is clearly distinct from operation of the aircraft and the owner is not involved in the actual operation of the aircraft.

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?
While the common law principle of strict liability exists in India, its application is limited to matters not covered by a specific statute. Since an aircraft or carrier’s liability in India is codified in the Carriage Act, the common law principle of strict liability finds no application to instances covered by the Carriage Act.

Are there minimum requirements for the amount of third-party liability cover that must be in place?
Yes. As per the Carriage Act, the operator of an aircraft has an obligation to maintain insurance for an amount that is adequate to cover its liability towards passengers and their baggage, crew, cargo, hull loss and third-party risks.
Overview

1. To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Indonesia has ratified and/or adhered to and is a party to the following air law treaties:
- the Chicago Convention On International Civil Aviation, Chicago, 1944;
- the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958; and

2. What is the principal domestic legislation applicable to aviation finance and leasing?

There is no principal domestic legislation applicable to finance and leasing. However, legislation which is relevant to typical aviation finance and leasing structures in Indonesia includes the Indonesian Civil Code, Aviation Law No. 1/2009, Fiduciary Security Law No. 42/1999, Indonesian Central Bank Regulation No. 173/PBI/2015 on the Obligation to use the Indonesian Rupiah within territory of Indonesia, Minister of Finance Decree No. 1169/KMK.01/1991 on Leasing, Minister Regulation No. 60/2008 and its amendment No. 61/2009 on CASR 45 regarding Identification and Registration Marking of an Aircraft, Minister Regulation No. 49/2009 on CASR 47 regarding aircraft registration.

The Minister of Law and Human rights is currently still working on the Security over Aircraft Bill which will cover domestic aircraft financing, aircraft security registry in Indonesia, and form of deed and execution procedure of such security.

3. Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Generally, aircraft registered in Indonesia with Indonesian nationality fall under Indonesian jurisdiction. However, for the purpose of international interest, according to article 71-72 of the Aviation Law, any agreement regarding security, title reservation, and leasing may be concluded based on a law agreed by each of the parties. In the event, the parties to such agreements are subject to Indonesian law, the agreements must be drawn in an authentic deed containing at least:
- the identities of the parties;
- the identity of the aircraft; and
- the rights and obligations of the parties.

However, to date, Indonesia has no standard regarding such authentic deed. See also question 2 with regard to the prospective Minister of Law and Human Rights Regulation on Security over Aircraft Bill.

Title Transfer

4. How is title in an aircraft transferred?

According to Indonesian law, title transfer is achieved by transferring possession from the seller to the buyer. A bill of sale is normally used to effect the title transfer. Besides a bill of sale, the evidence of ownership may be in the form of Grant Certificate or Document, lease agreement or other form acceptable by the Director General of Civil Aviation (DGCA).

5. What are the formalities for creating an enforceable transfer document for an aircraft?

There are no formalities such as notarial deed for creating an enforceable transfer document for an aircraft. The new owner (the buyer) shall only submit a registration application or application for the change of ownership to the DGCA. The DGCA in this case would only verify the requirement documents.

Registration of aircraft ownership and lease interests

6. Identify and describe the aircraft registry.

The DGCA maintains the aircraft registry in Indonesia. Registration of aircraft under Indonesia law can be registered only by and in the legal name of its owner. The owner shall mean buyer in possession or a person appointed to act on behalf of other parties (if the aircraft is owned by more than one person).

To be registered as an Indonesian aircraft, an aircraft shall meet the following requirements:
- it shall not registered in other country, and owned by Indonesian citizen or Indonesian legal entity;
- it shall be owned by a foreign citizen or foreign legal entity and operated by an Indonesian citizen or Indonesian legal entity for a minimum utilisation period of two years continuously based on an agreement or contract;
- it shall be owned by a government agency or regional government and the aircraft must not utilised for enforcement missions, or owned by a foreign citizen or foreign legal entity based on an agreement or contract subject to the law agreed upon by the parties for purposes of aircraft storage, hire, rental or commerce;
- all duties due and payable under the laws of Indonesian in respect of the importation of the aircraft into Indonesia have been paid; and
- all insurance required by the Aviation Law have been covered.

Indonesia has ratified article 83-bis of the Chicago Convention. However, we are not aware of any frequently used 83-bis arrangements between Indonesia and other jurisdictions.

There is no engine-specific register in Indonesia.

7. Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners, operators and lessees' interests in aircraft engines be registered?

The DGCA's aircraft registry is an owner's registry, although it also includes details of the operator, if different from the owner.

In Indonesia, there is no separate registry for leases and aircraft engines maintained. Further, once registered with the DGCA, there is no requirement to have the aircraft ownership registered at any other registry in Indonesia. In case of a leased aircraft, in addition to the details mentioned above, details (names, nationalities and address) of the lessor and
lessee, including the period of validity of the lease agreement, will also be required to be mentioned.

An owner definition, based on Minister Regulation 49/2009 includes a buyer in possession or person appointed (in the event that an aircraft is owned by more than one person). Therefore there is no distinction between an owner (real definition) and a lessee (who acts as the possessor of an aircraft). Furthermore, it is stated that a Certificate of Registration (CoR) is not evidence of ownership of an aircraft. The DGCA does not issue any certificate of ownership nor endorse any information with respect to ownership on a CoR. The DGCA only issues a CoR to the person who appears to be owner on the basis of the evidence of ownership (ex. bill of sale), application for aircraft registration, or record with the civil aircraft register. Based on that, the ownership or lease interest is only registered in the Indonesia Civil Aircraft Register.

There are no other registers in Indonesian regarding an ownership interest or any other interest in an aircraft. Registration of an aircraft can only be registered in the Indonesia Civil Aircraft Register held in the DGCA. It is not possible to register any interest in aircraft engines in the DGCA.

8 Summarise the process to register an ownership interest.

There are some requirements to be satisfied as previously described in question 6 to register an ownership interest in Indonesia. After meeting the requirements, the applicant or owner (note that to apply Indonesian aircraft to the Indonesia aircraft register the applicant must be an Indonesian citizen or legal entity under the Law of Indonesia) shall submit an application along with evidence of ownership, which may take the form of a bill of sale or present a certificate, document or other form as acceptable by the DGCA.

After fulfilling all the above requirements, the aircraft shall be given a CoR in no later than seven days which will be valid for three years. Further, an aircraft that already has the CoR will be given a nationality mark of Indonesia and shall be equipped with the Indonesian flag. The cost of filing the CoR is dependent on the weight of the aircraft.

The DGCA shall then record in the register information on the registered aircraft, which includes:
- the number of the CoR;
- the nationality and registration marks; manufacturer’s designation of the aircraft;
- the serial number of the aircraft;
- the name of the registered owner;
- the address of the registered owner; name of the registered operator;
- the date on which the entry was made in the register; and
- the type of operations for which the aircraft is registered.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

In Indonesia, the registration of an ownership interest with the aircraft registry constitutes a public notice of the ownership, and with such registration the owner’s right will be perfected against both the operator of the aircraft and third parties. Third parties can rely on the accuracy of the public registration of the ownership interest as recorded on the CoR. The CoR will confirm the nationality or common mark and registration mark of the aircraft, the manufacturer and manufacturer’s designation of aircraft, the aircraft serial number, name and address of the owner, the holders of registered liens, and will describe all documents and agreements filed in respect of a particular aircraft such as leases.

10 Summarise the process to register a lease interest.

Indonesia does not yet have a national aircraft (including aircraft frame and engine) registry. However, engines may be registered in the Fiduciary Office. Even so, commonly in Indonesia an aircraft (including aircraft frame and engine) or engine is subject to an international interest under the CTC. Such interest must be registered to the International Registry to have priority over subsequently registered interests or unregistered interests. However, such aircraft with international interest must previously be registered in the DGCA under the requirements and procedure stated in questions 6 and 8.

Further, a registered operator or owner (lessee) may issue an irrevocable deregistration and export request authorisation (IDERA) to the creditor or lessor. To become valid, such IDERA has to be acknowledged and recorded with the DGCA and may not be revoked without prior written consent of the creditor or lessor. An IDERA can be recorded at the same time as the conclusion of the lease agreement creating or providing the international interest, by completing DAFO Form 47–07 (Form of IDERA) and submitting it to the DGCA with the following required documents: a copy of the valid CoR and a copy of the agreement creating or providing for international interest.

After all the requirements have been fulfilled and reviewed, the IDERA form will be dated and signed by the DGCA to become valid, and recorded in the DGCA at the latest within seven calendar days.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

The following information will be recorded on the Indonesian CoR issued by the DGCA. CoR consists information regarding the CoR number, nationality mark, aircraft type, serial number of the aircraft, name and address of the owner, date of issuance and its validity period plus the signature of the DGCA. The CoR does not state the operator and mortgage information of the aircraft. This CoR includes the aircraft as a whole and not just its engine. See also question 6.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The IDERA may only be revoked at a request of the authorised party in whose favour the IDERA has been made (creditor or lessor). To revoke an IDERA, the letter should be submitted and signed by the creditor or lessor when the application considered appropriate by the DGCA. There are no notification requirements in this respect, however, in practice, the DGCA will summon and facilitate the related parties with mediation. If no solution is reached five days after submission of the request, the DGCA will deregister or export the aircraft. There is no legal means for the operator to block such deregistration.

13 What are the principal characteristics of deregistration and export powers of attorneys?

Indonesian aviation finance transactions usually require the Indonesian lessee to issue a deregistration power of attorney. A valid deregistration power of attorney executed by the lessee or operator in favour of the owner or lessor enables such owner or lessor to deregister the aircraft without the need for judicial intervention. There are no specific regulations on a power of attorney for the deregistration and export of an Indonesian aircraft, thus the requirements of a power of attorney shall be subject to Indonesian civil law.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The CTC is in effect in Indonesia. The notable features in the IDERA process in Indonesia are: It has to be acknowledged and recorded in the DGCA, the debtor is in default, the creditor or its representative is the only authorised person to submit the deregistration request to the DGCA; and in practice, before the DGCA deregisters and exports the aircraft, the DGCA will summon and facilitate the related parties through mediation. If there is no solution via mediation, or the debtor does not obey the mediation result, the creditor may continue to submit their request to deregister and export the aircraft to the DGCA. The DGCA will deregister and export the aircraft within five days from the submission of IDERA by the creditor. There is no legal means for the operator to block such deregistration.

Security

15 What is the typical form of a security document over the aircraft and what must it contain?

Since Indonesia has not yet regulated in what form aircraft security must be charged, thus, Indonesian law does not require aircraft security document take any particular form. However, the Aviation Law stipulates, if the parties agree that the aircraft security document is governed by the Indonesian law, such documentation shall be constituted in the form of an authentic deed. Meanwhile, the security document governed by foreign law is not required to be in any specified format. The authentic deed must
as a minimum include the identity of the parties, identity of the aircraft and right and obligation of the parties. For compliance with Law No. 24 of 2009 on Flag, Language, Symbol of State and Anthem, we suggest the security document be in two languages (English and the local language) where it involves an Indonesian party.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

Security documents for aircraft (aircraft frame and engines)

Indonesian law does not provide for specific requirements on the documentary formalities (such as notarisation, legalisation, stamping or translation) for creation of a valid security over an aircraft. However, in the event that the security is enforced through judicial proceedings in Indonesia and is signed in a foreign language, then the Indonesian court will require a certified Indonesian translation of the security document, provided by a qualified translator, to be presented to the court. In addition, if the security document is formed (or created) outside Indonesia, in order for such document to be admitted as evidence in the legal proceeding with the Indonesian court, it shall be certified as to its authenticity and legality by a notary public in the country where it is formed (or created), and such certification shall be further authenticated by an embassy or consulate of Indonesia in such country (or otherwise pursuant to the relevant bilateral or multilateral treaty to which both Indonesia and such country is a party).

Security documentary for the engine

If the parties agree to use the Indonesian fiduciary security over the engines, then the fiduciary security documents need to be made in an authentic deed notarised, legalised, stamped and made in a Bahasa Indonesia version for creating an enforceable security over an aircraft.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties?

Summarise the process to register a mortgagee interest.

For security over the aircraft (aircraft frame and engines)

No, security documents registered in the international registry are recognised under Indonesian law. However, a lessee may register such security which is made in a notarial deed and registered in the Fiduciary Office, there is no asset-based security available over an aircraft object equivalent to that of the holder of a registered international interest.

18 How is registration of a security interest certified?

There is no national regulation on aircraft security certification procedure in Indonesia. As long as it is in compliance with the International Registry procedure, the government recognises it and such registry will have priority over subsequently registered interests or unregistered interests.

19 What is the effect of registration as to third parties?

See question 18.

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Unless the engines can be charged by fiduciary security and registered to the Fiduciary Office, there is no asset-based security available over an aircraft in Indonesia. The parties involved will be advised to use foreign law and register the security to the International Registry.

21 What form does security over spare engines typically take and how does it operate?

Spare engines not forming part of an aircraft may be registered with the Fiduciary Office under Indonesian law, and fiduciary security can be granted on them as a single item of property.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

Indonesian law permits a lessor to repossess an aircraft without the need to obtain a court order (self-help remedy) if the parties in their security or leasing document have agreed on the implementation of an IDERA.

As stated in question 17, the security document is registered in the DGCA for the purposes of recording only. In practice, at the end of the lease term, the lessors or owners of the aircraft usually request the DGCA to issue a statement letter on aircraft security removal. If the aircraft is going to be re-exported, lessors or owners of the aircraft initiate customs proceedings. The DGCA will also cancel the Indonesian licence of the aircraft and report this cancellation to the jurisdiction where this aircraft will be registered.

The lessee may lawfully impede the owner’s rights to exercise default remedies by arguing that the grounds for expiry or termination of the lease do not exist.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

Indonesian law permits a lessor to repossess an aircraft without the need to obtain a court order (self-help remedy) if the parties in their security or leasing document have agreed on the implementation of an IDERA.

However, for the aircraft engine secured under the Indonesian fiduciary security which is made in a notarial deed and registered in the Fiduciary Office, in practice, such deed is executed by a court order.

If there is any insolvency occurs to the debtor, provided that a security over an aircraft has been duly registered, the IDERA will remain valid and will have no effect on the debt settlement. The creditor may request the DGCA to enforce his or her right in the occurrence of event of insolvency.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

According to Presidential Regulation No 8/2007 on ratification of the CTC, Indonesia declares that the following categories of non-consensual right or interest have priority under its laws over an interest in an aircraft object equivalent to that of the holder of a registered international interest (including an IDERA holder) and shall have priority over a registered international interest, whether in or outside insolvency proceedings:

- liens in favour of airline employees for unpaid wages arising since the time of a declared default under a contract to finance or lease an aircraft object;
- liens or other right of an authority of Indonesia relating to taxes or other unpaid charges arising from or related to the use of that aircraft object, and arising since the time of a declared default under a contract to finance or lease that aircraft object; and
- liens or other rights in favour of repairers of an aircraft object in their possession to the extent of service or services performed on and value added to that aircraft object.

There is no regulation stipulates regarding compensation for an owner or a mortgagee in term of aircraft confiscated or requisitioned by the Indonesian government.

Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

There are three taxes that will be imposed to an aviation-related payment including lease payment, loan repayment, and transfer of an aircraft (ie, Value Added Tax (VAT), income tax and sales tax on luxury goods). The
aviation-related payment is subject to Indonesian tax, but the rate will vary depending on the status of the parties and type of lease.

In terms of a financial lease arrangement, if an aircraft is imported and will be used by a commercial Indonesian carrier then such aircraft purchase price is subject to Indonesian VAT, income tax and sales tax on luxury goods at a rate of 0 per cent. Meanwhile, if the aircraft is imported by a non-air carrier company then the aircraft will be subject to income tax at a rate of 7.5 per cent (for the holder of an importer identification number (API)) or 2.5 per cent VAT rate for non-API, Sales Tax on Luxury Goods at a rate of 20 per cent of purchase price and VAT rate of 10 per cent.

In term of operating lease arrangement, such payment will be subject to VAT at a rate of 20 per cent. In this context, the operating lease payment will be subject to withholding tax.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

The Indonesian Currency Law (Law No. 7/2011) requires rupiah to be used for transactions conducted within the territories of Indonesia. However, other currency may still be used if the transaction is considered as an international trade transaction involving Indonesian and foreign parties.

Meanwhile, according to the Indonesian Foreign Exchange Law and Bank Indonesia Regulations on Foreign Exchange Flow (Law No. 24/1999), no approval is needed in relation with a transaction involving Indonesian citizen and foreign citizen. However, such transaction shall be reported to the Indonesian Central Bank (Bank Indonesia) and if it is deemed necessary Bank Indonesia may examine the accuracy of the report submitted. The report shall be submitted to Bank Indonesia on monthly basis, no later than by the 15th of the following month.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Under Indonesian law, the maximum default interest is 6 per cent per year, unless the parties of an agreement agree on a different rate.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

There are no costs to bring an aircraft into the Indonesia or to bring it out of Indonesia. Indonesian law applies a zero per cent rate of import or export duty either for the import or export of aircraft.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Indonesian law requires that all civil aircraft operating in Indonesia shall procure insurance coverage. All Indonesian airlines are required to obtain their insurance from insurers licensed or registered in Indonesia. There is no minimum or maximum percentage of the insurance that is required under Indonesian insurance law to be retained (in the case of reinsurance out of Indonesia). In practice, coverage may be provided on the basis of one captive insurer or spread among more than one insurance company.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

A reinsurance cut-through clause is generally permitted. However, we are not aware of any Indonesian court precedent addressing the effectiveness of a cut-through clause in the context of insolvency proceedings in respect of the insurer.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

An assignment of reinsurance is legally effective and is typically included in aviation leasing and financing transactions in Indonesia.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

The owner, lessor or financier is not liable for the operation of the aircraft or the activities of the operator, unless such owner, lessor or financier is directly or indirectly involved in the operation of the aircraft or committed tort under Indonesian law such as if the lessor does adequately maintain the aircraft while realising that such measures are warranted.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

No. Under Indonesian law, strict liability only applies to damages caused by an aircraft to third parties on the ground, and the aircraft operator is the only party liable for these damages. See also question 32.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?

Minister of Transportation Regulation No. 77 of 2011 on Air Transport Carrier Liability stipulates a certain amount of third-party liability that must be paid by the air carrier as a result of the aircraft operation.
Ireland

Hilary Marren and Joe Fay
McCann FitzGerald

Overview

1  **To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?**

Ireland is a signatory to, and has ratified, the Chicago Convention of 1944 on International Civil Aviation. The 2001 Cape Town Convention on International Interest in Mobile Equipment and the associated Protocol on Matters Specific to Aircraft Equipment were given force of law in Ireland by the International Interests in Mobile Equipment (Cape Town Convention) Act 2005.

Ireland is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), subject to the reservation that Ireland will only enforce the judgments of other contracting states.

Ireland has signed, but has not yet ratified, the 1948 Geneva Convention on the International Recognition of Rights in Aircraft.

Ireland is not a party to the 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (known as the Rome Convention).

2  **What is the principal domestic legislation applicable to aviation finance and leasing?**

There is no specific piece of legislation targeted solely at aviation finance and leasing, other than perhaps the International Interests in Mobile Equipment (Cape Town Convention) Act 2005 which gives effect to the Cape Town Convention and the related Aircraft Protocol.

Legislation which is relevant to typical aviation finance and leasing structures in Ireland includes the Companies Act 1963-2013 and certain provisions relating to the creation and enforcement of security arising under the Land and Conveyancing Law Reform Act 2009 (as amended).

3  **Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?**

In general, parties are free to choose the laws to govern contracts between them and such choice will usually be given effect to provided that it has been expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances in which it was entered into. However, the law which governs contractual obligations in a document relating to the creation of a right in rem (for example, the transfer of property or the creation of security interests in property) is not dispositive of such matters. Generally, as a matter of Irish law, creation of an interest in property must be valid in accordance with, inter alia, the law of the place where the property is deemed to be located at the relevant time (the lex situs). However, if the sale of an aircraft or engine falls within the scope of the Cape Town Convention and the related Aircraft Protocol, then, as a matter of Irish law, the applicable contract of sale will be effective to transfer the seller’s interest to the buyer without reference to the lex situs.

4  **How is title in an aircraft transferred?**

Under Irish law, title in an aircraft is customarily transferred by way of a bill of sale. Irish law will also give effect to transfer of title by way of delivery, although it is usual to obtain a written acknowledgement of delivery from the purchaser.

5  **What are the formalities for creating an enforceable transfer document for an aircraft?**

A bill of sale must be in writing, must identify the property to which it relates and the purchaser and must be signed by the seller. It need not be signed by the purchaser. If it is intended for the instrument of sale to constitute a ‘contract of sale’ within the meaning of the Cape Town Convention and the related Aircraft Protocol then, in addition to there being a connecting factor with the convention, the contract must be in writing, relate to an aircraft object of which the seller has the power to dispose, and enable the aircraft object to be identified in conformity with the convention. Furthermore the ‘contract of sale’ must not contain an express reservation of title.

Registration of aircraft ownership and lease interests

6  **Identify and describe the aircraft registry.**

The Irish aircraft register is operated and maintained by the Irish Aviation Authority (the IAA). It is a registry of nationality, not title. Registration of an aircraft in the name of a person does not establish that person’s title to the aircraft nor can it be regarded as giving notice (whether actual or constructive) as to a person’s interest in an aircraft. The IAA has concluded a number of 83-bis arrangements of which at least seven are active, namely those with Colombia, Italy, Mexico, Mongolia, Norway, Russia and Spain. An aircraft may not be registered in the state, or continued to be registered in the state unless it is wholly owned by:

- a citizen of Ireland or a citizen of a member state of the European Union having a place of residence or business in Ireland; or
- a company registered in and having a place of business in Ireland and having its principal place of business in Ireland or in another member state of the European Union; or
- by such citizen and company in combination.

Notwithstanding the foregoing, an aircraft may also be registered in Ireland if it is ‘chartered by demise, leased or on hire to, or is in the course of being acquired under a lease-purchase or hire-purchase agreement by, a citizen or company’ such as is referred to above or by such citizen and company in combination, but such registration is subject to such conditions as the IAA may deem fit to impose.

Please note that an aircraft will not qualify for Irish registration if it is already registered in another country; it appears to the IAA that any statutory requirements relating to the safety of the operation or the airworthiness of the aircraft cannot by complied with; or it is not compliant with applicable noise or exhaust gas emissions Regulations or Orders made or effective under the European Communities Act 1972.
7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with another registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

As mentioned in question 6, the Irish aircraft register is a register of nationality, not title. The basic criteria for registration of an aircraft in Ireland are set out in question 6.

The rights of a mortgagee, lessor or lessee in an aircraft cannot be separately registered or noted on the Irish register of aircraft.

There is no separate register of engines.

Interests that fall within the Cape Town Convention and the related Aircraft Protocol may be registered against an airframe or the applicable engine at the International Registry.

8 Summarise the process to register an ownership interest.

As noted above the Irish aircraft register is a register of nationality, not title. This answer provides basic information in relation to the process for registering an aircraft with the IAA where the applicant is an Irish company (which will usually be the case). More detailed information is available at the website of the IAA: www.iaa.ie.

An application to have an aircraft registered with the IAA must be made by filling out a form AAWSD Form 1 and sending the signed original to the IAA (this form is available online at www.iaa.ie). Evidence must be given in support of the particulars and the applicant is required to declare the truth of the particulars set out in the application. Where the applicant is an Irish company, no notarisation or appostilling will be required.

A completed dated, and signed aircraft registration AAWSD Form 1 with prescribed fee must be sent to the IAA.

If the aircraft has been registered in another state, a certificate from the competent authorities in the state of such registration that the registration is cancelled will be required.

A certificate of airworthiness must be obtained from the IAA before an aircraft registered on the Irish register can operate. In order to issue a certificate of airworthiness the IAA will require, inter alia, the following:

- if the aircraft is previously registered in another jurisdiction an Export Certificate of Airworthiness from that jurisdiction;
- the identity of the company which owns the aircraft including a list of its directors and shareholders, a copy of its certificate of incorporation and its Memorandum and Articles of Association (constitutional documents);
- details regarding the jurisdictions in which the aircraft will operate;
- a maintenance programme for the aircraft be agreed with, and approved by, the IAA; and
- the current practice of the IAA is to require that there be some company or organisation based in Ireland which will be responsible to the IAA, which will provide technical support for the aircraft and which can deal with any queries of a technical nature raised by the IAA.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

As noted above, the Irish aircraft register is a register of nationality, not title.

10 Summarise the process to register a lease interest.

It is not necessary or possible to register a lease with the IAA.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

The certificate of registration is issued by the IAA. It states the nationality and registration marks of the aircraft, the manufacturer and manufacturer’s designation of the aircraft, the aircraft serial number and the name and address of the registered owner (as noted in earlier answers, this will not necessarily be the legal owner).

The criteria for registration and the application procedure are summarised above.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Subject to what is said in the following paragraph, registration can be cancelled by the IAA at the written request of the registered owner or the lawful representative of the registered owner with the appropriate power of attorney. To export or deregister an aircraft, a request in writing from the registered owner(s) (signed by a director or the company secretary of the company being the registered owner) is required. The request must include the complete description of the aircraft, registration marks, make, model, serial number and statement of reason for cancellation. The name of the foreign State to which the aircraft is being exported is also required. Where an Export Certificate of Airworthiness is required, the applicant should submit the applicable Certificate of Airworthiness application form(s) with prescribed fee to the IAA.

Where the registered owner has issued an irrevocable deregistration request and export authorisation (IDERAs) in accordance with the Cape Town Convention and the related Aircraft Protocol which has been duly recorded by the IAA, the IAA is obliged to co-operate with and assist the authorised party thereunder in the exercise of the remedies set out in Article IX of the Protocol (which include the deregistration and export of the aircraft). Where the authorised party named in an IDERA is applying for deregistration, it will need to present the original stamped duly recorded IDERA to the IAA. Where an IDERA has been registered against an aircraft, the authorised party named in the IDERA (or its designee) is the only person who may request the deregistration of the aircraft and the IAA must honour the terms of the IDERA, subject to applicable safety laws and regulations. The authorised party acting on foot of an IDERA will be required to certify to the IAA that all interests registered at the International Registry ranking in priority to the interest of the authorised party have been discharged or that the holders of such interests have consented to the deregistration. In practice, IDERAs have supplanted deregistration powers of attorney as the means of effecting deregistration of Irish registered aircraft in distressed circumstances. However, it is usual to obtain a separate deregistration power of attorney with a view to possibly enabling the grantee to perform and effect actions which do not relate to deregistration and which are more extensive than the powers and delegations provided for in an IDERA.

13 What are the principal characteristics of deregistration and export powers of attorney?

Deregistration and export powers of attorney (other than IDERAs, as to which see the answer to question 14) must be in writing, should be signed, should be expressed to be by way of deed and are usually executed under the common seal of the registered owner. Even if expressed to be irrevocable, the power of attorney may be revoked by the grantor unless it is expressly stated to secure an obligation of the grantor in favour of the attorney. Powers of attorney can be granted to more than one person and where granted by an Irish company will typically survive the insolvency of that company (although the ability to exercise them may be limited or restricted depending upon the type of insolvency procedure which applies to the Irish company). Deregistration and export powers of attorney are not registrable at the IAA (see, however, the response to question 14 regarding IDERAs).

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERAs) process.

The prescribed form of IDERA to be registered at the IAA under the Cape Town Convention and the related Aircraft Protocol is available on the IAA’s website www.iaa.ie. The IDERA must be signed in duplicate by the registered owner (or by a director of the registered owner, if it is a company). Both originals are submitted to the IAA which retains one and returns the other (stamped). This stamped counterpart original must be carefully retained by the authorised person as the original must be presented to the IAA if the authorised person (or its designee) wishes to act on the IDERA.

An IDERA which has been registered with the IAA may be revoked by the authorised person only. Applications to revoke an IDERA must be made in writing on the authorised person’s letterhead and signed by an approved signatory.
Security

15 What is the typical form of a security document over the aircraft and what must it contain?

Security over an aircraft is typically taken by way of a mortgage which must be in writing and be a deed. The mortgage must secure a payment obligation but need not specify a maximum secured amount. Similarly, the mortgage instrument need not record the economic details of the financing (e.g., the amount of the loan, the interest rate, the repayment structure). The mortgage must clearly identify the secured property. There are no statutory requirements relating to the terms of aircraft mortgages (other than in the case of a mortgage created by an Irish individual or partnership and which is required to be registered under the applicable Bills of Sale legislation).

If it is intended that the mortgage should give rise to an international interest for the purposes of the Cape Town Convention and the related Aircraft Protocol then the requirements set out therein must be complied with.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

As there is no register of aircraft mortgages in Ireland, it is not necessary to have the execution of the mortgage notarised or legalised. As a matter of Irish law, a deed must be in writing, executed under the common seal of the relevant company (or executed by an authorised attorney acting under a power of attorney which has been executed under the common seal of the company), witnessed and delivered. If the mortgage is not in English (or in Irish) then it will have to be translated into English if it is to be enforced before the Irish courts.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties?

Summarise the process to register a mortgagee interest.

There is no register of aircraft mortgages in Ireland and, as previously noted, it is not possible to register an aircraft mortgage with the IAA.

Where the security is created by an Irish incorporated company, or a company incorporated outside of the state but which has a place of business within the state, then pursuant to Part IV of the Companies Act 1963 (as amended), prescribed particulars of the security must be registered with the Registrar of Companies within 21 days of the creation of the security. The particulars to be filed include the name of the chargor, the date of creation of the charge, the amount secured by the charge, short particulars as filed with the Registrar of Companies (or in the case of security created by an Irish individual or partnership, as filed with the Central Office of the High Court).

18 How is registration of a security interest certified?

Where a filing has been made with the Registrar of Companies in accordance with the requirements of Part IV of the Companies Act 1963 by a company incorporated or registered in the state then the Registrar of Companies will issue a certificate of registration of a charge. The certificate is conclusive evidence that the requirements of Part IV have been complied with. There is no prescribed period within which the Registrar must issue the certificate – it can often take a number of months.

19 What is the effect of registration as to third parties?

If a filing with the Registrar of Companies in respect of a security interest is required to be made pursuant to Part IV of the Companies Act 1963 (see question 17 above), but no such filing is made within the prescribed period, then the security is rendered void against the liquidator and any creditor of the company and the sums secured by the security interest become immediately due and payable. However, registration with the Registrar of Companies is merely perfection of the security, it does not, in itself, create priority. Priority after registration with the Registrar of Companies will be according to the date of creation of the security interest. Protection will be afforded to a mortgagee insofar as all subsequent mortgagees will be deemed to be on notice of the existence of the prior mortgage and of its particulars as filed with the Registrar of Companies (or in the case of security created by an Irish individual or partnership, as filed with the Central Office of the High Court).

In Ireland, the only registration system of priority in respect of security interests in aircraft arises under the Cape Town Convention and the related Aircraft Protocol. If a mortgage or charge constitutes an international interest thereunder, which is capable of being and has been registered in the International Registry, then the rights and interests of the chargor as creditor with respect to the airframe and the engines pursuant to the international interest constituted under the mortgage or charge will be subject only to:

- the rights and interests of any persons who are evidenced as having a registration in relation to the airframe and engines that is prior to the international interest constituted under the mortgage or charge on a priority search certificate issued by the International Registry;
- the rights and interests of the operator owner and the operator in the airframe and the engines pursuant to the Convention and the quiet enjoyment provisions set out in the relevant transaction documents;
- a pre-existing right or interest which enjoyed under the applicable law, before the effective date of the Convention, a priority greater than an international interest constituted under the mortgage or charge;
- the non-consensual rights or interests included in those categories covered by Ireland’s declaration under article 39 of the Cape Town Convention; and
- the rights of Ireland, any state entity, intergovernmental organisation or other private provider of public services to arrest or detain an aircraft object under the laws of Ireland for payment of amounts owed relating to those services in respect of that or another aircraft object pursuant to the declaration made by Ireland under article 39 of the Cape Town Convention.

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Security over an aircraft is usually taken by way of a mortgage. Security over a lease is usually taken by way of a security assignment from the lessor, with written notice to the lessee (and, by preference, a written acknowledgment from the lessee).

Where the security is granted in favour of a security trustee which holds the security on trust for one or more beneficiaries then, normally, a change in the identity of the beneficiaries will not require the grant of new security (or confirmation of the existing security).

21 What form does security over spare engines typically take and how does it operate?

There is no form of security peculiar to spare engines. The principles which apply to aircraft apply equally to engines. Where the engine is installed on the airframe it would be usual to include that engine in the general aircraft mortgage. If the engine is off-wing, then a mortgage is taken over the engine in the same way as a mortgage is taken over the airframe. The filing and registration requirements set out in the answers to questions 17, 18 and 19 apply.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

There is no restriction in Irish law on enforcement of a lease by the lessor by taking possession of the aircraft following termination or default, provided the terms of the lease allow it. If the repossession is contested,
the lease should also accommodate entry onto the property of the lessee (or other relevant landowner) to take possession. Repossession without judicial proceedings is likely to involve risks if it is not consensual. In particular, a lessee may claim that what it regards as an unjustified attempt by a lessor to recover possession is a breach of the covenant in the lease for quiet enjoyment and use of the aircraft, and may seek to restrain any such attempt by injunction.

If the lessor anticipates that the lessee will not cooperate (or, where the lessee is in liquidation or examinship, that the liquidator or examiner is unlikely to consent to repossession), the prudent course is often to begin judicial proceedings for recovery of the aircraft. Proceedings for recovery of an aircraft are usually eligible to be heard in the Commercial Court, a specialist division of the Irish High Court with enhanced case-management procedures designed to progress cases expeditiously and to minimise costs.

In many cases, the lessor will seek an injunction to detain the aircraft or to restrain its removal from Ireland pending the hearing. An application to restrain or detain an aircraft by interlocutory injunction can be made ex parte (without notice to the lessee) in urgent cases. If an interlocutory injunction is granted, notice of the making of an order is served immediately on the lessee and any other relevant party and the court fixes a hearing date (within a few days) for the hearing of the application with both parties present.

An interlocutory injunction, restraining disposal or requiring delivery up of an aircraft, may be granted where the court is satisfied that: there is a serious question to be tried; damages are an inadequate remedy in the circumstances; and the balance of convenience favours the applicant (lessor). If an interlocutory injunction is granted, the applicant must give an undertaking in damages confirming that it will, if ultimately unsuccessful at the trial, compensate the defendant for any loss and damage caused as a result of the granting of the interlocutory injunction. The court may make various types of interlocutory orders (eg, restraint of disposal, detention, preservation or inspection of the aircraft, pending trial).

Where an injunction application seeks to restrain a lessee from removing an aircraft from Ireland, the applicant must also satisfy the court that the defendant’s intention is to dispose of the asset for the purpose of preventing recovery of damages and not merely for the purpose of carrying on its business or discharging its lawful debts.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

On the occurrence of an event of default under a mortgage, the mortgagee can in principle take possession of the aircraft without judicial proceedings. However there is no specific legislation relating to enforcement of security over aircraft. While it is likely that the Irish courts would apply land law by analogy in respect of the mortgagee’s position and power of sale, much will depend on the language of the mortgage, including the provisions for appointment of a receiver, etc, and the position of the defaulting mortgagor (particularly, whether it is cooperating).

In Ireland, mortgages may be executed as legal mortgages (which constitute an immediate transfer of title from the aircraft to the mortgagor, subject only to the mortgagor’s equity of redemption) or as equitable mortgages (which constitute only an agreement to transfer title to the mortgagor). Strictly, in the case of a legal mortgage, a mortgagee is entitled, on default and in view of his legal title, to take possession immediately and sell the asset. However, in practice, the mortgagees will require lawful and vacant possession of the aircraft before it can exercise its power of sale.

In the event of non-cooperation, judicial proceedings may be required to obtain lawful and vacant possession. In the case of an equitable mortgage, there may not be an immediate right of sale and the mortgagee may have to obtain a court order declaring the sum due on the mortgage to be a valid charge on the aircraft and directing sale of the aircraft if the outstanding monies are not paid within a specified time. Unless an express right of access is contained in the mortgage, the mortgagee may need to obtain the consent of a relevant landowner or an order of court to enable access and repossession.

In practice, it is possible to obtain possession without judicial proceedings where there is cooperation by the mortgagee and relevant landowners or third parties, but in view of the risk of claims by the mortgagee (in defence or by counterclaim or cross-claim for damages), and the risk of claims by third parties for losses caused by wrongful seizure, trespass or other reasons, it is unusual for a mortgagee to attempt to enforce its rights in a contested claim in Ireland without legal proceedings.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is there any form of compensation available to an owner or mortgagee?

The following aircraft liens exist under Irish law:
- seller’s lien;
- salvage lien;
- possessor’s lien; and
- contractual lien (including pledge).

A possessor’s lien is a common law legal lien. There are a number of prerequisites for such a lien to exist in respect of an aircraft, namely:
- there must be possession by the lien-holder, which possession has been lawfully acquired and is continuous;
- the labour bestowed on the aircraft must improve it in some way; and
- the labour must be authorised by the owner, completed and the debt for such labour must be due.

The owner will be subject to a possessor or contractual lien even though it may have expressly prohibited its creation by the operator of the aircraft, unless the lien-holder was aware of this.

Aircraft liens will take precedence over the right of a lessee. That said, a lessee will usually be aware of the creation of aircraft liens, since it will be using the aircraft. In respect of a possessor lien, the lessee will usually have ordered these with the authority of the owner, whether that authority is expressed, implied or ostensible. The lessee will be aware of any salvage lien, and will be subject to any pledge over the aircraft.

The lessor will usually be required to pay off the liens and then seek indemnity against the lessee. Liens are not capable of registration with the Registrar of Companies.

Aircraft liens and rights will have priority over aircraft ownership or an aircraft security interest if an aircraft can be taken, seized or detained, is there any form of compensation available to an owner or mortgagee?

Under the Air Navigation and Transport Acts certain persons are granted a right to detain and in some cases to sell (or cause to be forfeited) aircraft in a variety of circumstances including:
- airport charges;
- air navigation charges;
- licensing;
- air navigation;
- customs; and
- noise and aircraft emissions;
- patents;
- public health;
- unpaid tax; and
- crimes and war or national emergency.

The legislative right of a person not only to detain, but also to sell, an aircraft exists in those cases marked with an asterisk (*). The legislative right to acquire an aircraft to be disposed of without notice to the lessee is marked with a cross (+). It occurs in the case of the contravention of certain provisions of customs law and in connexion with certain crimes such as drug trafficking and illegal immigrants trafficking.

On the liquidation of companies, if the mortgage has been perfected, the priority of the mortgage in the event of liquidation/bankruptcy of the mortgagor will be determined according to the order of priorities as set out below:
- creditors secured by a registered fixed charge;
- certain social welfare payments;
- costs, fees and expenses of the liquidator. The costs, fees and expenses of a receiver will be paid pro rata out of the proceeds of realisation of the assets secured by the fixed charge;
- creditors granted preferential by statute;
- creditors secured by floating charge;
- unsecured creditors; and
- shareholders.

Examiners’ remuneration, costs and expenses also have priority over the holders of fixed charges but rank after liens. Where an international interest exists, see also the answer to question 19.
Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Transfers of aircraft

Instruments for the sale or transfer of aircraft are exempt from Irish stamp duty.

For the purposes of Irish VAT, the sale of an aircraft is a supply of goods and the place of supply for VAT purposes is the place where the aircraft is located at the time of the supply. Accordingly, there would be deemed to be a supply for Irish VAT purposes if the aircraft is physically located in Ireland when title to the aircraft is transferred. Provided the aircraft is used or to be used by a transport undertaking operating for reward chiefly on international routes, VAT on the supply of the aircraft will be zero rated.

Withholding tax on lease payments or interest payments

Generally, lease rentals paid under an operating lease or a finance lease are not subject to Irish withholding tax.

Withholding tax at the standard rate of income tax (currently 20 per cent) must be deducted from payments of yearly interest that are within the charge to Irish tax. Yearly interest includes any interest that is capable of arising for a period of at least one year. This includes interest arising where no period is defined, even though in practice, the period may be significantly less. However, there are a large number of exemptions from the obligation to withhold amounts on account of Irish tax from payments of Irish source yearly interest. There is an exemption for interest payments made by a company in the ordinary course of a trade or business carried on by it to a body corporate that is resident for the purposes of tax in a member state of the European Communities (other than Ireland) or in a territory with which Ireland has concluded a double taxation agreement (residence of the member state or territory of which the lender claims to be resident) where that member state or territory imposes a tax that generally applies to interest receivable in that member state or territory by companies from sources outside that member state or territory.

The Irish courts will enforce a grossing up clause requiring payment of an additional sum to compensate for interest withheld from payments of Irish yearly interest.

VAT on lease payments

The lease of an aircraft is a supply of services for Irish VAT purposes. Provided the aircraft is used or to be used by a transport undertaking operating for reward chiefly on international routes, VAT on the lease of the aircraft will be zero rated.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Exchange Control consent has been generally abolished since 1993. As a general matter, no approvals or notifications to the Central Bank of Ireland would be required for payments, including payments of insurance claims out of Ireland. However, it is possible that the Minister for Finance may impose financial restrictions or asset freezing measures by orders under certain domestic and EU legislation.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Default interest provisions in a lease or loan agreement may be unenforceable to the extent that these are subsequently adjudged to be in the nature of a penalty.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

The importation of an aircraft into Ireland from outside the European Union will give rise to a charge to Irish VAT. Irish VAT will be chargeable at a rate of 0 per cent where the aircraft is used or to be used by a transport undertaking operating for reward chiefly on international routes. If the aircraft is not used or to be used by a transport undertaking operating for reward chiefly on international routes, the appropriate rate of VAT is 23 per cent.

The importation of an aircraft into Ireland from outside the European Union will also be subject to the payment of customs duties.

No VAT or export taxes are payable on the export of the aircraft from Ireland.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There is no captive insurance regime in Ireland applicable to aviation.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Not applicable. Aviation insurance for Irish airlines is typically placed in the London market under insurance contracts which are governed by English law.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance are legally effective in Ireland. In our experience, assignments of reinsurance are typically provided in aviation leasing and finance transactions in Ireland.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Liability in negligence arises from a failure to take reasonable care to discharge a duty of care with the result that damage is caused to a party to whom that duty is owed. The mere provision of finance for a commercial enterprise would not of itself be sufficient to give rise to a duty of care on the part of the financier to those who suffer damage as a result of the negligent operation of an aircraft by a commercial enterprise. The financier of an aircraft could come under a duty of care to third parties only in exceptional circumstances. For example, financing an aircraft which was known to be defective or failing to exercise a control open to it if it became aware that the aircraft was being improperly operated or maintained might well give rise to a liability. As far as we are aware, however, an issue of this kind has not come before an Irish court.

It is possible that a claimant could seek to fix an owner, lessor or financier with liability under certain safety and defective products legislation. However, it is likely that good defences would be available to an owner, lessor or financier in the event of such claims.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Strict liability is imposed by section 21 of the Air Navigation and Transport Act 1936 (as amended) (the 1936 Act) on the owner (who will be entitled to be indemnified by another in whom ‘legal liability is created’) where material damage is caused to any persons or property on land or water by any article or person falling from an aircraft while in flight, taking off or landing. Only if the lenders could be considered the ‘owner’ by virtue of
holding a security interest of a proprietary nature could liability arise under this provision. In the event that any of the financiers could be considered to be the ‘owner’ for the purpose of strict liability imposed by section 21 of the 1936 Act, liability on the part of the relevant financier would be excluded by section 21(2) pursuant to which the party to which the aircraft is demised for more than 14 days is deemed liable instead of the owner if no pilot, commander or operative member of the crew is in the employment of the owner. Similarly, in the event that a lessor or financier could be treated as the owner for the purpose of the strict liability imposed by section 21 of the 1936 Act, section 21(2) would also exclude liability on their part. While the owner could be treated as the ‘owner’ for the purpose of the strict liability imposed by section 21 of the 1936 Act, liability on the part of the owner could be excluded by section 21(2).

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?
Italy

Laura Pierallini and Francesco Grassetti
Studio Pierallini

Overview

1 To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Italy has ratified and is a party to the following major air law treaties:
- the Rome Convention of 1929 for the unification of certain rules relating to damage caused by aircraft to third parties on the surface;
- the Chicago Convention of 1944 on international civil aviation;
- the Geneva Convention of 1948 on the recognition of rights in aircraft;
- the New York Convention of 1968 on the Recognition and Enforcement of Foreign Arbitral Awards; and

Italy has signed, but has not yet ratified, the Cape Town Convention of 2001 on international interests in mobile equipment and the related Protocol on Matters specific to Aircraft Equipment. Therefore at present the said Convention and Protocol do not apply to Italian-registered aircraft.

2 What is the principal domestic legislation applicable to aviation finance and leasing?

The principal rules and provisions governing the aviation sector (including financing, leasing, ownership, securities, registration, operation and liability in connection with civil aircraft) are set out by the Italian Civil Code and the Italian Navigation Code.

Other relevant laws for the aviation sector are:
- Legislative Decree No. 69/2006, implementing fines for breach of EC Regulation No. 261/2004 on compensation and assistance to passengers in the event of denied boarding, flight cancellations or long delays of flights;
- Legislative Decree No. 197/2007, implementing fines for breach of EC Regulation No. 785/2004 on insurance requirements for air carriers and aircraft operators;
- Ministerial Decree dated 10 December 2008, providing guidelines in the matter of fares of airport services rendered on an exclusive basis; and
- Legislative Decree No. 24/2009, implementing fines for breach of EC Regulation No. 1107/2006 on the rights of disabled persons and persons with reduced mobility when travelling by air.

3 Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

As a general principle the parties are free to specify the applicable law for contracts concerning the transfer of aircraft title, aircraft leasing and creation of security over aircraft. In order to be recognised and enforceable within the Italian system a contract’s terms and conditions must be compliant with Italian public order rules (public policy). The concept of public policy includes, among others, the Italian Constitution, public safety regulations and mandatory provisions arising by operation of Italian law.

Title transfer

4 How is title in an aircraft transferred?

The transfer of title in an aircraft registered with the Italian Aircraft Registry is perfected by means of the execution of a bilateral agreement between the seller and the buyer. Pursuant to article 2684 of the Italian Civil Code and article 865 of the Italian Navigation Code, a bilateral aircraft sale and purchase agreement must be also filed with the Italian Aircraft Registry in order to be opposed to any third party (effects of public disclosure).

5 What are the formalities for creating an enforceable transfer document for an aircraft?

An aircraft sale and purchase agreement must be in writing, notarised (meaning that an Italian Public Notary must certify the identity and powers of the relevant signatories), filed with the Italian Public Registry of Private Deeds and thereafter with the Italian Aircraft Registry.

An aircraft sale and purchase agreement can also be executed abroad by the parties and notarised by a foreign notary public. If so, such notarised agreement (and apostilled, if required) shall be submitted to an Italian notary public along with a translation into Italian, and then filed with the Italian Public Registry of Private Deeds as well as with the Italian Aircraft Registry.

Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry.

The Italian Aircraft Registry is held by the Italian Civil Aviation Authority (ENAC). It is an owner registry where also aircraft operators can be registered (if other than the owner). The following information is recorded in the Aircraft Registry:
- manufacturer, type, model, manufacturer’s serial number and marks of the aircraft;
- name and legal seat of the owner;
- name and legal seat of the operator (if other than the owner); and
- mortgage details (if any).

On the basis of article 83-bis of the ICAO Convention Italy has entered into several bilateral arrangements with other countries in respect of the transfer of functions, tasks and liabilities for the surveillance of the operations, personnel and continuing airworthiness of foreign registered aircraft. In practice the most-used arrangements are the ones in place with, respectively, Ireland and Austria.

There is no separate registry for aircraft engines in Italy.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

An ownership interest can be registered with the Italian Aircraft Registry. Pursuant to article 750 of the Italian Navigation Code, aircraft can be registered with the Italian Aircraft Registry provided that certain nationality requirements are met. In particular - to satisfy the nationality requirements for the registration with the Aircraft Registry - the aircraft must be wholly or mainly the property of:
8 Summarise the process to register an ownership interest.

There is a list of documents and forms to be recorded with ENAC in order the register an aircraft with the Italian Aircraft Registry or perfect a transfer of title thereunder.

For an aircraft registration the filing of the following documents – among others – is required:
- the application for registration signed by the owner;
- a notarised (and apostilled, if required) deed giving evidence of the ownership interest in the aircraft (see questions 4 and 5);
- an updated extract of the owner from the competent Chamber of Commerce;
- a certificate of non-registration (for new aircraft) or a certificate of deregistration (for used aircraft) issued by the Civil Aviation Authority of the aircraft’s country of origin; and
- a copy of the application for the issuance of the aircraft certificate of airworthiness by the ENAC Operational Department.

The ENAC fees for an aircraft registration are equal to €106,00 for aircraft having maximum take-off weight (MTOW) less than 5,700kg; or €206,00 for aircraft having MTOW equal or higher than 5,700kg.

The ENAC fees for a transfer of title in an aircraft are equal to €110,00. See question 7 (last paragraph) in respect of the title to an engine.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

The registration of aircraft with the Italian Aircraft Registry serves as a proof of title toward any third party (effects of public disclosure), which can rely on the ownership interest recorded with the Registry and reflected on the aircraft certificate of registration.

Any third party can challenge an ownership interest recorded with the Italian Aircraft Registry by way of a legal action before the courts, arguing the lack of – or the defective – title in the relevant aircraft and filing proper evidence to support the challenge.

10 Summarise the process to register a lease interest.

A lease interest can be registered with the Italian Aircraft Registry by submitting to ENAC a copy of the relevant lease agreement previously filed with the Italian Public Registry of Private Deeds (if such lease agreement was in a foreign language the said Registry and ENAC would require a sworn translation into Italian thereof).

The Italian Aircraft Registry is the sole registry where an ownership interest in an aircraft can be registered.

Owing to the fact that there is no separate registry for aircraft engines in Italy, as a general principle engines are supposed to be property of the owner of the aircraft on which they are installed, unless a different ownership interest can be proven in accordance with Italian laws. In that respect, pursuant to article 247 of the Italian Navigation Code, the ownership interest in any separable part of aircraft (including engines) is valid and can be enforced against the owner of the aircraft whether such interest is reflected either in a deed with an undisputable date (such as a bill of sale or a recognition agreement) or in the aircraft certificate of registration (which is not common practice with ENAC).

11 What is the regime for certification of registered aviation interests in your jurisdiction?

The aircraft certificate of registration is issued by ENAC as soon as the registration process with the Italian Aircraft Registry is completed. The certificate contains the following information:
- date of registration;
- manufacturer, type, model, manufacturer’s serial number and marks of the aircraft;
- name and legal seat of the owner;
- name and legal seat of the operator (if other than the owner); and
- mortgage details (if any).

As previously mentioned, there is no separate registry for aircraft engines in Italy nor the issuance of a separate engine certificate of registration. Engine details are not reflected on the certificate of registration. See question 7 (last paragraph) in respect of aircraft engines.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Yes, the deregistration and export of an aircraft cannot be made without the consent of the owner or the mortgagee. Indeed, on the one side, the owner is the sole party entitled to decide as to whether or not to move the aircraft to a foreign registry (eg, for sale to another entity or for logistics reasons) and, on the other side, ENAC requires the prior release of any recorded mortgage by the relevant mortgagee in order to deregister an aircraft from the Italian Aircraft Registry.

The operator cannot block an aircraft deregistration or export to the extent that the aircraft is registered in the name of the owner; however, taking into account that the original certificate of registration is mandatorily kept on board of the aircraft by the operator and the same certificate is required by ENAC to complete the deregistration process (see questions 22 and 23 in respect of aircraft repossession).

On the other hand, if the aircraft is registered in name of the operator and the latter does not cooperate in the deregistration process, then ENAC may require satisfactory evidence that: the operator is in breach of its obligations under the lease; and as a consequence thereof the leasing has been lawfully terminated. ENAC may also require that such evidence be a judicial decision from the Italian or foreign competent courts.

13 What are the principal characteristics of deregistration and export powers of attorney?

As a general note, a deregistration and export power of attorney enables the relevant attorneys to freely deregister and export the aircraft from Italy to the extent that the operator or grantor cooperates in the process (see question 12).

In addition, an attorney or agent expressed to be irrevocable may nevertheless be revoked under certain circumstances for ‘cause’ in accordance to article 1723 of the Italian Civil Code. Furthermore a power of attorney...
would not survive the grantor’s insolvency and may also be limited in circumstances of conflict of interest.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Cape Town Convention is not effective in Italy, as the Italian legislator has not yet ratified it.

Security

15 What is the typical form of a security document over an aircraft and what must it contain?

A mortgage is the sole security interest which can be voluntarily created over an aircraft. Pursuant to article 1030 of the Italian Navigation Code, a mortgage must be recorded with the Italian Aircraft Registry and reflected on the aircraft certificate of registration.

A mortgage must be in the Italian language and contain, among others: the name and legal seat of the mortgagor and the mortgagee; type, model, marks and manufacturer’s serial number of the aircraft over which the security is recorded; and the secured amount.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

A mortgage on an aircraft can only be created by means of a public deed executed by the aircraft owner (mortgagor), certified by a Notary Public and then registered with the Italian Aircraft Registry.

The costs associated with the creation of a mortgage include the Notary Public’s fees for the execution and notarisation of the mortgage and the ENAC’s fees for registering the mortgage with the Italian Aircraft Registry (both varying on the basis of the secured amount specified in the mortgage deed). In addition, the perfection of a mortgage attracts a registration tax in the flat amount of €200,00 (if the mortgage is granted directly by the borrower to the lender) or, otherwise, in the proportional amount equal to 0.50 per cent of the sum secured by the mortgage.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

Yes, the mortgage deed must be registered with the Italian Aircraft Registry as a condition to its effective creation against the debtor and third parties. Failing such registration means the mortgage is null and void, as if it had never come into existence.

The process to register a mortgage requires, at first, the execution of a mortgage deed by the aircraft owner (mortgagor) before a Notary Public. Subsequently the notarised mortgage deed must be filed with the Italian Aircraft Registry along with:

- an application for registration signed by the mortgagor;
- no. 2 enrolment notes (summarising details of the mortgagor, the mortgagee, the aircraft, and the secured amount); and
- the original certificate of registration of the aircraft.

18 How is registration of a security interest certified?

The existence of a mortgage is certified by way of the registration of the mortgagor in the Italian Aircraft Registry and the relevant note on the aircraft certificate of registration, which is duly updated and reissued by ENAC upon the notarised mortgage deed being submitted to such authority by the mortgagor.

19 What is the effect of registration as to third parties?

Under Italian law the main effects of the registration of a mortgage are the following:

- to provide public notice of the existence of the mortgage toward any third party;
- to grant the mortgagee with security and priority over all subsequent mortgages (ie, mortgages with a lower rank);
- to create a right in rem over the aircraft in favour of the mortgagee;
- to prevent that any modifications to the essential features of the aircraft be made without the mortgagee’s prior express consent; and
- to prevent the deregistration of the aircraft without the prior release or cancellation of the mortgage.

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

As a general remark the Italian laws recognise the concept of trust. Italy is party to the Hague Convention of 1985 on the law applicable to trusts and on their recognition (ratified by Law No. 364 of 16 October 1989). Nevertheless, notwithstanding the implementation of the Hague Convention, the concept and the role of a trust are not often utilised within the Italian system.

On the other hand, a trust acting on behalf of foreign lenders is a common mechanism in cross-border lease and financing transactions involving Italian aircraft operators, to the extent that the same does not have the effect of avoiding any rule of Italian public policy. On such basis the role of a trust is recognised in Italy and indeed an aircraft ownership can be registered in the name of a foreign trust with the Italian Aircraft Registry. Also, an aircraft mortgage can be granted in favour of foreign trusts as mortgagees in representation of a pool of lenders.

In case of a change to the security or its beneficiaries, as a general principle the execution of novation or assignment agreements would be required under the Italian laws.

As far as the nature of an aircraft security, mortgages over Italian registered aircraft are considered to be a right in rem rather than in personam, as they are attached over the asset and not over the asset’s beneficiary. Therefore mortgages stay on the ownership of the aircraft, regardless of the identity of the aircraft owner. On the contrary, a mortgage interest cannot be assigned by the mortgagee, unless in conjunction with the assignment of the mortgagee’s credit behind the grant of the mortgage. If so, pursuant to article 2843 of the Italian Civil Code, the transfer of the mortgage interest to the assignee is effective upon recording of the relevant credit assignment with the Italian Aircraft Registry.

21 What form does security over spare engines typically take and how does it operate?

Under Italian laws engines are considered to be part of an aircraft, even if materially separate. There is no specific public register for engines, but rather for the aircraft in its entirety (ie, the Italian Aircraft Registry). Accordingly, pursuant to article 1029 of the Italian Navigation Code, a mortgage recorded over an aircraft encumbers as well on its appurtenances and separate parts (including engines), irrespective of whether they are installed or not on the airframe. The sole exception to the mentioned rule is when the ownership interest in an engine is from a party different from the aircraft owner and such ownership interest is reflected either in a deed having undisputable date (such as a bill of sale or a recognition agreement) or in the aircraft certificate of registration (which is not common practice with ENAC). If a different ownership interest can be proven by one of the said means, then the aircraft mortgage does not affect the engine.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

There are no self-help remedies available in Italy for the owner or lessor to repossess an aircraft following a lease termination, at least to the extent that such remedies would entitle the enforcing party to take measures without seeking remedies through the judicial system. Indeed, under the Italian laws a judicial order of the competent court is necessary to take possession of the aircraft in the case of the lessee’s non-cooperation. Therefore the owner or lessor may either enforce a foreign judgment in Italy (as long as such judgment is recognised by the Italian system) or act before the Italian competent court claiming:

- an injunction of return of the aircraft pursuant to article 653 of the Italian Civil Procedure Code, which can be granted inaduita altera parte (without notice to the lessee) and either immediately enforceable or subject to a waiting period of 40 days for possible objection by the lessee; and/or
- precautionary measures (including seizure or attachment of the aircraft).

The lessee may oppose to the issuance of the said measures by counter-arguing and providing evidence that the owner or lessor is not entitled...
to claim the aircraft repossession (for instance, because the lease would not be terminated or no event default would exist). As a general principle, the insolvent of the lessee and the absence of disputes about the lessee’s default or the lease would expedite the repossession process, while – on the contrary – disputes about sums to be paid, or the claimant’s right to repossess or the existence of any default under the lease, would slow the process.

The above measures – if and when granted or recognised by the Italian competent court – are materially enforced on Italian territory by taking physical repossession of the aircraft through the assistance of the competent court bailiff.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

As in the event of a lease termination, self-help remedies are not permitted to enforce a security interest. Therefore any action by the secured parties against the aircraft (or against its owner) must be taken by way of the judicial system. In particular, a mortgagee could start an enforcement action pursuant to the rules set out by the Italian Civil Procedure Code, claiming the competent court to order the sale of the aircraft by public auction and then satisfy the mortgagee’s credit through the assignment of the relevant sale proceeds (or a quota thereof).

It must be also noted that in no circumstances can the parties agree on the transfer of title of the encumbered aircraft to the mortgagee in the event the mortgagor is in default of its obligations under the relevant agreement (eg, loan, credit facility). Any similar arrangement between the mortgagor and the mortgage is null and void pursuant to article 2744 of the Italian Civil Code. In the same way, the mortgagee cannot claim the assignment of the encumbered aircraft by judicial procedure.

As far as the effect of an insolvency upon a creditor’s enforcement right, please consider that pursuant to article 168 of the Italian Bankruptcy Law (Royal Decree No. 267 dated 16 March 1941, as subsequently amended and supplemented from time to time) no enforcement and precautionary measures can be commenced or continued by any creditor against the assets of the insolvent company upon the relevant insolvency procedure has been filed (‘stay of proceeding’ rule).

The aircraft owner may lawfully impede the mortgagee’s enforcement by challenging such remedy before the competent court and providing proper evidence that the secured party has not right to proceed (eg, because no default has occurred under the financing or the relevant credit or interest have been fully repaid).

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Specific liens and rights have priority over both aircraft ownership and aircraft mortgage interest pursuant to article 1023 of the Italian Navigation Code. Among others: judicial costs due to the state; expenses incurred in the common interest of the creditors for enforcement measures against the aircraft (including the procedura ecutiva (ie, the judicial procedure for the sale of the aircraft by public auction before the court)); wages of the captain and the crew; airport duties and similar charges and taxes; indemnities and rewards for giving assistance to, and the rescue of, the aircraft; compensations for death or bodily injury of passengers or for loss of the cargo or the baggage.

In addition, pursuant to Law No. 324 dated 5 May 1976 the aircraft owner is jointly liable with the operator for any unpaid duties, charges, taxes and interest due for flight operations to and from the Italian airports. The Italian government or other public authorities may confiscate or requisition an aircraft if such measure is owing to a serious public interest or for giving assistance to, and the rescue of, the aircraft; compensations for death or bodily injury of passengers or for loss of the cargo or the baggage. The Italian government or other public authorities may confiscate or requisition an aircraft if such measure is owing to a serious public interest.

As a general rule the importation of aircraft from non-European countries into Italy is subject to VAT at the standard rate of 22 per cent. The owner or mortgagee?

Under the Italian system (Law No. 108/1996, Usury Law), limitations to default interests are calculated by increasing the global average effective rates established by the Bank of Italy (TEGM) of one-fourth plus a fixed rate of 4 per cent. In any case, the difference between a default interest and the Bank of Italy’s TEGM cannot exceed 8 per cent (usury limitations).

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

As a general rule the importation of aircraft from non-European countries into Italy is subject to VAT at the standard rate of 22 per cent. The owner and importer of the aircraft is responsible to pay VAT, provided that any other party with an interest in the importation (such as the foreign seller or lessor) is deemed liable for such payments by the Italian Tax Authority and the product is not released by customs until the payments are made.

An exemption from the aforementioned rule is established when the importation into Italy is carried out by an international airline (ie, it chiefly operates flights for profit on international routes).

On the other hand, no customs duties are due for the importation of civil aircraft, irrespective of whether they are imported by a qualified international airline or otherwise.

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

The insurance regime applicable in Italy is that set out by the European legal framework for all EU member states (mainly EC Regulation No. 78/2004, as amended by EU Regulation No. 285/2010). Accordingly, the Italian laws and regulations on aviation insurance are meant to reflect and implement the EU legislation.

Insurance for civil aircraft can be placed with Italian or foreign insurers at the operator’s own choice, as long as the relevant insurers are duly
Get Information on Reinsurance Assignments

Assignments of reinsurance are typically executed in connection with aviation leasing and finance transactions, always provided that – as a general principle – any assignment of rights against an Italian debtor is legally effective pursuant to article 1264 of the Italian Civil Code.

Generally speaking, yes, cut-through clauses under insurance and reinsurance documentation are legally effective in Italy.

Assignments of reinsurance are typically executed in connection with aircraft leasing and finance transactions, always provided that – as a general principle – any assignment of rights against an Italian debtor is legally effective upon the assignment is duly notified to, or accepted by, the debtor pursuant to article 1264 of the Italian Civil Code.

An owner, lessor or financier is not liable for the operation of the aircraft or the activities of the operator.

Lazio region argued that the law was illegitimate as IRESA would be a matter under exclusive jurisdiction of the Italian regions. It must be noted that Lazio region had previously implemented IRESA by Regional Law No. 2/2013 and applied tax rates between €1.60 and €2.50 per aircraft ton (both Rome FCO and Rome CIA airports fall within the jurisdiction of Lazio region). On such basis the Constitutional Court was asked to rule on the constitutional legitimacy of the law adopted by the Italian parliament.

The case resolved by the Constitutional Court had been commenced by Lazio region in order to challenge the provisions set out by National Law No. 9/2014, according to which the maximum rate of the noise emission tax cannot exceed €0.50 per aircraft ton throughout the Italian territory. This Law has also set guidelines for the tax adjustment in case of daily or overnight flights, as well as in connection with the characteristics of the specific urban area nearby the involved airport. Before the issuance of National Law No. 9/2014, in practice taxes between €1.50 and €2.50 had been applied per ton and for each take-off or landing.

As a consequence of the above resolution, on March 2015 the Lazio region authorities announced that they will readjust the IRESA rates in compliance with the ruling of the Constitutional Court and refund the excess taxes paid by the operators prior to the court’s decision, by allowing the excess to be applied against future payments of the tax.

Laura Pierallini
Francesco Grasetti
Viale Liegi, 28
00198 Rome
Italy
Tel: +39 06 884 1713
Fax: +39 06 884 0249
www.studiopierallini.it

Laura Pierallini
Francesco Grasetti
Piazza Castello, 26
20121 Milan
Italy
Tel: +39 02 86 91 54 68
Fax: +39 02 87 75 04
l.pierallini@pierallini.it
f.grasetti@pierallini.it

Update and trends

A recent judgment issued by the Italian Constitutional Court (No. 13 dated 18 February 2015) established a fundamental rule for the implementation of the tax on aircraft noise (IRESA) by the Italian regions.

By way of background, it must be recalled that IRESA is charged from 2013 for the noise emissions caused by civil aircraft during the take-off and landing operations at the Italian airports. The amount of the tax is determined by each region on the basis of the aircraft maximum take-off weight and the noise levels certified by the International Civil Aviation Organization for each aircraft type (aircraft types with maximum take-off weight below 4.5 tons benefit from a tax exemption), like state aircraft (ie, owned by the Italian government or other public bodies) and aircraft engaged in firefighting, rescue operations and medical or emergency services. In addition, historical aircraft (being registered for more than 40 years) and aircraft used for training purposes have a tax-exempt status.

The case resolved by the Constitutional Court had been commenced by Lazio region in order to challenge the provisions set out by National Law No. 9/2014, according to which the maximum rate of the noise emission tax cannot exceed €0.50 per aircraft ton throughout the Italian territory. This Law has also set guidelines for the tax adjustment in case of daily or overnight flights, as well as in connection with the characteristics of the specific urban area nearby the involved airport. Before the issuance of National Law No. 9/2014, in practice taxes between €1.50 and €2.50 had been applied per ton and for each take-off or landing.

Lazio region argued that the law was illegitimate as IRESA would be a matter under exclusive jurisdiction of the Italian regions. It must be noted that Lazio region had previously implemented IRESA by Regional Law No. 2/2013 and applied tax rates between €1.60 and €2.50 per aircraft ton (both Rome FCO and Rome CIA airports fall within the jurisdiction of Lazio region). On such basis the Constitutional Court was asked to rule on the constitutional legitimacy of the law adopted by the Italian parliament.

By means of the aforementioned decision the Constitutional Court stated that National Law No. 9/2014 is fully legal and legitimate, explaining, inter alia, that no violation of article 117 of the Italian Constitution (regarding the separation of the legislative powers among the state and the regions) had been proven by Lazio region. According to the court, the limit and guidelines fixed at a national level also have an important role in coordinating the implementation of IRESA region by region, thus minimising the risk of negative effects on fair competition between different airports and geographical areas.

As a consequence of the above resolution, on March 2015 the Lazio region authorities announced that they will readjust the IRESA rates in compliance with the ruling of the Constitutional Court and refund the excess taxes paid by the operators prior to the court’s decision, by allowing the excess to be applied against future payments of the tax.

By way of background, it must be recalled that IRESA is charged from 2013 for the noise emissions caused by civil aircraft during the take-off and landing operations at the Italian airports. The amount of the tax is determined by each region on the basis of the aircraft maximum take-off weight and the noise levels certified by the International Civil Aviation Organization for each aircraft type (aircraft types with maximum take-off weight below 4.5 tons benefit from a tax exemption), like state aircraft (ie, owned by the Italian government or other public bodies) and aircraft engaged in firefighting, rescue operations and medical or emergency services. In addition, historical aircraft (being registered for more than 40 years) and aircraft used for training purposes have a tax-exempt status.

The case resolved by the Constitutional Court had been commenced by Lazio region in order to challenge the provisions set out by National Law No. 9/2014, according to which the maximum rate of the noise emission tax cannot exceed €0.50 per aircraft ton throughout the Italian territory. This Law has also set guidelines for the tax adjustment in case of daily or overnight flights, as well as in connection with the characteristics of the specific urban area nearby the involved airport. Before the issuance of National Law No. 9/2014, in practice taxes between €1.50 and €2.50 had been applied per ton and for each take-off or landing.

Lazio region argued that the law was illegitimate as IRESA would be a matter under exclusive jurisdiction of the Italian regions. It must be noted that Lazio region had previously implemented IRESA by Regional Law No. 2/2013 and applied tax rates between €1.60 and €2.50 per aircraft ton (both Rome FCO and Rome CIA airports fall within the jurisdiction of Lazio region). On such basis the Constitutional Court was asked to rule on the constitutional legitimacy of the law adopted by the Italian parliament.

By means of the aforementioned decision the Constitutional Court stated that National Law No. 9/2014 is fully legal and legitimate, explaining, inter alia, that no violation of article 117 of the Italian Constitution (regarding the separation of the legislative powers among the state and the regions) had been proven by Lazio region. According to the court, the limit and guidelines fixed at a national level also have an important role in coordinating the implementation of IRESA region by region, thus minimising the risk of negative effects on fair competition between different airports and geographical areas.

As a consequence of the above resolution, on March 2015 the Lazio region authorities announced that they will readjust the IRESA rates in compliance with the ruling of the Constitutional Court and refund the excess taxes paid by the operators prior to the court’s decision, by allowing the excess to be applied against future payments of the tax.
cargo and third parties. The insured risks shall include acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion. In particular:

- for liability in respect of passengers, the minimum insurance cover shall be 250,000 Special Drawing Rights (SDRs) per passenger (at present approximately equal to €322,172);
- for liability in respect of baggage, the minimum insurance cover shall be 1,131 SDRs per passenger in commercial operations (at present approximately equal to €1,457);
- for liability in respect of cargo, the minimum insurance cover shall be 19 SDRs (at present approximately equal to €24); and
- for liability in respect of third parties, the minimum insurance cover per accident is determined on the basis of the aircraft maximum take-off weight (for instance, aircraft between 50 and 200 tons shall be insured for €386 million; aircraft over 500 tons shall be insured for €902 million).
Overview

1 To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Malta is a party to the major air law treaties, including:
- the Chicago Convention on International Civil Aviation (1944), ratified 5 January 1965;
- the Convention relating to Co-operation for the Safety of Air Navigation (Eurocontrol), as amended (1960), ratified 1 July 1989;
- the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), ratified 28 June 1991;
- the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971) and Protocol (1988), ratified 14 June 1991; and

In terms of the European Union Act (Chapter 460 of the laws of Malta), EU Regulations, Directives and other acts adopted by the European Union are binding on and applicable in Malta.

2 What is the principal domestic legislation applicable to aviation finance and leasing?

The Aircraft Registration Act (Chapter 503 of the laws of Malta) (the Act) is the principal legislative instrument applicable to aviation finance and leasing, regulating, inter alia, the registration of aircraft and aircraft mortgages, and the leasing and operation of aircraft. The Act also served to transpose the Convention and the Aircraft Protocol and brought about other legislative amendments to the fiscal regime applicable to aircraft registration and financing. The First Schedule of the Act (the First Schedule) is the implementing law of the Convention and the Aircraft Protocol.

3 Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Subject to the relevant provisions of the Rome I Regulation (EC) No. 593/2008 and Rome II Regulation (EC) No. 864/2007, a contract (or part thereof) may be governed by the law chosen by the parties thereto provided that said choice is made clear or expressly demonstrated by the terms of the contract or the circumstances of the case.

Title transfer

4 How is title in an aircraft transferred?

Title to an aircraft object may be transferred by a bill of sale or contract of sale. Title reservation agreements, in terms of which ownership of the aircraft object does not pass until fulfilment of the condition or conditions stated therein, are also possible.

5 What are the formalities for creating an enforceable transfer document for an aircraft?

The bill of sale or contract of sale referred to in the preceding section must be in writing, and must contain an obligation whereby one of the parties, having the power to dispose of the identifiable object specified therein, binds himself to transfer to the other the said object for a price which the latter binds himself to pay to the former.

Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry.

The National Aircraft Register (the National Register) is maintained by the Director General for Civil Aviation (the DG). This National Register contains, inter alia, details of:
- the aircraft and engines;
- the registrant;
- mortgages; and
- irrevocable deregistration and export request authorisations (IDERA) or any other power of attorney.

The National Register also contains annotations permitted by the Act, most notably any ownership rights in aircraft or engines. No specific engine register exists but interests in engines may be noted in the National Register at the request of the registrant. Where the engines are not the property of the registrant, prior consent of the owner is required for such an annotation to be made.

Applicants who may register aircraft in the National Register include an owner of aircraft under construction, an operator of an aircraft under temporary title (such as a lease) and a buyer under a conditional sale or title reservation agreement (each a ‘registrant’). Registration of aircraft and engines under the terms of a trust is also possible.

If the aircraft is intended to provide air services (ie, not solely for private use) the registrant must be a qualified person (see question 7).

Registrants of private aircraft are not subject to the qualifying requirements of aircraft used for ‘air services’, which are required to obtain a Maltese operating licence. If the aircraft is not used for air services, it may be registered by any aviation undertaking established in an Organisation for Economic Co-operation and Development member country.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners, operators’ and lessors’ interests in aircraft engines be registered?

Where an application for registration of an aircraft is made by a registrant, the persons holding an interest by way of ownership or title in the aircraft (or a share therein) may include a request in writing to the DG to have such persons’ ownership interests or title noted in the National Register.

The following persons are entitled to register any aircraft in the National Register:
- the government of Malta;
- a citizen of Malta, Switzerland, an EU state or an EEA state (each a ‘qualifying state’), having a place of residence or business in a qualifying state; and
an undertaking established in a qualifying state and having its registered office, central administration and principal place of business within a qualifying state, whereof not less than 50 per cent of the undertaking is owned and effectively controlled by the government of Malta, any EU member state or by citizens of a qualifying state, whether directly or indirectly through one or more intermediate undertakings.

An aircraft in construction and an aircraft not used to provide air services may be registered by a citizen of a qualifying state, but not having a place of residence or business in a qualifying state; or an undertaking established in a qualifying state, but with less than 50 per cent of its ownership held by citizens of a qualifying state, and having its effective control carried out in a qualifying state, provided however that each of its shareholders and directors are a citizen of, or an undertaking established in, an ‘approved jurisdiction’ in terms of the Aircraft Registration (Approved Jurisdiction) Regulations (2011). For the purposes of the Act, such person or undertaking is referred to as an ‘international registrant’, provided such person:

- has legal capacity to own or operate an aircraft in terms of law;
- appoints a local resident agent to represent him in Malta for matters concerning the registration of the aircraft; and
- complies with applicable regulations and guidelines.

The Maltese legal framework does not provide for any registries other than the National Register, in which an ownership interest in an aircraft or engine may be registered.

The notations which may be made in the National Register upon a request by the registrant or any other person who with the consent of the registrant demonstrates an interest having such information noted in the National Register, include:

- ownership rights in the aircraft or engines;
- lessor rights relating to the aircraft or engine when the lessee is a person different from the owner, although the same person may appear on the register as lessee;
- the lessee rights in relation to the aircraft or engine and all matters relating thereto;
- details of the resident agent where the registrant is an international registrant; and
- information on any international interest registered in the International Registry and the debtor thereof.

8 Summarise the process to register an ownership interest.

A request for notation in the National Register as to the ownership interest in the aircraft is made pursuant to the application for registration of the aircraft. The relevant part of the application is to be signed by the owner and countersigned by the registrant. A copy of the bill of sale or other proof of ownership of the aircraft would need to be submitted to the CAD together with the application.

On a general note, where documentation submitted to the CAD is notarised and apostilled. Where the document originates from within the EU, this needs to be a certified true copy and legalised; and where the document originates from outside the EU, this needs to be notarised and apostilled.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

The certificate of registration constitutes prima facie evidence of its contents. Accordingly should the holder of an interest, whether by way of ownership or title in the aircraft or a share therein, make a request to have such interest noted in the certificate of registration together with his personal details respectively, this would constitute proof of title which can be relied upon by third parties.

Registration in the National Register, whether by way of notation or record, has the following legal effects:

- it renders information public and considered to be within the knowledge of third parties;
- the registration becomes effective against third parties;
- it creates priority, according to the provisions of the Act and applicable law, between different rights, provided that except for the preservation of special privileges or reservation of title of aircraft or accessories of aircraft in accordance with the provisions of the Act, the notation of ownership or lessee rights shall not imply priority over those of the holder of a registered mortgagee;
- where expressly conditional on registration, it shall create legal effects between the parties to certain transactions; and
- all other effects under applicable law.

10 Summarise the process to register a lease interest.

A notation in the National Register as to the lease interest in the aircraft is also made at time of registration through the insertion of the necessary information in the application for registration. A copy of the aircraft lease or operating agreement would need to be submitted to the CAD together with the application for registration.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

A non-transferrable certificate of registration may be requested from the DG. This would include details relating to:

- date of issue;
- nationality marks of the aircraft and the registration marks assigned to it by the DG;
- constructor of the aircraft;
- manufacturer, serial numbers and physical details of the engines attached to the aircraft and any replacement engines to the extent that such are designated for use on the aircraft (no separate certificate of registration is issued for engines); and
- every person holding an interest by way of ownership or title in the aircraft or a share therein, if applicable.

A certificate of registration may be issued when the aircraft is still under construction, but such certificate shall expressly state that the aircraft is not permitted to operate until it complies with the provisions of the applicable law.

12 Is an owner or mortgagor required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagor?

Where an IDERA is in force, the authorised person indicated therein will not be able to deregister the aircraft and procure the export and physical transfer of the aircraft without the prior consent in writing of the holders of any registered interest ranking in priority to that of the authorised person. Prior to the exercise of such right, the authorised person shall be required to certify to the CAD that all registered interests ranking in priority to that of such authorised person have been discharged or that the holders of such interests have consented to the deregistration and export. Moreover, reasonable prior notice of deregistration and export is to be given to the debtor and any guarantor. Where any other person having rights over the aircraft or aircraft objects has had such interest annotated in the register, reasonable notice is also to be given to such person.

13 What are the principal characteristics of deregistration and export powers of attorney?

A power of attorney or IDERA may be registered in the National Register or in the International Registry. Where a mandate or power of attorney (irrevocable or otherwise) granting powers relating to the exercise of rights relating to the aircraft, or to the closure of the register on behalf of the registrant, is granted for a stated period of time after which it shall lapse, such date must be recorded in the register and the registration of the mandate will cease to have effect after such date.

Where the request in writing is made by an authorised person, pursuant to an IDERA or power of attorney which has been registered in the National Register or in the International Registry, such request shall be acted upon in all cases, provided that the authorised person certifies that all registered interests ranking in priority to that of the authorised person have been discharged or that the holders of such interests have consented to the deregistration and export. Revocation of an IDERA, where recorded by the CAD, requires the written consent of the authorised person. An irrevocable mandate by way of security survives the insolvency of the debtor or the creditor and continues to be binding on, or continue for the benefit of, the heirs or liquidator (or similar officer) of the debtor, or the creditor, in accordance with its terms.
14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Article 13(2) of the Act and article 25 of the First Schedule provide for the granting of an IDERA by the registered owner to a third party. The IDERA has to be submitted to the CAD in the format specified in the Second Schedule of the Act, and should be signed by the registrant and submitted in duplicate together with sufficient evidence that the signatory has due authority (by way of power of attorney or corporate authorisation) to bind the registered owner by his signature. It may be possible to request the CAD to issue a letter of undertaking acknowledging the IDERA and the registration thereof.

Security

15 What is the typical form of a security document over the aircraft and what must it contain?

Mortgages

It is possible to register a mortgage in the National Register over an aircraft by means of a statutory form executed by the mortgagor in favour of the mortgagee in the presence of, and attested by, a witness. The mortgage is drawn up in the English language and may be registered in favour of the creditor himself or a security trustee appointed or acting under a trust for the benefit of the creditors.

Mortgages may be registered as security for payment of a principal sum and interest, a current account or the performance of any other obligation, including a future obligation, due by a debtor to a creditor. The Act does not require that the value of the indebtedness is specified in the mortgage unless it is intended to secure a future obligation, in which case a maximum sum by way of principal for which the mortgage is granted must be expressly stated (such sum would also be reflected in the National Register). It is not necessary to record any other economic terms (such as interest and repayment dates).

Convention and aircraft protocol

In addition to the registration of a mortgage referred to above, in terms of the First Schedule creditors and debtors may also create international interests over airframes, aircraft engines or helicopters (‘aircraft objects’) and register such interests in the International Registry. International interests must be constituted pursuant to an instrument in writing executed by the chargor (or, in the case of title reservation agreements and leaseholds) who has the power to dispose of the aircraft object specified therein. There is no requirement to specify a sum or maximum sum secured, however the agreement must at least specify what obligations are being secured.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The following is a list of documents to be submitted to the CAD for registration of a mortgage:

- an original version of a mortgage form signed by the mortgagor and attested by a witness;
- if the mortgage form is being signed by an authorised attorney in Malta, an original power of attorney granted by the mortgagor; and
- copies of corporate authorisations, authorising the granting of the mortgage and the named attorney to execute the mortgage in Malta.

Other formalities (such as certification of copies, notarisation and legalisation) are required in connection with documents executed outside of Malta. The costs for legalisation and notarisation of such documents vary, typically in our experience within the region of €50–€75 and €50–€150 respectively (exclusive of VAT), depending on the type and length of the document.

The formalities for registration of international interests in the International Registry are set out in question 15.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties?

Summarise the process to register a mortgagee interest.

The mortgage must be registered with the CAD and will have no effect until it is recorded in the National Register. The mortgage takes its priority from the date and time of its registration in the National Register by the DG.

The process for registration is relatively straightforward. Once all necessary documents (see question 16) are readily available in Malta, these are delivered to the DG for registration for immediate recording of the mortgage by the DG. With a view to avoiding any delays in the recording of the mortgage, pre-vetting is advisable. At present, no fees are payable upon the registration of mortgages or amendments thereto.

18 How is registration of a security interest certified?

After the mortgage has been submitted, the DG will note on the original mortgage that it has been recorded by him, stating the date and time of that record. A transcript of the National Register may be requested by the mortgagor or mortgagee. The transcript will show, inter alia, the security interest registered on the aircraft and its priority.

With regards to international interests registered in the International Registry, a certificate issued by the International Registry constitutes prima facie proof that it has been issued and of the facts stated therein.

19 What is the effect of registration as to third parties?

The registration of a mortgage renders it effective and also creates priority over subsequent mortgages. If there are a number of mortgages registered over the same aircraft, the mortgagees will be entitled in priority, one over the other, according to the date and the time at which each mortgage is recorded in the National Register.

Since the Convention came into force in Malta on 1 February 2011, all mortgages registered in the National Register after said date rank after any international interest, prospective international interest and any other right or interest registered in the International Registry, irrespective of the date and time of registration in the International Registry.

20 How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

The concept of a security trustee is recognised in Malta and commonly applied in granting of security over aircraft. A mortgage may be granted in favour of the beneficiary or in favour of a security trustee appointed or acting under a trust for the benefit of persons to whom a debt or other obligation is due.

The security trustee would be recognised as the mortgagee, and will be entitled to exercise all the rights in relation to the mortgage accorded to mortgagees under the Act. Accordingly, the mortgagee will only refer to and recognise the security trustee as the person in whose favour the mortgage is registered, without any reference to the underlying lenders.

A mortgage constitutes a right in rem over the aircraft.

21 What form does security over spare engines typically take and how does it operate?

Mortgages on aircraft can be registered in the National Register in terms of Part IV of the Act. For the purposes of this Part of the Act, an aircraft includes, inter alia, any engines owned by the owner of the aircraft, whether attached to the aircraft or not, as well as any replacement engines which are designated for use on the aircraft and owned by the owner of the aircraft but temporarily not attached to the aircraft.

Security over the aircraft would not, however, extend to any engine attached to the airframe when such engine is not the property of the owner of the airframe granting the security, notwithstanding that the engines may be specifically referred to in the instrument of mortgage, the National Register or elsewhere. In terms of article 573 of the Civil Code (Chapter 16 of the laws of Malta), where an engine attached to an airframe is not also owned by the airframe owner, each of the owners retains the ownership of their respective asset.

Also, in terms of the First Schedule, international interests on aircraft engines may be registered in the International Registry. International interests that may be registered in the International Registry are interests in aircraft objects:
The First Schedule also provides that a creditor may exercise any additional remedies permitted by law, including any remedies agreed upon by the parties to the agreement. In the event of a default under a title reservation agreement or leasing agreement, the conditional seller or the lessor (as the case may be) is entitled to:

- terminate the agreement and take possession or control of any aircraft object to which the agreement relates; or
- apply to court requesting issuance of an order authorising or directing either of these acts.

In addition to the remedies specified above, in terms of the First Schedule the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in such provisions:

- procure the deregistration of the aircraft; and
- procure the export and physical transfer of the aircraft object from the territory in which it is situated. It is important to note that the creditor is only entitled to exercise the said remedies with the prior written consent of the holder of any prior ranking registered interest.

The First Schedule also provides that a creditor may exercise any additional remedies permitted by law, including any remedies agreed upon by the parties to the agreement. In the event of a default under a title reservation agreement or leasing agreement, the conditional seller or the lessor (as the case may be) is entitled to:

- terminate the agreement and take possession or control of any aircraft object to which the agreement relates; or
- apply to court requesting issuance of an order authorising or directing either of these acts.

In addition to the remedies specified above, in terms of the First Schedule the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in such provisions:

- procure the deregistration of the aircraft; and
- procure the export and physical transfer of the aircraft object from the territory in which it is situated. It is important to note that the creditor is only entitled to exercise the said remedies with the prior written consent of the holder of any prior ranking registered interest.

The First Schedule also provides that a creditor may exercise any additional remedies permitted by law, including any remedies agreed upon by the parties to the agreement. In the event of a default under a title reservation agreement or leasing agreement, the conditional seller or the lessor (as the case may be) is entitled to:

- terminate the agreement and take possession or control of any aircraft object to which the agreement relates; or
- apply to court requesting issuance of an order authorising or directing either of these acts.

In addition to the remedies specified above, in terms of the First Schedule the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in such provisions:

- procure the deregistration of the aircraft; and
- procure the export and physical transfer of the aircraft object from the territory in which it is situated. It is important to note that the creditor is only entitled to exercise the said remedies with the prior written consent of the holder of any prior ranking registered interest.

The First Schedule also provides that a creditor may exercise any additional remedies permitted by law, including any remedies agreed upon by the parties to the agreement. In the event of a default under a title reservation agreement or leasing agreement, the conditional seller or the lessor (as the case may be) is entitled to:

- terminate the agreement and take possession or control of any aircraft object to which the agreement relates; or
- apply to court requesting issuance of an order authorising or directing either of these acts.

In addition to the remedies specified above, in terms of the First Schedule the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in such provisions:

- procure the deregistration of the aircraft; and
- procure the export and physical transfer of the aircraft object from the territory in which it is situated. It is important to note that the creditor is only entitled to exercise the said remedies with the prior written consent of the holder of any prior ranking registered interest.

The First Schedule also provides that a creditor may exercise any additional remedies permitted by law, including any remedies agreed upon by the parties to the agreement. In the event of a default under a title reservation agreement or leasing agreement, the conditional seller or the lessor (as the case may be) is entitled to:

- terminate the agreement and take possession or control of any aircraft object to which the agreement relates; or
- apply to court requesting issuance of an order authorising or directing either of these acts.

In addition to the remedies specified above, in terms of the First Schedule the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in such provisions:

- procure the deregistration of the aircraft; and
- procure the export and physical transfer of the aircraft object from the territory in which it is situated. It is important to note that the creditor is only entitled to exercise the said remedies with the prior written consent of the holder of any prior ranking registered interest.

The First Schedule also provides that a creditor may exercise any additional remedies permitted by law, including any remedies agreed upon by the parties to the agreement. In the event of a default under a title reservation agreement or leasing agreement, the conditional seller or the lessor (as the case may be) is entitled to:

- terminate the agreement and take possession or control of any aircraft object to which the agreement relates; or
- apply to court requesting issuance of an order authorising or directing either of these acts.

In addition to the remedies specified above, in terms of the First Schedule the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in such provisions:

- procure the deregistration of the aircraft; and
- procure the export and physical transfer of the aircraft object from the territory in which it is situated. It is important to note that the creditor is only entitled to exercise the said remedies with the prior written consent of the holder of any prior ranking registered interest.
Mortgages are also granted the status of an executive title where the obligation secured is a certain debt, liquidated and due or where a maximum sum secured pursuant to the said mortgage is specified in the mortgage.

An executive title is, in effect, equivalent to a judgment, which can constitute the basis for seeking enforcement including, through the issuance of executive warrants (such as an executive warrant of arrest), an order for the judicial sale by auction of the aircraft or the approval of a private sale by the court (which would give the purchaser a title which is free from all privileges and encumbrances).

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The following debts are, in terms of the Act, secured by a special privilege over the aircraft as well as by insurance proceeds (provided that such privilege does not apply in relation to an indemnity payable under a liability policy) and proceeds from any indemnity arising from any mishaps:

- judicial costs incurred in respect of the sale of the aircraft and the distribution of the proceeds thereof pursuant to the enforcement of any mortgage or other executive title;
- fees and other charges due to the DG arising under the applicable law in respect of the aircraft;
- wages due to crew in respect of their employment on the aircraft;
- any debt due to the holder of a possessory lien for the repair and preservation of the aircraft, to the extent of the service performed on and value added to the aircraft;
- the expenses incurred for the repair and preservation of the aircraft, to the extent of the service performed on and value added to the aircraft; and
- wages and expenses for salvage in respect of the aircraft.

The same applies in the case of the following, however only after registration in the International Registry:

- taxes, duties and levies due to the government of Malta in respect of the aircraft; and
- wages and expenses for assistance or recovery in respect of the aircraft.

Upon the registration of such privileges in the register, the person registering the aircraft, its owner, or its operator is to be notified of the registration by the registrant of the privilege. The requirement for registration of the privilege for taxes, duties and levies due to the government of Malta and the specific ranking position of such claim in terms of the Act is applicable and binding with reference to such claims notwithstanding the provisions of other special laws of Malta which may govern such claims.

Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Maltese taxation legislation provides for tax measures favourable to both lessors and lessees of aircraft. No withholding tax is payable on lease payments where the lessor is not a tax resident. The Inland Revenue Department has issued guidance providing clear rules on the tax treatment of the finance charge, available tax deductions to aircraft finance lessors and capital allowances for leases.

Income derived by non-Maltese resident operators from the ownership, leasing or operation of aircraft or aircraft engines used in international aviation business will not be taxed in Malta unless the income therefrom is actually received in a Maltese bank account. This will apply even if the aircraft is registered or is operated in or from Malta.

Operators setting up a company in Malta may avail themselves of attractive finance leasing rules which minimise the tax burden considerably. A favourable tax treatment for operating leases is also available.

Leasing of aircraft is chargeable to VAT on the deemed use of the aircraft within European airspace. In order to establish the percentage of use of an aircraft within EU airspace, the VAT Department has issued a formula that takes into account essential features of the aircraft on the basis of which the percentage of use is established. Through such a scheme, the lessor would be entitled to claim the original VAT incurred upon the acquisition of the aircraft as it becomes engaged in performing the economic activity of chartering the aircraft. No VAT is charged in respect of the supply, acquisition, importation, chartering, maintenance, servicing and provisioning of aircraft to be used by airline operators for reward chiefly for international transport of passengers, goods or both.

Accelerated tax depreciation rates (six years for the aircraft and engines and four years for the interior of the aircraft) also apply.

Qualifying companies may benefit from various tax credit schemes and other incentives offered by Malta Enterprise.

No taxable fringe benefit shall be deemed arising in Malta in the case of private use of an aircraft by an individual who is a non-resident employee or officer of an employer or corporate entity whose business activities include the ownership, leasing, or operation of one or more aircraft or aircraft engine is used for, or employed in, the international transport of passengers or goods.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

No exchange control restrictions apply.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

As a general rule, interest can be charged at up to a maximum rate of 8 per cent per annum. In addition, the compounding of interest is not enforceable in Malta unless the obligation to pay interest is due for a period of more than one year and certain procedures are followed. However, in terms of the provisions of the Commercial Code (Chapter 13 of the laws of Malta) on late payments in commercial transactions, the legal interest for late payment is set at the applicable European Central Bank reference rate plus 8 per cent. Limitations on the rate of interest and the compounding thereof are generally considered not to apply to debts or obligations when:

- obligations arise under a contract governed or otherwise regulated by the law of a country other than Malta;
- the agreed interest rate or compounding of interest are in accordance with international market conditions prevailing at the time that the debt or obligation has been contracted; and
- the payor of interest is not a natural person.

The same position applies in the case of security governed by Maltese law relating to such types of debts or obligations.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

No import duty is payable in respect of civil aircraft. Aircraft are not deemed to be chargeable assets for stamp duty purposes.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

The Civil Aviation (Insurance Requirements for Air Carriers and Aircraft Operators) Order (Sl. 499.41) (the Order), which implements the rules promulgated in terms of Regulation EC 785/2004 on insurance requirements for air carriers and aircraft operators (as amended), requires that an operator of aircraft must meet the requirements of such Regulation. The Order does not require that insurance must be placed with a domestic insurer, and there is no prevailing practice to place insurance in the local market. In fact, only a limited number of reinsurance principals authorised by the local insurance regulator to carry on the business of insurance in or from Malta are authorised to provide insurance in relation to aircraft.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

In terms of the Act, proceeds from an insurance policy related to an aircraft are secured by a special privilege upon the aircraft. Moreover a mortgage would attach to any proceeds from any indemnity arising from any mishaps...
Update and trends

In April 2013, the Aviation Advisory Committee was established for the purpose of advising the Minister responsible for aviation on all matters relating to aviation in Malta and the efficient and effective management thereof. The Committee brought together a range of stakeholders, including public, private and civil society organisations. A consultation process culminated in a National Aviation Policy, launched at the end of 2013, aimed in particular at providing guidance to the sector for its continued growth in the medium term. It shall be revised as and when necessary to cater for changes in the area.

Following the launch of the National Aviation Policy, the authority responsible for the regulation of the aviation sector, Transport Malta, in collaboration with the Ministry for Transport and Infrastructure and the Ministry for Tourism, carried out a public consultation regarding proposed amendments to the Act. The proposed amendments formulated through this latest consultation process, which to date have not yet been implemented, are intended to update the Act and certain relevant provisions of other related laws. Parts of the proposed amendments serve to add clarity where conflicting interpretations of certain provisions of the Act have arisen over time. The more substantive changes are expected to further enhance Malta’s competitiveness in the industry.

One substantive change to the Act which is being proposed relates to the establishment of a separate regime applicable to aircraft leases, which would give similar rights and remedies to those currently found in the First Schedule of the Civil Code (Chapter 16 of the laws of Malta), thus serving to dispel doubts as to whether in such cases the Maltese courts should refer to the general Maltese law on lease. Further amendments are aimed, inter alia, at: protecting mortgagees and lessors and whether certain amendments to the Act would be appropriate to function properly in practice or whether revisions are necessary, whether the VAT leasing guidelines relating to aircraft leases are necessary to cater for changes in the area.

Amendments to the Financial Institutions Act (Chapter 376 of the Laws of Malta) are also under discussion. As that law currently stands, an international lender entering into financial leases with Maltese operators (that is the person entitled to operate the aircraft as owner or under an operating agreement) on a regular and habitual basis would require a financial institutions’ licence, possibly discouraging lessors from partaking in business in Malta. Accordingly, an amendment to the Financial Institutions Act is being proposed to provide for a carve-out from the licensing requirements in cases involving a lessor under a finance lease of an aircraft which is being leased to an operator and which is registered on the National Register.

Finally, other issues are also mentioned in the Consultation Document, including notably that Malta’s application for review by the Organisation for Economic Co-Operation and Development in order to be able to qualify for Cape Town Discounts is being finalised.

In addition to the above, Malta Enterprise, with the support of the Ministry for Tourism, Transport Malta and the Malta Business Aviation Association, launched the Business Aviation Cluster Excellence initiative towards the end of last year. Several companies and service providers operating in the business aviation sector, including handling, registration, ownership, technical documentation and AOCs, R&D and training, as well as legal, financial and other related services, attended these meetings. The initiative forms part of a wider project at EU level through which Malta Enterprise hopes to introduce the concept of clusters as a tool to develop certain sectors, including in particular the business aviation sector.

as well as any insurance proceeds, except in relation to an indemnity payable under a liability policy.

It is possible to stipulate under Maltese law for a person to stipulate for the benefit of a third party, subject to the satisfaction of the following criteria:

- the third person must be defined;
- the third person must have signified his intention to avail himself of the stipulation; and
- the stipulation must constitute:

- the mode or condition made by the person for his own benefit (such ‘mode’ has been interpreted by Maltese courts to refer to an obligation which, if not present in the contract, would render the contract a gratuitous one); or
- a donation or grant made by him to others.
31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

In terms of Maltese law, a debt, right or cause of action may be assigned subject to the satisfaction of the requisites essential for its validity, namely agreement as to the subject of the assignment and the price, and, except in the case of a right transferable by the delivery of the respective document of title, the execution in writing of a deed of assignment.

An assignee may not, in regard to third parties, exercise the rights assigned to him except where the debtor has acknowledged the assignment, or after due notice of the assignment has been given to the debtor by means of a judicial act by the assignee himself or by the assignor.

As a signatory of the Convention, all associated rights (defined therein as all rights to payment or other performance by a debtor secured by or associated with the aircraft object) including, inter alia, reinsurance contracts associated with the aircraft, are capable of being assigned unless otherwise agreed between the parties.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

The Aviation Act requires that if an aircraft is flown in such a manner as to be the cause of unnecessary danger to any person or property, the pilot or the person in charge of the aircraft shall be liable for the payment of a fine not exceeding €2,500 or to imprisonment not exceeding six months or to both such fine and imprisonment.

Where material loss or damage is caused to any person or property by, or by a person in, or an article or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable.

Where aircraft have been bona fide demised, let or hired out, for any period exceeding 14 days, by the owner thereof, and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner, the relevant sections of the Aviation Act whereby liability for damages would attach to the owner of the aircraft so leased would be applicable to the person to whom the aircraft has been so demised, let or hired out, as if such person were the owner of the aircraft.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

No, where the owner can prove to the satisfaction of the court that the aircraft was so flown without his actual fault or privity, liability would not attach to the owner but to the person having the operational interest in the aircraft.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?

Aircraft having a maximum take-off mass of less than 500kg, and microlights which are used for non-commercial purposes, or local flight instruction not entailing the crossing of international borders, are required to have a minimum insurance cover per accident of 0.75 million special drawing rights (SDR) per passenger. In respect of non-commercial operations by aircraft with a maximum take-off mass of 2,700kg or less, the minimum insurance cover shall be 100,000 SDR per passenger.

The requirements with respect to all other aircraft set out in Regulation EC 785/2004 (see question 29) apply.
Overview

1. To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?
Mexico is part of the following treaties or conventions:
- the Rome Convention (1963), signed on 26 October 1961 and ratified on 6 September 1985;
- the Chicago Convention (1944), 25 June 1946;
- the Cape Town Convention (2001), 31 July 2007; and

2. What is the principal domestic legislation applicable to aviation finance and leasing?
The principal domestic legislation applicable to aviation finance and leasing would be the Civil Aviation Law (including its related rules and regulations), the Federal Civil Code and the Commerce Code.

3. Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft?
The ownership interest would be effective against third parties, even if the owner has no title or a defective title.

Title transfer

4. How is title in an aircraft transferred?
Title in an aircraft is usually transferred through a bill of sale.

5. What are the formalities for creating an enforceable transfer document for an aircraft?
The existing documentary requirements to perfect transfer of title of an aircraft and its related formalities would be as follows.

   - In writing, notarisation would be necessary in specific cases, as well as the legalisation or apostille of the corresponding document, depending if the parties involved are part of the Hague Convention.
   - Translation of the document would be necessary in any and all events by a duly authorised translator, or the document could be executed in two languages.

Registration of aircraft ownership and lease interests

6. Identify and describe the aircraft registry.
The Mexican Aeronautics Registry is an operator registry, and is a public registry where information is available to any person or entity that evidences its legal interest in the information requested or to be requested.

   - Transfer of regulatory and oversight functions may verify.
   - Notwithstanding that an interest on an engine may be registered through various legal structures (ie, via lease agreement or a pledge), the Mexican Aeronautics Registry is not an engine registry per se.

7. Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

   - The ownership interest in, or lease agreement over, aircraft are subject to registration before the Mexican Aeronautics Registry.
   - No limitations exist on who can be recorded as owner.
   - In addition to the above, as of November 2007, Mexico is part of the Cape Town Convention on International Interest in Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment, therefore, any international interest must be registered before the International Registry.

8. Summarise the process to register an ownership interest.
Mortgages, pledges, ownership and any and all liens in connection to aircraft and engines are registered before the Mexican Aeronautics Registry, an entity under the subordination of the Directorate General of Civil Aeronautics (DGAC).

   - The Mexican Aeronautics Registry is under the supervision of the Ministry of Communications and Transport. Documents through which property, possession and other rights on Mexican aircraft are acquired, transmitted, modified or extinguished, including such aircraft-related engines, as well as the lease of Mexican or foreign aircraft, should be filed with the Registry.

9. What is the effect of registration of an ownership interest as to proof of title and third parties?
The registration of an ownership interest before the Mexican Aeronautics Registry constitutes proof of title, and the parties can rely on the accuracy of the public registration of the ownership as recorded and evidenced in an Aircraft Certificate of Registration or on the relevant documents filed for registration and duly stamped by the Mexican Aeronautics Registry.

   - The ownership interest would be effective against third parties, even if the owner has no title or a defective title.

10. Summarise the process to register a lease interest.
Article 14 of the Mexican Aeronautic Registry Regulation establishes the requirements for any interested party to register a lease interest. The petition must be in written form, with the following requirements to be completed by the applicant:

   - name;
   - Certificate of Incorporation;
   - power of attorney;
   - domicile to receive notification within Mexican territory;
   - evidence of the payment of duties regarding the document or documents to be registered; and
   - the transaction documents duly executed by the parties, formalised before a notary public, legalised or apostilled as applicable and duly translated into Spanish by a duly authorised translator if applicable.

11. What is the regime for certification of registered aviation interests in your jurisdiction?
The certificate of registration should have the following information, pursuant to article 100 of the Civil Aviation Regulation:
• place and date of issuance, and registration number;
• registration numbers and marks;
• model of the aircraft and engines;
• name of the manufacturer;
• manufacturer’s serial number;
• year of manufacture;
• name and domicile of the owner, and title of ownership;
• if applicable, name and domicile of the operator and documents related (ie, lease, among other things);
• if applicable, name and domicile of the of the mortgagor or person with a title of interest, type and date of the interest;
• base of operation of the aircraft;
• type of operation of the aircraft; and
• any other registration related to the Mexican Aeronautic Registry pursuant to the applicable regulations.

Within the next 10 business days after the filing, the officers of the Registry should have recorded the documents.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

In accordance with article 46 of the Civil Aviation Law, if there is a mortgage in place no deregistration process would be effective without the prior written consent of the mortgagee. Moreover, the deregistration could be performed by a written request filed by the owner or the legitimate possessor (operator). However, in practice, the Aviation Authority requests the consent of the operator in the event that the owner files the deregistration petition.

13 What are the principal characteristics of deregistration and export powers of attorney?

The power of attorney must comply with the Federal Civil Code or the applicable local Civil Code. The power of attorney must be duly formalised before a Mexican notary public. If the power of attorney is granted outside Mexico, it must be certified by a notary public, legalised or apostilled, as applicable, duly translated into Spanish by a translator authorised by the local or federal court, and formalised by a Mexican notary public. In accordance with Mexican legislation, the power of attorney is irrevocable and no authorisation is required to exercise it. Furthermore, the power could be granted in favour of one or several attorneys.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Pursuant to the declarations set forth by the Mexican government to the Cape Town Convention, the IDERA process is not applicable in Mexican jurisdiction.

Security

15 What is the typical form of a security document over the aircraft and what must it contain?

Pursuant to the Civil Code, the mortgage must be granted and formalised before a notary public. In the event that the security is granted outside Mexico, the document must be legalised or apostilled, as applicable, and duly translated into Spanish by a translator authorised by the local or federal court.

In accordance with article 101 of the Regulation of the Civil Aviation Law, the security document must be authorised by the Ministry of Communications and Transport and duly recorded with the Mexican Aeronautic Registry.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The mortgage must be granted and formalised before a notary public. In the event that the security is granted outside Mexico, the document must be legalised or apostilled, as applicable, and duly translated into Spanish by a translator authorised by the local or federal court.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

Pursuant to article 101 of the Regulation of the Civil Aviation Law, the security must be filed before the Mexican Aeronautic Registry; and in accordance with the Cape Town Convention and its Protocol, the security could be registered before the International Registry.

In accordance with the regulations of the Mexican Aeronautic Registry, in order to register a security the applicant must comply with the following requirements:

- name;
- Certificate of Incorporation;
- power of attorney;
- domicile to receive notification within Mexican territory;
- evidence of the payment of duties regarding the document or documents to be registered;
- authorisation granted by the Ministry of Communications and Transport to the carrier to execute the security document; and
- the transaction documents duly executed by the parties, formalised before a notary public, legalised or apostilled as applicable and duly translated into Spanish by an authorised translator if applicable.

The officers of the Registry should record the documents within the next 10 business days of the filing.

18 How is registration of a security interest certified?

The officers of the Registry record the security document within its corresponding section in accordance with the regulations of the Mexican Aeronautic Registry. Furthermore, the officers modify or incorporate the registration of the security document into the Certificate of Registration of the aircraft. In addition to the above, any party of the security document has the right to request before the Mexican Aeronautic Registry an evidence of the said registration.

19 What is the effect of registration as to third parties?

The registration of a security document before the Mexican Aeronautic Registry confers priority over subsequent interest and, due to its registration, is enforceable before third parties. The Mexican Aeronautic Registry has a designated section before which the security documents are duly recorded on a date basis.

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

According to Mexican Civil and Aviation Law, any alterations carried out in previously recorded interests before the Mexican Aeronautic Registry must be duly recorded before said Registry, otherwise they will not be effective before the new involved parties. This attests to the fact that the interests and rights are in rem and not in personam.

21 What form does security over spare engines typically take and how does it operate?

Pursuant to the Civil Code, the security document must be granted and formalised before a notary public. In the event that the security is granted outside Mexico, the document must be legalised or apostilled, as applicable, and duly translated into Spanish by a translator authorised by the local or federal court.

In accordance with the Cape Town Convention and its Protocol, the security could be registered before the International Registry.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

The return of an aircraft lessor or owner at the end of the lease term, or otherwise upon termination or following the occurrence of an event of default, does not require the consent or approval of, the giving of notice to, the registration with or the taking of any other action in respect of any government entity of Mexico. It does not contravene any laws of Mexico. However, if a lessee does not return the aircraft voluntarily, a court order
based on a final judgment will be required in order to retrieve possession of the same.

The following is the deregistration criteria established in article 46 of the Mexican Civil Aviation Law:

The cancellation of the registration marks of an aircraft before the Mexican Aeronautics Registry will have as a consequence the loss of its Mexican nationality and may be made in the following cases:

(i) at the written request of the owner or person in legitimate possession of the aircraft. The deregistration of an aircraft with a registered lien will not take place, without the consent of the person that holds such lien;
(ii) through a judicial order or an order of other competent authority;
(iii) in case of destruction, loss or abandonment of the aircraft;
(iv) for the conclusion of the term of a temporary registration;
(v) for the registration of the aircraft in another country; and
(vi) for any of the events described in the respective regulations.

The Registration Certificate is a relevant element or document that is always requested by the DGAC in order to proceed with a deregistration request. This document is therefore always delivered to the lessee, therefore it is important to have physical possession of such document. No self-help remedies are available in Mexico.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

Self-help remedies are not available in Mexico.

A court order must be obtained to detain an aircraft. An aircraft cannot be detained by an ex parte application.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The obligation to pay rent under a lease or sublease is the direct and unconditional general obligation of a Mexican operator, and will rank in right of payment at least pari passu with all unsecured debt of the Mexican operator.

A Mexican operator is subject to civil and commercial law, and its actions constitute private and commercial acts. Neither the operator nor any of its revenues, properties or assets enjoys any right of immunity from suit, set-off, or attachment upon or prior to judgment or in aid of execution in respect of its obligations under a lease or a sublease transaction. Employee rights and tax liabilities have priority under Mexican legislation.

If the ownership or a mortgage have been duly filed before the Mexican Aeronautics Registry, and the operator does not have any potential or partial ownership or property rights on an aircraft, the equipment may be repossessed.

An aircraft may not be confiscated, seized or detained for any reason whatsoever, unless a criminal action involves the aircraft (ie, drug trafficking).

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

No payment of rent, to be made by an operator under a lease or sublease, and no insurance proceeds to be paid under any of the insurance policies to be maintained under a lease or a sublease, should be subject to any Mexican withholding tax or will give rise to any other taxes imposed by Mexico or any political subdivision or fiscal or taxing authority thereof. Neither a lease or a sublease of an aircraft to a Mexican operator; the use and operation of an aircraft leased or subleased by a Mexican operator; nor any other transactions from the operator should result in the owner, a mortgagor, a lessee or sub-lessee being subject to any taxes imposed by Mexico or any political subdivision or fiscal or taxing authority thereof. Neither the transfer and delivery of an aircraft to a Mexican operator, nor the ownership of the aircraft by the owner, nor the return of the aircraft at the end of the term of a lease or sublease or following the occurrence of a default or event of default should result in any taxes imposed by the Mexican government or any political subdivision or fiscal or taxing authority thereof upon or with respect to any such transfer, delivery or return with respect to the aircraft; except that:

- a Mexican withholding tax will apply to the amount of each rental payment made by the Mexican operator to lessor or sublessor; and
- a 1.8 per cent annual asset tax on the value of the assets lease or subleased would apply.

The above Mexican taxes are almost always paid by the Mexican operator, depending on the structure of the transaction documents.

Subject to the nationality of the parties involved in the lease or sublease transaction, the Mexican operator may be qualified, under a Double Taxation Treaty, to certain benefits and rights thereto, which may cause or enable the Mexican operator to avoid such withholding and asset taxes.

The Mexican operator is also obliged to pay upon filing all filing fees, which will be assessed by the Mexican Aeronautics Registry in respect of a lease or a sublease, in order for the registration process to be accomplished.

The obligation of the operator to pay such taxes and fees, and the execution or performance of any act relating to the payment of the same by the operator directly or indirectly to the appropriate Mexican tax authorities, should not under Mexican law create an implication of any type of ownership interest by the operator in an aircraft, or in any way negatively affect the rights of the owner, lessor or sub-lessor in an aircraft.

Taxes would apply in relation to a sale or transfer of title of an aircraft within Mexican territory.

Additionally, a 16 per cent VAT tax would be imposed on a temporary import of an aircraft into Mexican territory.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

No restrictions exist in relation to international payments, and exchange controls are in effect in Mexico.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

In Mexico, no limitation exists on the amount of default interests.

According to article 2,395 of the Federal Civil Code, the legal interest is 9 per cent calculated on an annual basis. A conventional interest may be agreed by the parties of a transaction, and the interest percentage may be higher or lower than the legal interest. Nevertheless, when such an interest is so disproportionate that it may reasonably generate the belief that an abuse exists and affects the debtor, such an interest may be reduced by a judge.

Additionally, jurisprudence exists in congruence with excessive interests, as stated in the Federal Civil Code.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Import and export costs, as well as customs duties, exist to bring an aircraft into Mexico. Aside from a customs broker’s variable fee, a 16 per cent VAT tax exists.

In the case of repossession, the owner or mortgagee would be entitled to export the aircraft without the operators assistance. Nevertheless, such owner or mortgagee would need to absorb the corresponding export costs.

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Chapter XIII, article 74 of the Civil Aviation Law presents that an insurance policy (Mexican insurance) needs to be obtained and contracted with an insurance entity duly qualified to do business in our country. This is in addition to the civil liability coverage that any and all operators require.

No minimum or maximum percentage of the insurance is prevented or applicable to aviation.
**Update and trends**

The creation of a Federal Agency is envisaged as the governmental entity that would regulate the aviation activity including the Mexican Aeronautic Registry, together with the possibility to amend the Cape Town Protocol.

### 30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Cut-through clauses under the insurance and reinsurance documentation are legally effective.

### 31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Reinsurance is regulated by the National Commission of Insurances and Bonds (NCIB).

- Assignment of reinsurance is legally effective in Mexico.
- Essentially, the reinsurance market is a niche for foreign reinsurance companies.
- Any and all reinsurance companies, whether Mexican or foreign, have to be duly registered and approved by the NCIB.
- Assignments of reinsurance are typically provided on aviation leasing and finance transactions.

### 32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

The owner, lessor or financier are not liable for the operation of the aircraft or the activities of the operator, unless such owner, lessor or financier are directly or indirectly involved in the operation of the aircraft.

### 33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Article 61 of the Aviation Law establishes that the authorised operators (‘permit or concession holders’) of the aircraft shall be responsible for the damages caused to the passengers, to the cargo and to the luggage being transported.

- Based on the provisions of the Aviation Law, the airline or the operator is responsible for damages caused to passengers.
- Pursuant to article 1,915 of the Civil Code for the Federal District, the damage repair shall consist of the restatement of the situation prior to such damage, and when that consists of the payment of damages, pursuant to the following rules.
- When damage is caused to individuals and causes death, or total or partial disability, temporary or permanent, the amount of the indemnity shall be fixed applying the tariffs established in the Federal Labour Law. The basis to compute the corresponding indemnity shall be four times the highest daily minimum salary in force in the region.

Pursuant to articles 500 and 501 of the Federal Labour Law, the indemnity payment to be made in the event of the death of the victim shall be equivalent to two months’ salary for funeral expenses and the payment of an amount equivalent to 5,000 days of salary.

In accordance with article 62 of the Civil Aviation Law, the right to recover damages is subject to that prescribed by article 1,915 of the Civil Code for the Federal District in common matters, and for all of Mexico in federal matters, the only exception being that the recoverable amount shall be three times the amount provided in such article.

Consequently, pursuant to the above, the recoverable material damages, under article 1,915 of the Civil Code, would be the amount equivalent to the minimum salary in force at the time of the death, multiplied by 790 (5,000 plus 60 days for funeral expenses). This result is multiplied by four.

When the Civil Aviation Law applies to the recoverable damages, the amount resulting from the numerical operations described in the previous paragraph is multiplied by three (article 62 of the Civil Aviation Law).

#### Moral damage

It is important to note that article 62 of the Civil Aviation Law only prescribes that the damages to passengers would be subject to the indemnities established by article 1,915 of the Civil Code for the Federal District. Such legal provision only prescribes the recovery for material damages.

Nevertheless, it is possible that a Mexican court would analyse and grant moral damages to the plaintiff if the court finds that a moral damage has been caused to such plaintiff.

Pursuant to article 1,916, a moral damage consists of ill effects suffered by a person to his or her feelings, likings, religious beliefs, decorum, honour, reputation, private life, configuration and physical aspect or the consideration that third parties may have of him or her.

In accordance with articles 1,916 and 1,916-bis of the Civil Code for the Federal District, the indemnity for moral damage must be established through a monetary amount determined by the judicial authority, taking into account the following.

#### The affected rights of the victim

The plaintiff must prove that they have actually suffered in terms of their feelings, likings, religious beliefs, decorum, honour, reputation, private life, configuration and physical aspects or else the considerations that third parties may have of him or her. It is not enough, pursuant to Mexican law, to make a general statement indicating that a damage has been caused. Instead, the plaintiff must demonstrate to the court the alleged actual damage.

#### Degree of responsibility

Pursuant to this principle, the court shall determine in any event the existence of an illicit conduct, and in its case, the extent or degree of same. An
Illicit act or conduct is defined by article 1,830 of the Civil Code as that which is contrary to the laws of public order or against customary good behaviour.

It should be noted that, pursuant to article 1,916-bis of the Civil Code for the Federal District, in any and all events, whoever claims recovery for moral damages must fully prove the illicit conduct of the defendant and the direct damage caused by such conduct.

The economic situation of the liable party and that of the victim
The plaintiff must submit documents to the court that gives evidence of their annual income so that the court, based on such documents, can justly determine a fair indemnity with respect to the moral damage, in case that it finds that such damage existed.

The other circumstances
The court can only take into account those damages that are a direct consequence of the illicit conduct. In this regard, article 1,916-bis of the Civil Code for the Federal District expressly establishes the above.

No other recoverable damages
The Civil Code and the Civil Aviation Law establish the recoverable damages in favour of the victims, in the terms prescribed above. Mexican law will not recognise other damages in addition to material and moral damages, and consequently, it does not recognise punitive damages or damages for pain and suffering or similar concepts, and consequently those items are not recoverable damages under Mexican law.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?
No minimum requirements need to be in place for the amount of third-party liability cover.
Overview

1. To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

The Netherlands has ratified and is a party to the following air law treaties:
- Convention for the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft, Rome, 29 May 1933 (Geneva Convention);
- Chicago Convention of 1944;
- Convention on the International Recognition of Rights in Aircraft, Geneva, 19–25 June 1948 (Geneva Convention); and

The Netherlands has signed but not ratified the Cape Town Convention (2001). An instrument of ratification with respect to the Cape Town Convention and the Protocol thereto on Matters Specific to Aircraft Equipment was deposited by the Netherlands on 20 July 2010, but only in relation to the Netherlands Antilles (ie, the Caribbean islands of Curaçao, Sint Maarten, Bonaire, Sint Eustatius and Saba). Following the modification of the internal constitutional relations within the Kingdom of the Netherlands, the reference to the 'Netherlands Antilles' is to be replaced by 'Curaçao, Sint Maarten and the Caribbean part of the Netherlands (the islands of Bonaire, Sint Eustatius and Saba)'.

2. What is the principal domestic legislation applicable to aviation finance and leasing?

Rules relevant to aircraft finance and leasing are to be found in various statutes. With respect to the registration of aircraft in the Dutch nationality register, the Aviation Act, the Aircraft Decree 2008, and the Regulation regarding the Registration of Dutch Civil Aircraft must be consulted as these instruments provide for the relevant requirements for registration.

Book 8 of the Dutch Civil Code is of specific relevance as it provides, in section 8:3(a) a definition of the term 'aircraft' and, in sections 8:300 to 8:321, provisions on rights in aircraft as well as privileged claims. These provisions are based on the Geneva Convention (1948) and the provisions of the former Act on Registered Aircraft.

In addition, the Order on Registered Aircraft 1996 and the Registered Aircraft Regulation 2005, which deal with the formal requirements for the registration of rights in aircraft in the Dutch Public Registry (ie, the register maintained pursuant to theGeneva Convention (1948) and sections 729 and 729(a)–729(e) of the Dutch Code of Civil Procedure dealing with the precautionary arrest of aircraft, incorporating the provisions of the Rome Convention (1933), should be mentioned. The general provisions on mortgages, as set forth in sections 3200 et seq of the Dutch Civil Code, including the provisions regarding the exercise of rights and remedies by the mortgagee, apply to aircraft mortgages as well.

3. Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Yes, concerning the transfer of title to and interests in, or the creation of security over, aircraft, Dutch rules of private international law prescribe the application of the laws of the jurisdiction where the relevant aircraft is registered as to nationality (section 10:127(3) of the Dutch Civil Code). Section 10:271(4) of the Dutch Civil Code provides that the domestic laws of the jurisdiction where the aircraft is registered as to nationality determine, inter alia, which requirements apply to the transfer of title or the creation of security interests, the applicability and scope of accession rules, which rights can be vested in an aircraft and how such rights are created, transferred, amended and terminated. As a consequence, Dutch courts will, with respect to aircraft registered in the Dutch nationality register, only recognise title transfer instruments or security instruments governed by Dutch law. Similarly, Dutch courts will, with respect to aircraft registered in any other nationality register, only recognise transfer instruments or security instruments governed by the laws of the jurisdiction where the relevant aircraft is registered as to nationality.

Title transfer

4. How is title in an aircraft transferred?

It is noted that the Netherlands maintains two registers, the nationality register (the register maintained pursuant to the Chicago Convention (1944); the Nationality Register) and the public register (the register maintained pursuant to the Geneva Convention (1948); the Public Registry). Dutch aircraft, in other words aircraft registered in the Nationality Register, can also be registered in the Public Registry, but such registration is not mandatory. If an aircraft is only registered in the Nationality Register, title transfer is achieved by transferring possession to the buyer. Transfer of possession can be achieved by physical delivery of the aircraft books and records, but usually takes place by the execution of a bill of sale by the seller and the buyer, which expresses that legal title and possession is transferred to, and accepted by, the buyer. If the aircraft is, and is to remain, in the possession of a third party, for example a lessee, the transfer will only be effective if the third party has acknowledged the transfer or has been served a written notice of the transfer. There are no formal requirements in relation to such notice.

If an aircraft is registered in the Nationality Register and in the Public Registry, transfer of title can only be achieved by the (electronic) filing with the Public Registry of a notarial deed of transfer executed by or on behalf of the seller and the buyer in the presence of a Dutch civil law notary.

5. What are the formalities for creating an enforceable transfer document for an aircraft?

As indicated in question 4, no formalities apply in relation to the transfer of title to an aircraft which is only registered in the Nationality Register. If it concerns a Dutch aircraft which is registered in the Public Registry, the deed of transfer must be in the form of a Dutch law notarial deed. In both cases, however, the new owner must be registered with the Nationality Register.

Registration of aircraft ownership and lease interests

6. Identify and describe the aircraft registry.

The Nationality Register requires the registration of the owner of the aircraft and, if the owner is not the ‘holder’ of the aircraft as well, the registration of the holder or operator. The Public Registry allows for the registration of ownership title to a Dutch aircraft, as well as for the registration of mortgages, purchase options and possession rights (pursuant to a lease agreement with a term of at least six months).
The Netherlands does not have any 83-bis arrangements in place. There is no specific aircraft engine register in the Netherlands, because engines are generally considered to be component parts.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be recorded with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be recorded with any other registry? Can owners', operators’ and lessees’ interests in aircraft engines be registered?

Where an aircraft is to be registered in the Nationality Register the particulars of the holder or operator and the owner must be registered. There are no restrictions on who can be recorded as owner in the Nationality Register, except where it concerns owners with the nationality of a state with which the Netherlands has terminated diplomatic relations.

The Nationality Register is, however, not designed to record ownership rights or lease interests. It is generally recommended to register a Dutch aircraft with the Public Registry and to record ownership rights and other recordable rights with the Public Registry, as this will provide the owner and the holder of any recorded right with the protection of the Geneva Convention (1948).

There are no other registers in the Netherlands where an ownership interest or any other interest in an aircraft can be registered.

It is not possible to register any interest in aircraft engines in any public register in the Netherlands.

8 Summarise the process to register an ownership interest.

In order to register an ownership interest in respect of a Dutch aircraft with the Public Registry, an application must be filed with the Amsterdam District Court, requesting the court’s approval for the registration of the aircraft and the applicant’s ownership interest in the Public Registry. For this purpose, the form provided by the Public Registry must be used. The Application for the Recordation of an Aircraft must contain:

- full particulars of the applicant; and
- full particulars of the aircraft, including:
  - the name of the manufacturer of the aircraft;
  - the place where the aircraft was built;
  - the type and manufacturer’s serial number;
  - the name of the manufacturer of the engines;
  - the type and serial numbers of the engines; and
  - the maximum take-off weight.

The applicant must have a chosen domicile in the Netherlands. As the application is typically filed by a Dutch attorney-at-law representing the applicant, the office address of the applicant’s lawyer will usually serve as the applicant’s chosen domicile in the Netherlands. In addition the applicant must state that the aircraft is a Dutch aircraft which is not registered in the Public Registry and that, to the best of the applicant’s knowledge, the aircraft is eligible for registration in the Public Registry.

If the aircraft has ever been registered in the Public Registry or a similar register in another jurisdiction, the application must state all relevant information in respect of such previous registration, including the relevant jurisdiction, the date of registration and the registration number.

If the application relates to an aircraft acquired by the applicant in a sale in execution of the aircraft in the Netherlands, the application should state the treaty register (being a register of a contracting state to the Geneva Convention (1948)) or similar register where the relevant aircraft is registered or, as the case may be, that the aircraft is not, and has never been, registered in any such register.

Together with the application, the applicant must submit:

- a certificate of registration of the aircraft with the Nationality Register;
- a certificate issued by the Dutch civil aviation authority stating the maximum take-off weight of the aircraft;
- if the aircraft was previously registered in a treaty register or any similar register, a statement issued by the competent authorities confirming the deregistration of the aircraft from such register after it was determined that with respect to the aircraft no liens or encumbrances were registered or, as the case may be, that the holders of registered liens or encumbrances have consented to the deregistration;
- a bill of sale or other instrument evidencing that the applicant is the legal owner of the aircraft;
- if the application relates to an aircraft registered in a treaty register (being a register of a contracting state to the Geneva Convention (1948)) or similar register and was acquired by the applicant in a sale in execution of the aircraft in the Netherlands a certified copy of the minutes of the sale in execution evidencing the acquisition of the aircraft by the applicant; and
- if the applicant is a legal entity, the constituent documents of the applicant and a recent excerpt from the competent trade registry or similar registry or equivalent document confirming the existence of the applicant.

If the application is filed and executed by a Dutch attorney-at-law representing the applicant, a duly executed notarised power of attorney (with apostille) and a copy of the passport of the signatory must be submitted as well. Provided the application complies with the above requirement and is filed with the court prior to 10am, the court will usually approve the application the same day. The application, together with the court’s approval, can thereupon be electronically filed with the Public Registry. Filing is usually done by a Dutch civil law notary. Provided the filing is done prior to 3pm on a Dutch business day, the filing will be processed on the same day. The applicant will first receive (usually within 30 minutes after the filing) an electronic confirmation of receipt which only confirms the filing; and subsequently (usually within two hours after filing) an electronic confirmation of registration, which confirms that the registration has been made. Filings made after 3pm will be deemed to have been made at 9am on the next Dutch business day. On the Dutch business day immediately following the date of filing, the Public Registry will be able to provide an excerpt from the registry evidencing the recordation of the aircraft and the applicant’s ownership interest in the Public Registry. The costs for registration of an aircraft in the Public Registry, including court fees, will be in the range of €75.

The Dutch Civil Code provides in section 8:3(a), inter alia, that engines attached to, or only temporarily removed from, an aircraft are component parts of the aircraft. This accession rule is inspired by article XVI of the Geneva Convention (1948).

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration of an ownership interest in the Public Registry requires court approval as set forth in question 8, and the owner of such registered interest will have the benefit of international recognition of his registered interest as awarded by the Geneva Convention (1948). Third parties can generally rely on the accuracy of registration of an ownership interest (and other interests, like a mortgage or a lease interest) in the Public Registry, unless such party was otherwise aware of the information being incorrect.

10 Summarise the process to register a lease interest.

Section 8:1309 of the Dutch Civil Code provides that a lessee’s lease interest can be registered in the Public Registry provided it concerns an aircraft which is already registered in the Public Registry and a lease agreement with a lease term of at least six months. This requires the filing with the Public Registry of a Dutch law notarial deed, executed by or on behalf of the owner or lessor and the lessee in the presence of a Dutch civil law notary. The deed must contain a clear description of the aircraft and the main characteristics of the lease agreement, including the lease term. Similarly, a lessee’s purchase option can be registered with the Public Registry, by the filing with the Public Registry of a notarial deed executed by the grantor and the beneficiary in the presence of a Dutch civil law notary, containing the terms and conditions of the purchase option and a clear description of the relevant aircraft. Filing is done electronically. Provided filing is done prior to 3pm on a Dutch business day, the filing will be processed on the same day. The applicant will first receive (usually within 30 minutes after the filing) an electronic confirmation of receipt, which only confirms the filing; and subsequently, (usually within two hours after filing) an electronic confirmation of registration, which confirms that the registration has been made. Filings made after 3pm will be deemed to have been made at 9am on the next Dutch business day. On the Dutch business day immediately following the date of filing, the Public Registry will be able to provide an excerpt from the registry evidencing the registration of the lease interest with the Public Registry. A lease interest or purchase option registered with the Public Registry operates as a right in rem.
11 What is the regime for certification of registered aviation interests in your jurisdiction?

With respect to aircraft recorded in the Public Registry, certificates can be obtained from the Public Registry. A certificate will contain the particulars of the relevant aircraft, namely the manufacturer of the aircraft, the place where the aircraft was built, the type and manufacturer’s serial number, the manufacturer of the engines, the type and serial numbers of the engines and the maximum take-off weight, the name and address of the owner, the date of registration of the aircraft in the Public Registry and, if applicable, the jurisdiction where the aircraft was previously registered in a treaty register or similar register.

A certificate will also contain information of recorded consensual liens, in other words mortgages, lease interests and purchase options as well as any non-consensual liens such as arrests. Such information will include the name and address of the holders of such liens and, in the case of mortgages, the maximum secured amount.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

A Dutch aircraft can be deregistered at the request of the owner or, if the aircraft no longer meets the requirements for registration, ex officio by the registrar of the Nationality Register. Deregistration at the request of the owner will only be effected if the aircraft is not, or no longer, registered with the Public Registry or, if it is still registered with the Public Registry, all holders of recorded rights have consented to the deregistration of the aircraft. This may include the lessee if its lease interest is recorded in the Public Registry. If this is not the case, the lessee cannot block deregistration of the aircraft from the Nationality Register.

13 What are the principal characteristics of deregistration and export powers of attorney?

Deregistration and export powers of attorney, which are sufficiently broadly worded, enable an owner or mortgagee to deregister the aircraft from the Public Registry and the Nationality Register. Powers of attorney can be granted to more than one attorney and can contain the power of substitution and delegation. Powers of attorney can be made irrevocable by expressly including wording to the effect that the power of attorney is granted in the interest of the attorney so appointed or a third party. Still the court may, at the request of the grantor, set aside the irrevocability of a power of attorney on the basis of serious grounds, such as unforeseen circumstances or apparent abuse of the powers granted. A power of attorney will terminate upon the grantor being declared bankrupt. There is no specific requirement to register or notarise deregistration powers of attorney.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Cape Town Convention is not in effect in the Netherlands.

15 What is the typical form of a security document over the aircraft and what must it contain?

Dutch aircraft which are not registered in the Public Registry can be encumbered by a Dutch law right of pledge. Non-possessory rights of pledge can be created by a deed in private writing which is properly registered with the Dutch tax authorities, but we would recommend working with a notarial deed of pledge. It is noted that a right of pledge in respect of an aircraft is not recordable in any publicly accessible registry, and will not enjoy the benefits of international recognition under the Cape Town Convention (1994). On this basis it is recommended that financiers require that the relevant aircraft be registered in the Public Registry and made subject to a mortgage. The mortgage is created by the electronic filing with the Public Registry of a Dutch law notarial deed, executed by or on behalf of the mortgagor and the mortgagee in the presence of a Dutch civil law notary. The mortgage deed usually also contains a right of pledge in relation to the aircraft book and records. The mortgage deed, as filed with the Public Registry, must be in Dutch, but an English translation will be provided to the parties. The mortgage deed must clearly describe the aircraft (including the name of the manufacturer, type, manufacturer’s serial number and registration marks), the secured obligations, the rights and remedies of the mortgagee (to the extent not already applicable by operation of Dutch law) and the maximum secured amount, which is usually set at the amount of the initial principal amount of the loan plus 40 per cent thereof to cover interest, default interest, costs and expenses. There is no specific requirement to record the economic terms of the financing; it suffices to refer to the relevant loan or facility agreement.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

See question 15. Documentary costs for the filing of a mortgage with the Public Registry are in the region of €168.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

See question 15. The notarial mortgage deed must be filed with the Public Registry. Filing is done electronically by the civil law notary. Provided filing is done prior to 3pm on a Dutch business day, the filing will be processed on the same day. Within usually 30 minutes after filing, the Public Registry will send an electronic confirmation of receipt which confirms the filing; and subsequently, usually within two hours after filing, an electronic confirmation of registration, which confirms that the registration has been made. Filings made after 3pm will be deemed to have been made at 9am on the next Dutch business day. On the Dutch business day immediately following the date of filing, the Public Registry will be able to provide an excerpt from the registry evidencing the registration of the mortgage with the Public Registry. There is no requirement to renew mortgage registrations.

18 How is registration of a security interest certified?

The Public Registry provides excerpts of the registration of aircraft registered in the Public Registry to any person on request. The excerpt shows the name and address of the owner and of all holders of recorded rights and the time of registration (see question 19). Copies of the relevant instruments, such as mortgage deeds, can be obtained from the Public Registry as well. The excerpt does not state the rank or priority of a recorded right.

19 What is the effect of registration as to third parties?

The priority of recorded rights is determined by the time of filing with the Public Registry. It is possible to change the priority of recorded rights by filing a Dutch law notarial deed executed by the parties to the recorded rights, which expressly states that the parties agree to the change of priority. If, for example, the lessee’s lease interest was filed prior to a mortgage deed, the lessor, lessee, mortgagee and mortgagee can reverse the priority by the filing of a notarial deed, executed by or on behalf of each of them in the presence of a Dutch civil law notary, which expresses that the mortgage shall rank first and the lease interest shall rank second. Registration of a mortgage interest or lease interest with the Public Registry grants the owner of such registered interest the benefit of international recognition of his registered interest as awarded by the Cape Town Convention (1994). Third parties can generally rely on the accuracy of registration of such mortgage or a lease interest in the Public Registry, unless such party was otherwise aware of the incorrectness of the information.

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Security over aircraft and leases is typically structured by having a security trustee or security agent act as mortgagee and pledgee respectively. The Netherlands is a party to the Convention on the Law Applicable to Trusts and on their Recognition (The Hague, 1 July 1988) and trusts will be recognised in accordance with the provisions of that Convention. Dutch law requires that the grantee of a Dutch law security right is also the creditor of the obligations secured by the relevant security right. This poses a problem as the security trustee or security agent is not the creditor of the secured obligations but is merely appointed to hold collateral on behalf of the lenders. Although untested in a Dutch court, it is market practice to create ‘parallel debt’, in other words an undertaking of the borrower or grantor to pay to the security trustee an amount equal to the underlying debt, being the indebtedness owing by the borrower to the lenders under
the relevant facility agreement. The security right will secure the parallel debt owing by the grantor to the security agent, as mortgagee or pledgee. All payments made by the borrower to the lenders in relation to the under-lying debt reduce the amount of the parallel debt and, similarly, all pay-ments made by the borrower to the security agent in relation to the parallel debt (and all proceeds collected by the security agent in the foreclosure of the relevant security right) reduce the underlying debt. This structure makes it possible for the security trustee to hold the security for a changing group of beneficiaries without affecting the security and without having to amend the existing security documents. In the event the transaction pro-vides for a single lender – without involvement of a security trustee or security agent – which is also the grantee of a security right, the transfer of the loan to a new lender does not affect the validity of the security right. The indebtedness, now owed to the new lender, will continue to be secured by the relevant security right. It is, however, recommended that where it concerns an aircraft mortgage a filing is made with the Public Registry to the effect that the name and address of the new lender, as mortgagee, is properly recorded in the Public Registry.

21 What form does security over spare engines typically take and how does it operate?

Section 83(a) of the Dutch Civil Code provides that 'engines, the propellers, the radio equipment and all other articles intended for use in or on the aircraft, irrespective of whether they are attached thereto or temporarily separated therefrom, shall be component parts of the aircraft'. There is no Dutch case law which determines whether or not the words ‘intended for use’ only refer to ‘other articles’ or also refer back to ‘engines, propellers and radio equipment’. Similarly it is not clear what exactly the term ‘temporarily separated’ means. In legal literature it has been argued that an engine should only qualify as a component part if the owner or operator had the intention to install the engine to an airframe with a certain per-manence. In other words, if an engine is temporarily installed only to keep the aircraft operational, for example, where it replaces an engine taken off-wing for overhaul or repair, such engine should not qualify as a component part. As the replaced engine is still qualifying as a component part, because it was only temporarily separated from the aircraft, having the replacement engine also qualify as a component part would lead to undesirable conclu-sions, namely that the relevant aircraft, for example, a Boeing 737, has three engines.

However, as a consequence of this provision, a mortgage over a Dutch aircraft will by operation of law include the engines installed on (or only temporarily separated from) that aircraft at the time of the execution and filing of the mortgage deed and at any time thereafter. Engines which are permanently (or in any event not temporarily) separated from an aircraft no longer qualify as component part and will no longer be encumbered by a mortgage over the aircraft.

With respect to spare engines, in other words engines which are not installed to (or only temporarily separated from) an airframe, which are physically located in the Netherlands, the appropriate security right would be a Dutch law right of pledge. A non-possessory right of pledge is created by way of a notarial deed of pledge or, alternatively, a deed in public recordation. There is no public registry in the Netherlands for the recordation of rights of pledge on ‘loose’ aircraft engines or other moveable goods. If an engine, encumbered with a right of pledge, is attached to an aircraft, the owner of the engine will in principle lose its title to the engine and the pledgee will lose its security interest in the engine if, as a result of the installation, the engine qualifies as a compo-nent part of the aircraft pursuant to section 83(a) of the Dutch Civil Code.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

It is possible for parties to an agreement to agree that certain self-help remedies shall be permitted if certain circumstances arise. This may include contractual provisions in a lease, allowing the lessor to repossess the aircraft in the event the lease has expired or terminated in accordance with its terms. However, since aircraft are usually located at restricted facil-ities or areas, the exercise of those self-help remedies may be restricted if the lessor has no access to such facilities or areas (airport). It is therefore advisable to obtain a court order ensuring the cooperation of the relevant authorities.

To repossess the aircraft, the lessor as owner of the aircraft can file a claim for recovery based on section 52 of the Dutch Civil Code. This may also be done in summary proceedings. In both proceedings, the court may order the lessee to return the aircraft to the lessor subject to a penalty.

Once the lessor has obtained a judgment entitling it to repossess the aircraft, the lessor can levy an attachment in execution for the purpose of surrender of the aircraft. There are two different applicable regimes for such an attachment depending on whether the aircraft is:

- registered in the Public Registry or a Geneva Convention (1948) register; or
- not registered in such register.

If the aircraft is registered in the Public Registry or in a Geneva Convention (1948) register, section 584(b) of the Dutch Code of Civil Procedure (CCP) applies. Pursuant to section 584(b) CCP, which equally applies, the execu-tion commences with the service by the bailiff on the debtor of an order to comply with the judgment within 24 hours. The attachment in execution can in principle only be levied after this 24-hour period has lapsed. However, the competent judge in summary proceedings can determine upon request (including upon an oral request by the bailiff) that the execution attachment can be levied without first serving this order on the debtor (section 584(b)(2) CCP). Execution is levied by the bailiff who takes possession of the aircraft and delivers the aircraft to the lessor (section 584(1)(2) CCP).

In case the aircraft is not registered in the Public Registry or in a Geneva Convention (1948) register, execution on the aircraft is levied in accordance with the rules applicable to moveable property not subject to registration (section 491 et seq CCP). Execution on the aircraft also commences by the service on the debtor of an order to comply with the judgment. Contrary to an ordinary attachment in execution, section 491(1) CCP provides that it is not required to wait for a two day period after the service of the order in case of an attachment in execution for the pur-pose of surrender provided that the judgment obtained has been declared provisionally enforceable. Execution can therefore take place immediately after service of the judgment and the order to comply with the judgment.

Prior to obtaining a judgment entitling it to enforcement, a lessor may wish to secure its rights to repossession by grounding the aircraft by means of a precautionary arrest for the purpose of surrender in accordance with section 730 CCP. Since the debtor is normally not granted a hearing on the request for precautionary arrest, a debtor or lessee that wishes to lift the precautionary arrest either needs to provide sufficient security to the lessor or needs to file a claim to lift the precautionary arrest in summary proceed-ings, stating that the claim (of the lessor) is prima facie unfounded or that sufficient security has been offered (section 755(2)(CCP).

Pursuant to section 729(6) CCP (in case the relevant aircraft is regis-tered in the Public Registry or in a Geneva Convention (1948) register) and section 755(2) CCP (in case the relevant aircraft is not registered in such a register), a precautionary arrest is converted into an attachment in execution once a judgment entitling the lessor to execution has been rendered and served on the defendant. An appeal against or, in case of a default judgment, an application to set aside the judgment will suspend the enforcement unless the judgment has been declared provisionally enforce-able at the request of the claimant.

Pursuant to section 729 CCP, incorporating article 3 of the Rome Convention (1932), certain aircraft are exempt from precautionary arrest:

- aircraft exclusively appropriated to a state service, including the postal service, but excluding commercial service;
- aircraft actually in service on a regular line of public transport, together with the indispensable reserve aircraft; and
- every other aircraft appropriated to the carriage of persons or goods for reward, where such aircraft is ready to start on such carriage, unless the arrest is in respect of contract debt incurred for the purpose of the journey which the aircraft is about to make, or of a claim which has arisen in the course of the journey.

Based on the (little) Dutch case law available, it could well be argued that courts (should) give a strict interpretation to these exemptions from pre-cautionary arrest in the present day and age.
23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

If the aircraft is encumbered with a Dutch law mortgage, in order to enforce its mortgage the mortgagee needs to levy an attachment in execution on the aircraft pursuant to sections 84(1b) et seq CCP. Pursuant to section 84(f) CCP, the mortgagee should then request the court in whose jurisdiction the aircraft is located to set a date for the sale of the aircraft.

Regarding the enforcement of a right of pledge in respect of an aircraft not registered with the Public Registry, section 3:248 et seq of the Dutch Civil Code applies. The pledgee is entitled to summary execution. The pledgee may sell the aircraft in a public sale pursuant to local customs and applicable standard terms and conditions (section 3:259 of the Dutch Civil Code). Alternatively, the pledgee may sell the aircraft in a manner determined by an order of the president of the competent district court. The president may rule that the aircraft may be sold to (and therefore remain with) the pledgee in consideration of a price to be determined by the president (section 3:251 of the Dutch Civil Code). The pledgee and the pledgor may also agree to a private sale or any other solution without involvement of the president of the district court, provided such agreement is reached after the pledgee has become entitled to summary execution (section 3:251(2) of the Dutch Civil Code). In insolvency, a mortgagee or pledgee may enforce its rights as if there was no insolvency. However, the competent court may as a general rule set a period of up to four months during which the mortgagee or pledgee may not, without the court’s consent:

- claim the asset subject to the mortgage or pledge if it is under the control of the trustee in bankruptcy; or
- seek recourse against the asset.

During such period, repossessing the aircraft would not be possible without the court’s consent. In addition, the trustee in bankruptcy may:

- give the mortgagee or pledgee a reasonable period to exercise its rights; and
- if the mortgagee or pledgee fails to sell the asset within that period, claim the asset and sell it, without prejudice to the mortgagee or pledgor’s entitlement to the proceeds after deduction of a contribution to the bankruptcy costs, taking into account his rank.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

In principle, any person rightfully in possession of the aircraft, such as repairmen, and having a claim against the owner or operator shall be entitled to exercise retention rights in respect of the aircraft and suspend its operation in the Netherlands to which the delivery of the aircraft is attributable; or the owner or operator’s authority to enter into such agreement). As long as the aircraft is recorded in the Public Registry, such retention right does, however, not entail a right to enforce?

Claims in respect of salvage and extraordinary preservation cost, with the meaning of section 8:1317 of the Dutch Civil Code, incurred by third parties in respect of the aircraft shall have priority over all recorded liens and rights.

Eurocontrol and other traffic control authorities do not have special detention rights in the Netherlands. Section 57(1) of the Dutch Aviation Act provides that if extraordinary circumstances so require, sections 58 and 59 of the Aviation Act can, by Royal Decree following a proposal to that effect by the Dutch Prime Minister, be determined to be effective. Section 58 of the Aviation Act states that the Dutch Minister of Infrastructure and Environment can requisition aircraft and airfields for the transport of certain persons or objects. Section 59 of the Aviation Act states that the Dutch Minister of Defence can requisition aircraft and airfields for use by the Dutch military or can request the Dutch Minister of Infrastructure and Environment to do so on his behalf. These powers only exist after a Royal Decree has been issued on the basis of section 57 of the Aviation Act as referred to above.

Section 58 of the Aviation Act provides that measures taken pursuant to section 58 and 59 of this Act will give rise to compensation on the basis of rules to be determined by general decree. According to the Compensation Decrease Aviation Act, compensation shall be determined on the basis of the lease rentals due under the lease during the relevant period. In addition, any extraordinary loss of value resulting from the requisitioning of the aircraft will be compensated. The operator of a requisitioned aircraft shall be entitled to (claim) loss of profit resulting from such requisitioning.

25 What taxes and payment restrictions may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Aircraft lease payments, as well as the purchase price of an aircraft, are subject to Dutch VAT at a rate of 21 per cent, but may be reduced to 0 per cent if certain conditions are met as further set out below. Repayments of principal and interest payments made by a Dutch tax resident borrower are exempt from Dutch VAT.

The purchase price is subject to Dutch VAT at a rate of 21 per cent if the seller qualifies as an entrepreneur for Dutch VAT purposes and the aircraft is located in the Netherlands at the time of delivery (ie, title transfer). The seller of the aircraft would be liable for the payment of Dutch VAT due by the purchaser if the seller either resides or has a permanent establishment in the Netherlands to which the delivery of the aircraft is attributable; otherwise, the purchaser is liable for the payment of VAT provided that he or she qualifies as entrepreneur for Dutch VAT purposes (reverse charge).

In respect of an operational lease arrangement or a financial lease arrangement and assuming that both the lessor and the Dutch lessee qualify as entrepreneur from a Dutch VAT perspective and the aircraft is not leased to a permanent establishment of the Dutch lessee located outside the Netherlands, the lease payments (including the interest element) are generally subject to Dutch VAT at a rate of 21 per cent. The lessor is liable for the payment of VAT due by the lessee if the lessor either resides or has a permanent establishment in the Netherlands to which the leasing of the aircraft is attributable. Otherwise, the lessee is liable for the payment of VAT (reverse charge).

However, if the (financial) lease arrangement qualifies as a hire purchase agreement for Dutch VAT purposes (ie, title to the aircraft passes automatically from lessor to lessee before or upon payment of the final lease payment, without the lessee first having to exercise a purchase option), title to the aircraft is deemed to be delivered to the lessee at acceptance of the aircraft on the lease commencement date. This means that if at that time the aircraft is located in the Netherlands the present value of all future lease payments under the hire purchase agreement is deemed to be paid all at once for Dutch VAT purposes as per the delivery date and subject to Dutch VAT at a rate of 21 per cent (the interest element (VAT exempt) of that amount is excluded only if such interest has been separately calculated for); and consequently none of the actual future lease payments would be subject to Dutch VAT. The lessor would be liable for the payment of VAT due by the lessee if the lessor either resides or has a permanent establishment in the Netherlands to which the delivery of the aircraft is attributable; otherwise, the lessee is liable for the payment of VAT (reverse charge).

The Dutch VAT rate of 21 per cent in each of the scenarios referred to above will be reduced to zero per cent if the Dutch lessee demonstrates that it qualifies as an airline operating for reward predominantly (chiefly in the words of the European Court of Justice) on international routes. In determining whether that is the case, all information may be taken into account which indicates the relative importance of the type of operations concerned, turnover in particular.

Dutch VAT on transfers of aircraft? How may tax liability be lawfully minimised?

Moreover, any VAT that is due in connection with the lease or purchase of an aircraft should not necessarily constitute costs for the Dutch lessee or purchaser because it may be entitled to claim a refund of the VAT if and to the extent it will use the aircraft for the supply of goods or services that are subject to VAT (VATable activities). If, for example, 70 per cent of the turnover generated from the use of the aircraft would be subject to VAT, the Dutch lessee could claim a refund of 70 per cent of Dutch VAT (subject to, in the case of a purchase or hire purchase only, a revision period of four years following the fiscal year in which the delivery of the aircraft took place).

For completeness sake, it should be noted that in case no Dutch VAT would be due over any of the transactions described above, VAT (or a similar tax) may be due in another jurisdiction involved.
Lease payments, repayments of principal, interest payments and payments in consideration for the purchase of an aircraft made by a Dutch taxpayer are not subject to any Dutch withholding taxes.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?
In principle, there are no restrictions on international payments and exchange controls in effect in the Netherlands. However, based on the Sanctions Act 1977, the Netherlands has several sanctions orders in force implementing national and international sanctions. The provisions of financial services, such as transferring money, to certain (legal) persons or countries may be prohibited or restricted under these sanctions orders.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?
Dutch courts may, on the basis of the requirements of reasonableness and fairness, mitigate amounts payable as default interest.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?
Pursuant to the EU Community Customs Code, one external tariff applies to goods (including aircraft) imported into or exported from the EU (subject to relief rules) and no tariff applies if such goods are exported or imported from one member state to another member state. Generally, bringing an aircraft into the Netherlands from a non-member state or taking it out of the Netherlands to a non-member state is subject to a customs duties rate of zero per cent.

No further restrictions apply in principle, except that export to certain countries may be subject to limitations under domestic or international sanction orders.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.
There is no requirement that insurance be placed in the Netherlands.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?
Yes.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?
Although a security assignment under Dutch law is not valid pursuant to section 3:84(3) of the Dutch Civil Code, under Dutch private international law parties are free to choose the law governing the security assignment. If the security assignment is governed by a foreign law and such foreign law also governs the reinsurance agreement, that law governs all aspects of the security assignment (its validity and enforceability against the assignor, the assignee and the insurer). If valid and enforceable under such foreign law, the security assignment would also be recognised and enforced in the Netherlands.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?
Unless an owner, lessor or financier has committed a tort itself, for example by impeding the necessary maintenance of the aircraft or not taking adequate (maintenance or repair) measures while knowing, on the basis of reports, that such measures are warranted, it cannot be held liable under Dutch law for (damages caused by) the operation of the aircraft or the activities of the operator.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?
No.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?
Under EC Regulation No. 785/2004 on insurance requirements for air carriers and aircraft operators (as amended by EC Regulation No. 1137/2008 and EU Regulation No. 285/2010), the operator has to ensure a proper minimum level of insurance to cover third-party liability. The minimum insurance cover per accident and per aircraft depends on the maximum take-off weight (MTOM) of the aircraft. For aircraft with less than 500kg MTOM, the minimum insurance cover is 750,000 SDR. For aircraft with 12-25 tons MTOM (eg, regional jets), the minimum insurance cover is 50 million SDR. For aircraft with 200-500 tons MTOM (eg, long-haul jets), the minimum insurance cover is 500 million SDR.
New Zealand

Frank Porter and Rishalat Khan
Buddle Findlay Lawyers

Overview

1 To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

New Zealand is a signatory to, and has ratified the Convention on International Civil Aviation of 1944.

New Zealand is not a party to the Convention on the International Recognition of Rights in Aircraft Geneva, 1948, nor is it a party to the Convention for the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft of 1933.

New Zealand has acceded to the 2001 Cape Town Convention on International Interests in Mobile Equipment and the associated Protocol on Matters Specific to Aircraft Equipment (Cape Town Convention).

The Cape Town Convention became part of New Zealand law on 1 November 2010 pursuant to the Civil Aviation (Cape Town Convention and Other Matters) Amendment Act 2010 which amended the Civil Aviation Act 1990 (Civil Aviation Act). The Cape Town Convention has primacy in place of other New Zealand legislation that deals with the same matters.

New Zealand has also acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

2 What is the principal domestic legislation applicable to aviation finance and leasing?

There is no New Zealand legislation peculiar to aircraft financing and leasing other than, as noted in question 1, the Cape Town Convention.

Other legislation that is relevant to aviation finance and leasing in New Zealand, particularly where the borrower or lessee is a New Zealand incorporated company:

• the Companies Act 1993 (Companies Act);
• the Receiverships Act 1993;
• the Personal Property Securities Act 1999; and
• the Corporations (Investigation and Management) Act 1989.

3 Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

There are no restrictions on choice of law clauses in contracts transferring interests in, or creating security interest over aircraft provided that the choice of law is bona fide, has a connection with the commercial realities of the transaction and is not for any reason contrary to public policy.

Notwithstanding a valid choice of law in a mortgage or transfer document, a court is likely to follow the English courts and require the mortgage or transfer to be effective in accordance with the domestic laws of the jurisdiction where the aircraft is located when the mortgage was granted or transfer completed where the aircraft is in international airspace at the relevant time the mortgage or the transfer should be recognised by the domestic laws of the aircraft’s state of registry.

Title transfer

4 How is title in an aircraft transferred?

Title to an aircraft is customarily transferred by way of a bill of sale which is usually issued in accordance with an agreement for sale and purchase of the aircraft.

New Zealand law will also give effect to a transfer of title of the aircraft by way of delivery although in practice this would be unusual.

5 What are the formalities for creating an enforceable transfer document for an aircraft?

There are no formalities peculiar to the transfer of an aircraft. For instance, there is no prescribed form or requirement for notarisation, legalisation or stamping.

That said, if the bill of sale or other sale documentation is to be registered on the International Registry (IR) as a ‘contract of sale’ then in addition to other Cape Town Convention prerequisites, the ‘contract of sale’ must be in writing and relate to an aircraft object.

Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry.

The New Zealand Register of Aircraft (Aircraft Register) is administered by the Civil Aviation Authority of New Zealand (CAA). The CAA is a statutory body established under the Civil Aviation Act. The CAA has control over the registration and operation of aircraft.

The Aircraft Register is a public registry. Only the person entitled to lawful possession of the aircraft for 28 days or longer (Operator) is entitled to appear on the Aircraft Register. Accordingly, no ownership or security interest can be registered.

Although New Zealand has no 83-bis arrangements in place, it has several working arrangements under various memoranda of understanding with other jurisdictions.

New Zealand has no aircraft engine register.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry?

Evidence of ownership or a lessee interest in an aircraft or an aircraft engine cannot be registered on the Aircraft Register: see question 6. A lessee that is the Operator will appear on the Aircraft Register in that capacity.

An owner’s or lessee’s interest can be recorded on the IR by registration of the ‘contract of sale’ or the ‘international interest’ constituted by the transfer of ownership document or the lease, as the case may be.

Lease (but not ownership) interests may also be registerable on the New Zealand Personal Property Securities Register (PPSR) which effectively acts as a noticeboard of such deemed security interests. Registrations on the IR will have priority over the equivalent registrations on the PPSR.

Similar considerations apply for aircraft engines.

8 Summarise the process to register an ownership interest.

As noted in questions 6 and 7, the Aircraft Register is only an operator register.
9 What is the effect of registration of an ownership interest as to title and third parties?
Registration of an aircraft on the Aircraft Register is not evidence as to title and no party should rely on that registration as evidence of any ownership interest.

10 Summarise the process to register a lease interest.
A lease interest is not registerable on the Aircraft Register. Registration of a lease may nevertheless be registerable on the IR as an ‘international interest’ or on the PPSR as a deemed security interest: see question 7.

A lease interest constituting an ‘international interest’ can be registered on the IR. Such registration is completed online in accordance with the IR regulations and procedures. Standard IR fees will apply.

A lease interest (ie, a lease for more than one year) may also be registered on the PPSR. Registrations are completed online and registration fees are prescribed from time to time.

As both registrations are completed online, no supporting documents are required.

11 What is the regime for certification of registered aviation interests in your jurisdiction?
The CAA will issue a Certificate of Registration for an aircraft (but not an engine) entered on the Aircraft Register. That Certificate of Registration will identify the aircraft by:
- manufacturer;
- manufacturer’s designation;
- New Zealand registration mark;
- manufacturer’s serial number; and
- the Operator’s name and address.

In addition, a Certificate of Airworthiness must be obtained from the CAA before an aircraft registered on the Aircraft Register can operate.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Unless an irrevocable deregistration request and export authorisation (IDERA) has been submitted to the CAA, no consent of the owner or mortgagee is required to any deregistration or export of the aircraft from New Zealand. An IDERA is required to be submitted to the CAA in the prescribed form. Where there is no IDERA, the CAA is not required to give notice of that deregistration to any interested parties.

Where no IDERA has been registered, there is no ability to block any proposed deregistration or export unless the deregistration or export is in breach of any contractual arrangements, in which case the owner or mortgagee may be entitled to seek injunctive or similar relief.

Where an IDERA has been registered with the CAA then the Operator cannot deal with the registration of the aircraft unless the authorised party has submitted an IDERA removal request to the CAA or the Operator has obtained the written consent of the authorised party and provided it to the CAA.

13 What are the principal characteristics of deregistration and export powers of attorney?
There are no particular formalities or characteristics of a deregistration power of attorney other than it should be in the form of a deed. If the requisite powers are granted under the deregistration power of attorney it should allow the deregistration and export of the aircraft. Deregistration powers of attorney can be granted in favour of multiple attorneys.

A deregistration power of attorney expressed to be irrevocable and given for valuable considerable will not be revoked by notice of events (such as death, mental deficiency or bankruptcy of the grantor) which would otherwise revoke a power of attorney.

Even prior to the implementation of the Cape Town Convention deregistration powers of attorney have not been customary in New Zealand. The reason for this is that when an aircraft was repossessed, the lessee or mortgagor would, through losing its right to lawful possession, no longer be entitled to hold the Certificate of Registration in favour of the lessor or mortgagee and that right would revert to the person then entitled to possession following repossession.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.
As noted in question 12, the CAA has prescribed a form of IDERA consistent with the form set out in the Cape Town Convention. The IDERA must be signed by the Operator. The IDERA does not provide for countersigning by the CAA. As a matter of practice, the IDERA is granted directly in favour of the mortgagee and a separate designation letter is not used. The original signed IDERA must be submitted to the CAA together with the prescribed submission form and payment of the requisite CAA fee. On receipt of the IDERA, the CAA has a statutory obligation to record the IDERA against the aircraft on the Aircraft Register.

An IDERA, once registered, may only be deregistered with the authority of the authorised party.

Deregistration powers of attorney are now even less commonly used in New Zealand (see question 13) as they have largely been superseded by IDERA’s.

15 What is the typical form of a security document over the aircraft and what must it contain?
Security over an aircraft is usually granted by way of a mortgage. There is no specified form. If the mortgage contains a power of attorney or a guarantee it should be prepared as a deed. Mortgages are invariably in the English language.

An aircraft mortgage can state a maximum secured amount. However, usually no maximum sum is stated. A mortgage can include a stated priority limit (as opposed to maximum secured amount) to protect its priority against subsequent mortgages.

The economic terms of the deal are not required to be included within the mortgage itself and would more often be included within the loan agreement.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?
There are no documentary formalities such as notarisation, legalisation, stamping or translation required on the creation of a security interest over an aircraft nor are there any documentary costs.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties?
Summary the process to register a mortgage interest.
It is not possible to register security documents or evidence of security documents with the CAA: see question 7. Where the security document constitutes an ‘international interest’ under the Cape Town Convention, registration can be made on the IR. Similarly, registration can also be completed on the PPSR by registering a financing statement.

As priority under the IR and PPSR are generally based on time of registration, registration should be completed in each case without delay.

The process to register a mortgage interest is the same as for a lease interest: see question 10.

18 How is registration of a security interest certified?
Where the security interest is registered as an ‘international interest’ on the IR, evidence of that registration is achieved by obtaining a post registration Priority Search Certificate in respect of the relevant airframe and engines from the IR.

If registration is completed under the PPSR, a verification statement in respect of that financing statement is automatically issued by the PPSR immediately following registration. Further evidence of the registration of that financing statement and other financing statements relating to the same collateral can be obtained by undertaking PPSR post-registration searches of the debtor or lessee (by entity name and where relevant, New Zealand company number) and of the aircraft (by reference to its nationality mark and manufacturer’s serial number).

In each case, subject to contractual arrangements to the contrary, priority is generally determined in order of the time of registration.
19 What is the effect of registration as to third parties?
Priority of registrations on both the IR and the PPSR are generally, in the absence of contractual arrangements to the contrary, determined on a first in time basis: see question 18. Both the IR and the PPSR are public regis-
ters and are searchable. Parties can generally rely on the accuracy of these registers.

Non-consensual interests in the nature of possessory liens such as workman’s liens entitle the lienholder to possession of the aircraft until its charges have been met notwithstanding the prior registration of the mort-
gage on the IR or the PPSR. Such interests are not required to be registered.

Security interests registered on the PPSR prior to 1 November 2010 continue to have priority over ‘international interests’ registered on the IR subsequent to that date but not otherwise.

20 How is security over aircraft and leases typically structured?
What are the consequences of changes to the security or its beneficiaries?

A mortgage or other security such as a security assignment over a lease can be granted either in favour of the lender or a security agent for exist-
ing and future lenders. Security agents are well recognised and commonly appointed to hold security over aircraft. A change in the identity of the ben-
eficiaries will generally not require any amendment to the security held by the security agent. Loan transfers which are effected by way of novation should not affect the security held by the security agent. Consequently, security registrations should not be affected and no new registrations should be required if a loan is transferred to a new lender without any change in the security agent.

21 What form does security over spare engines typically take and how does it operate?

Security over engines usually takes the same form as security over an air-
craft; see question 15. The security over a spare engine can be included within the aircraft mortgage along with the airframe and installed engines.

Under the Cape Town Convention, independent security interests exist over the airframe and each engine (including a spare engine) and are registered separately on the IR.

An encumbered engine should not cease to be encumbered by removal or installation on another aircraft and these security interests should con-
tinue to attach to that engine.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

In the event of a lease termination, repossession can be achieved as a self-
help remedy. A court order, although available where possession has not been made available consensually, is not required. A lessor undertaking self-
help repossession must nevertheless act peacefully and lawfully. In cases where the aircraft is at risk an order for possession can generally be obtained from the courts on an urgent and, if necessary, on an ex parte, basis.

Where the default or right to repossession of the aircraft is contentious, a lessee may similarly apply for a court order restraining the lessor from entering into possession of the aircraft. Where the identity and availabil-
ity of the lessor is known and unless there is urgency such an application should not be on an ex parte basis or at least without notice to the lessor.

Where the lessee is a New Zealand registered company and is insol-
vent it may enter into voluntary administration under the Companies Act, thereby immediately creating a creditor’s moratorium which would not allow the aircraft to be reposessed. However, this moratorium would be subject to the rights of the lessor under Alternative A of the Cape Town Convention. Consequently, on the expiration of the 60-calendar-day waiting period the lessor would have a right to possession of the aircraft regardless of the creditors’ moratorium, subject to the right of the lessee to purge the default.

23 Outline the basic measures to enforce a security interest.
How may the owner lawfully impede the mortgagee’s right to enforce?

Enforcement of a security interest would involve the same considerations as termination of a lease: see question 22.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Possessory liens in the nature of mechanics or workman’s liens entitle the lienholder to maintain possession of the aircraft or the relevant parts until its charges have been met. An owner or mortgagee seeking to take pos-
session of the aircraft would be required to discharge those liens before it could take possession.

No statutory liens arise as a consequence of the non-payment of land-
ing or navigation charges or employee rights.

Under the Defence Act 1990 in an actual or imminent emergency an aircraft can be requisitioned for the deployment outside New Zealand of New Zealand armed forces. Compensation is payable for its use including for any loss or damage.

Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

New Zealand withholding tax can apply at the rate of 15 per cent to:
- aviation-related lease payments (where the aircraft is leased to a non-
resident lessee for use in New Zealand or a New Zealand resident les-
see) to a non-resident lessor; or
- interest payments to a non-resident lender.

Withholding tax does not apply to principal loan repayments.

Tax treaty relief may be available to eliminate the New Zealand withholding tax liability for non-resident lessors of certain tax jurisdic-
tions where the lease is treated as an operating lease for New Zealand tax purposes.

In relation to New Zealand withholding tax chargeable on interest payments, such withholding tax can be reduced to zero per cent if the bor-
rower and lender are not associated for New Zealand tax purposes and the borrower opts to pay Approved Issuer Levy (AIL) at 2 per cent of the interest payment instead. A borrower can opt to pay under the AIL regime by registering itself and the transaction with the New Zealand Inland Revenue. Where the lease is treated as a finance lease for New Zealand tax purposes, all or part of a lease payment may be deemed to be an interest payment for New Zealand tax purposes. The lessee may also opt into the AIL regime to reduce the New Zealand withholding tax chargeable on the deemed interest component of any such finance lease payment.

The tax position can differ if the non-resident lessor or lender has a branch or other fixed place of business in New Zealand.

Parties should determine the New Zealand tax consequences of trans-
actions so as to be able to ascertain and agree which party should bear the cost of any potential New Zealand withholding tax or AIL. A gross-up provision dealing with withholding tax and any other taxes is enforceable. In addition, New Zealand has a system of goods and services tax (GST) in relation to supplies of goods and services made within or deemed to be made within New Zealand. GST is in the nature of a value added tax and generally applies at the rate of 15 per cent.

Where a non-resident supplier sells an aircraft to a New Zealand GST registered purchaser, no GST should apply to the sale unless the parties agree otherwise. However, where the sale of the aircraft is between two non-resident parties then GST would apply to the sale unless the aircraft is not physically located in New Zealand at the relevant time of supply. In addition, GST is also payable on the importation of the aircraft into New Zealand. Such GST is in the nature of a customs duty. It is therefore important that the parties to a transaction ensure that the importer (usually the New Zealand resident lessee or purchaser of the aircraft) has the ability to recover such GST.

There is no stamp duty payable in New Zealand.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There are no exchange controls or other restrictions in relation to interna-
tional payments other than where such payments may contravene counter-
terrorism laws and the like.
Update and trends
The most recent development in aircraft financing and leasing in New Zealand has been the adoption of the Cape Town Convention as part of New Zealand law. Although the Cape Town Convention has been in effect since late 2010 it is still regarded as recent law. To date, none of the provisions of the Cape Town Convention has been considered by a New Zealand court. The international certainty and conformity that the Cape Town Convention has brought to aircraft financing has assisted Australasian airlines in accessing the international debt markets. Although the Civil Aviation Act is presently the subject of review, it is unlikely that this review will result in any changes that will affect the implementation of the Cape Town Convention or otherwise significantly affect aircraft financing or leasing in New Zealand.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?
Unless such amounts of default interest were such that they could be regarded as a penalty rather than being in the nature of a genuine pre-estimate of loss or, in the case of loan payments could be regarded as ‘oppressive’ (ie, harsh, unjustly burdensome, unconscionable or in breach of reasonable standards of commercial practice) then there should be no limitation on the amounts charged.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?
As discussed in question 25, GST will generally be payable by the importer on importation of the aircraft into New Zealand.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.
There is no captive insurance regime applicable to aviation in New Zealand and there is no requirement that insurance be placed with local insurers. In practice, aviation insurance is generally not placed in the local market.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?
As a matter of contract a cut-through clause should be enforceable provided that it is drafted to allow the airline the benefit of the re-insurance policy in accordance with the Contracts (Privity) Act 1982.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?
Assignments of reinsurance should in principle be effective under New Zealand law.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?
In the normal course a passive lessor or financier should not be liable for the operation of an aircraft or the activities of the operator.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?
Where an owner, lessor, financier or other party has no operational involvement with the aircraft it should not have liability for any strict liability offences.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?
Under the Civil Aviation Act, the Minister of Transport or the Secretary of Transport may require an applicant for, or the holder of, an air services licence to furnish satisfactory proof that its liability in relation to death or bodily injury or damage to property is covered by insurance. This reflects the obligation in article 50 of the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (the Montreal Convention) that state parties require their carriers to maintain adequate insurance cover in respect of liability under the Montreal Convention.
Nigeria

L Fubara Anga and Oluwasemiloore Atewologun

Overview

1 To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?


2 What is the principal domestic legislation applicable to aviation finance and leasing?

The Civil Aviation Act (CAA 2006) and the Nigerian Civil Aviation Authority (NCAA) regulations are the primary legislative instrument governing aviation finance and leasing in Nigeria.

3 Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where is it registered the relevant applicable law?

Generally, in interpreting choice-of-law clauses, Nigerian courts uphold the principle of pacta sunt servanda, which literally means ‘agreements must be kept’. While, there are generally no restrictions, in very limited circumstances, public policy considerations may mandate Nigerian law especially if one of the parties is a state entity.

Title transfer

4 How is title in an aircraft transferred?

A bill of sale is effective to transfer title in an aircraft. The Nigerian Civil Aviation Authority (NCAA) recognises not only a bill of sale but also any other written agreement that transfers title.

5 What are the formalities for creating an enforceable transfer document for an aircraft?

A transfer document for an aircraft must be in writing and stamped. There is no express provision for notarisation and legalisation of a transfer document under Nigerian law. Translation of a transfer document is necessary if it is not English. The translated document should be certified by the Nigerian Embassy. However, where there is no Nigerian embassy in a country a certified copy by the British Embassy or High Commission or by a notary public may be accepted.

Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry.

By virtue of the Civil Aviation Act (2006) and the Nigerian Civil Aviation Regulations, Parts 1–11 (2009), the NCAA is vested with the function of registering aircraft in Nigeria. The NCAA is an instrumentality of the Ministry of Transportation established by the Civil Aviation Act (2006) and the Nigerian Civil Aviation (Procedure) Rules, 2013.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

An ownership interest, lease interest or lease agreement over an aircraft shall be registered with the aircraft registry. The NCAA provide that an aircraft is eligible for registration if it owned by the following category of people:

- a citizen of Nigeria;
- an individual citizen of another state who is lawfully admitted for permanent residence in Nigeria;
- a corporation lawfully organised and doing business under the laws of Nigeria, where the aircraft is based and primarily used in Nigeria;
- a government entity of Nigeria or political subdivision thereof;
- a foreign person who has leased the aircraft to one of the persons described in the points above, provided that:
- the aircraft may remain on the Nigerian registry only for as long as the lease remains in effect; and
- the certificate of registration includes the names and addresses of the lessee and, if different, the operator of the aircraft.

Owners, operators and lessees’ interests in aircraft engines shall be filed at the NCAA. In addition any interest that constitutes a charge over the assets of a Nigerian limited liability company must be filed at the Corporate Affairs Commission (CAC) as well.

8 Summarise the process to register an ownership interest.

An ownership interest in an aircraft must be recorded before operations can begin, with Form AC-AWS 001A. After the aircraft has been inspected and found acceptable for issue of a certificate of registration, the following documents are required to be submitted to the authority:

- a certificate or notice of deregistration from the previous state of registry or a letter from the state of manufacture, if the aircraft is new and has never been registered in any other state, confirming non-registration. The deregistration certificate must be received by the authority directly from the state of registry and should never be presented by the applicant – it should be state-to-state;
- documents to prove the aircraft ownership (eg, bill of sale);
- a copy of a government-issued ID or passport if owned by an individual or any other identification card approved by the authority;
- a certified copy of the certificate of incorporation if owned by a company;
names of the directors of the company owning or leasing the aircraft and their specimen signatures giving authority to register or operate the aircraft in Nigeria and indicating who among them has the mandate to transact on their behalf on matters relating to the aircraft registration or operation;
• a certified copy of the lease agreement if the aircraft is on lease with stamp duties paid;
• a certified copy of the power of attorney from the owner or lessor and the lessee (both of them);
• a certified copy of a current aircraft insurance certificate; and
• proof of payment of the prescribed fees (see fees schedule in the Nigeria CARs); and
• a certified copy of the air transport licence, air operating permit or permit for non-commercial flight.

There is no express provision for notarisation under Nigerian law. The cost of registering an ownership interest in an aircraft depends on the weight of the aircraft in question. The fees to be paid are as follows:
• under 5,000kg – 10,000 naira;
• 5,000kg but not exceeding 6,000kg – 20,000 naira;
• 6,000kg but not exceeding 15,000kg – 30,000 naira;
• 15,000kg but not exceeding 50,000kg – 50,000 naira; and
• 50,000kg and above – 100,000 naira.

An additional fee of 10,000 naira is payable if an applicant requests for a special registration mark which is not out of sequence. An interest in aircraft extends to the engines of the aircraft and thus, title to an engine automatically vests in the owner of the host aircraft unless there is a contrary intention expressed by registering the interest in the engine separately.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?
Registration is prima facie proof of title. The NCAA issues a certificate of registration which contains the following information: nationality and number registration marks, manufacturer and manufacturer’s designation of aircraft, serial number of aircraft, date of manufacture, name of registered operator, address of operator, name and address of owner. The certificate of registration, however, does not state the owner’s, operator’s or mortgagee’s interest over the aircraft. A separate engine certificate of registration is not issued.

Third parties can rely on the accuracy of the public registration of the ownership interest.

10 Summarise the process to register a lease interest.
The executed lease agreement is assessed and the applicable stamp duties paid at the Federal Inland Revenue Service (FIRS). The stamped lease agreement is subsequently submitted to the NCAA for filing.

11 What is the regime for certification of registered aviation interests in your jurisdiction?
As there is no formal registry of legal interest, no certificate is issued. The NCAA may, however, confirm by letter that the interests have been registered.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?
Whoever registers an aircraft can deregister and export it. If an owner or a mortgagee’s interest is filed, the NCAA will usually give notice and almost certainly, if the owner is seeking to deregister or export the aircraft, the operator shall be notified.

On a general note Nigeria is a signatory to the Cape Town Convention and the NCAA will honour an irrevocable deregistration and export request authorisation (IDERA) and deregistration power of attorney (DPoA). The operator can only block a proposed deregistration or export in circumstances where it can prove that there has been no default or breach of agreed contract terms in very limited circumstances. Before deregistration, the original certificate of registration has to be returned. It is therefore advisable that the original be held or kept in escrow and a certified true copy of the certificate of registration is retained on the aircraft.

13 What are the principal characteristics of deregistration and export powers of attorney?
A DPoA enables an owner to freely deregister and export the aircraft. It is grantable to only one attorney. It is mandatory to file the DPoA with the NCAA along with the lease documents of the aircraft in question.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.
An IDERA is required to be filed with the aviation authority. The form of IDERA used in Nigeria is usually countersigned by the aviation authority. The IDERA is required to be registered with the NCAA. The authority recognises powers of attorney as well, and sometimes a belt-and-braces approach is adopted.

Security
15 What is the typical form of a security document over the aircraft and what must it contain?
A mortgage is the usual security, and it must be in English. While there is no specified form for a security document, it should contain all the material economic terms. The amount secured needs to be stated in the security document.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?
While the security document must be by deed, stamped and duly executed between both the mortgagor and mortgagee, there is no express provision requiring notarisation and legalisation. Stamping fees are payable at the FIRS while registration fees are payable at the NCAA and the CAC. Some filing fees are nominal, others are charged as a percentage of the value of the security.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties?
Summarise the process to register a mortgage interest.
The security document must be filed with the NCAA. In addition, the security document must be filed with the CAC where the mortgagee is a company. A person who wishes to register a mortgage interest must apply in writing to the Director General of the NCAA and submit the deed of mortgage duly endorsed by the parties with stamp duty paid. The fees payable for the registration of a mortgage interest are as follows:
• on the first 100,000 naira secured by the mortgage, a fee of 500 naira for each complete 10,000 naira;
• on the next 900,000 naira secured by the mortgage, a fee of 500 naira for each 100,000 naira or part thereof; and
• thereafter, a fee of 200 naira for each 1 million naira or part thereof.

The minimum fee payable in any case is 10,000 naira and the maximum fee payable is 150,000 naira. Where the amount of the mortgage is not specified, the fee payable shall be 50,000 naira.

18 How is registration of a security interest certified?
There is no separate registry for economic interests in Nigeria. The practice is to file and register economic interests in the aircraft file kept at the Civil Aviation Registry. Leases, mortgages and other security interests are filed with the NCAA.

The Companies and Allied Matters Act Chapter C20 Laws of the Federation of Nigeria (2004) (CAMA) also provides that when a Nigerian limited liability company creates a charge, it must be registered at the CAC. A certificate of registration of the charge is issued by the CAC.

19 What is the effect of registration as to third parties?
The Cape Town Convention (2011) has the force of law in Nigeria and thus, registration of a security interest confers priority over subsequent security interests – registered and unregistered. Third parties can rely on the accuracy of public registration and on the information recorded on the certificate. Nigeria is also a signatory to the Geneva Convention and the provisions regarding priority are applicable.
CAM provides that every charge created by a Nigerian limited liability company that is intended to provide security must be registered at the CAC within 90 days of its creation, otherwise it shall be void against the creditors or liquidators of the company. This provision also applies to aircraft. A registration fee on the amount secured is payable.

The rationale for registration is to ensure that third parties who conduct searches at the CAC have actual notice of all charges created by the company.

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

The concept of security trustee is recognised in Nigeria. The nature of the security is usually a right in personam, but where it relates to a lien or other charge on the aircraft, a right in rem may arise. The CAMA provides that whether or not a debenture is secured by a charge over the company’s property, it may be secured by a trust deed appointing trustees for the debenture holders. In fact, in many transactions where there are multiple lenders, it is preferable to have all the security vested in a security trustee who holds on behalf of the lenders. Changes in the security or beneficiaries will have no effect on the security interest as it attaches to the aircraft. If there is a fixed charge over the assets and the beneficiaries change, a deed of accession to the agreement is required to be filed at the CAC. If there is a change in the composition of the trustees, then a novation to the agreement is required.

21 What form does security over spare engines typically take and how does it operate?

In Nigeria, engines can be encumbered separately. The formal requirements for creating security over engines are similar to those in respect of the creation of interests in an aircraft.

Enforcement measures

22 Outline the basic repossessions procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

Self-help is available and permitted in Nigeria provided it is consistent with agreed contractual terms and the parties observe all applicable laws and regulations relating to deregistration and export of the aircraft. A special declaration was made pursuant to article 54(2) of the Cape Town Convention and associated protocol which came into force in Nigeria on 14 November 2006, to the effect that any remedies available to a creditor under any relevant provision under the Cape Town Convention that do not require application to the court may be exercised without court action and without leave of court.

A court order is not necessarily required before a creditor can exercise their right of repossession or sale of an aircraft in the event of default, provided it is specifically provided for in the agreement.

A lessee may lawfully delay the exercise of default remedies by applying to the court for an injunction restraining the lessor from exercising the right to repossess the aircraft pending the determination of the parties’ legal rights. The lessee can also request the intervention of regulatory authorities, although consideration of the request may lead to delays in granting the appropriate approvals.

The court has wide discretionary powers to make an order for grounding an aircraft while court proceedings are pending. The applicant has to adduce adequate evidence before the relief is granted. The court also has the power to make orders for the detention of the aircraft.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

The lessor may seek an order of specific performance of the provisions of the agreement to enforce their security interest. On the effect of insolvency on enforcement rights, section 414 of CAMA provides that where winding-up proceedings have been commenced against a company, any attachment or execution put in force against its assets shall be void. Article 30(1) of the Cape Town Convention provides that an international interest remains effective provided it was registered prior to the commencement of insolvency proceedings and in accordance with the provisions of the Convention.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Under article IV of the Geneva Convention, where claims for compensation due for salvage operations and extraordinary expenses indispensable for the preservation of an aircraft give rise to a right conferring a charge against the aircraft under the law of the contracting state where the salvage or preservation took place, such right shall have priority over all other rights in the aircraft. The Geneva Convention has been domesticated in Nigeria and thus, its provisions are applicable.

However, please note that statutory government agencies such as the Nigerian Airspace Management Authority (NAMA), Federal Airports Authority of Nigeria (FAAN) and the NCAA take priority and have the right to detain an aircraft for failure to pay mandatory fees and navigation charges.

Yes. Compensation is payable to an owner where the aircraft is wrongly detained, seized or taken. Usually the amount of compensation is determined by mutual agreement between the parties or the courts.

Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

The taxes applicable include:

- Stamp duty: This tax will be payable in Nigeria on leases and other documentation. The rate of the duty payable depends on the term of the lease. For a lease for a term of one to seven years the applicable stamp duty is 0.78 per cent. Although in some cases the Commissioner for stamp duty has assessed stamp duty at 1.25 per cent.
- Value added tax (VAT): VAT is charged and payable, at the rate of 5 per cent, on the supply of all goods and services unless where exempt.

Interest earned by a lessor on a finance lease is a return on investment and thus, is not liable to a charge of VAT.

Withholding tax (WHT)

Income on a property (rent, hire or lease payments or rights (royalties) situated in Nigeria is liable to tax, notwithstanding the place of payment. Where rent is to be paid to an individual or company, WHT at a rate of 10 per cent is applicable. It applies also to lease payment and loan payment.

Grossing up is not unlawful.

WHT may be reduced to 7.5 per cent where the company is incorporated in a country that has entered into a double taxation agreement with Nigeria. These countries include the United Kingdom, France, Belgium, Pakistan, Romania, Canada, the Czech Republic, Slovak Republic, the Netherlands, the Philippines, South Africa, Italy, Kenya, Sweden and China. Agreements with some other countries have been negotiated but are yet to come into force.

In addition for a finance lease where the interest is clearly spelt out withholding tax is payable only on that portion.

Income tax

Companies income tax is chargeable at a rate of 30 per cent and there is a further 2 per cent education tax levied on the assessable profits of companies. Assessment and payment of education tax is done together with the assessment and collection of the companies’ income tax.

Capital gains tax

Capital gains tax is imposed on capital gains arising from the sale or disposal of chargeable assets at a rate of 10 per cent.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Yes. The Central Bank of Nigeria (CBN) regulates international payments and exchange control pursuant to the provisions of the CBN Act and the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act and the regulations made thereto.

There is free convertibility of naira to foreign currency at the official rate for aircraft lease payments, loan repayments and insurance premiums, provided that certified documentation is produced to the authorised dealers, that is, licensed banks.
For example, the documents required for remittance of insurance for aircraft operating in Nigeria are:

- a duly completed Form A;
- a valid air operator’s certificate issued by the NCAA;
- an insurance policy;
- a demand note; and
- a letter of attestation issued by the National Insurance Commission (NAICOM).

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?
No. But a court may take the view that certain levels of interests are punitive and contrary to public policy.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?
Yes. Custom duties are imposed on the importer. It is possible to obtain a waiver of import duties if the aircraft is being imported under the temporary import permit regime. In order to export the aircraft, all outstanding payments due to statutory bodies such as the FAAN, NAMA and the Nigerian Customs Service must be paid.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.
Section 74 of the Civil Aviation Act (2006) provides that any domestic carrier operating air transport services to, from or within Nigeria shall maintain adequate insurance covering its liability under the Act and also towards meeting compensation for damages that may be sustained by third parties.

Furthermore, section 72(1) of the Insurance Act (2003) states that no person shall transact any insurance or reinsurance business with a foreign insurer or reinsurer in respect of any life, asset, interest or other properties in Nigeria (businesses classified as domestic insurance), unless with a company that is registered under the Act. Domestic insurance or reinsurance businesses include aviation liability insurance and reinsurance. Under Nigerian law, liability insurance must be placed in Nigeria unless the prior approval of the regulator, NAICOM, has been obtained. Any proportion of insurance paid abroad requires the prior approval of NAICOM. Usually, a minimum of 5–10 per cent must be placed in Nigeria. The rest can be spread between more than one insurance company.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?
Yes.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?
Yes.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?
The owner of an aircraft is liable for any damage, injury or loss arising from the operations and activities of the aircraft operator where same are under its control. However, the owner’s liability is extinguished where the aircraft has been leased, demised or hired out and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?
Yes. The Civil Aviation Act in Nigeria states that damages in respect of injury shall be recoverable without proof of negligence or intention or any other cause of action subject to the right to be indemnified by the lessee or operator.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?
Yes. The NCAA prescribes a minimum amount from time to time.
Oman

Mansoor J Malik and Asad Qayyum
Al Busaidy, Mansoor Jamal & Co

Overview

1. To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

The Sultanate of Oman has been a party to a number of major international air law treaties and conventions, demonstrating its commitment to the smooth operation of the civil aviation industry in Oman. The Civil Aviation Law issued by Royal Decree No. 93/2004, as amended from time to time (the Aviation Law) sets the primary legislation governing civil aviation in Oman. It provides that the provisions of the 1944 Convention on International Civil Aviation (the Chicago Convention), alongside the provisions of the 1999 Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) and the relevant international conventions and agreements to which Oman is a signatory, each constitute an integral part of the Aviation Law with the former prevailing in the event of conflict with the latter. Oman is also a signatory to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the 2001 Cape Town Convention on International Interests in Mobile Equipment (the Cape Town Convention), the 2001 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Protocol) and the 1948 Convention on the International Recognition of Rights in Aircraft (the Geneva Convention).

2. What is the principal domestic legislation applicable to aviation finance and leasing?

The Aviation Law, the Executive Regulations of the Civil Aviation Law (Ministerial Decision 44/T2007) (the Executive Regulations) and the notices and decisions issued pursuant to the Aviation Law and Executive Regulations set the primary legislation governing civil aviation in Oman. Further to reorganisation undertaken in 2008 and 2012 and following issue of Royal Decree No. 33/2012, functions, allocations and assets of the previous aviation authorities (that is, the Directorate General of Civil Aviation and Meteorology (the DGCAM) and the Directorate General of Safety and Aviation Services (DGSA)) were transferred to the Public Authority for Aviation Services (DGSAS)).

3. Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Omani law generally does not impose any limitation or restriction in relation to choice of jurisdiction or choice of governing law clauses in contracts. In the context of civil aviation specifically, Civil Aviation Regulation 49 on the Regulation of Aircraft Titles and Security Documents (CAR 49) provides that the validity of any instrument eligible for recording under CAR 49 (which includes, among other things, a bill of sale, contract of conditional sale, assignment of interest, mortgage, assignment of mortgage, lease and other instruments affecting interests in aircraft, each referred to as a ‘conveyance’) is governed by the laws of the state in which the instrument was delivered, regardless of the location or place of delivery of the property affected by the instrument. CAR 49 further provides that if the place where an instrument is intended to be delivered is stated in the instrument, it is presumed that the instrument was delivered at that place. Therefore, it should be permissible for a contract in respect of the transfer of an interest in, or creation of security over, an aircraft to be governed by non-Omani law and this should not affect its validity or enforceability in Oman. This position has been further reinforced by the recent Civil Transactions Law of Oman, enacted pursuant to Royal Decree No. 29/2013, which for the first time expressly provides the Omani courts with authority to give recognition to foreign governing law clauses and the jurisdiction in which an agreement has been executed. The foregoing is subject to the caveats that the Omani courts would need to be satisfied that the application of the particular foreign law would not violate any applicable Omani law or public policy (failing which the court will proceed by applying Omani law instead) and, in practice, there may be practical difficulties in attempting to enforce foreign law in the courts of Oman.

Title transfer

4. How is title in an aircraft transferred?

CAR 49 regulates the registration of the transfer of aircraft registered in the Aircraft Register in Oman (which, in the language of that regulation, is a type of conveyance to which that regulation applies). To be eligible for recording under CAR 49, a conveyance must:

- be in a form prescribed by, or acceptable to, the Aviation Authority for that kind of conveyance;
- describe the aircraft to which it relates by make, model, manufacturer’s serial number, Omani registration marks and other details that make identification possible;
- be an original document, duplicate of an original document, or if the original or duplicate is not available, a certified copy of the original;
- affect an aircraft registered under the Aviation Law; and
- be accompanied by the recording fee.

5. What are the formalities for creating an enforceable transfer document for an aircraft?

The Aviation Law prohibits a disposal of any aircraft registered in the Aircraft Register in Oman, whether by sale, mortgage, lease or otherwise except with the approval of the Aviation Authority. The disposal between the contracting parties shall become valid only after it has been entered in the Aircraft Register in Oman. The following documents are normally required to be submitted to the Aviation Authority to register a change in registered ownership:

- the certificate of aircraft registration issued to the previous owner, along with a request for cancellation of the same;
- a new application for aircraft registration in the form prescribed by the Aviation Authority, along with the power of attorney or board resolution evidencing the authority of each signatory to the application;
- a bill of sale or other evidence of a conveyance from the seller of the aircraft or other evidence of ownership;
- a bank draft towards payment of the prescribed registration fee;
- proof of the nationality of the purchaser in whose name the aircraft is to be registered;
- if the aircraft is leased an authenticated or notarised copy of the lease agreement; and
- any other documents as may be required by the Aviation Authority.

The application for aircraft registration should contain the type of registration sought (permanent or temporary), the location of the aircraft in order...
Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry. The Aviation Authority maintains the National Civil Aircraft Registry (the Aircraft Register) which records for an aircraft, among other things, its registration number and registry page number, nationality and registration marks, manufacturer, number of engines, serial number, airworthiness certificate details, owner or operator details, ownership documentation and details on the transactions concluded in respect of the aircraft including the date of their occurrence. The Aviation Authority also records in the Aircraft Register data relevant to the mortgage of an aircraft. For an aircraft to be eligible for registration in the Aircraft Register, it must meet the technical specifications and standards prescribed in Civil Aviation Regulation 47 (CAR 47), namely: it must be owned by a citizen of Oman or by an individual citizen of a foreign country who has lawfully been admitted for permanent residence in Oman, or owned by a corporation (other than a corporation which is a citizen of Oman) lawfully organised and doing business under the laws of Oman so long as the aircraft is based and primarily used in Oman; and it must not be registered under the laws of any foreign country.

In addition, Civil Aviation Notice 1-03 (CAN 1-03), which is complementary to CAR 47, provides that each of the following aircraft shall be eligible for registration in the Sultanate of Oman:

- aircraft owned fully or partially by an Omani national or by an Omani company or firm;
- aircraft owned fully or partially by a non-Omani national who is a resident of Oman and has a place of business in Oman; and
- aircraft chartered by, or leased to an Omani national, to an Omani company or to an Omani airline or operator.

The term ‘Omani citizen’ has been defined for the purposes of CAR 47 to mean each of the following:

- an individual who is a citizen of Oman;
- a partnership of which each member is a citizen of Oman; and
- a corporation or association created or organised under the laws of Oman of which the president and two-thirds or more of the board of directors and other managing officers are citizens of Oman and in whom at least 75 per cent of the voting interest is owned or controlled.

In light of the above, an aircraft may be registered in the Aircraft Register in the name of an owner or lessee of the aircraft. If, however, the owner or lessee is not an Omani citizen, in order to be eligible for registration in Oman, such an owner or lessee must be lawfully organised and doing business in Oman and the aircraft must be based in and primarily used in Oman.

7 Can an ownership or lease interest be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry?

CAR 47 regulates registration in the Aircraft Register of ownership interests in aircraft, and CAR 49 regulates the registration of certain conveyances affecting an interest in any aircraft registered in the Aircraft Register (including aircraft leases and related assignments). CAR 49 also provides that conveyances which are recordable under that regulation include those used as evidence of ownership under CAR 47, thereby providing two routes for registration of an ownership interest in an aircraft in the Aircraft Register.

CAR 47 defines an ‘owner’ of an aircraft as including a buyer in possession, a bailee in possession, or a lessee in possession of an aircraft under a contract and the assignee of that person. CAR 47(1)(b) also appears to allow a repossession of an aircraft (under a security agreement and applicable local law) to apply for aircraft registration. It follows that the lessor or new owner of an aircraft would need to be in possession or repossession of an aircraft in order to be able to apply for a certificate of aircraft registration in its own name. At the same time, CAR 473(1) states that the Aviation Authority may issue a certificate of aircraft registration to the person ‘who appears’ to have sole control of the aircraft on the basis of the evidence of ownership submitted. In light of the provisions regarding possession of an aircraft above, it is not clear whether the Aviation Authority would issue a certificate of aircraft registration in the name of a lessee or a new owner without the aircraft having been actually delivered to that lessee or new owner.

In addition to regulating the registration of conveyances in respect of whole aircraft, CAR 49 expressly provides for registration of conveyances in respect of certain engines, propellers and other appliances maintained for installation or use in an aircraft, provided the qualifying threshold criteria are satisfied.

8 Summarise the process to register an ownership interest. Please see questions 4-7. Additional documentation to that listed in question 7 may be required to be submitted to the Aviation Authority under CAR 47 depending on a number of factors, in particular the identity of the applicant and an aircraft’s registration history.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

CAR 47 draws a distinction between legal ownership and registered ownership of an aircraft, and states that registration on the Aircraft Register does not constitute evidence of ownership in any proceedings. This is repeated in CAR 1-03. According to CAR 47.5, the registered owner of an aircraft is the person to whom an aircraft is registered, and the legal owner is the person who can otherwise prove his title to the aircraft and thereby has his rights protected under the Geneva Convention. CAR 47.3(f) elucidates further that the Aviation Authority neither issues any certificate of ownership nor endorses any information with respect to ownership on a certificate of aircraft registration, and that certificates of aircraft registration are issued to the person ‘who appears’ to have sole control of the aircraft on the basis of the evidence of ownership submitted under CAR 47.11. Similarly, CAR 49.17(c) provides that the recordation of a conveyance does not constitute a decision of the Aviation Authority that the instrument effecting the conveyance in fact affects title to, or an interest in, the aircraft or other property that it covers. Neither the Aviation Law nor the Executive Regulations expressly provide that entries made in the Aircraft Register constitute public notice of such entries to third parties. The Aviation Law is silent in terms of what reliance, if any, may be placed by any party on the information recorded in the Aircraft Register.

Practically speaking, the purpose and intent of the Aircraft Register (as for similar registers in other jurisdictions) is to reflect the rights of ownership and the interest of lessees, lessors and other third parties in particular aircraft. If an interest in an aircraft was not registered as required under the Aviation Law, it is unlikely that any such interest would be legally recognised in Oman. The Aviation Authority does not, as a matter of practice, permit the public to examine or carry out searches of the Register with respect to an aircraft except with the written consent of the registered owner or operator of the aircraft. In view of that practice, the Omani courts may be sympathetic to arguments by third parties that they have no notice of rights or interests recorded in the Aircraft Register. As to whether any such third party’s interest might supersede a registered interest in the case of a dispute between them in the Omani courts remains uncertain.

In the case of a party seeking to register an aircraft interest in the Aircraft Register, such an applicant will be made aware of pre-existing registrations. In any case, pending judicial consideration by the Omani courts, the precise legal effect of registration of an interest in an aircraft on the Aircraft Register remains to be determined.

10 Summarise the process to register a lease interest.

In order for an aircraft lease to be effective and enforceable in Oman, the lessee of the aircraft needs to receive the aircraft on the Aircraft Register and obtain a certificate of registration. Article 35(3) of the Aviation Law provides that an aircraft leased for the purpose of purchase or leased for a period of more than one year must be registered in accordance with the rules and terms prescribed in the Executive Regulations. Article 27(2) of the Executive Regulations provides that the Aviation Authority shall issue the certificate of registration in accordance with the conditions and rules specified in CAR 47. Under CAR 47, a lessee in possession of an aircraft may have the aircraft registered in its own name and may, for that purpose, submit the lease contract as evidence of its interest in the aircraft. However, under CAR 49, the lease contract may also be registered as a conveyance.
for security purposes. The same lease contract may therefore be registered separately under both CAR 47 and CAR 49 as, on the one hand, evidence of an ownership interest in an aircraft and, on the other hand, a conveyance affecting a mortgage interest in an aircraft (or for security purposes (recording the lessor’s interest in the aircraft as an encumbrance). This is possible as CAR 49 provides that conveyances which are recordable under that regulation include those used as evidence of ownership under CAR 47.

CAR 49 and the other regulations issued pursuant to the Aviation Law do not currently prescribe any particular form that an aircraft lease needs to be in for it to be eligible for registration. However, CAR 49 does state that for a conveyance to be eligible for recording under it, the conveyance must meet certain criteria. (See question 4, which sets out the relevant criteria.) CAR 1-06 specifies a fee of 400 Omani rials for registration of an aircraft lease on the Aircraft Register, which may be revised by the Aviation Authority from time to time.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

Pursuant to article 35 of the Aviation Law, the Aviation Authority issues registration certificates after completion of the prescribed legal procedure for registration. As noted in question 9, CAR 47 clarifies that the Aviation Authority neither issues any certificate of ownership nor endorses any information with respect to ownership on a certificate of aircraft registration, and that certificates of aircraft registration are issued to the person ‘who appears’ to have sole control of the aircraft on the basis of the evidence of ownership submitted under CAR 47.

12 Is an owner or mortgagor required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagor?

CAR 47.47 provides that the holder of a certificate of aircraft registration who wishes to cancel the certificate for the purposes of export of the aircraft must submit to the Aviation Authority: • a written application for cancellation of the certificate, describing the aircraft by make, model, and serial number, stating the Omani identification marks and the country to which the aircraft will be exported; and • evidence satisfactory to the Aviation Authority that each holder of a recorded right has been satisfied or has consented to the transfer.

CAR 47.47 further provides that the Aviation Authority shall notify the country to which the aircraft is to be exported of the cancellation by ordinary mail, or by airmail at the owner’s request. Article 3.8 of CAN 1-03, which is complementary to CAR 47, provides that an aircraft shall be deregistered on receipt of written notification from the registered owner of the aircraft, surrendering the certificate of registration for cancellation and advising that: • the aircraft has been destroyed, lost or permanently withdrawn from use;
• the registered owner intends to register the aircraft in another country and requests the Aviation Authority to notify the deregistration to the civil aviation authorities of that country where he has applied for registration; or • the registered owner has sold the aircraft or has terminated the lease and the aircraft has been returned to the lessor.

Article 2.8 of CAN 1-03 also provides for a number of other circumstances under which an aircraft shall be deregistered by the Aviation Authority. In view of Oman having become a party to the Cape Town Convention and the Protocol, deregistration of an aircraft registered in Oman should now also be possible in accordance with the provisions of the Cape Town Convention and the Protocol, but subject to any rights which may have priority as a matter of Omani law and declared as such by Oman in relation to the Cape Town Convention and the Protocol. To our knowledge no aircraft has ever been deregistered in Oman so it is not possible to say what practical difficulties might be encountered by a holder of a certificate of aircraft registration when trying to effect such a deregistration in Oman.

13 What are the principal characteristics of deregistration and export powers of attorney?

Pursuant to CAR 49.13(d), the Aviation Authority registers powers of attorney which authorise one person, on behalf of another person, to sign documents to be lodged with the Aviation Authority. In the event that an expiration date is not stated in the power of attorney, CAR 49.13(d)(ii) provides that the power of attorney will cease to be valid after a period of three years from the date of its signature, unless the grantor certifies in writing that the power of attorney is still in effect. In each case, a registered power of attorney will be subject to revocation by its grantor.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDER A) process.

Notwithstanding that the Cape Town Convention is in effect in Oman, to our knowledge no aircraft has ever been deregistered and exported from Oman in accordance with the IDERA process so it is not possible to advise as to what the notable features might be when trying to effect that process in Oman.

Security

15 What is the typical form of a security document over the aircraft and what must it contain?

Security over aircraft in Oman typically takes the form of a commercial mortgage pursuant to article 67 of the Oman Commercial Law (Royal Decree No. 55/1990) (the OCL). Article 98 of the Aviation Law provides that an aircraft may be officially mortgaged and that the mortgage may cover the entire aircraft or its ‘major portion’ (undefined). The official mortgage of the aircraft must be made through an official deed signed in the presence of the Aviation Authority. Article 60 of the Aviation Law requires a mortgage over an aircraft to be recorded in the Aircraft Register. For a mortgagor or other security holder in respect of aircraft registered in Oman, the name, address and commercial registration number (if any) would be entered on the Aircraft Register.

The application form for registration of a mortgage on the Register is available from the Aviation Authority (the Mortgage Registration Form) and the mortgagee is required to populate the form by completing, among other things, the date of the mortgage, a description of the mortgaged aircraft (including its type, nationality, registration marks and aircraft serial number), any aircraft parts also subject to the mortgage, the amount secured by the mortgage, and the name, address and, where applicable, the company registration number of the mortgagor. The completed form must be submitted to the Aviation Authority together with the relevant fee (see question 16) and a certified copy of the mortgage. The Aviation Authority confirms the entry of a mortgage on the Aircraft Register by returning a photocopy of the relevant entry to the registered owner and all parties named in the Mortgage Registration Form.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

Our past experience with the Aviation Authority’s office has been that they are generally willing to accept documents in English without the need for any Arabic translation. We are not aware of any reason why this practice might have altered. Notarisation and legalisation are also not necessary (except in the case of aircraft leases); however, the documents must be either in original form, signed by both parties on each page, or if a copy is being submitted then it must be certified by the person submitting it or by its legal counsel to be a true copy of the original. CAR 1-06 specifies a fee of 400 Omani rials for registration of an aircraft mortgage on the Aircraft Register, and 30 Omani rials for registration of a security document; these amounts are however subject to revisions by the Aviation Authority from time to time.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

As noted above, CAR 49.13(c) provides that the recordation of a conveyance does not constitute a decision of the Aviation Authority that the instrument effecting the conveyance in fact affects title to, or an interest in, the aircraft or other property that it covers. Neither the Aviation Law nor the Executive Regulations expressly provide that entries made in the Register constitute public notice of such entries to third parties. The Aviation Law is silent in terms of what reliance, if any, may be placed on the information recorded in the Register. The process and cost to register a mortgage interest in an aircraft are generally straightforward and the Aviation Authority is generally willing to accept documents in English. Our past experience with the Aviation Authority’s office has been that they are generally willing to accept documents in English without the need for any Arabic translation. We are not aware of any reason why this practice might have altered. Notarisation and legalisation are also not necessary (except in the case of aircraft leases); however, the documents must be either in original form, signed by both parties on each page, or if a copy is being submitted then it must be certified by the person submitting it or by its legal counsel to be a true copy of the original. CAR 1-06 specifies a fee of 400 Omani rials for registration of an aircraft mortgage on the Aircraft Register, and 30 Omani rials for registration of a security document; these amounts are however subject to revisions by the Aviation Authority from time to time.
aircraft in Oman is also summarised above. The mortgage would not need to be recorded or filed at any other public office or registry in Oman.

18 How is registration of a security interest certified?
As noted in question 13, the Aviation Authority confirms the entry of a mortgage on the Register by returning a photocopy of the relevant entry to the registered owner and all parties named in the Mortgage Registration Form.

19 What is the effect of registration as to third parties?
As noted above, as Omani courts are yet to consider and rule upon the effect of Aircraft Register registration, it is not possible to advise with certainty on what the Omani courts will deem the precise effect of such registrations to be as a matter of Omani law. Notwithstanding such, it is advisable to make all registrations required or permitted to be made under Omani law.

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?
Security over aircraft and aircraft leases is typically structured using a security trustee to hold the security on behalf of the finance parties. The security typically takes the form of a commercial mortgage over the relevant aircraft (inclusive of any inventory retained in Oman) or aircraft lease, or an assignment by way of security over a lessee’s rights in an aircraft lease. Mortgage creation and registration has already been considered above. Within Omani jurisdictions, although there appear to be no formalities prescribed under the Aviation Law or Executive Regulations for the creation and perfection of an assignment of an aircraft lease, such an assignment must be registered as a conveyance pursuant to the provisions of CAR 49. As noted above, CAR 49 allows for the registration of certain conveyances affecting title to, or any interest in, any aircraft registered in Oman, and such conveyances include an aircraft lease as well as any assignments of the rights and benefits in an aircraft lease.

Regarding the security trust structure, although there is no specific law of trusts in Oman, the concept of trust is recognised under various laws of Oman. For example, the banking law of Oman, issued under Royal Decree No. 114/2000 (the Banking Law), allows Omani licensed banks to act as trustees for and on behalf of their clients and in project finance transactions undertaken in Oman. Omani banks have been appointed as security trustees for the purposes of holding security interests on behalf of foreign and local lenders. Shari’ah law also recognises and provides for the establishment and regulation of trusts. Provided that the rights, responsibilities and obligations of a trustee are well documented, and the terms and conditions of any trust deed are not contrary to Omani law, public policy and or custom then the same should be enforceable as a matter of Omani law.

Turning to the issue of security amendments, if a security in respect of an aircraft or aircraft lease is registered as a conveyance under CAR 49 then, pursuant to CAR 49.17(d)(4), any subsequent amendment of, or supplement to, such a conveyance must meet the requirement for the recording of the original conveyance and must describe the original conveyance in sufficient detail to identify it, including its date of Aviation Authority recording and the recorded conveyance number. Such an amendment would be effected by lodging the form relating to changes in particulars on the Register of Aircraft Mortgages (Changes in Mortgage Particulars Form) with the Aviation Authority, along with payment of the specified fee (CAN 1-06 specifies a fee of 30 Omani rials for registration of a change in particulars on the Aircraft Register which is subject to revision by the Aviation Authority from time to time). Provided the prescribed procedure is followed, the security should remain enforceable as amended.

Additionally, if the identity of the secured parties (on behalf of whom a security trustee is holding a security interest under a security) were to change, such a change should not by itself jeopardise or discharge the security. However, if the identity of the security trustee were to change then (even though this is not clarified by Omani law) there is a possibility that the security may not be enforceable before an Omani court by a new security trustee unless such new security trustee has been registered on the Aircraft Register. In such circumstances, it would be advisable to amend the security by registering a replacement of the former security trustee with the new security trustee on the Aircraft Register.

21 What form does security over spare engines typically take and how does it operate?
The current Mortgage Registration Form, as noted above, provides for the recording on the Register of, among other things, any aircraft parts also subject to the mortgage being lodged for registration. Provided that the spare engines are described in sufficient detail in the mortgage as clearly being subject to the mortgage (by describing such in the mortgage as included in the inventory for the aircraft) no separate registration should be required in respect of such spare engines. Notwithstanding that, as also already noted above, in addition to regulating the registration of conveyances in respect of whole aircraft, CAR 49 specifically contemplates, and is stated as being applicable to, the registration of conveyances in respect of engines, propellers and other appliances maintained for installation or use in an aircraft which satisfy the specified criteria in CAR 49. With respect to aircraft engines, the specified criteria in CAR 49.13(a)(2) for CAR 49 to apply is any specifically identified aircraft engine of 750 or more rated takeoff horsepower, or the equivalent horsepower.

Where a Mortgage Registration Form is lodged to effect the registration of a mortgage over the whole or major portion of an aircraft, subject to the following sentence, it would be a commercial decision whether or not to make separate registrations on the Register in respect of spare engines which satisfy the relevant criteria or to simply rely on describing these in sufficient detail in the Mortgage Registration Form itself. Notwithstanding CAR 49, the prevailing practice is that the Aviation Authority currently does not register any aircraft engines, propellers or spare parts separately from aircraft, and so it follows that it is also not possible to separately register mortgages against engines, propellers or other spare parts. Security over aircraft spares is sometimes also lodged separately with the Omani Ministry of Commerce and Industry as a commercial mortgage, with the mortgagor subject to an obligation to register amendments to the mortgage as and when any addition are made to the inventory of spare parts.

Enforcement measures

22 Outline the basic repossessions procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?
Unless the interest of the lessor in the aircraft is registered as an international interest under the Cape Town Convention and the Protocol (thereby enabling the lessor to exercise its rights under that Convention and Protocol without the need for initiating judicial proceedings in Oman), the lessor would, in case the lessee is not voluntarily willing to surrender the aircraft, need to undertake judicial proceedings in Oman to take physical possession of the aircraft.

Where the lessor wishes to export the aircraft from Oman, unless the lessor is able to procure the export of the aircraft from Oman in accordance with the provisions of the Cape Town Convention and the Protocol, to export the aircraft from Oman upon termination of the lease, an application would need to be made to the Aviation Authority to cancel the registration of the aircraft. In accordance with CAR 47, an application for cancellation of registration is made by the holder of the certificate of aircraft registration (which, in the case of a leased aircraft, would be the Omani lessee) submitting to the Aviation Authority:

• a written application for cancellation of the certificate, describing the aircraft by make, model, and serial number, stating the Omani identification marks and the country to which the aircraft will be exported; and
• evidence satisfactory to the Aviation Authority that each holder of a recorded right has been satisfied or has consented to the transfer.

Following the submission of the application, the Aviation Authority notifies the country (to which the aircraft is to be exported) of the cancellation. The owner is responsible for arranging and paying for the transmission of this notice by means other than ordinary mail or airmail.

CAN 1-09 provides that an aircraft shall be deregistered on receipt by the Aviation Authority of written notification from the registered owner (which, in the case of a leased aircraft, would be the Omani lessee), surrendering the certificate of registration for cancellation and advising the Aviation Authority that:

• the aircraft has been destroyed, lost or permanently withdrawn from use;
• the registered owner intends to register the aircraft in another country and requests the Aviation Authority to notify the deregistration to the civil aviation authorities of that country where he has applied for registration; or
• the registered owner has sold the aircraft or has terminated the lease and the aircraft is returned to the lessor.

For legal or judicial restraints that might hinder or delay the return of the aircraft in case of a default under the lease, see question 23.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

In the case of a commercial mortgage over moveable property, enforcement upon the occurrence of an event of default by the mortgagor can be made by the mortgagee for the sale of all or part of the assets covered by the commercial mortgage. Enforcement will need to occur through the filing of proceedings with the Omani courts and a judgment being obtained. The sale of the assets will be by way of public auction, and the mortgagee cannot take direct possession of the secured assets. Although security documents may contain self-help remedies, there is a risk of such provisions being held to be void by the Omani courts, and any agreement which attempts to circumvent the enforcement mechanism through the Omani court could be void in light of provisions contained in the OCL that bar such remedies.

Furthermore, article 633 of the OCL provides that contracts which are binding on both sides, to which a bankrupt may be a party, shall not be abrogated on the adjudication of bankruptcy, unless based on personal considerations. According to article 635, if a receiver or trustee in bankruptcy does not implement the contract, the other party thereto may apply for its abrogation and then participate in the bankruptcy for the compensation due on the abrogation. While article 631 does not clarify what may be regarded as ‘personal considerations’, it does imply that valid and binding contracts entered into by a bankrupt party (prior to its bankruptcy) do not become ineffective by the mere fact of bankruptcy of that party.

In the event that security is to be enforced through the Omani courts, the cost of the proceedings would include the filing fees, which would be the equivalent of 2 per cent of the value of the asset of which possession is required to be taken, with a maximum cap of 3,000 Omani rials. Legal counsel fees would be chargeable on the basis of the time spent or such other arrangements as may be agreed by the mortgagee with the legal counsel. The court may also appoint other experts it considers necessary for assisting it in taking possession of the aircraft, conducting any investigations, examinations of the aircraft and for the storage of the aircraft until such time that the relevant orders have been issued.

It may also be noted that under the Commercial Companies Law of Oman (Royal Decree No. 4/1974) the liquidator of a company enjoys general powers to take actions and measures to preserve the interests of the company. Under the bankruptcy provisions of the OCL, which also apply to companies, the receiver or trustee in bankruptcy enjoys powers to take actions for furthering the interests of the creditors of the bankrupt as a group. It is possible that in the exercise of such powers, the liquidator or receiver or trustee in bankruptcy of the owner may seek to deny the rights of the mortgagee in favour of the creditors of the owner as a group, in which case the mortgagee would need to initiate legal proceedings in Oman against any such action of the liquidator or receiver or trustee in bankruptcy by which it may be aggrieved. In this regard, article 614 of the OCL allows a person to recover from the bankrupt party specific items to which he is able to prove his ownership. The receiver or trustee in bankruptcy is, however, not permitted by article 614 to hand over the item sought to be recovered without the permission of the court supervising the bankruptcy. In case the receiver or trustee in bankruptcy refuses to hand over the item whose recovery is sought, the dispute may be referred to court.

If, however, the interests of the mortgagee are registered as international interests under the Convention and the Protocol, the mortgagee should be able to assert its remedies on insolvency as provided for under the Protocol in order to obtain possession of the aircraft, subject to rights having priority as a matter of Omani law and declared as such by Oman in relation to the Convention and the Protocol.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Liens and rights with priority over aircraft

Under article 9 of the Aviation Law, the following rights shall have a lien over an aircraft and any such claims shall be settled or paid from the price of the aircraft according to the order listed hereunder, with priority over other debts even if they are preferred debts or secured by mortgage, with the exception of judicial disbursements:

• debts due to the Aviation Authority and other government departments;
• costs of aircraft rescue and any extraordinary costs of preserving it;
• compensations payable for injury that the aircraft causes to others on the ground, whether the injury was caused by the aircraft itself or by a person or an object falling from it, unless the aircraft owner or operator has covered such injuries by insurance for the benefit of the injured parties that covers the value of the due compensation in that case, or 20 per cent of the value of the aircraft when new or the lower of the two values; and
• debts incurred on the last flight that the aircraft had made or almost made before it was forcibly sold, as a result of the cost of repairs or maintenance, or arrival or departure or supply with fuel or oils or with the needs of its passengers or crew of food or consumer goods.

While article 9 of the Aviation Law states that the rights referred to therein shall be recoverable from the price of the aircraft, it does not expressly provide the holders of those rights to sell the aircraft directly. The holders of such rights would therefore need to initiate legal proceedings before Omani courts for an enforcement of their rights.

Confiscation

Under article 134 of the Aviation Law, the courts of Oman may order the seizure of an aircraft involved in any of the following offences (which may result in the owner or mortgagee being deprived of its title to the aircraft):

• displaying incorrect nationality or registration marks, or not displaying either of these marks; or
• transportation by the aircraft owner or operator of weapons, war ammunitions, explosives, firecrackers or other materials of war or nuclear materials or nuclear isotopes, or X-rays, or poisonous gases, or bacterial substances or other hazardous goods with the purpose of smuggling or committing a crime that affects the security of Oman.

Other than the above, neither the Aviation Law nor the Executive Regulations provide for any circumstances in which an owner or mortgagee may be deprived of its title to an aircraft.

Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Income tax

The tax rates applicable to all companies incorporated in Oman (save for petroleum exploration companies), including branches of foreign entities and permanent enterprises, is currently 12 per cent on taxable income in excess of 30,000 Omani rials per tax year.

Article 35 of the Income Tax Law, issued by Royal Decree No. 28/2009 (the Tax Law), defines income, whether in cash or in kind, to include, among other things, remuneration for lease, utilisation of property, machinery or other fixed or moveable assets. A lessor would need to obtain specialist tax advice on whether or not the income to be derived by it under any particular aircraft lease would be subject to income tax.

Subject to limited exceptions, foreign corporate entities are taxed in Oman only if they have a permanent establishment or are deemed to have a permanent establishment in Oman within the meaning of article 2 of the Tax Law. If a foreign corporate entity has no branch office or other legal presence in Oman which may fall within the definition of a permanent establishment under the Tax Law, it should not be liable to corporation tax in Oman. The mere fact that a lessor is registered as such in the Aircraft Register would not, in and of itself, result in that lessor becoming liable to pay any corporation tax in Oman.
It is noteworthy that the tax authorities in Oman have usually interpreted the term ‘permanent establishment’ broadly. Contracts that require limited visits to Oman have resulted in a permanent establishment for a foreign entity, notwithstanding that the foreign entity is not registered in Oman and that such limited visits may not constitute a presence of a permanent nature. Also, if a foreign entity sends people to Oman to carry out activities from which income is derived for that foreign entity then this has also been regarded by the Oman tax authorities as being evidence of a permanent establishment having been created by the foreign entity (article 2 of the Tax Law refers expressly to consultancy or other services being undertaken in Oman through workers under the control of a foreign entity as included within the meaning of a ‘permanent establishment’ where such services are provided for a period of 90 days or more in any year). Therefore foreign entities will need to exercise a degree of caution in relation to any ‘wet’ aircraft lease entered into with an Omani nexus. Wherever possible, if a foreign company intends to provide services from outside Oman, it should do so on an arm’s-length basis.

Withholding tax

Article 52 of the Tax Law provides for payment of withholding tax only on royalties, remuneration for conducting research and development, remuneration for using or the right to use computer programs and considerations for management services. Withholding tax is payable at the rate of 10 per cent. The Tax Department to date has not held interest on principal amounts or repayment of principal amounts to overseas lenders as being subject to withholding tax, however, payment of rent under a lease may be subject to the 10 per cent withholding tax if the lessor is a foreign entity without a permanent establishment in Oman. The obligation to pay withholding tax would fall on the debtor entity responsible for making the relevant payment that is to be taxed. As is common across most jurisdictions, gross up provisions are typically deployed where withholding tax might apply.

Transfers

There are currently no provisions under Omani law covering stamp duty, sales tax, VAT or other similar taxes so no such tax would be applicable on the transfer of an aircraft in Oman.

International tax treaties and tax relief

The Tax Law is to be read in conjunction with the tax treaties entered into between Oman with other countries. There are a number of tax and investment protection treaties in force in the Sultanate of Oman although some of these are limited in scope. Oman has entered into agreements for the avoidance of double taxation and the prevention of avoiding income tax with a number of countries including Algeria, Belarus, Belgium, Brunei, Canada, China, Egypt, France, India, Iran, Italy, Japan, Korea, Lebanon, Mauritius, Moldova, Morocco, Pakistan, Russia, the Seychelles, Singapore, South Africa, Sudan, Syria, Thailand, Tunisia, Turkey, the United Kingdom, Vietnam and Yemen.

It is noteworthy that many of the foreign airlines carrying on business through permanent establishments in Oman are exempted from income tax in Oman by virtue of such double taxation agreements. By way of example, article 8.1 (Shipping and Air Transport) of the double tax agreement entered into by Oman separately with each of Singapore, the United Kingdom and Canada provides that profits of an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that Contracting State. In addition, even where double taxation agreements are not in place with a particular country, some foreign airlines which earn income through establishment in Oman are exempted from tax in Oman by virtue of reciprocal tax exemptions granted in the foreign airline’s native country. Such exemptions are currently in place with a number of countries including India, Iran, Jordan, Kuwait, the Netherlands, Singapore, Sri Lanka, Sweden, Switzerland and Tanzania.

Import duty

On 9 November 2000, Oman became a fully fledged member of the World Trade Organization (WTO), and as part of the agreements signed to effect its membership Oman committed to limit or abolish a number of import duties. In accordance with the WTO agreements, import duty on aircraft and parts was initially reduced to 5 per cent and was later further reduced to its current level of zero per cent.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Under the Banking Law, the Central Bank of Oman is responsible for issuing exchange control regulations as and when necessary. Currently there are no exchange controls in force in Oman (save for certain restrictions on the foreign currency holdings of commercial banks), and judgment monies, sale proceeds and insurance proceeds, once obtained, should all be freely remittable abroad from Oman.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Default interest provisions should be dealt with as a matter of contract, and such provisions are commonly inserted in loan agreements put in place by Omani banks. The OCL also recognises default interest provisions. As a more general point, the usual remedy before the Oman courts is damages for loss, and it is possible that a default interest provision may be vulnerable to the argument that such a provision is not compensating for any actual loss suffered and is in the nature of a pure penalty. In our experience, however, default interest provisions are generally enforceable.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Bringing in

Pursuant to article 15 of the Aviation Law, subject to limited exceptions, aircraft operating in Oman shall be subject to the following conditions:

- they shall hold a valid registration certificate pursuant to the provisions of Annex VII to the Chicago Convention;
- their airworthiness certificate and noise level authorisation certificate shall be valid and issued or approved by the state where the aircraft are registered, in accordance with the prescribed international Standards and Recommended Practices;
- they shall display the their nationality and registration marks in accordance with the relevant international rules and regulations;
- they shall be fitted with the prescribed equipment and appurtenances;
- members of the piloting team shall possess valid permits issued by the Civil Aviation Authority in the country where the aircraft is registered; and
- they shall be insured under a policy covering its crew, passengers and third parties on the land surface, in accordance with the relevant rules.

Please also see question 6 (which outlines costs associated with registration and operation of an aircraft in Oman) and question 25 (which outlines the current position with respect to import duty on the importation of aircraft and parts into Oman). There will also be other incidental costs payable by the applicant in complying with the requirements of article 15 of the Aviation Law (for example, obtaining various permits and ensuring adequate insurance).

Taking out

Unless the aircraft is being exported out of Oman in accordance with the provisions of the Cape Town Convention and the Protocol, an application will need to be made to the Aviation Authority to cancel the registration of the aircraft (see question 12 above for further details on the deregistration process). There is no fee prescribed for deregistration of an aircraft from the Aircraft Register. An export certificate of airworthiness from the Aviation Authority would also be required in order to export the aircraft out of Oman. Pursuant to article 6.3(b)(f)(g) of CAN 1-06, the fee payable by the applicant for the issuance by the Aviation Authority of an export certificate of airworthiness is six (Omani rials per 100kg of maximum permissible ramp weight of the relevant aircraft. No other taxes or fees have been specified under the Aviation Law or the Executive Regulations in respect of the export or repossessing of aircraft.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Article 57 of the Insurance Companies Law of Oman (Royal Decree No. 12/1979, as amended) (the Insurance Law) prohibits the government, public companies, companies in which the government is a shareholder, and natural and juristic persons registered on the Commercial Register maintained at the Ministry of Commerce and Industry from entering...
into insurance contracts (except for life insurance contracts) with foreign insurance companies which are not licensed to conduct insurance business in Oman. Article 51 of the Insurance Law allows foreign insurance companies operating in the Sultanate of Oman, through an agency, branch office or subsidiary unit, to engage in insurance related activities in Oman subject to the conditions, provisions and requirements set out in Ministerial Decision 5/80, as amended. It follows that if the party responsible for insuring an aircraft is registered on the Commercial Register at the Ministry of Commerce and Industry it would not be open to that entity to meet its insurance obligations by placing its insurance with a foreign insurer unless that foreign insurer has a branch or subsidiary registered in Oman that satisfies the requirement of article 51 of the Insurance Law.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Commercial practice in Oman in terms of policy wording conforms to industry practices internationally. Arrangements such as cut-through clauses are widely used.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Reinsurance is generally regulated by the issuance of Ministerial Decisions of the Capital Market Authority, issued pursuant to the Insurance Law. Invariably, national insurance companies will reinsure the risk assumed by them under insurance policies with overseas reinsurance companies. In such circumstances, lenders have typically entered into assignment of insurance proceeds under the reinsurance policies directly with the reinsurers and provided for such assignments to be governed by English Law or such other foreign law as is found to be acceptable to the lenders.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Article 51 of the Aviation Law provides that the lessor of an aircraft shall undertake to handover the aircraft in a good and airworthy condition to the lessee, and shall also maintain and conduct the necessary technical inspections, unless agreed otherwise. Furthermore, article 52 of the Aviation Law states that, subject to the rights of the lessor to refer to whoever is responsible for the damage, the lessor shall be responsible for damage resulting from defects in the aircraft, unless such damage is caused by hidden manufacturing defects or is a result of force majeure events.

In relation to leasing of aircraft capacity, pursuant to article 57 of the Aviation Law the lessor is also responsible to the lessee for any defect in the aircraft that requires payment of compensation due to any damage that may be caused as a consequence thereof (other than damage caused by hidden manufacturing defects, by an error by the pilot-in-command or by crew members).

Under article 112 of the Aviation Law, the owner or the lessee in whose name the aircraft is registered may be liable to pay compensation to any person suffering injury on the ground due to an aircraft while in flight or by a person or object falling from it, unless they can prove that the aircraft operator is a different person, in which case they are required to take all necessary measures to have the aircraft operator joined in the lawsuit as a party. Note that for the purpose of liability which may arise under Article 112, an aircraft is considered to be in flight from the moment its engines start lifting it from the ground until the moment it has completely landed.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Please see question 32.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?

No.
Panama

Maria de Lourdes Marengo
Patton, Moreno & Asvat

Overview

1. To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?
Panama is not a signatory to the Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

Panama has ratified the Chicago Convention (1944) on International Civil Aviation, the Geneva Convention on International Recognition of Rights in Aircraft (1948), the Cape Town Convention (2001) and the New York Convention of 1958 (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

2. What is the principal domestic legislation applicable to aviation finance and leasing?
Aircraft finance and leasing are governed by Decree Law 2 (1955), which regulates mortgages on chattel property; Law 129 (2013), which modernises the law of mortgages on chattel property; Law 21 (2003) on Civil Aviation; Law 29 (2003) which adopts the Cape Town Convention; the provisions of the Civil Code and the Commerce Code of the Republic of Panama and the administrative practices observed by the Civil Aeronautics Authority (AAC).

3. Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it was registered the relevant applicable law?
Purchase contracts and aircraft mortgages would be deemed acts of commerce and the parties thereto may choose the applicable law to govern the terms thereof. However, the laws of Panama govern the title and mortgage with respect to particular requirements which should appear therein, as well as their registration and the effect thereof. The courts of Panama generally uphold choice of law clauses, but may refuse to enforce terms which are contrary to public policy in Panama.

Title transfer

4. How is title in an aircraft transferred?
Title is transferred by execution of a purchase agreement or a bill of sale between seller and buyer. However, such transfer does not affect third parties until the corresponding document is translated into Spanish by a Panamanian certified public translator if executed in another language, protocolised and filed with the Public Registry in Panama.

5. What are the formalities for creating an enforceable transfer document for an aircraft?
The purchase contract or the bill of sale, and acceptance thereof as applicable, should be translated into Spanish by a Panamanian certified public translator if executed in another language, protocolised and registered at the Public Registry together with a certificate of appraisal issued by the AAC. Thereafter the following documents must be filed with the AAC:
- evidence of registration of the purchase contract or bill of sale with the Public Registry;
- a certificate of cancellation from the previous registry;
- a certificate from the Public Registry showing that the interested party is a valid legal entity in existence, together with the name of its legal representative in respect of companies organised in accordance with the laws of Panama. If the owner is a foreign entity, it must file an official certificate of existence from its place of incorporation; and
- a power of attorney in favour of a law firm in Panama to execute the required documents and complete registration proceedings.

All documents coming from abroad must be certified by a notary public. The notary must state that the signature is authentic and that, pursuant to sufficient evidence provided to him, the party signing is duly authorised to sign on behalf of the company. Thereafter, the signature of the notary must be certified according to the 1961 Hague Convention on the apostille or by a Panamanian consul in the place of issuance.

Once the information provided by the applicant has been verified by the AAC, the aircraft will be assigned its registration marks. Thereafter the interested party should complete various technical and legal requirements to obtain its certificate of registration, such as the issuance or validation of a certificate of airworthiness, as well as the payment of the relevant registration fees.

The AAC may issue a provisional certificate of registration if the owner of the aircraft demonstrates that proceedings have been initiated in order to conduct registration of ownership at the Public Registry.

Registration of aircraft ownership and lease interests

6. Identify and describe the aircraft registry.
The AAC is responsible for directing and regulating air transportation services in Panama. It maintains a National Aeronautical Registry where all aircraft with Panamanian registration marks are recorded. Such Registry maintains records of both owners and operators.

In addition, the Public Registry of the Republic of Panama has an Aeronautical Section where titles, leases and mortgages on aircraft must be registered in order to make them effective against third parties.

There are 83-bis arrangements in place between Panama and other jurisdictions.

There is no specific engine register. However, there is a section of mortgages on chattel property at the Public Registry, where mortgages on engines are registered together with the corresponding title.

7. Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessors’ interests in aircraft engines be registered?
Titles and leases over aircraft must be registered at the Public Registry and filed with the AAC. Title and lease agreements must be translated into Spanish by a Panamanian certified public translator if executed in another language, protocolised and registered at the Public Registry. Only the person that holds the title can be registered as owner. Once the title and lease are recorded with the Public Registry, these must be filed with the AAC for issuance of the definite registration certificate that will show the title holder as owner and the lessee as operator.

There is no engine registry, but it is possible to register title on engines when registering a mortgage on engines at the section of mortgage on chattel property of the Public Registry.
8 Summarise the process to register an ownership interest.
Generally, a mortgage on an aircraft will cover the parts and engines incorporated therein whether they are present or future accessories or improvements. Ownership on engines capable of individualisation and determination can be mortgaged separately. The title and the mortgage over the engine must be translated into Spanish by a Panamanian certified public translator if executed in another language, processed and filed with the Public Registry for registration. If the documents are issued abroad, the notarisation and legalisation requirements stated in question 5 apply.

The registration fees are US$100 for review by the Public Registry, plus US$250 for each US$100,000 or fraction with a cap of US$4,200. Additionally, notarial fees in the amount of US$14 per page and translation fees based on the length of the document apply.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?
Registration constitutes proof of title. Third parties may rely on the public records, as according to the Aviation Law, title, leases and mortgages become effective against third parties as of the time these are filed with the Public Registry. Law 129 of 2013, which modernises the mortgages on chattel property, provides that the mortgage is effective against third parties as of the date of registration. Regulation of Law 129 is pending and will hopefully clarify whether the mortgage will affect third parties as of the date of filing or the date of registration at the Public Registry.

10 Summarise the process to register a lease interest.
Lease interests can be recorded with the Public Registry. The lease agreement, evidence of the existence of lessee and lessor, and the corresponding corporate authorities must be translated into Spanish by a Panamanian certified public translator if executed in another language, and processed and filed with the Public Registry.

Documents executed abroad must comply with the notarisation and legalisation requirements stated in question 5.
The registration fees are US$100 for review by the Public Registry, plus US$250 for each US$100,000 or fraction. Additionally, notarial fees in the amount of US$14 per page and translation fees based on the length of the document apply.

11 What is the regime for certification of registered aviation interests in your jurisdiction?
Records at the Public Registry and the AAC reveal complete details in respect of the ownership of the aircraft, mortgages, leases and any judicial measures against the aircraft and a complete description of the aircraft, its marks and registration details.

Public Registry certificates are issued to any interested party, and contain at least the above-mentioned information.
Upon registration, the AAC issues a certificate of registration to the owner or operator showing the registration number, owner, operator and type of service.

When the mortgage on an engine is recorded at the Public Registry, it is possible to obtain a Public Registry certificate stating ownership and mortgage details.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?
The registration of an aircraft will be deleted, upon request, by an interested party (ie, the owner or operator) or as a matter of course by the AAC whenever:
- it is requested by the owner or operator of the aircraft;
- the ACC authorises registration of the aircraft in another country, which will occur whenever the aircraft is free of any limitation or encumbrance or given the consent of its registered creditors;
- it is necessary to set the aircraft out of services;
- the ownership of the aircraft is going to be transferred to a person who is not qualified to register an aircraft in Panama;
- there is a total loss of the aircraft;
- the aircraft appears registered in another country; or
- in other cases as provided in the regulations.

Generally Deregistration Powers of Attorney are issued in favour of owner and mortgagee, and filed with the AAC in order to facilitate deregistration. Accordingly, in principle the lessee or operator should not be able to block deregistration.

13 What are the principal characteristics of deregistration and export powers of attorney?
Deregistration Powers of Attorney enable the owner or mortgagee to freely deregister and export the aircraft. Panamanian commercial and aviation law do not expressly regulate whether powers of attorney may be irrevocable. Panamanian shipping law expressly recognises irrevocable powers of attorney. In practice, irrevocable powers of attorney are widely used in aviation.

Powers of attorney may be issued to more than one attorney.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.
IDERAs are filed with the AAC. The form of IDERA used in Panama is not countersigned by the AAC. The IDERA is not recorded with the Public Registry. It is filed with the AAC. The AAC has no preferred way of dealing with financiers.

Security

15 What is the typical form of a security document over the aircraft and what must it contain?
The typical form of security over an aircraft is a mortgage. The mortgagor maintains the use and possession of the aircraft while mortgaged. It is possible to constitute several mortgages over an aircraft, provided that written notice is given to all prior mortgagees. There is no specific form. The mortgage must be translated into Spanish by a Panamanian certified public translator if executed in another language, and must include the full names and details of the parties and their representatives, the economic terms including the maximum amount secured, the interest agreed, the manner in which payments will be made, a complete description of the mortgaged aircraft indicating its value, the place where the aircraft will be located and any other lawful conditions agreed to by the parties.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?
The mortgage, evidence of the existence of mortgagor and mortgagee, and the corresponding corporate authorities must be translated into Spanish by a Panamanian certified public translator if executed in another language, and processed and registered with the Public Registry.

Documents executed abroad must comply with the notarisation and legalisation requirements stated in question 5.

The registration fees are US$100 for review by the Public Registry, plus US$250 for each US$100,000 or fraction with a cap of US$4,200. Additionally, notarial fees in the amount of US$14 per page and translation fees based on the length of the document apply.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties?
Summarise the process to register a mortgage interest.
According to the Aeronautical Law, the mortgage is valid between the parties as of the time of execution but must be recorded with the Public Registry in order to be effective against third parties. The law of Mortgages on Chattel Property provides that the mortgage will be effective against third parties as of the date of registration with the Public Registry. This discrepancy must be resolved in pending regulations. Registration can be achieved within five to 10 days. Registration may be expedited if fast-track registration fees in the amount of US$500 are paid. The mortgage will remain valid throughout the term of the mortgage.

18 How is registration of a security interest certified?
Public Registry certificates and AAC certificates confirming title, leases, mortgages and operators can be obtained as stated in question 11. Other security interests cannot be registered in Panama.
19 What is the effect of registration as to third parties?
It is not possible to register other security interests in Panama.

20 How is security over aircraft and leases typically structured?
What are the consequences of changes to the security or its beneficiaries?
Security over an aircraft is constituted through mortgages. Any changes to the mortgage must be filed with the Public Registry in order to be effective against third parties. The aircraft mortgage creates a right in rem. Trusts are recognised and regulated in Panama as a contractual arrangement and commonly used in finance transactions. Generally a trust is created and the security trustee acts as mortgagee. The trust does not need to be registered and accordingly changes to the beneficiaries of the trust do not require registration.

21 What form does security over spare engines typically take and how does it operate?
Generally, a mortgage on an aircraft will cover its accessories and improvements, such as spare parts and engines incorporated therein, whether they are present or future accessories of improvements. Engines and other spare parts capable of individualisation and determination and able of being sufficiently identified can be mortgaged separately from the aircraft.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?
Upon an event of default under the lease, the lessor would have to initiate either ordinary or special judicial proceedings to repossess the aircraft. Panamanian law does not recognise self-help remedies.
The termination of the lease must be recorded with the Public Registry and filed with the AAC, and the certificate of operation of the aircraft with lessee as operator must be cancelled. There are no other non-contractual procedures or requirements that apply to lease termination.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?
The mortgagee may pursue either executive or special judicial proceedings for the enforcement of its rights under the mortgage.
If the debtor has repaid at least one half of the loan, the court will decree the sale of the aircraft in accordance with the terms of executive proceedings, save that there will only be one auction and the base amount will be the sum owed plus costs and expenses. If there is no bidder willing to pay the price, the aircraft will be adjudicated to the mortgagee. The obligations arising under the mortgage are extinguished by the judicial sale.
If the debtor has paid less than one half of the amount owed, the aircraft will be adjudicated to the mortgagee and the obligation secured will be extinguished. The debtor may, within 10 days after being notified of the sale, request the sale of the aircraft to a party other than the mortgagee, provided that it deposits with the court an amount sufficient to cover the expenses of the sale, and satisfies the court that it will pay the balance owed in the event that the sale price does not cover the amount owed. If the mortgagee allows the mortgagee to take possession and administer the aircraft, the court may allow the mortgagee to take over the administration of the aircraft pending its judicial sale.
When the parties agree in the contract to an extrajudicial execution, they must appoint a legal representative who must take the necessary steps to notify the execution to the mortgagee. Once the mortgagee receives the notice of execution, he may deliver the aircraft to the mortgagee or file an opposition to the execution process.
In the case of extrajudicial execution, the value of the aircraft will be fixed by an expert appraiser appointed jointly by both parties in the contract or in a later agreement. The aircraft may be detained by way of an ex parte application. The mortgage has priority over other creditors rights except for those listed in question 24.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?
According to the Aeronautical Law the following claims have priority over all other claims:
- national taxes over the aircraft;
- aircraft mortgage;
- the salaries and other social benefits due to the crew; and
- the amounts owed to the air transport sector on account of the operations of the aircraft in its last flight.
The priority among several mortgages on the aircraft will be determined by the date of registration at the Public Registry.
Furthermore, Panama has made the following declaration in respect of article 39 of the Cape Town Convention:
In respect of article 39 of the Convention, the following non-consensual rights and interests shall prevail over an international interest registered in accordance with the Convention:
- any sums due and from or capable of being demanded from the debtor by way of salaries, pensions and other social security benefits and employment allowances owed in respect of employees of that debtor;
- any sums due from or capable of being levied from the debtor by way of fiscal and parafiscal contributions owed in respect of employees of that debtor;
- any sums due or capable of being levied from the debtor, by way of taxes, duties or contributions payable to the Panamanian state or to the decentralised bodies that collect such revenue, in accordance with Panama’s internal laws;
- the right of Panama to arrest, attach or confiscate mobile equipment and aircraft equipment in the event of breach of the customs or criminal laws of Panama; and
- courts’ costs in connection with the foreclosure of the mortgage, and national taxes over the aircraft.

These different priorities may create a conflict of laws which would have to be resolved by the Panamanian Judicial Branch once a case of this nature is presented.
Executive interference concerning expropriation or requisition of aircraft (or other property) is rare in Panama. The Panamanian Constitution expressly provides for the confiscation, or expropriation, of private property in the event of war, national catastrophe or suspension of constitutional rights. The government could decree the requisition of an aircraft upon payment of compensation.
In the event that an aircraft is mortgaged or attached, the amount of compensation for the expropriation thereof would be deposited with the National Bank and creditors would be notified of the proper action to be taken in respect thereof.

Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

ITBMS tax
Panamanian law taxes provide for a specific tax for transfer of chattel property and services (ITBMS), which is applied to those assets transferred or services provided in the territory of Panama. This is regardless of the place where the contract has been entered into or the place where payment is made. ITBMS tax would apply for the sale of aircraft located within the territory of Panama.
Under general tax provisions, lease contracts are considered a service rendered by lessor and thus are subject to the ITBMS tax.
Currently the applicable ITBMS rate is 7 per cent.

Income tax
Payments made by the lessee to the lessor and payments made by mortgagee to mortgagee are subject to income tax. The applicable corporate tax rate is of 25 per cent of net taxable income.

Withholding tax
Payments made by the lessee or mortgagee to a non-domiciled lessor or mortgagee pursuant to a lease or a mortgage of an aircraft economically
used within Panama, or by a local operator for international transporta-
tion, are subject to a withholding tax of 30 per cent of the applicable tax
rate on 100 per cent of the amounts credited to the non-domiciled les-
sor, unless reciprocity agreements are in effect between Panama and the
country of the lessor. The United States has a tax reciprocity agreement
(exchange of notes) with Panama, whereas the gross income derived from
lease or mortgage payments of aircraft engaged in international transpor-
tation are exempt from income tax.

Import tax
Aircraft operators engaged in public transportation services or aviation-
related business are exempt from import taxes on aircraft and spare parts
including engines.

Gross-up provisions are not enforceable.
Tax liability may be minimised when double taxation treaties are in
effect between the countries of the parties.

26 Are there any restrictions on international payments and
exchange controls in effect in your jurisdiction?
There are no restrictions on the remittance of funds abroad from Panama
or exchange controls. No central bank or official consents are required.

27 Are there any limitations on the amount of default interest
that can be charged on lease or loan payments?
There are no limitations on the amount of default interest that can be
charged on a lease or loan.

28 Are there any costs to bring the aircraft into the jurisdiction or
take it out of the jurisdiction? Does the liability attach to the
owner or mortgagee?
For import taxes refer to question 25. There are no restrictions on the export
of aircraft from Panama.
Under Panamanian law an aircraft may be detained, and in some cases
sold, by public authorities for liens created by the operator, or for failure
to comply with legal requirements, or when the aircraft is used in illegal
activities, or in the case of war, national catastrophe or suspension of con-
stitutional rights.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction
as applicable to aviation.
International aircraft carriers and airport concessionaires are obligated to
obtain insurance coverage for damages to third parties on the ground, crew
members, passengers and any other parties that may suffer harm as a result
of their operations.
Maritime insurance regulations are also applicable to aviation insur-
ance, to the extent that they are pertinent and compatible.

Pursuant to article 153 of Law 12 on Insurance (2012), it is mandatory
for entities, companies and persons domiciled in Panama to enter into
contracts with insurance companies authorised to do business in Panama
with respect to all insurance on assets and persons located in Panama.
Foreign insurers may not cover assets or persons located in Panama, unless
there is a fronting arrangement with a local insurance company or if any of
the following exceptions apply:
- there is a breach of any treaties or international agreements entered
  into by the Republic of Panama;
- the insurance coverage does not exist in the Republic of Panama; or
- it is impossible to obtain insurance due to rejection of coverage by the
  licenced insurers in Panama.

The superintendent, prior to verification that it is not possible to obtain
such insurance in Panama, may authorise its contracting abroad if all legal
requirements are fulfilled, among which, the withholding and payment of
income tax as provided by the Fiscal Code. The companies, entities or
persons must register the authorisations granted in this connection with the
Superintendent.

Reinsurance may be placed with local or foreign licenced reinsurers.
Under Panamanian law, captive insurance may apply to any foreign
risks, including aviation-related risks. Captive insurance activities under-
taken in Panama may not cover risks located in Panama.

30 Are cut-through clauses under the insurance and reinsurance
documentation legally effective?
Cut through clauses are permitted under freedom of contracting principles
of Panamanian law.

31 Are assignments of reinsurance (by domestic or captive
insurers) legally effective? Are assignments of reinsurance
typically provided on aviation leasing and finance
transactions?
Assignments of reinsurance are legally effective and are typically provided
on aviation leasing and finance transactions.

32 Can an owner, lessor or financier be liable for the operation of
the aircraft or the activities of the operator?
An owner lessor is not liable for the operation of the aircraft or the activities
of the operator. However, the aircraft may be detained for enforcement of
liens or for acts of the operator.

33 Does the jurisdiction adopt a regime of strict liability for
owners, lessors, financiers or others with no operational
interest in the aircraft?
Panama does not create a regime of strict liability for owners, lessors or
financiers with no operational interest.

34 Are there minimum requirements for the amount of
third-party liability cover that must be in place?
According to the Aviation Law the indemnification that the carrier must pay is:

Maria de Lourdes Marengo: mmarengo@pmalawyers.com
Capital Plaza Building, 8th Floor
Roberto Motta Avenue
Costa del Este
PO Box 0819-05911
Panama
Tel: +507 306 9600
Fax: +507 263 7887
info@pmalawyers.com
www.pmalawyers.com
• for damages to passengers, 25,000 balboas;
• for loss, damage or destruction of hand luggage, up to 33.20 balboas; and
• for loss, destruction or breakdown of cargo or paid luggage, up to 24.75 balboas.

If the cargo or paid luggage is transported according to the declared value, and the interested party has paid the additional fees according to the company’s fee, the limit of indemnification will be the value declared.

The limits of liability provided in the former paragraph are not payable if it is proved that the damage is the result of an action or omission of the carrier or the operator or their dependants, with the intention of causing the damage, or recklessly or knowing that the damage would be caused; however in the case of an action or omission of the dependants, it is necessary to prove that these were acting in their duties as such.

The amount of compensation, subject to the preceding article, shall not exceed per aircraft event:
• 16,600 balboas per aircraft whose weight does not exceed 1,000kg;
• 16,600 balboas plus 13.25 balboas per kilogram over 1,000kg for aircraft weighing more than 1,000kg and not exceeding 6,000kg;
• 82,850 balboas plus 8.3 balboas per kilogram over 6,000kg per aircraft whose weight is more than 6,000kg and does not exceed 20,000kg;
• 199,000 balboas plus five balboas per kilogram over 20,000kg per aircraft whose weight is more than 20,000kg; and
• 349,000.50 balboas plus 3,325 balboas per kilogram over 50,000kg for aircraft weighing more than 50,000kg;

Indemnification in case of death or injuries shall not exceed 25,000 balboas per death or injured person.

For the purposes of these provisions, weight means the maximum weight of aircraft authorised by the airworthiness certificate for take-off.
Overview

1. To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

The Philippines is a signatory to, and has ratified, the 1948 Geneva Convention on the International Recognition of Rights in Aircraft and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The Philippines is not a signatory to the 1933 Rome Convention for the unification of certain rules relating to the precautionary arrest of aircraft and the 1966 Cape Town Convention on International Interests in Mobile Equipment.

2. What is the principal domestic legislation applicable to aviation finance and leasing?

The principal domestic legislation applicable to aviation finance and leasing are Republic Act No. 386, otherwise known as the Civil Code of the Philippines, and Republic Act No. 9497, otherwise known as the Civil Aviation Authority Act of 2008 (the CAAP Law).

3. Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Under our Civil Code, personal property is subject to the law of the country where it is situated. This covers transactions involving sale, mortgage, barter, exchange, lease assignment, or any form of alienation relating to the personal property.

Philippine law also allows contracting parties to select a foreign law to govern their contract. The chosen law must also bear a substantive relation to the transaction. Philippine courts will generally respect such choice of law, as long as the foreign law is not contrary to law, morals, good customs, public order or public policy, and is not designed to evade some provisions of law of another jurisdiction having a close connection with the transaction contemplated therein.

While the choice of a foreign law as the governing law will generally be recognised by Philippine courts, such courts may, in disregard of the chosen law, apply the laws of the Philippines with respect to matters bearing upon the authority and capacity of any Philippine national to enter into and perform its obligations under the contract, in determining compliance of the contract with all requirements of governmental approvals in the Philippines, in determining compliance of the contract with the formalities required under Philippine law for the conveyance of, and the creation of security interests in, properties situated in the Philippines, and insofar as Philippine law may have a closer connection to the transactions contemplated therein.

Title transfer

4. How is title in an aircraft transferred?

The execution of a bill of sale, coupled with delivery, is effective to transfer title over an aircraft. Delivery may be accomplished by actual or real delivery, constructive or legal delivery, or delivery in any other manner signifying an agreement that the possession is transferred to the buyer.

5. What are the formalities for creating an enforceable transfer document for an aircraft?

The transfer document should state: the interest in the aircraft of the person by whom such conveyance is made or executed and the interest transferred by the conveyance.

In addition to being in writing, the transfer document must also comply with the formal requirements for documents similar to conveyance of an interest in land (ie, initialled on each page, notarised following a specific notarial attestation format).

Any conveyance affecting title to or interest in any Philippine-registered aircraft or any portion thereof must be recorded with the Civil Aviation Authority of the Philippines (the CAAP) in order to be valid and effective against third persons (section 49, CAAP Law).

If executed abroad, the transfer document should be consularised at the Philippine consulate in the jurisdiction where it was signed. The CAAP will also require documentation showing the authority of the persons who executed the transfer document (eg, special power of attorney, a board resolution or an equivalent corporate authorisation).

Registration of aircraft ownership and lease interests

6. Identify and describe the aircraft registry.

The aircraft registry is maintained by the CAAP, which has a broad range of powers and functions including the duty to operate as the sole and exclusive registry for aircraft, aircraft engines, as well as liens and security interests thereon. There is no separate engine registry in the Philippines.

The CAAP registry is an operator registry. The CAAP Law provides that, except as otherwise provided in the Philippine Constitution and existing treaty or treaties to which the Philippines is a party, no aircraft shall be eligible for registration in the Philippines unless it is owned by or leased to a citizen of the Philippines or corporations or associations organised under the laws of the Philippines at least 60 per cent of whose capital is owned by Filipino citizens (section 44, CAAP Law). Thus, the nationality of the owner or the operator is the principal factor in determining which entity will be issued the Philippine certificate of registry. The owner of the aircraft (if not qualified to be the entity named in the aircraft registry) may still record its interest in the aircraft register and cause the annotation of the Philippine certificate of registry to reflect such interest.

The Philippines has entered into a delegation agreement with Ireland on the implementation of article 83-bis of the Chicago Convention, or the Convention of International Civil Aviation.

7. Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners, operators and lessees’ interests in aircraft engines be registered?

As mentioned under question 6, an ownership or lease interest in an aircraft may be entered in the CAAP registry. Interests in aircraft engines, whether as owner, operator, or lessee, may likewise be registered.

8. Summarise the process to register an ownership interest.

For registration of an aircraft with the CAAP, a deregistration fax and e-mail have to be issued by the former registry, if any. A proper application for the issuance of the Certificate of Registration is made in writing, signed
and sworn to by the owner, ie, notarised (if eligible) or lessee of any aircraft eligible for registration. The application shall state the date and place of filing, specification, construction and technical description of the aircraft and such other information that may be required by the CAAP. A standard application form is available from the CAAP.

The application for registration is filed with the CAAP Engineering and Registration Division, Airworthiness Department and Flight Standards Inspectorate Service.

The supporting documents that must be attached to the initial Certificate of Registration application form are as follows:

- documentary evidence of ownership or for leased aircraft, notarised duplicate signed copy of the lease agreement (if the lease agreement is signed outside the Philippines, it must be notarised and consularised at the Philippine consulate in the jurisdiction where it was signed);
- special power of attorney or equivalent document such as a board resolution authorising the applicant to sign on behalf of the applicant owner or lessee;
- customs clearance or tax exemption (if applicable), customs release or payment;
- certificate of non-registration, if factory new;
- official receipt, payment of registration fee (which depends on the gross weight of the aircraft);
- official receipt, payment of recordation fee of 400 pesos;
- CAAP Accounting Clearance;
- assignment of registration number or RP-C number (note: the applicant must reserve a registration number which must be used within 90 days, otherwise the reserved registry number is deemed automatically cancelled if not used within that specified period);
- constitutive documents of the applicant owner or lessee; and
- certified true copy of the aircraft’s certificate of insurance.

Additionally, for aircraft for hire to the general public, the following must also be submitted:

- Civil Aeronautics Board (CAB) permit or approval; and
- air operator certificate.

The CAAP may require the submission of additional supporting documents. If the CAAP Director General, upon considering the application for registration, finds that the aircraft is eligible for registration, such aircraft shall be registered and a Certificate of Registration will be issued.

As a general rule, title to engine is presumed to vest with the owner of the aircraft, unless title to the engine is specifically claimed by a different party, and a separate certificate of engine registration is sought from the CAAP.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration of an ownership interest in an aircraft is considered as proof of title that is binding on third parties. Third parties may rely on the accuracy of such registration.

10 Summarise the process to register a lease interest.

An aircraft may also be registered in the name of a lessee, who is a citizen of the Philippines or a corporation or association organised under the laws of the Philippines at least 60 per cent of whose capital is owned by Filipino citizens. The timing, prescribed forms, supporting documents and other requirements for the registration of a lease interest and issuance of a Certificate of Registration in the name of a lessee is the same as that for an owner. See question 8.

See also question 5 with respect to the formalities for the lease agreement, to qualify for registration with the CAAP.

A minimal recording fee of 400 pesos is charged for registration of the lease with the CAAP.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

The CAAP is the sole and exclusive registry for aircraft, aircraft engines, as well as liens and security interests thereon. Any and all interests registered with the CAAP must be annotated on the Certificate of Registration of the aircraft to bind third parties. Certification of registered aviation interests is accomplished through the issuance by the CAAP of a certified true copy of the Certificate of Registration of the aircraft.

Certificates of Registration for aircraft recorded in the CAAP reflect the following:

- type of registration (whether original, renewal or transfer);
- usage (whether for air commerce or general aviation);
- nationality and registration marks;
- name of manufacturer and designation of aircraft;
- aircraft serial number;
- gross weight of the aircraft;
- name of owner or operator;
- address of owner or operator;
- date of issue;
- fees paid and the official receipt number pertaining to the payment; and
- leases, mortgages and encumbrances, if any, on the back page.

A separate engine certificate of registration may be issued by the CAAP. Conveyances affecting title to, or interest in, aircraft engines may also be recorded in the CAAP registry.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The appropriate party to apply for deregistration is the entity in whose name the aircraft is registered (ie, the owner (if eligible) or the lessee). To this extent, the owner or lessee (as may be applicable) must consent to the deregistration of the aircraft and, without such consent, the owner or lessee (as may be applicable) may block the proposed deregistration of the aircraft by a third party. On the other hand, the owner or lessee (as may be applicable) may delegate such power through a Special Power of Attorney in favour of a third party.

Deregistration will not be permitted without the consent of any recorded mortgagee or lessee, whose interests are recorded in the CAAP registry and annotated at the back of the Certificate of Registration of the aircraft.

13 What are the principal characteristics of deregistration and export powers of attorney?

The entity in whose name the aircraft is registered may delegate the power to apply for deregistration of the aircraft through a power of attorney in favour of a third party. The power of attorney creates an agency between the registered owner or lessee and the attorney-in-fact, who is provided with authority to represent the registered owner or lessee before the appropriate government agencies for the deregistration and exportation of the aircraft.

Our jurisdiction recognises the concept of an irrevocable power of attorney coupled with an interest if a bilateral contract depends on such agency, or if such agency is the means of fulfilling an obligation. The deregistration power of attorney is typically issued specifically to ensure the fulfilment of the lessee’s obligations under a lease (ie, the deregistration of the aircraft, among others, upon the termination or expiry of the lease).

In financing transactions, registered owners of an aircraft would also issue deregistration powers of attorney in favour of a security agent (or trustee, representing the interest of lenders).

A deregistration power of attorney may be granted in favour of more than one attorney-in-fact.

Under Philippine corporate law, no right or remedy against any corporation or any liability incurred by a corporation is impaired by the subsequent dissolution of the corporation and, thus, the power of attorney should survive such dissolution of the corporation.

Although not strictly a security interest over an aircraft which requires to be registered with the CAAP, the CAAP has allowed the registration of deregistration powers of attorney in our most recent transactions.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Philippines is currently not a party to the Cape Town Convention.
Security

15 What is the typical form of a security document over the aircraft and what must it contain?

A security document over the aircraft typically takes the form of a chattel mortgage. Under Philippine law, a chattel mortgage must sufficiently describe the mortgaged property and the secured obligation. A chattel mortgage can only cover obligations existing at the time the mortgage is constituted, and may refer to a determined principal amount and undetermined interest, penalties and other charges, by making reference to the principal financing document.

The chattel mortgage is typically written in English (being one of our official languages). For purposes of registration with the CAAP, the formal requirements similar to documents relating to a conveyance of land are also applicable. The chattel mortgage must be registered with the CAAP in order to bind third persons. If the chattel mortgage is not recorded, it is nevertheless binding as between the parties.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The formalities discussed in question 5 for conveyance of an interest are also applicable to security documents.

The CAAP collects a nominal fee of 400 pesos for every security document filed for registration.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

Yes. Any conveyance which affects title to, or interest in, an aircraft of Philippine registry, or any portion thereof (which includes a security document) must be recorded in the CAAP registry to be valid against third parties having no actual notice thereof. Although no period for the recordation of the security document is specified in the CAAP Law, it is recommended that the instrument be recorded promptly after execution.

To register a security interest over an aircraft with the CAAP, the security document must be filed and recorded in the registry of the CAAP and annotated on the rear portion of the Certificate of Registration. See question 15 for the formalities and other requirements.

Once registered, there is no requirement to periodically renew the registered security interests.

18 How is registration of a security interest certified?

After registration, a security interest is annotated on the rear portion of the Certificate of Registration of the aircraft. The CAAP does not issue a separate certificate or evidence of registration of the security interest. Upon written request of a third party conducting a search on an aircraft, the CAAP may issue a certified copy of the Certificate of Registration with all the annotations reflected at the back.

The annotation of the security interest does not state the rank or priority of such security interest.

19 What is the effect of registration as to third parties?

The registration of a security interest with the CAAP constitutes public notice to third parties and is valid and binding against all persons from the date of its recordation with the CAAP. Third parties may rely on the accuracy of such registration.

Generally, prior registration coupled with good faith, confers a better right over the aircraft in favour of the registered interest holder.

20 How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

The concept of trust is recognised in the Philippines. The typical security structure involves a security agent holding the security over the aircraft and leases in trust for a changing pool of beneficiaries. The registration of a security document with the CAAP operates as notice, and binds the lessee and third parties to its terms. In that regard, the security constitutes a right in rem.

The change in the identity of the beneficiaries in whose favour the security agent holds the assignment will not affect the security interest under a particular security document. On the other hand, a change in the person of the security agent would require a new registration and annotation process with the CAAP.

21 What form does security over spare engines typically take and how does it operate?

A security document over spare engines typically takes the form of a chattel mortgage. Please refer to the discussion under item no. 15 for the creation and registration of a chattel mortgage.

Unless otherwise stipulated by the parties, a security interest created over a financed aircraft generally covers the installed engines, on the assumption that the owner of the aircraft and the installed engines are one and the same entity. A security interest may, however, be created over an engine independently, whether installed or uninstalled, especially so if the engines are owned by an entity other than the owner of the aircraft.

Unless the parties stipulate otherwise, the removal of an engine or the installation of an engine on another aircraft will not cause the encumbrance on it to be discharged or lifted.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

No court proceeding is necessary if the lessee voluntarily relinquishes possession of the aircraft. However, in the event that the lessee refuses to voluntarily redeliver the aircraft to the lessor, judicial intervention will be necessary to forcibly take possession of the aircraft. The lessor may elect to file an action in the Philippines, or alternatively in a foreign jurisdiction.

Filing an action in the Philippines

The owner may file an action for replevin for the recovery of the aircraft, with an application for the issuance of a writ of replevin, which is a provisional remedy, relying on the termination of the lease as the lessor’s cause of action. Replevin, broadly understood, is both a form of principal remedy and of a provisional relief. It may refer either to the action itself, ie, to regain the possession of personal chattels being wrongfully detained from the plaintiff by another, or to the provisional remedy that would allow the plaintiff to retain the thing during the pendency of the action and hold it pendente lite. The action is primarily possessorial in nature and generally determines nothing more than the right of possession.

Upon filing of the case in court, the owner may include in the complaint an application for the immediate delivery of the aircraft to the owner while the principal action is still being litigated, upon a showing that the owner has good legal basis for seeking such interim possession and posting of a replevin bond equivalent to double the value of the property, intended to indemnify the lessee against any loss it may suffer by reason of it being compelled to surrender the possession of the aircraft pending trial of the action.

To impede the lessor’s remedy, the lessee may object in court as to the sufficiency of the bond or the sureties. The court may deny its objection or, if the objection is held to be valid, require the submission of a new bond. Alternatively, the lessee may submit to the court, copy furnished the lessor, a redelivery bond equivalent to double the value of the aircraft as stated in the lessor’s affidavit for the return of the aircraft to it.

Filing an action for enforcement of a foreign judgment in the Philippines

Instead of filing an action in the Philippines, the owner may file an action in a foreign tribunal and consequently, commence an action for recognition and enforcement of the foreign judgment in the Philippines with replevin as provisional remedy.

A final judgment may be enforced before a Philippine court without a rehearing on the merits, but such judgment may be repelled by evidence that such foreign court did not have jurisdiction in accordance with the jurisdictional rules of such court, the party against whom the judgment was rendered had no notice of the proceedings, or the judgment of such foreign court was obtained through collusion or fraud or was based on clear mistake of law or fact (section 48 of Rule 39, Rules of Court).
23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

The owner may resort to either judicial foreclosure of the mortgage or extrajudicial foreclosure as provided under Act No. 1508 (the Chattel Mortgage Law). In case of an extrajudicial foreclosure of mortgage on an aircraft, it must be supported by the billing statement from the non-resident lessor, is required to declare the same in writing and to furnish information thereof for domestic or international transport operations is exempt from exchange controls in effect in your jurisdiction?

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Yes, cross-border transfers of Philippine pesos and foreign currencies are regulated in the Philippines. Any person importing, exporting or bringing with him into or taking out of the Philippines, or electronically transferring, legal tender Philippine notes and coins, checks, money order and other bills of exchange drawn in pesos against banks operating in the Philippines in an amount exceeding 10,000 pesos must secure authorisation from the Bangko Sentral ng Pilipinas (our central monetary authority, BSP).

On the other hand, if personal property (eg, aircraft) produced outside the Philippines of the contract (BIR Ruling No. DA-512-04 dated 30 September 2004). Thus, if personal property (eg, aircraft) produced outside the Philippines is sold outside the Philippines, any income derived from the sale thereof will be considered as sourced outside the Philippines, and the seller, who is a non-resident foreign entity, will not be liable for Philippine income tax. On the other hand, if personal property produced outside the Philippines is sold in the Philippines – as when the sale is perfected and consummated while the aircraft is on the ground or in Philippine airspace – any income derived from the sale thereof will likely be considered as sourced in the Philippines, and the seller should be liable for Philippine income tax.

Generally, the assumption of tax by a party other than the taxpayer itself constitutes an additional income for the original taxpayer. The assumption of tax, absent any law expressly allowing it, consequently gives rise to tax (Old Colony Trust Co v Commissioner, 279 US 716).

In the Philippines, the franchise of airline companies may provide for tax relief with respect to Philippine source income of foreign lessors or lenders. As in the case of our national carrier Philippine Airlines, its legislative franchise provides that all taxes on lease rentals, interest, fees and other charges payable to lessors, whether foreign or domestic, of aircraft, engines, equipment, machinery, spare parts and other property rented, leased, or chartered the airline company are exempt from all taxes, where the payment of such tax is assumed by the airline. Cross-sup provisions in lease and loan agreements qualify as assumption of taxes otherwise payable by a foreign lessor or lender, allowing a local airline to avail of the tax exemption provided by its legislative franchise.

Under Philippine tax law, the sale, importation or lease of passenger or cargo vessels and aircraft, including engine, equipment and spare parts thereof for domestic or international transport operations is exempt from the value-added tax (section 109(1)(S), National Internal Revenue Code). Accordingly, no value-added tax should be payable.

Any other payments (not considered lease rentals and other than indemnification for actual losses incurred by a lessor) made to the lessee under the lease, which constitute Philippine-sourced income under Philippine tax laws, will generally be subject to a 30 per cent final withholding tax, in the absence of an applicable tax treaty.
**Update and trends**

A practical hurdle that has increasingly been confronted in recent transactions is the delay in the CAAP’s process of registration of documents. This is primarily owing to the bureaucratic process that characterises the CAAP’s procedures. Parties to transactions should be aware beforehand of this practical issue so that they take a commercial view of and manage risks that such delays may cause (e.g., conditions precedent periods to accomplish registration of security interest).

The BSP has implemented a market-oriented interest rate policy since 1983. The BSP has adopted the policy that the rate of interest, including commissions, premiums, fees and other charges, on a loan or forbearance of any money, goods or credits, regardless of maturity and whether secured or unsecured, that may be charged or collected by any person, whether natural or juridical, shall not be subject to any ceiling prescribed under or pursuant to the Usury Law, as amended (CB Circular No. 905, Series of 1982, effective on 1 January 1983).

Based on jurisprudence, our courts may adjust contractually stipulated interest and penalties if they are determined to be unconscionable.

28 **Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?**

Aircraft, equipment and machinery, spare parts commissary and catering supplies imported by and for the use of scheduled airlines operating under Congressional franchise, provided that such articles or supplies are not locally available in reasonable quantity, quality and price and are necessary or incidental for the proper operation of the scheduled airline importing the same are considered conditionally free imports, which are exempt from the payment of import duties, subject to the regulations to be promulgated by the Customs Commissioner (section 105 (u), Tariff and Customs Code).

29 **Summarise any captive insurance regime in your jurisdiction as applicable to aviation.**

By express provision of law, a Philippine entity is not allowed to procure or accept policies or contracts of insurance from any insurance company not authorised to transact business in the Philippines, covering risks, life or non-life, situated in the Philippines. However, this restriction for obtaining insurance coverage locally does not apply to reinsurance, and it is typical for local insurers to cede up to 98 per cent of insurance risk to their reinsurers, including foreign reinsurers.

30 **Are cut-through clauses under the insurance and reinsurance documentation legally effective?**

Cut-through clauses are generally valid under Philippine law.

31 **Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?**

Assignments of reinsurance are legally effective under Philippine law. Assignments of reinsurance are typically provided in aviation leasing and finance transactions we handle.

32 **Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?**

Being the entity in whose favour the CAB has issued permits to engage in air commerce or air transportation, the lessee is generally the party liable for the operation, maintenance and insurance of the aircraft.

The owner, lessor or financier will only be held liable for any damage caused by the aircraft to third parties due to its own fault or negligence (article 2176, Civil Code).

33 **Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?**

While Philippine law generally recognises the concept of strict or vicarious liability, such liability has generally not been applied to the lessor as owner or lender as secured party of the equipment for the action or inaction of the operator. Generally, the lessor or financier will only be held liable for any damage caused by the equipment to third parties through its own fault or negligence (article 2176, Civil Code).

34 **Are there minimum requirements for the amount of third-party liability cover that must be in place?**

Yes, no person may operate an aircraft unless it has a valid insurance guarantee covering aircraft hull, each person, freight and mail on board the aircraft, and third-party liability.
Portugal

Luís Soares de Sousa*
Cuatrecasas, Gonçalves Pereira

Overview

1 To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Portugal has approved but not ratified the 1958 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

Portugal is a party to the 1944 Convention on International Civil Aviation (Chicago Convention) and to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft.

Portugal is also a party to the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw on 12 October 1929 (Warsaw Convention) and to the Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999 (Montreal Convention).

The Convention on International Interests in Mobile Equipment (Cape Town Convention 2001) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment are not in force in Portugal.

Portugal is a party to the New York Convention of 1958 (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards), and will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting state.

2 What is the principal domestic legislation applicable to aviation finance and leasing?

The general legal provisions of the Civil Code (Book II, Title II, Chapter IV, articles 1022 et seq, as last amended and restated by Law No. 82/2014 of 30 December) governing the rights and obligations of lessors and lessees also apply to the lease of aircraft. A lease contract is defined therein as the agreement whereby a party undertakes to grant the other the temporary use of an asset, purchased or manufactured in accordance with the agreed period of time for a pre-established or pre-determinable price.

Portuguese law makes a distinction between operating leases, where the temporary use of an asset is the main purpose of the contract, and financial leases, which are defined by Decree-Law No. 149/95 of 24 June, as amended and supplemented by Decree-Law No. 285/2003 of 3 November, and Decree-Law No. 30/2008 of 25 February, as the agreement whereby a party undertakes, for consideration, to cede to the other the temporary use of an asset, purchased or manufactured in accordance with the lessee’s instructions, which the lessee has the right to buy at the end of the agreed period of time for a pre-established or pre-determinable price.

In both operating and financial leases, the legal ownership of the asset remains with the lessor until its purchase by the lessee or another party. For accounting and taxation purposes, the economic substance prevails over the legal form, and therefore a lease agreement may be qualified as a financial or an operating lease for accounting and tax purposes regardless of its legal qualification or the contract title as attributed by the parties.

Financial lease companies, governed by Decree-Law No. 72/95 of 5 April, as amended by Decree-Law No. 285/2001 of 3 November, Decree-Law No. 186/2002 of 21 August and Decree-Law No. 157/2014 of 24 October, are credit institutions that deal exclusively with financial lease activity. As a complementary activity, financial lease companies may alienate, assign the exploitation, lease or perform other management acts over assets that have been returned by virtue of termination of a financial lease contract, or in the event of the lessee not exercising the right to acquire its ownership.

Besides financial lease companies, only credit institutions, financial companies and financial credit institutions may legally enter into financial lease agreements as lessors.

Decree-Law No. 298/92 of 31 December, as amended and supplemented (with last amendment under Law No. 23-A/2015 of 27 March), governs the process for the establishment and carrying out of the activity of credit institutions and financial companies, largely reflecting EU Directives. In this Legal Framework of Credit Institutions and Financial Companies, a credit institution is an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account, whereas a financial company is a company which is not a credit institution and whose main activity consists in one or more of the following: credit operations, including granting guarantees and other engagements, financial lease and factoring.

Financial credit institutions were created and are governed by Decree-Law No. 186/2002 of 21 August. These are defined as credit institutions with the purpose of carrying out the same operations that banks are allowed, save to receive deposits.

3 Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Portuguese rules of conflict of laws provide that the creation and assignment of interests over any means of transportation subject to registration are governed by the laws of the country of the relevant registry (article 462(3) Civil Code).

Hence the transfer of title or the creation of a mortgage as regards an aircraft that is registered in Portugal falls under the scope of this rule: if an aircraft is registered in Portugal at the time of the transfer of its ownership or at the time of the creation of a mortgage, these must be governed by Portuguese law and should be registered with the National Aircraft Registry (RAN).

The parties may choose the law governing the bill of sale, pursuant to Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), but for the contract to have a transfer of title effect it must be valid and legally effective in accordance with the governing law, and the sale will have to be registered in accordance with the law of registration.

If the envisaged security involves the creation of a mortgage over an aircraft that is registered in Portugal at the time of creation of such security, this security must take the form of a mortgage governed by Portuguese law, and it must be registered with RAN to become valid, effective and enforceable in Portugal.

Moreover, and in view of the above, if the lessor of an aircraft on lease to a lessee assigns by way of security or otherwise grants a security interest pursuant to a security assignment governed by a foreign law, any rights thus purported to be created over an aircraft registered in Portugal will only be enforceable for parties inside Portugal. They will be contractual obligations of such parties, but they will not grant security rights over such aircraft registered in Portugal, in view of the Portuguese rule of conflict of laws mentioned above.
Title transfer

4 How is title in an aircraft transferred?

A bill of sale or a purchase agreement, evidencing the owner’s title to the aircraft, is effective to transfer title in an aircraft that is registered in Portugal at the time of the transfer as between transferor and transferee.

The new owner should apply for registration of ownership with RAN for the transfer to become valid and effective as regards third parties.

5 What are the formalities for creating an enforceable transfer document for an aircraft?

All documents to be filed with RAN must be notarised, and the signature notarisation should state the signatories’ authority.

Documents issued or executed in other jurisdictions must be legalised through apostille (Hague Convention of 5 October 1961), or by a Portuguese consulate, before being filed for registration in Portugal. However, documents to be filed in relation to aircraft registration may be written in English, without the need for translation into Portuguese.

Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry.

In Portugal, the registration of aircraft is the responsibility of RAN, which is a department of the Portuguese Civil Aviation Authority (ANAC).

RAN is a substantive register, and registration establishes the recognition and priority of interests of owners and mortgagees. The registration of title and any other interest constitutes evidence of the ownership as well as of any other rights and interests to and in the aircraft.

Registration publicises the relevant fact, and so will constitute public notice to third parties.

Moreover, under Regulation (EC) No. 1008/2008 of 24 September 2008 on common rules for the operation of air services in the EC, an aircraft used by an EC air carrier must be registered in the national register or within the EC.

Hence, if an aircraft is operated by a Portuguese airline under a lease, both such aircraft and the lease must be recorded with RAN to enable the airline to operate the aircraft.

Portugal has entered into bilateral agreements for the transfer of oversight responsibilities under article 83-bis of the Convention on International Civil Aviation (Chicago Convention) with Germany (2 July 2011), Italy (14 July 2010) and Spain (20 June 1997). Each possible 83-bis situation should, as a matter of caution, be reviewed on a case-by-case basis.

There is no specific separate engine register. Engines are registered with RAN.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

Both ownership and the lease interest resulting from a lease agreement over aircraft can be registered with RAN.

There are no limitations on who can be recorded as owner, and an ownership interest regarding aircraft cannot and should not be registered with any registry other than RAN.

RAN also records owners’ and lessees’ interests in autonomous equipment, including engines.

8 Summarise the process to register an ownership interest.

The following is a basic list of the required documentation to register an ownership interest:

- petition by the owner to the Chairman of ANAC applying for the ownership registration; and
- notarised and apostilled power of attorney enabling a local counsel (or other appropriate representative) to sign the above-mentioned petition on behalf of the owner and proceed with the filing for the ownership registration.

The following are the complementary licences to be granted for the operation of the aircraft in Portugal (assuming the lessee is a local operator):

- airworthiness certificate;
- radio station licence;
- air navigation diary;
- noise certificate; and
- aircraft logbooks.

For registration of an aircraft in Portugal, including the registration of two engines and auxiliary power unit, the overall total cost of registration is currently €769.66.

The recognition of the rights of the new owner takes effect from the date the documents are filed with RAN.

Title to an engine that is mentioned in the registration petition applying for the ownership registration of an aircraft shall automatically vest in the owner of such aircraft, unless the engine ownership is specifically registered with a different owner.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration constitutes proof of title, and third parties can rely on the accuracy of the public registration of the ownership interest (as recorded on the certificate of registration).

A registered ownership interest is effective against third parties until a new owner files for the registration of ownership or any interested party legally challenges the registered owner’s defective interest.

10 Summarise the process to register a lease interest.

To record and perfect the registration of a lease, the following basic documentation is required (assuming the aircraft has already been registered in accordance with question 8):

- a notarised and apostilled lease agreement;
- a petition by the lessor or owner to the Chairman of the Board of Directors of ANAC applying for lease registration; and
- a notarised and apostilled power of attorney enabling a local counsel (or other appropriate representative) to sign the above-mentioned petition on behalf of the lessor and proceed with the filing for the lease registration.

The registration of a lease, by itself, if the aircraft is already registered, does not have any cost, and the corresponding certificate issued to evidence the registration of the lease interests is also obtained without any additional cost.

All documents to be filed with RAN must be certified or notarised, and they must also be legalised with the Hague Apostille of 5 October (1961) or at the nearest Portuguese consulate.

The recognition of the rights of the lessor and lessee takes effect from the date the documents are filed with RAN.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

The certificate of registration is issued by ANAC.

RAN registration records the following facts, and a certificate shall be issued to evidence same:

- the aircraft registration number;
- the manufacturer’s serial number of the aircraft and of the engines;
- the name and address of the owner or lessor, and of any lessee, as well as any other interest in the aircraft (co-ownership, mortgages, etc); and
- the name and address of the relevant party.

A separate engine certificate of registration may be obtained if the engine is registered separately from the aircraft, and ownership, security and lease interests may be recorded for an engine.
12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The deregistration or export of the aircraft must be petitioned or consented by the aircraft owner. From a Portuguese registration perspective, it is the registered owner of the aircraft that is entitled to the rights over the aircraft, limited only by any liens and interests, created pursuant to Portuguese law, as may be registered with RAN. If the aircraft has been mortgaged, the specific consent in writing (duly notarised and legalised) of the lender or mortgagee will be also required. In any case, the owner must submit evidence to RAN that the lease has been duly terminated. The operator can block the export by filing a lawsuit, namely claiming that the lease has not been duly terminated.

13 What are the principal characteristics of deregistration and export powers of attorney?

A deregistration power of attorney shall enable the owner, the attorneys mentioned therein or both to act as representative of the lessee or operator and deregister and export the aircraft. An irrevocable deregistration power of attorney granted by lessee to lessor should be a condition precedent (a pre-delivery requirement) in a lease. It is important that the wording of the irrevocable deregistration power of attorney complies with the Portuguese rules governing voluntary representation, namely that the attorney be expressly authorised by the grantor to represent both the grantor and the attorney in any act or contract to avoid a conflict of the attorney representing both parties’ interests, which is forbidden by Portuguese law unless expressly authorised by the grantor, as business with oneself. By using the irrevocable deregistration power of attorney, the lessor will be able to deregister the aircraft, and a court intervention will not usually be required unless the lessee would seek to contend that such repossession was wrongful. The lessor has to have cooperation from the lessee to have access to the airport, to the technical books in order to obtain the certificate of airworthiness for export issued by ANAC if required by the country of destination. In case the lessor has no cooperation from the lessee, the alternative is to initiate proceedings against lessee, in this case an injunction for provision of possession followed within 30 days by the main suit to claim effective possession.

If the lessee is declared insolvent, the deregistration power of attorney will be terminated by mere effect of the law upon the declaration of insolvency of the lessee. The lessor has to have cooperation from the lessee to have access to the airport, to the technical books in order to obtain the certificate of airworthiness for export issued by ANAC if required by the country of destination. In case the lessor has no cooperation from the lessee, the alternative is to initiate proceedings against lessee, in this case an injunction for provision of possession followed within 30 days by the main suit to claim effective possession.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Convention on International Interests in Mobile Equipment (Cape Town Convention 2001) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment are not in force in Portugal.

Security

15 What is the typical form of a security document over the aircraft and what must it contain?

If the aircraft is registered in Portugal at the time of creation of a mortgage, the mortgage must be governed by Portuguese law and registered with RAN. Such mortgage shall grant the mortgagee a security that shall be effective in rem over the specific mortgaged aircraft, and enforceable towards all, against any third parties, namely common creditors of the mortgagor and subsequently registered mortgagees. A mortgage created under Portuguese law does not involve the transfer of ownership or the possession of the mortgaged assets, and it does not allow the mortgagor to directly dispose of the mortgaged asset. The mortgagor shall have a preferred interest to be repaid out of the proceeds of the sale of the mortgaged asset (the aircraft, in this case), prior to the mortgagor’s ordinary or common creditors, and to subsequently registered mortgages over the same aircraft, pursuant to specific court foreclosure proceedings.

Under Portuguese law, a mortgage can be created and registered against a future or conditional debt, provided it is for a specific amount or a specific obligation that can be determined. The mortgage may also comprise any incidental obligations provided they are mentioned in the mortgage title and duly registered. Therefore it may cover all forms of interest payments, namely those usually contemplated in a lease agreement, as well as any additional amount related to the foreclosure or collection costs, such as attorney’s fees, court costs, and related expenses.

The agreed interest rate should be expressly mentioned in the mortgage document for registration purposes, as otherwise the Portuguese legal interest rate shall be deemed applicable to the guaranteed principal (the Portuguese legal interest rate is a variable rate, periodically fixed by joint decree of the Ministries of Justice and of Finance). Please note that, notwithstanding any stipulation of the parties to the contrary, a mortgage created under Portuguese law cannot comprise more than three years of interest, but a new mortgage can be registered with relation to outstanding interest.

A mortgage created under Portuguese law may be denominated in euros or in any foreign currency that may be legally converted to euros. A mortgage over an aircraft registered in Portugal must be governed by Portuguese Law, but it may be written in English. RAN will accept the filing of the relevant documents in English. The Portuguese translation of the aircraft mortgage documents will only be required if such documents have to be submitted to a Portuguese court. For registration purposes, the total mortgage amount must be indicated, comprising:

- the principal amount;
- the costs, charges and expenses arising out of, or in connection with, the enforcement of the mortgage including (but not limited to) court fees, litigation fees, lawyer’s fees and any other disbursements made by the mortgagee in order to enforce its rights under the mortgage, up to an amount equivalent, for the purpose of registration, to 10 per cent of the principal amount; and
- the maximum amount of interest over the outstanding principal amount, which will yield over a period of 36 consecutive calendar months (the maximum period permitted by Portuguese law).

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The mortgage must be notarised and legalised with the Hague Apostille of 5 October 1961, or at the nearest Portuguese consulate. If written in English, no translation is required.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

To record and perfect the registration of a mortgage, the following basic documents are required (assuming the aircraft has already been registered in Portugal, in accordance with question 8):

- a notarised and apostilled mortgage;
- a petition by the aircraft owner to the chairman of ANAC applying for the mortgage registration; and
- a notarised and apostilled power of attorney enabling a local counsel (or other appropriate representative) to sign the above-mentioned petition on behalf of the owner and proceed with the filing for the mortgage registration.

The recognition of the rights of the mortgagee takes effect from the date the documents are filed with RAN. Please note that the registration of a mortgage created under Portuguese law is mandatory and an essential legal requirement for the mortgage to be valid and effective, even with relation to the parties thereto. The registration need not be renewed, but a new mortgage may be required, and should be registered, with relation to outstanding interest, in view of the above mentioned rule that a mortgage created under Portuguese law cannot comprise more than three years of interest.

As to RAN registration charges for a mortgage, these will be calculated in accordance with the actual mortgage total amount (which will be
converted into euros for the calculation of registration charges if the mortgage is denominated in another currency).

The registrar will calculate the amount payable for the registration of each mortgage based on the mortgage total amount.

For registration of a mortgage, the basis for calculating the cost of the mortgage is 1/100,000 over the actual mortgage total amount, the following limit amounts to be paid to ANAC being:
- minimum limit per mortgage: €72,33; and
- maximum limit per mortgage: €947,72.

18 How is registration of a security interest certified?

The registration of mortgage is evidence by means of a registration certificate, which shall state the rank or priority of the mortgage.

The registration certificate is issued by ANAC, and will normally be available within five days from filing for registration.

19 What is the effect of registration as to third parties?

Registration of a mortgage created under Portuguese law is mandatory. It is an essential legal requirement for the creation and perfection of a mortgage, for it to be valid and effective between mortgagee and mortgagor.

Registration confers priority over subsequent security interests, and third parties can rely on the accuracy of the public registration of the security interest as recorded on the certificate of registration.

20 How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

Portugal does not recognise the concept of trust or the role of a security trustee.

Under Portuguese rules of conflict of laws, the creation and assignment of interests over any means of transportation subject to registration must be governed by the laws of the country of the relevant registry, as discussed above. Hence the creation of a mortgage over an aircraft registered in Portugal must be governed by and registered in accordance with Portuguese law.

Typically, security over aircraft is granted by means of a mortgage. Security over leases is also typically structured by means of the assignment of the rents as guaranty.

A mortgage created and registered in accordance with Portuguese law is a right in rem.

Loan transfers that operate as classic novations do not affect the security, if the mortgage created and registered in accordance with Portuguese law, nor do new security registrations need to be effected if the loan is transferred to a new lender. But there must always be some connection (eg, by means of an agreement), between the registered owner of the aircraft and its lessor.

Changes to the security or its beneficiaries, in terms such that the identity of the aircraft owner or the lessor of the aircraft remain unchanged, will not trigger the requirement for an update of the aircraft registration.

21 What form does security over spare engines typically take and how does it operate?

A mortgage over a spare engine that is not installed on a host aircraft follows very much the same process as the mortgage of an aircraft, as regards its form and required registration.

If the engine is installed on a host aircraft, it follows the mortgage of the aircraft unless the engine has a different registered owner.

Whether a security interest over financed aircraft creates an independent security interest over its engines, or the aircraft and engines are treated as a single item of property, depends on the terms of such security.

An effective security interest can be created over an engine if it is registered separately and not as installed on the aircraft at the time of creation (assuming that the non-installed engine is also in the jurisdiction).

An encumbered engine shall cease to be encumbered upon the express consent of the mortgagee for the cancellation of such encumbrance.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

For the repossession of the aircraft and its export from Portugal, it will be necessary for the registered owner to apply for deregistration with RAN.

The consent of the lessee or operator is not necessary, but is necessary to submit evidence to RAN that the lease agreement has been terminated.

With cooperation from the lessee or operator, the deregistration process should take five to seven days.

Without cooperation from the lessee or operator, and provided that the lessor has an irrevocable power of attorney granted by the lessee or operator and no injunction is filed with the court to prevent it, deregistration should take 10-15 days.

The lessee may file with the court for an interim measure that will effectively, albeit temporarily, prevent ANAC from deregistering the aircraft and authorising its exportation, pending the discussion in a lawsuit of the termination dispute.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

As mentioned above, a mortgage created under Portuguese law does not involve the transfer of ownership nor does it grant the mortgagee any possession rights over the mortgaged assets. Any provisions purporting to grant the mortgagee the right to directly dispose of the mortgaged asset will be deemed null and void.

The mortgagee shall have a preferred interest to be repaid out of the proceeds of the sale of the mortgaged asset (the aircraft, in this case), prior to the mortgagor’s ordinary or common creditors, and to subsequently registered mortgages over the same aircraft, pursuant to specific court foreclosure proceedings.

The owner may not lawfully impede the mortgagee’s right to enforce. In insolvency proceedings secured claims, which are those with security in rem over assets in the estate, up to the value of such assets, are not affected and will cover the claims and also the interest on them.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The following rights or interest will take precedence over aircraft ownership or an aircraft security interest:
- any previously registered mortgage;
- any possessory lien arising out of work done on the aircraft or in connection with expenses incurred to preserve and avoid deterioration of the aircraft; or
- privileged credits in respect of taxes and duties owed to the state (including aircraft charges and air navigation charges) or the municipality, and crew’s wages.

The airport authorities have a specific possessory lien of the aircraft in the case of lack of mandatory information or non-payment by the lessee or operator of the applicable airport fees. Notwithstanding, please note that all the above-mentioned rights arise out of debts that are typically debts of the operator or lessee. In a lease situation, where the owner or lessor and the operator or lessee are separate entities, the lessee’s debts are not deemed guaranteed by an aircraft on lease, and only privileged credits arising from the owner or lessor’s debts, if any, will take precedence over the registered lease.

Public requisition of the aircraft may occur in time of war or serious national emergency. Compensation would then be due.

Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Under the general rules, withholding of Portuguese corporate income tax (P CIT) will be levied over the aviation-related lease payments, whenever the lessee is a Portuguese tax resident entity and the lessor is a non-Portuguese tax resident entity (without a permanent establishment located
in Portugal to which the rental income is imputable). This withholding tax on the lease rents would be levied at a 25 per cent flat rate (domestic rate), except where a double tax treaty (DTT) entered into by Portugal applies, in which case the withholding rate may be reduced under the applicable DTT (since income derived from the lease of commercial or industrial equipment is generally qualified as a royalty, PCIT would be withheld under the rates provided for in article 12 of the applicable DTT). So that the DTT benefits may be applied for, some formal procedures will have to be fulfilled (more precisely, in alternative said benefit must be claimed by way of the form Mod 21-RFI, which must duly certified by the tax authorities of the income recipient’s country of residence or a non-certified version of the form Mod 21-RFI properly filled out jointly with a tax certificate issued by the tax authorities of the country of residence attesting that the recipient of the income is a resident of such country).

The withholding of PCIT may, however, be exempt whenever the conditions provided for in EU Council Directive 2003/49/EC of 3 June, applicable to interest and royalty payments made between associated companies of different member states are met; notably, a direct minimum participation of 25 per cent between the lessor and the lessee, held for at least an uninterrupted period of two years or, where both the lessor and the lessee are held in, at least, 25 per cent by the same entity, during the two years preceding the attribution of income. Moreover, the relevant companies must have one of the legal forms listed in the Annex to the Directive and must be subject to CIT or to an equivalent tax in their country of residence. Additionally, an ad hoc exemption from PCIT on the lease rents may, however, be granted on public services grounds, upon formal request to be submitted by the lessee to the Portuguese Minister of Finance, provided that the lessee is a non-Portuguese resident entity without a permanent establishment located therein to which the rental income is imputable.

As for VAT, the aircraft lease agreements are qualified as supplies of services which would be located in Portugal whenever the lessee or recipient of the service is a Portuguese taxable person (the general place of supply rule for B2B transactions foreseen in the domestic rule equivalent to article 44 of the Council VAT Directive 2006/112/EC would apply). This means that the VAT that may be due will have to be accounted for and paid to the Portuguese Tax Authorities by the lessee under the reverse-charge mechanism. A VAT exemption may, however, be applicable if the aircraft being leased is aimed to be used by an airline operating for reward chiefly on international routes (ie, whenever, by reference to the preceding 12 months, the percentage of turnover attributable to international air traffic or, alternatively, the number of passengers carried in international routes exceeds 50 per cent of the total turnover or passengers).

In general, a final PCIT withholding of 25 per cent would be levied over the interest component of a loan repayment whenever the debtor entity is a Portuguese tax resident entity and the creditor is a non-Portuguese tax resident entity (without a permanent establishment located therein to which the interest income is imputable). This withholding tax on interest income may be reduced where a DTT entered into by Portugal applies (see above the formal requirements for the concession of DTT’s benefits).

Moreover, where both the creditor and the debtor are entities resident for tax purposes in the EU, the withholding of PCIT on interest may, however, be exempt whenever the conditions provided for in EU Council Directive 2003/49/EC, of 3 June, applicable to interest and royalty payments made between associated companies of different member states are met (see above the main conditions that must be met).

Also regarding the payment of interest to non-Portuguese tax resident entities not having a permanent establishment located therein, to which said income is imputable, an ad hoc exemption from withholding of PCIT may be granted on public services grounds, upon formal request to be submitted by the debtor to the Portuguese Minister of Finance.

In principle, a loan repayment would not trigger any Portuguese VAT taxation since the VAT exemption provided for financial transactions would apply to the interest component of the payments. Whenever the entity transferring the ownership of the aircraft is not resident in the Portuguese territory, nor does it have a permanent establishment located therein to which such transaction is imputable, the Aircraft SPE which stock (or the beneficial interest) in the company that owns the aircraft (Aircraft SPE), no PCIT will be due either, whenever the seller is a non-Portuguese tax resident company without a permanent establishment located therein to which such transaction is imputable, and the Aircraft SPE which stock (or the beneficial interest) is being transferred is also not resident in Portugal.

As for VAT, the transfer of the ownership of the aircraft will be liable to Portuguese VAT, provided that the aircraft is put at the acquirer’s disposal in the Portuguese territory (ie, the aircraft is on Portuguese soil or airspace at the moment it is transferred to the acquirer). Therefore, if the acquirer of the aircraft is an entity established in Portugal for VAT purposes, then the VAT that may be due would have to be accounted for and paid to the Portuguese tax authorities by the acquirer. Conversely, if the acquirer of the aircraft is an entity not established in Portugal for VAT purposes, then the reverse-charge mechanism would not apply. As a consequence, the non-established seller would have to:

- trigger a VAT registration in Portugal (and, if resident outside the EU territory, also appoint a tax representative in Portugal); and
- account for and pay any Portuguese VAT due.

Notwithstanding the above, a VAT exemption may apply provided that the aircraft being transmitted is aimed to be used by airlines operating for reward chiefly on international routes (which would have to be demonstrated by the applicant – see above).

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There are no restrictions on international payments nor exchange controls in effect in Portugal, and capital import and export, as well as cash conversion to other currencies, are, in general, free as regards both EU and non-EU countries.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

No. Maximum interest rates are only applicable to credit granted to consumers, that is, natural persons taking out loans for purposes unrelated to business and which the interest income is imputable). This withholding tax on interest may, however, be exempt whenever the conditions provided for in EU Council Directive 2003/49/EC, of 3 June, applicable to interest and royalty payments made between associated companies of different member states are met (see above the main conditions that must be met).

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagor?

According to the EU regulations, there are no customs duties to bring the aircraft into Portugal or to take it out provided the importer entity obtains the required customs qualification as end use for the aircraft.

To obtain such qualification, a customs clearance officer is generally retained and the average fee for their services is €800–1,000.

The liability shall attach to the airline, as the importing entity must be the holder of an air transport licence and an air operators certificate.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.


Additionally, Decree-Law No. 223/2005 of 27 December sets forth the insurance requirements applicable regarding non-commercial operations by aircraft with a MTOM of 2,700kg or less.

Insurance and reinsurance activities are regulated and therefore the exercise of said activities by, and the incorporation of, insurance or reinsurance companies in Portugal is subject to specific requirements set forth in Decree-Law No. 94-B/98 of 17 April, which has enacted into Portuguese law the EU Insurance Directives regarding the creation of a single market for the insurance sector within the EU.

Although there is no specific requirement under Portuguese law regarding a captive insurance regime specifically applicable to aviation, Decree-Law No. 94-B/98 of 17 April, on the requirements applicable for the
exercise of the insurance and reinsurance activities in Portugal, expressly
allows the incorporation of captive reinsurance companies.

In Portugal, aviation insurance and reinsurance agreements may be
entered into with any insurance or reinsurance company incorporated in
Portugal or authorised to exercise its activity in the jurisdiction.

Provided the above-mentioned requirements are met, no specific
provision applies requiring the insurance or reinsurance agreement to be
placed in the jurisdiction.

Furthermore, regarding reinsurance agreements, there is no mini-
imum or maximum percentage of the insurance that must be retained in
the Portuguese jurisdiction. In fact Decree-Law No. 94-B/98 of 17 April
authorised reinsurance agreements to be placed with reinsurance compa-
nies whose head offices are located outside of the EU territory, and which
are not established in Portugal, provided these are duly authorised to carry
out the reinsurance activity in the relevant country. However, whenever
said reinsurance company’s head offices are located within the territory of
a country who has not entered into an agreement with the EU on super-
vision requirements, said reinsurance company will be required to grant
additional guarantees as set forth by regulations issued by the Portuguese
Supervisory Authority.

Finally, please note that there are no legal requirements determinin-
g the placement of the reinsurance with more than one reinsurance company.

30 Are cut-through clauses under the insurance and reinsurance
documentation legally effective?

Although cut-through clauses are more commonly used in reinsur-
ance agreements entered into with captive reinsurers, we may find them
also included in reinsurance agreements entered into with reinsurance
companies.

Pursuant to the Portuguese Insurance Law (approved by Decree-Law
No. 72/2008, of 16 April), unless otherwise set forth by law or in the rein-
surance agreement, the reinsurance agreement does not grant to the policy
holder any rights or obligations with regard to the reinsurer, or vice versa.

Notwithstanding the above, the same provision establishes that the
above mentioned general rule does not jeopardise the validity and enforce-
ability of the clauses pursuant to which the insurer grants to the
policyholder the ownership or the exercise of rights initially granted to the
insurer pursuant to the reinsurance agreement, provided said clauses are
admissible in accordance with the general law.

Considering that, pursuant to Portuguese law, at least part of the
credits towards the reinsurers are included among the assets representing the
technical provisions, and that said assets are deemed as a privileged
patrimony specially aimed at guaranteeing the credits emerging from the
insurance agreements, and that in case of insolvency of the insurer the
policyholders are granted by law a privileged credit over said patrimony, in
the scenario of the insolvency of the insurer, the validity and enforceability
of cut through clauses may be challenged on the basis that they constitute
an unauthorised preference in liquidation.

31 Are assignments of reinsurance (by domestic or captive
insurers) legally effective? Are assignments of reinsurance
typically provided on aviation leasing and finance
transactions?

As a general rule, Portuguese law authorises not only the assignment of
rights but also the assignment of the contractual position entitling one of
the counterparties to transfer to a third party not only the rights but also the
obligations emerging from a given agreement.

While in the first case the validity and enforceability of the assign-
ment is not subject to the authorisation of the counterparty (in this case
the only exceptions to the general rule of free assignability: the agreement
itself prohibits assignment; the assignment is prohibited by law; or the
agreements calls for the performance of ‘personal services’), the assign-
ment of rights and obligations is subject to the prior authorisation of the
counterparty. Should that authorisation be granted before the execution of
the assignment, it will only become perfected upon its notification to the
counterparty.

Notwithstanding the above, assignments of reinsurance are not com-
mon regarding aviation leasing and finance transactions. Generally, said
assignment may only occur in run-off situations.

32 Can an owner, lessor or financier be liable for the operation of
the aircraft or the activities of the operator?

For the purposes of determining potential liabilities, Portuguese law clas-
sifies three categories of entities:
- the owner, in other words the registered owner of the aircraft;
- the user the entity using the aircraft; and
- the air transporter, in other words the entity authorised to provide
  air services by transporting persons, luggage, cargo or mail in such
  aircraft.

The owner will only be liable if it is also the user of the aircraft.
If the use of the aircraft has been ceded to another party (eg, operator
or lessee), the user will be liable for the operation of the aircraft and related
activities of the operator, and no liability shall accrue to the owner or lessor.
The financier shall not be liable for the operation of the aircraft or the
activities of the operator.

33 Does the jurisdiction adopt a regime of strict liability for
owners, lessors, financiers or others with no operational
interest in the aircraft?

In compliance with Regulation (EC) No. 785/2004 of the European
Parliament and of the Council of 21 April 2004 (as amended by Regulation
April 2010) on insurance requirements for air carriers and aircraft opera-
tors, Decree-Law No. 321/89 of September 25 sets forth that air carriers and
aircraft operators shall be insured in accordance with said law as regards
their aviation specific liability in respect of passengers, baggage, cargo and
third parties. The insured risks shall include acts of war, terrorism, hijack-
ing, acts of sabotage, unlawful seizure of aircraft and civil commotion.

Furthermore, it sets forth that air carriers and aircraft operators shall ensure that insurance cover exists for each and every flight, regardless of whether the aircraft operated is at their disposal through ownership or any form of lease agreement or through joint or franchise operations, code-sharing or any other agreement of the same nature.

**34** Are there minimum requirements for the amount of third-party liability cover that must be in place?


<table>
<thead>
<tr>
<th>Category</th>
<th>MTOM (kg)</th>
<th>Minimum insurance (million SDRs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>&lt;500</td>
<td>0.75</td>
</tr>
<tr>
<td>2</td>
<td>&lt;5,000</td>
<td>1.5</td>
</tr>
<tr>
<td>3</td>
<td>&lt;2,700</td>
<td>3</td>
</tr>
<tr>
<td>4</td>
<td>&lt;6,000</td>
<td>7</td>
</tr>
<tr>
<td>5</td>
<td>&lt;12,000</td>
<td>18</td>
</tr>
<tr>
<td>6</td>
<td>&lt;25,000</td>
<td>80</td>
</tr>
<tr>
<td>7</td>
<td>&lt;50,000</td>
<td>150</td>
</tr>
<tr>
<td>8</td>
<td>&lt;2,000,000</td>
<td>300</td>
</tr>
<tr>
<td>9</td>
<td>&lt;5,000,000</td>
<td>500</td>
</tr>
<tr>
<td>10</td>
<td>≥5,000,000</td>
<td>700</td>
</tr>
</tbody>
</table>

* The author would like to acknowledge, with thanks, the assistance of the following colleagues: Diogo Ortigão Ramos, Conceição Balcão Reis and Ana Sofia Silva.
Overview

1 To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Russia is a party to:
- the Chicago Convention on International Civil Aviation (1944; the Chicago Convention);
- the Cape Town Convention on International Interests in Mobile Equipment (2011) and the associated Protocol on Matters Specific to Aircraft Equipment (the Cape Town Convention); and

All of the above are currently effective in Russia.

Russia is not a party to the Geneva Convention on the International Recognition of Rights in Aircraft (1948) or the Rome Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (1933).

2 What is the principal domestic legislation applicable to aviation finance and leasing?

The principal Russian legislation in this sphere includes the Civil Code of the Russian Federation (the Civil Code) and the Air Code of the Russian Federation (the Air Code), expanded in various specific laws and by-laws.

3 Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

The main principle stated in the Civil Code is that proprietary rights (including ownership and mortgage interests) in an aircraft are governed by the law of the jurisdiction where the aircraft is registered. Thus, to create valid ownership title to, or mortgage interest in, an aircraft, relevant contracts must be valid and effective under the law of the jurisdiction where the aircraft is registered.

Under Russian law, parties to a contract may agree that any foreign law is governing if there is a sufficient foreign element in the transaction (e.g., a foreign entity or, potentially, a foreign asset is involved). Russian courts should recognise the choice of law unless such choice of law contradicts Russian public policy or imperative norms of Russian law (such as application of Russian governing law to agreements in relation to immovable property located in Russia (see question 6)).

Finance transactions for Russian airlines are normally structured to ensure that the ownership title to the aircraft vests in a bankruptcy-remote special purpose vehicle (SPV) established outside of Russia (e.g., in Bermuda or Ireland). The aircraft is further leased to a Russian airline directly or through a chain of SPVs established for registration (e.g., in Bermuda or Ireland) and tax (e.g., in Ireland or Cyprus) purposes (the Standard Structure).

In the Standard Structure, all finance, security and lease documents are normally governed by common law and, if required, by the law of the jurisdiction where the aircraft is registered.

Title transfer

4 How is title in an aircraft transferred?

If an aircraft is registered in the Russian Aircraft Register (all terms from this paragraph are defined in question 6), the title to such aircraft must be transferred by a sale and purchase agreement governed by Russian law. Such transfer of title will be effective from the moment of its registration in the Register of Rights.

If the aircraft is registered in a foreign register, the ownership title to the aircraft normally vests in a bankruptcy-remote SPV outside of Russia, and transfer of title happens between non-Russian entities and outside of Russia (see questions 20 and 25). Current market practice is for relevant transfer agreements to be governed by applicable foreign law.

It is not clear to what extent Russian regulations on registration of rights to aircraft and transactions connected with them (the Registration Regulations) may apply to transfer agreements governed by foreign law in relation to aircraft registered in a foreign register (the ‘foreign transfer agreement’) (see questions 6 and 7). Current market practice is to assume that the registration regulations would not apply to such foreign transfer agreements. Therefore, the moment of transfer of title to such aircraft is regulated by the governing law of the transfer agreement and provisions of the transfer agreement itself.

5 What are the formalities for creating an enforceable transfer document for an aircraft?

There are no specific Russian law requirements in respect of a foreign transfer agreement. If a Russian entity is a party to the transfer agreement, it must be in written form, with no other specific requirements applied. For registration requirements see questions 4, 6 and 7.

To be presented as evidence in a Russian court or to any Russian authority, the transfer agreement must be in Russian or have a certified translation into Russian.

Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry.

There are two types of aircraft registers in Russia:
- for national registration, the State Register of Civil Aircraft of the Russian Federation (the Russian Aircraft Register); and
- for title registration, the Unified Register of Rights to Aircraft and Transactions Therewith (the Register of Rights).

Both registers are maintained by the Federal Aviation Agency of the Russian Federation Ministry of Transport (Rosaviation) and are publicly available. The Russian Aircraft Register is an owners’ registry. With respect to the Register of Rights, any person having or acquiring a right in an aircraft subject to registration may apply for such registration which will serve as public evidence of such rights.

In accordance with provisions of the Air Code, an aircraft operated by a Russian airline should be registered either in the Russian Aircraft Register or in a register of a country with which Russia concluded an agreement on the maintenance of continuing airworthiness, under article 83-bis of the Chicago Convention (Foreign Register). Currently, the most widely used foreign registers in Russia are Bermudan and Irish.
An aircraft registered in the Russian Aircraft Register acquires Russian nationality and becomes an immoveable property under Russian law. This leads to various consequences:

agreements relating to such aircraft must be governed by Russian law if such aircraft are located in Russia (there is no clear statutory criteria for determining the location of an aircraft (ie, whether the decisive criteria should be the place of its registration, actual physical location, location of base airport, owner or operator));

- Russian arbitrazh courts (the system of Russian trade courts) have exclusive jurisdiction over claims with respect to the rights relating to such aircraft; and
- legal interests in such aircraft, such as ownership title and mortgage interest, shall be registered in the Register of Rights.

It is not clear to what extent the Russian regime of immovable property and Registration Regulations should be applied to an aircraft registered in the Foreign Register (for registration regulations see question 7). However, current market practice for non-Russian manufactured aircraft finance and leasing is to register the aircraft in the Foreign Register (other than helicopters, which are registered in the Russian Aircraft Register) and use the Standard Structure despite this risk.

There is currently no separate register for engines or rights in engines in Russia.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry?

Can owners, operators’ and lessees’ interests in aircraft engines be registered?

The registration regulations require that the occurrence, transfer, termination of property rights (including ownership title and mortgage interest) and encumbrances over such rights with respect to civil aircraft subject to state registration shall be registered in the Register of Rights (no other registers are available for this purpose). Registration of any interest in an aircraft in the Register of Rights may be initiated by a person holding or intending to acquire the relevant interest. There are no limitations on jurisdiction of the holder of interest in the aircraft for the purpose of such registration.

Bearing in mind aircraft registration provisions of the Air Code (see question 6), there is a theoretical risk that, on the basis of literal application of the Registration Regulations and the Air Code, rights in an aircraft operated by Russian airlines and registered in the Foreign Register may be subject to the Registration Regulations.

In relation to aircraft lease agreements, there are some contradictory interpretations on whether they are subject to state registration in the Register of Rights. This is because of a contradiction between registration requirements applicable to immovable property and transportation vehicles.

The position that aircraft leasing falls under the exception available for transportation vehicles was confirmed by the Supreme Arbitrazh Court of Russia. Therefore, in our view, registration of an aircraft lease in the Register of Rights should be treated as voluntary (for information purposes) rather than obligatory.

Our current understanding is that the Registration Regulations should be applicable to aircraft registered in the Russian Aircraft Register and Russian law agreements. It is in line with current market practice not to register in the Register of Rights the ownership title, mortgage interest and lease interest related to aircraft registered in the Foreign Register.

8 Summarise the process to register an ownership interest.

Registration of any interest in the Register of Rights is possible only after registration of the underlying interest. There is no limitation on how far the registration authorities should investigate the existing ownership title, and there is a risk that they may request documents with respect to the whole chain of transfers of title up to a purchase from a manufacturer.

The Registration Regulations provide for the maximum period of one month after filing of all necessary documents, for registration of rights and encumbrances in the Register of Rights.

Together with application for registration of ownership interest, the applying party should file documents (in Russian or containing certified translation into Russian):

- confirming its rights to file the application, including rights of the signatory to sign such application;
- creating the relevant interest (eg, sale and purchase agreement);
- identifying the aircraft; and
- confirming payment of state duty for registration.

A more precise list of the documents necessary for registration of ownership interest in the aircraft should be considered on a case-by-case basis, depending on the background of a particular transaction. Documents filed for registration must contain all information required for such registration.

State duty for issuance of the certificate confirming ownership interest in an aircraft varies depending on the type (weight) of the aircraft, but does not exceed 5,000 Russian roubles.

Russian law does not provide for registration of any interest in engines. The description of an aircraft for the purpose of registration of some interest in it must contain the serial numbers of engines installed in the aircraft. However, as we understand, there is no intention to create registration of interest in engines themselves this way.

Registration of ownership interest in the host aircraft should not automatically vest the title to the engines installed in such aircraft in the aircraft owner.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration of the ownership interest in the Register of Rights is the only evidence of such interest. It does not remedy a defective title, but registered interest in an aircraft may only be challenged in court.

10 Summarise the process to register a lease interest.

The process of registration of a lease interest is substantially similar to the process of registration of the ownership interest (see question 8). See our considerations on the necessity of registration of lease interest in question 7. Lease interest in an aircraft may be registered only if the ownership interest in such aircraft is registered in the Register of Rights.

State duty for registration of a lease interest varies, depending on the type (weight) of the aircraft, but does not exceed 5,000 Russian roubles.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

Registration of ownership of an aircraft in the Register of Rights is confirmed by a certificate issued by Rosaviation. The content of such certificate is stipulated by the Registration Regulations. The certificate contains information about the owner and the aircraft itself. State registration of an agreement subject to registration in the Register of Rights is confirmed by a registration stamp on the agreement.

Information about rights relating to an aircraft may be requested from Rosaviation in the form of an extract from the Registry of Rights.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The Russian Aircraft Register is the owners’ register. No consent is required from the lessee for the purpose of deregistration, and there are no notification requirements in this respect.

There is no legal way for the operator to block such deregistration. Export of the aircraft from Russia requires flight permission from Rosaviation and customs clearance of the aircraft. Normally, it is the lessee who is responsible for compliance with these formalities.

Russian customs regulation is based on the assumption that the customs regime will be closed by the same person who has imported the aircraft into Russia (the lessee). Although export of a reposessed aircraft by its owner is theoretically possible, it is not directly regulated and may be cumbersome, especially if the lessee failed to pay customs duties during the term of lease or did not comply with a particular customs regime.

There has been a court decision with respect to leased vehicles imported into Russia under the same temporary import regime normally used for import of aircraft. The decision confirmed in three instances the right of the lessor or owner to export the leased asset and conduct export customs clearance in the name of the owner or lessor in case of termination of the lease agreement.
13 What are the principal characteristics of deregistration and export powers of attorney? No power of attorney is currently required for deregistration of an aircraft from the Russian Aircraft Register, since it is the owner’s register. At the same time, the deregistration and export power of attorney (DPOA) is a standard instrument in aircraft leasing, even though it has not been widely tested in Russia. The DPOA may be useful for deregistration of the aircraft from the Foreign Register and export of the aircraft from Russia.

Until recent changes to the Civil Code, DPOAs were often governed by English law and executed in the UK or Germany because it was not possible to issue an irrevocable power of attorney for a term of more than three years in Russia. Currently the Civil Code provides for the possibility to issue an irrevocable power of attorney for an extended time period. Such irrevocable power of attorney may be issued for the purpose of performance or security of performance of any obligation of the person issuing such power of attorney in relations with the attorney or any third parties, if such obligation is connected to entrepreneur activity. Such irrevocable power of attorney must be certified by a notary and may be revoked after performance of the obligation that it relates to, if the attorney abuses its powers or there are certain circumstances certifying that abuse might occur.

Since the above amendments to the Civil Code are very recent, it remains to be seen how the irrevocable powers of attorney will be perfected, recognised and performed in practice, but irrevocable DPOAs issued in Russia and governed by Russian law are becoming common.

Under Russian law, a power of attorney automatically terminates in case of the liquidation of a company that issued such power of attorney. DPOAs do not require any registration or filing in Russia.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERAs) process. Russia has made the declaration on IDERA to the Cape Town Convention, but as an IDERA is a new instrument for Russia, there is no established practice of its use.

IDERAs are not required for the deregistration of an aircraft from the Russian Aircraft Register. However, export authority contained in IDERA may be useful for the export of aircraft registered in the Foreign Register from Russia.

The form of IDERA effective in Russia contains standard deregistration and export authorities, and it must be countersigned and recorded by Rosaviation in accordance with the Cape Town Convention. No specific regulations have been adopted in Russia in relation to IDERAs and any recording thereof. Therefore, while Rosaviation may still be able to record IDERAs relating to aircraft registered in the Russian Aircraft Register, recording of IDERAs in relation to aircraft registered in the Foreign Register remains an open issue, and effectiveness of an IDERA without such record is questionable.

A DPOA and an IDERA have different spheres of application and at the beginning of the transaction it cannot be predicted where aircraft may be located at the time of repossession. It is advisable to obtain both a DPOA and an IDERA in parallel.

Security

15 What is the typical form of a security document over the aircraft and what must it contain? As a general rule, the validity and effectiveness of mortgage interest is assessed under the law of the jurisdiction where the aircraft is registered. In the Standard Structure, an aircraft mortgage agreement is governed by foreign law and should be enforced outside of Russia. However, there is a risk that a Russian court may assume its exclusive jurisdiction over disputes relating to an aircraft if it is considered to be immovable property and apply Russian law to the aircraft mortgage agreement on the same ground (see question 6).

The main contractual security applicable to aircraft under Russian law is a mortgage. The mortgage can be both possessory and non-possessory, but does not give the mortgagee a title to the mortgaged property, which remains in the ownership of the mortgagor. The mortgage provides the mortgagee with a priority right to discharge its claims under the secured documents from the value of the mortgaged aircraft or proceeds received from its disposal.

A mortgage over an aircraft registered in the Russian Aircraft Register must be governed by Russian law and registered in the Register of Rights. Without the registration in the Register of Rights a mortgage is invalid.

There are no specific requirements for the language of security documents that are not subject to state registration in Russia. If the aircraft mortgage is to be notarised by a Russian notary or registered in the Register of Rights, it must be in Russian or bilingual with the Russian language prevailing. Any document to be filed as evidence in Russian courts must be in Russian or accompanied by a certified translation into Russian.

A Russian mortgage must contain a detailed description of the secured obligations, including their nature, amounts and schedule of payments under the secured document, detailed description of the mortgaged property and its value. In the absence of these terms, the mortgage agreement is invalid.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs? An aircraft mortgage must be concluded in written form and is generally not subject to notarisation requirement (other than the aircraft mortgage securing a notarised document). The parties may also specifically agree on a notarised form of the agreement. The failure to meet statutory or contractual requirements to the form of the agreement entails invalidity of such agreement.

The notarial fee may vary depending on the grounds for notarisation and value of the aircraft, and should be confirmed on a case-by-case basis.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest. The Russian registration requirement for an aircraft mortgage is similar to registration requirements applicable to the ownership title, discussed in question 7.

An aircraft mortgage is effective upon its registration in the Register of Rights. The process and costs of registration of mortgage interest are similar to the registration of ownership and lease interest (see question 8). In the Standard Structure, an aircraft mortgage is governed by foreign law and is not registered in the Register of Rights. However, since this practice has not been tested in Russian courts, the risk that enforcement of such aircraft mortgage may meet certain resistance in a Russian court remains. We would advise for an alternative security to be arranged (see question 20).

18 How is registration of a security interest certified? Upon registration of aircraft mortgage, the relevant record is created in the Register of Rights and a registration stamp is placed on a mortgage agreement.

19 What is the effect of registration as to third parties? An aircraft mortgage subject to registration in Russia is effective upon its registration in the Register of Rights. If there are several mortgages over the same aircraft, the order of priority between them will be established in accordance with the time of registration.

Registration of an aircraft mortgage in the Register of Rights is the only evidence of such mortgage interest. Registered mortgage interest may only be challenged in court.

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries? For the Standard Structure, see question 3.

In the Standard Structure, an aircraft mortgage is governed by foreign law and is not registered in Russia (remaining under the risk of falling under Russian registration requirements to it, see question 17). At the same time, there is usually alternative security, such as a share charge over an SPV and common law governed security assignments over lease agreements. Such alternative security is intended to minimise the lenders’ risks associated with enforceability of an aircraft mortgage in Russia, and provide them with maximum flexibility at the time of enforcement.
Since, in the Standard Structure, finance documents and most of the
security (unless specifically required otherwise by the jurisdiction where
the aircraft is registered) are governed by common law, the common law
concept of security agent or trustee is commonly used. There is no con-
cept of trust in Russian law, but it should be interpreted and applied in
accordance with the governing law of finance documents. Since there is no
Russian security involved it does not need to be adjusted to Russian law
requirements.
Under Russian law, an aircraft mortgage is a proprietary right (see
question 15). Any change of beneficiaries may be made by way of transfer
of beneficiaries’ rights under the mortgage agreement, together with their
secured rights.

21 What form does security over spare engines typically take and
how does it operate?
It is possible to take security over an engine either as part of the aircraft
in which it is installed or separately from the aircraft as separate equipment.
If any of the parties to the security agreement over the spare engines is a
foreign entity, parties will be able to choose foreign governing law. Under
Russian law such security would take the form of a pledge, with the pledgee
acquiring a priority right to discharge its claims under secured documents
from the value of the pledged engine or proceeds received from its disposal.
Under Russian law, the moment of creation of security over an engine,
and its termination, do not depend on whether it has been installed in or
removed from the aircraft.

Enforcement measures
22 Outline the basic repossession procedures following lease
termination. How may the lessee lawfully impede the owner’s
rights to exercise default remedies?
It is questionable to what extent repossession of aircraft without recourse
to a court or arbitration will work if the lessee is not cooperative. Although
it is not directly prohibited by Russian law, there are many practical mat-
ters where owner’s or lessor’s actions without cooperation of lessee or
third parties (e.g., maintenance facilities, airports) may not be practically
possible or could be dangerously close to a breach of law (administrative
or criminal).
Russia has made the declaration on out-of-court enforcement to the
Cape Town Convention. However, it has not yet been tested in practice.
Repossession of aircraft on the basis of a court decision or arbitral
award is the most clear and straightforward way.
For the purpose of repossession, the owner or lessor must comply with
provisions of the lease agreement and its governing law. Under Russian
law, before terminating a lease the lessee is obliged to send a default notice
requesting that the lessee comply with its respective obligations under the
lease agreement.
The only lawful way for the lessee to impede the owner’s right to exer-
cise default remedies is to file various counterclaims or requests to post-
pone or reschedule hearings on various grounds. There are no standard
grounds that may be considered outside of the particular enforcement
scenario.

23 Outline the basic measures to enforce a security interest. How
may the owner lawfully impede the mortgagee’s right
to enforce?
Foreign security should be enforced in accordance with its governing law.
Under Russian law, the Russian law pledge or mortgage gives the
pledgee or mortgagee rights of claim in case of the pledgor’s or mortgag-
or’s default, which shall be satisfied from the value of the pledged or mortg-
gaged property.
The enforcement may be performed through courts or by means of an
out-of-court procedure to which the parties should specifically agree.
Out-of-court enforcement of a Russian law pledge or mortgage
requires notary endorsement to be made in the beginning of enforcement.
Since such endorsement can be made only on the notarised agreement,
the relevant pledge or mortgage agreement must be executed in the presence
of a notary if out-of-court enforcement option is required.
For certain ex parte claims that may impede a mortgage or pledge
enforcement, see question 24.
If bankruptcy proceedings have commenced with respect to the les-
see, and the lease agreement has not been terminated, then the rights of
the lessee under the lease agreement will fall into the lessee’s bankruptcy
estate. The leased aircraft itself, not being the lessee’s property, will not be
included in the lessee’s bankruptcy estate.
Russia has made a declaration to the Cape Town Convention provid-
ning for the obligation of the insolvency administrator or the debtor upon
the occurrence of an insolvency-related event, to give possession of the
aircraft to the creditor no later than at the end of a 60-day waiting period.
At the liquidation stage (where all creditor claims are subject to satis-
faction), the satisfaction of unsecured payment claims (i.e., not secured by
Russian law pledge or mortgage from a Russian lessee) against the insol-
vent company is generally subject to statutory order of priorities with the
contractual claims being satisfied last.
The only lawful way for the owner to impede the mortgagee’s right
to exercise default remedies is to file various counterclaims or requests to
postpone or reschedule hearings on various grounds. There are no stand-
ard grounds that may be considered outside of scenario of the particular
enforcement. Under Russian law, a pledgor may request a court to post-
pone the sale of pledged property for a term not longer than one year.

24 Which liens and rights will have priority over aircraft
ownership or an aircraft security interest? If an aircraft can be
taken, seized or detained, is any form of compensation
available to an owner or mortgagee?
Lien within commercial relations
A person possessing a defaulting party’s asset on a legal or contractual
basis may refuse to return that asset until the defaulting party performs
its obligations. For the purpose of liens, Russian law does not distinguish
property owned by the defaulting party from the property leased to it.
Generally, a creditor who has validly exercised a right of lien also has
a right to sell the asset to obtain payment of the relevant debt. We believe
that in this case the owner has good reason for challenging such actions
and for repossession of its property, especially when the lease is termi-
nated prior to such sale.

Requisition
An aircraft may be subject to requisition in emergency events. In this
case the state is obliged to pay the entire value of the aircraft to its owner.
The owner may dispute such amounts paid in court. The owner may also
demand that the requisitioned property be returned after the relevant
events have passed.

Criminal or administrative offence
The aircraft may be arrested or confiscated as an object of a criminal or
administrative offence (e.g., in the case of breach of the customs regime or
non-payment of customs duties). We are not aware of any cases of Russian authorities exercising
their rights to confiscate an aircraft. However, we are aware of a case where an
aircraft owner was arrested for non-payment of customs duties with a view
to facilitate such payments.

Taxes and payment restrictions
25 What taxes may apply to aviation-related lease payments,
loan repayments and transfers of aircraft? How may tax
liability be lawfully minimised?
Formally, the lessee would be required to withhold Russian corporate
income tax in respect of rent payments under the lease agreement (20 per
cent, in most cases). Depending on the way the aircraft is used, Twenty per
cent withholding tax may also apply to damages or other payments under
the lease. At the same time, where a relevant double tax treaty provides for
a tax relief and the lessee was provided with a tax residency confirmation
of the lessor, no obligation to withhold should arise.
There is some uncertainty in Russian tax legislation with respect to
whether rent payments payable by a Russian lessee to a foreign lessor are
subject to Russian VAT. At the same time, there are official clarifications of
Russian tax authorities that provide some comfort by confirming that no
VAT is applicable in such case. Current market practice is in line with such
clarifications.
In theory, Russian VAT may apply to the transfer of title to the aircraft.
Although Russian legislation provides for no mechanism of VAT assess-
ments when both transferee and transferee have no presence in Russia, it
may be worth transferring the title to the aircraft outside Russia (preferably
in international airspace to prevent the similar risks in other jurisdictions).
Tax gross-up provisions are standard for lease and finance documents. However, there is some possibility that they may be unenforceable as payment of another person’s tax liability. A loan is usually provided to the non-Russian SPV owner, so Russian taxes are not applicable to loan payments. Registration of the aircraft in the Russian Aircraft Register may trigger some additional tax considerations.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

The Russian obligor must open a deal passport for particular contracts under which payments will be made to a foreign person, with the Russian authorised bank servicing such payments. Failure by the Russian obligor to open a deal passport may influence the technical ability of the Russian obligor to make a payment, but will not affect the validity of the Russian obligor’s obligations under the relevant agreement.

Russian law does not impose any other restrictions related to international payments.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

There are no statutory limitations on the amount of default interest. However, a Russian court may reduce its amount on the grounds that it is clearly incommensurate with the consequences of the default.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Importation of aircraft into Russia is generally subject to 18 per cent VAT and customs duties up to 18.6 per cent (this may vary depending on the aircraft type).

Certain aircraft could benefit from full conditional exemption from customs duty and import VAT depending on its type, manufacturer, empty weight and seat capacity.

In addition to the above, deferral of customs duties and VAT is available under certain customs procedures, such as temporary import.

Generally no customs duties or taxes are payable upon export of assets, other than customs processing fees. Exportation costs would also include broker’s fees and possible overheads.

The aircraft owner or mortgagee should not be liable for any payment of customs duties (subject to risk of arrest or confiscation of the aircraft; see question 24).

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Insurance under Russian law is a licensed activity, and interests and liabilities of Russian airlines must be insured by Russian insurance companies. There are multiple insurance companies specialising in aviation insurance.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

There are no cut-through clauses in Russian law insurance. Although, reinsurance cut-through clauses are standard for common law lease agreements with Russian lessees, it is not clear how they would work when Russian insurance companies are involved.

Under Russian law, reinsurance is effectively insurance of the initial insurer’s entrepreneur risk (rather than transfer of the property insurance risk). Therefore, the insurer will most likely be required to get money from a reinsurer in the case of the insured event, and will in any case be obliged to pay under the initial insurance contract.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignment of reinsurance placed outside of Russia is typical, and Russian law is not applied to it.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

By default, the owner of an aircraft is deemed to be liable for the damage caused by such aircraft and will need to prove that operational control was with the lessee to avoid such liability.

The owner, financier or lessor may be held liable for damages caused by an accident only if it is involved in the operation of an aircraft or its maintenance, or if the relevant damage was its fault. Russia is a party to the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1952) setting out criteria for operational control over the aircraft.

Update and trends

The hot topic in many spheres is sanctions and aviation is not an exception. Another widely discussed topic is a requirement to register all aircraft leased to Russian lessees in the Russian Aircraft Register. It is expected that at some point this requirement will enter into force for the aircraft leased by the Russian lessees under the lease agreements executed after the relevant amendments are introduced to the Russian legislation.

At the same time, Russian law permits a two-level structure with initial insurance in the Russian market and reinsurance in an international market. Such structure is widely used in aircraft finance and leasing. There is no statutory regulation on the minimum percentage of the insurance that must be retained in Russia in this case.

C L I F F O R D
C H A N C E

Victoria Bortkevicha
Anna Nikulina

6 Gashkeva Street
125047 Moscow
Russia

victoria.bortkevicha@cliffordchance.com
anna.nikulina@cliffordchance.com

Tel: +7 495 258 5050
Fax: +7 495 258 5051
moscow.office@cliffordchance.com
www.cliffordchance.com
33. Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?
No. See question 32.

34. Are there minimum requirements for the amount of third-party liability cover that must be in place?
For flights over the territory of Russia, a minimum amount of third-party liability cover is calculated as statutory minimal wage as of the date of the insurance contract multiplied by two and multiplied by maximum takeoff weight of the aircraft in kilograms. For international flights, regulation of the relevant state must be taken into account for calculation of this minimum amount.
Sweden

Fredrik Wilkens, Emma Stuart-Beck and Malin Sund
Advokatfirman Vinge

Overview

1. To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Sweden acceded, and is a party, to the Rome Convention (1933) as of 1939, the Chicago Convention (1944) as of 1946, the Geneva Convention (1948) as of 1955 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) as of 1972.

Sweden has not acceded to the Cape Town Convention (2001). However, through Sweden’s EU membership and the EU’s accession in 2009 to the Cape Town Convention (2001), Sweden is thus bound by the Convention insofar as the EU has judicial competence (ie, Sweden is not a Contracting State thereto). See ‘Update and trends’.

2. What is the principal domestic legislation applicable to aviation finance and leasing?

The primary aviation legislation in Sweden consists of:
- the Aviation Act (2010);
- the Aviation Ordinance (2010);
- the Operational Register Ordinance (1986);
- the Registration of Rights to Aircraft Act (1955); and
- the Act on Damage Caused to Third Parties by Air Carriage (1922).

3. Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

There are no such restrictions under Swedish law. Instead, the parties are free to specify the applicable law.

Pursuant to the Geneva Convention (1948), and the Swedish implementation thereof in the Act pursuant to Sweden’s accession to the 1948 Convention concerning International Recognition of Rights to Aircraft 1955, Swedish law recognises a foreign aircraft security right created by way of contract as security for debt, provided that the security right has been validly constituted in accordance with the law of the convention state. Thus, the law where the aircraft is registered would be the applicable law in relation to a security right in an aircraft registered in a convention jurisdiction, regardless of any choice of law clauses. As regards other non-convention jurisdictions, Swedish international private law would recognise the law where the aircraft is registered provided that such application is not viewed as manifestly incompatible with Swedish public policy.

Title transfer

4. How is title in an aircraft transferred?

The title in an aircraft is transferred by a valid and enforceable agreement (such as a bill of sale) between the parties.

5. What are the formalities for creating an enforceable transfer document for an aircraft?

There are no formalities required for enforceability of the transfer.

However, if the aircraft is registered in Sweden, the Swedish Transport Agency should immediately be given notice of a change in ownership of the aircraft by filing, for example, the original bill of sale or a certified copy thereof. If the bill of sale is in a language other than Swedish, Norwegian, Danish or English, a certified translation to one of those languages has to be provided.

Registration of aircraft ownership and lease interests

6. Identify and describe the aircraft registry.

There are two public registers with respect to aircraft:
- the Operational Register, in which aircraft registered in Sweden are recorded; and
- the Rights Register, in which a right in rem for an aircraft registered in Sweden can be recorded.

The Operational Register contains information about the owner and the operator of the aircraft. Both registers are maintained by the Swedish Transport Agency. There is no separate engine register in Sweden, and a registration in the Operational Register or the Rights Register would include, inter alia, the airframe, engines, propellers, radio equipment, instruments and other fittings, irrespective of whether they are installed on the aircraft or temporarily separated from it.

As per April 2015, Sweden has 85-bis arrangements in place with Estonia, Ireland, Italy, Latvia, Luxembourg, Spain and Germany.

7. Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

An aircraft owner may be registered in the Operational Register only if it is wholly owned by one of the following:
- the Swedish state;
- a Swedish municipality or county council;
- a citizen within the European Economic Area (EEA) or the estate of such a person;
- a company, an association, a trust or an estate of Swedish nationality or having its seat in a country within the EEA; or
- a European economic interest grouping domiciled in Sweden.

In addition, the Swedish Transport Agency may allow an aircraft to be registered in the Operational Register if the aircraft is normally operated in Sweden by one of the legal entities listed above. The Swedish Transport Agency generally grants such a registration when a foreign owner or lessor has leased the aircraft to a Swedish operator or lessee. The ownership may also be registered in the Rights Register. The ownership interest cannot be registered with any other registry besides those two.

A lease can be registered in the Rights Register (eg, by submitting the lease agreement) and if not registered in the Rights Register the lease must be immediately be registered in the Operational Register if the term of the lease is for an indefinite period or for at least one month. The lease may be registered in the Rights Registers and noted in the Operational Register if the lessor or user so requests. In addition, it must be registered in the Operational Register if the lessee shall assume the strict third-party liability imposed on the owner or lessor pursuant to the Act on Damage
9 What is the effect of registration of an ownership interest as to proof of title and third parties?

**Operational Register**

Registration in the Operational Register does not have an effect on the rights to an aircraft. It merely determines whether an aircraft should be considered to be registered in Sweden or not. Thus, it is only a ‘notation’ registration. Once registered, the Swedish Transport Agency issues a certificate of registration (nationality and registration certificate) for the aircraft.

**Rights Register**

Registration in the Rights Register provides proof of ownership and thereby creates priority and protection for the registered owner against third party claims. A registration of ownership in the Rights Register shall, as of the date of filing of the relevant documents with the Swedish Transport Agency, be deemed to be known by all persons whose rights to the aircraft are dependent on good faith in relation to the registration. Registration of the ownership in the Rights Register thus provides protection against bona fide purchasers of the aircraft as of the date on which the registration is made. However, as regards creditors of the previous owner of the aircraft, protection is not obtained until the next day and consequently the aircraft is used to cover the debts of the previous owner up to and including the day when the application for registration was made by the new owner.

10 Summarise the process to register a lease interest.

The lease may be registered in the Rights Register, and the following documents should then be submitted:

- an original application form (available on the Swedish Transport Agency’s website) to be signed by the lessor;
- a certified copy of the lessor’s certificate of registration not older than six months; and
- a document proving that the person acting on behalf of the lessor is an authorised signatory of the lessor.

There is no cost for the actual registration of a lease in the rights register, but the cost of obtaining a certificate (ie, proof of right of lease) is currently 11,200 Swedish kronor.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

The Swedish Transport Agency issues certificates of registration (nationality and registration certificate) for the aircraft upon a registration in the Operational Register. A certificate of registration contains information about nationality and registration mark, manufacturer and manufacturer’s designation of aircraft, aircraft serial number, owner and the owner’s address.

For a fee, the Swedish Transport Agency can issue certificates regarding the rights for the aircraft (general ownership through acquisition, leases and mortgages) registered in the Rights Register.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

An aircraft may be deregistered if the owner so requests in writing. An aircraft can only be deregistered or exported if there are no rights registered or noted in the Rights Register (eg, mortgagees). An operator cannot block a proposed deregistration or export by the registered owner.

13 What are the principal characteristics of deregistration and export powers of attorney?

Deregistration and export powers of attorneys are not common in Sweden. The power of attorney may be issued in favour of several attorneys.
However, it would not be possible to register the power of attorney, and it is not established by judicial precedent or otherwise by Swedish law that a power of attorney can be made irrevocable, and it is therefore arguable that any power of attorney can be revoked. Furthermore, any powers granted under the power of attorney will be terminated by operation of law upon the grantor’s insolvency. Thus, updated powers of attorney issued by the registered owners are generally required by the Swedish Transport Agency in connection with a deregistration from any of the Swedish registers.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Cape Town Convention (2001) is not applicable, as Sweden has not acceded to it. However, see “Update and trends”.

Security

15 What is the typical form of a security document over the aircraft and what must it contain?

The security document usually consists of a promissory note governed by Swedish law, and the aircraft owner (registered in the Rights Register) is required to agree to the security granted in the aircraft by signing the security document or promissory note. The owner’s signature must be witnessed by at least two other persons. The promissory note must contain information about the nationality and registration mark of the aircraft and the principal amount (in Swedish or foreign currency) to which the security relates. The interest should be specified. However, it should be noted that the security will not secure interest accumulated for a period extending to three years. It is not a requirement to file the separate loan agreement if such an agreement coexists with the promissory note.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

If the promissory note is in a language other than Swedish, Norwegian, Danish or English, a certified translation to one of those languages has to be provided once filed in original with the Swedish Transport Agency for registration in the Rights Register.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

In order to create a security right, the owner must first be registered as the owner in the Rights Register, which requires that the aircraft is registered in the Operational Register. In addition, the promissory note in original must be delivered to the mortgagee in order to be enforceable against the mortgagor and the security must be registered in the Rights Register in order to obtain perfection against other creditors and third parties.

Registration of a security interest in the Rights Register requires that the following documents are submitted:

• an original application form (available on the Swedish Transport Agency’s website) to be signed by the owner;
• the original security document or promissory note in original; and
• a certified copy of the owner’s birth certificate, or if the owner is a corporate entity, a certified copy of the certificate of registration not older than six months.

Upon registration, the original promissory note will be returned together with relevant documentation such as a certificate or abstract from the Rights Register. There is no cost for the actual registration in the Rights Register besides the stamp duty, but the cost of obtaining an additional certificate evidencing the registration of the security is currently 11,800 Swedish kronor.

The registration will be effected as of the date of filing if the registration is received by the Swedish Transport Agency before noon on a business day (provided that the application is granted), and if received by the Swedish Transport Agency in the afternoon it will be effected on the following day.

In addition, stamp duty of 1% of the principal value secured by the security is levied and payable by the owner of the aircraft. However, pursuant to the Act regarding Sweden’s accession to the 1948 Convention concerning International Recognition of Rights to Aircraft (1955), such stamp duty would not apply to a security (which by nature would be recognised in Sweden) that is transferred to the Rights Register upon the request of the mortgagee when the aircraft is transferred to the Operational Register. However, the aircraft must be registered in Sweden for three months in order for the transferred security’s priority right to be recognised under Swedish law.

18 How is registration of a security interest certified?

The rank or priority is stated in the Rights Register, and can be evidenced by the certificate or an abstract from the Rights Register. The Swedish Transport Agency can, for a fee, issue additional certificates as regards security registered in the Rights Register. Provided that the security is registered, the certificate can be issued the day after the day on which the order is made.

19 What is the effect of registration as to third parties?

The registration of a security in the Rights Register perfects the security and thus creates priority and protection for the holder against third party claims. If not registered, the mortgagee has no better right than unsecured creditors. The date of filing of the application for registration of the security with the Swedish Transport Agency determines the priority. If several applications are made during the same day, they rank equally. Third parties may rely on the Rights Register.

20 How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

Swedish law does not recognise the concept of trusts. However, a security agent may act on behalf of itself and the financiers provided that it has been duly appointed by the financiers. Security held by the security agent must be properly separated from the security agent’s own assets. The security is a right in rem and not in personam that is perfected through registration. The promissory note to be registered in the Rights Register will set out the identity of the mortgagee. However, it is not a requirement (although it is possible) that the details of the mortgagee are noted in the Rights Register in order to obtain perfection. In addition, there is a risk of clawback of the security if registered by the owner in the Rights Register within three months from the owner being declared bankrupt.

21 What form does security over spare engines typically take and how does it operate?

Engines and spare parts may not be registered separately in the Rights Register, and engines which are installed on a host aircraft on more than a purely temporary basis will be included in the registered mortgages if owed by the owner of the aircraft. This may also apply to engines installed by a lessor, although the legal situation in Sweden regarding this issue is not entirely clear. A security may also cover spare parts (including engines) belonging to the owner of the aircraft. The spare parts must then be described in terms of the characteristics as well as the approximate number thereof in the security document or in an appendix thereto, and the spare parts must be stored at locations in Sweden or another state that has acceded to the Geneva Convention (1948). In addition, a certificate from a reliable person stating that the spare parts belong to the owner of the aircraft must be submitted to the Swedish Transport Agency, and the spare parts must be clearly marked at the storage location as mortgaged and provide details of the scope of the mortgage, contact details of the mortgagee, and that the mortgage has been registered in the Rights Register.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

The owner would be required to pursue its claim through judicial procedures in order to repossession the aircraft, as self-help is not permitted under Swedish law. The judicial procedures available to the owner would be court proceedings or summary proceedings with the Swedish Enforcement Authority including enforcement assistance with repossession. The latter would generally entail submitting an application form, the lease agreement and any notices of termination and payment of a nominal application fee. Once the Swedish Enforcement Authority grants the application, the lessor will be informed of the date of repossession. The owner would be precluded from repossession or foreclosing the aircraft in an insolvency situation and the repossession would then have to be granted by the receiver in bankruptcy.

There are no sole legal steps to ensure successful repossession.
Update and trends

On 21 November 2013 the Swedish government formed a commission of inquiry to analyse and provide recommendations as to whether Sweden should accede to the Cape Town Convention (2001). The commission submitted its report to the government on 11 December 2014, whereby the commission recommended that Sweden should take appropriate measures enabling Sweden’s accession to the Cape Town Convention as soon as possible. The main reason for the proposal is the economic benefits that Swedish airlines stand to gain in the financing of new aircraft and aircraft engines and in light of the competitive market in which Swedish airlines operate and the fact that the Swedish aircraft fleet will need to be renewed over the coming years, financing terms are very important. The commission also proposes that the Convention and the Protocol be given the status of Swedish law through the introduction of a new act on international interests in mobile equipment and that certain legislative amendments are to be to current Swedish aviation legislation. The Cape Town Convention (and the Aircraft Equipment Protocol) will enter into force on the first day of the month following the expiration of three months after Sweden has ratified the instrument of accession with UNIDROIT. Only when Sweden is bound by the Cape Town Convention (and the Protocol) can the new proposed act on international interests in mobile equipment enter into force. The act should therefore begin to apply on a date determined by the Swedish government.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?
Judicial procedures must be undertaken in order to enforce a security interest in the aircraft, as self-help is not permitted under Swedish law. If the mortgagor takes possession of the aircraft without the owner’s consent, the mortgagor is likely to commit a criminal offence under Swedish law and may also be liable for damages. The judicial procedures available would be court proceedings or summary proceedings with the Swedish Enforcement Authority. Summary proceedings entail submitting a written application to the Swedish Enforcement Authority stating the amount claimed and containing a request that the claim is to be satisfied by execution of the mortgaged aircraft. The mortgagee will be requested to respond to the claim in writing and if the mortgagee fails to do so the Swedish Enforcement Authority will issue an order that payment should be paid out of the mortgaged aircraft. However, if the mortgagee challenges the application and raises any defence to the claim, the application will, upon the mortgagee’s request, be forwarded for ordinary court proceedings. Ordinary court proceedings would entail that the mortgagee files a summons application (if the matter is not upon the mortgagee’s request forwarded from the Swedish Enforcement Authority). The court then issues a writ of summons which is followed by service of the writ of summons, written submissions, one or more preparatory hearings and a main hearing. Should the mortgagee (or its representatives) not appear, the court may render judgment in default. There exists a right to detain the aircraft by way of court application provided that:
- the mortgagee has a legitimate claim on the mortgagor, being the owner of the aircraft;
- there is a risk that the aircraft will be removed from Sweden or otherwise disposed of in a way that impedes the mortgagee’s possibilities to recover the claim; and
- the mortgagee can provide security for damage that might be caused to the mortgagor (this may be disregarded in certain circumstances).

The mortgagee has a right to submit a response to the application, but an expert application is possible if the detention is urgent. However, pursuant to the Aircraft Exemption from Provisional Attachment Act (1939), special provisions may apply to, inter alia, aircraft assigned for government service and aircraft for transportation when ready for departure.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?
There are some preferred creditors, which include secured creditors. Any potential claims would generally rank as follows:
- fees for the administrator of a reorganisation;
- claims related to agreements entered into by the administrator during a reorganisation;
- claims secured by a salvage lien (ie, compensation due as a result of salvage of the aircraft, parts thereof, goods or people on board);
- mortgagee’s (secured) claims;
- claims secured by a repairman’s lien or other rights of retention;
- taxes;
- corporate mortgages;
- salary claims; and
- pension claims.

Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?
Assuming the lessor or lessee has no physical or permanent presence in Sweden, the lessor or lessee will not need to register for tax purposes in Sweden. Aircraft (intended for transportation of fare paying passengers) are generally exempt from Swedish VAT. However, the exemption may not apply in relation to certain lease structures in respect of the head lease where the sub-lessee is a Swedish entity. Such Swedish entity may be imposed and required to report VAT in relation to the head lease. Nevertheless, deduction possibilities will render in no increased VAT expenses. Please also refer to question 17 regarding stamp duty for mortgages.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?
No. However, if direct and indirect payments to or from Sweden exceed 150,000 Swedish kronor, or if the aggregated payments amount to 150,000 Swedish kronor, the intermediary arranging the payments must report certain information by submitting a statement of income for the previous income year to the Swedish Tax Agency no later than by 31 January the subsequent year. In addition, certain restrictions may apply should extraordinary circumstances prevail (such as war or exceptional short-term capital movements) in Sweden.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?
No. However, the Swedish Contracts Act (1915) contains a general clause stating that any term in an agreement found unconscionable as regards the contents of the agreement, the circumstances prevailing at the time the agreement was entered into, subsequent circumstances and circumstances in general, may be set aside or modified, although the demands for a term or agreement to be found unconscionable are rather stringent.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?
No, not in relation to commercial aircraft to be solely imported to, or exported from, Sweden.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.
There is no prevailing practice to place the insurance in the Swedish market. There are certain activities for which there are requirements under Swedish law that insurance must have a local connection. None of these activities are, however, likely to apply.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?
A cut-through clause accessing reinsurance would, in general, be considered valid under Swedish law. However, the insurance company providing the reinsurance cover may be deemed to conduct insurance business in Sweden by way of usage of cut-through clauses and thereby trigger a licensing requirement for insurance business under Swedish law.
31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

The Swedish Insurance Contracts Act (2005) does not apply to reinsurance contracts. The reinsurance market for aviation in Sweden is rather limited, and Swedish law provides little guidance, therefore foreign customary law is used for reference. However, the assignment of reinsurance is likely to be legally effective under Swedish law if permitted under the reinsurance contract. In the absence of such a provision in the contract, the general principle under Swedish law would be that rights or obligations under the reinsurance contract can only be assigned if the other party has consented thereto.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

According to the Act on Damage Caused to Third Parties by Air Carriage (1922), a lessor (as owner) of an aircraft will be strictly liable for all damage caused to third parties in operating the aircraft. However, in the event that:

- the lessee and operator and the lessor enter into an agreement stating that the lessee and not the lessor shall be liable;
- the lease is for a term exceeding one year;
- the lessee or operator is entitled to use its own or other pilots or commanders on the aircraft or is entitled to use the aircraft for commercial air transport purposes; and

then the lessee or operator and not the lessor or owner will be liable for damage caused to third parties by air carriage.

It is unlikely that a financier or mortgagee could be held liable for any actions or omissions of the counterparty.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

See question 32.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?

EC Regulation No. 285/2010 of 6 April 2010 amending EC Regulation No. 785/2004 of the European Parliament and of the Council on insurance requirements for air carriers and aircraft operators provides for minimum insurance requirements in respect of liability for passengers, baggage, cargo and third parties and is applicable in Sweden. It specifies minimum insurance requirements in respect of third-party liability coverage ranging from 0.75–700 million SDR depending on the specific aircraft’s maximum take-off weight.
Switzerland

Frédéric Meyer, Raphaël Baeriswyl, Philippe Renz and Antoine Labaume
Meyer Avocats

Overview

1. To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Switzerland is a party to the Rome Convention (1933), the Chicago Convention (1944), the Geneva Convention (1948) as well as the Warsaw (1929) and the Montreal Conventions (1999). The Cape Town Convention (2001) and its Aircraft Protocol have been signed but not yet ratified by Switzerland.

Switzerland joined the Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe (1956). Most of the EU aviation legislation is applicable in Switzerland, as a result of the entry into force on 1 June 2002 of the Agreement between the European Community and the Swiss Confederation on Air Transport (1999).

Switzerland is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

2. What is the principal domestic legislation applicable to aviation finance and leasing?

The main sources of domestic legislation applicable to aviation finance and leasing are the Swiss Civil Code, the Swiss Code of Obligations, the Federal Aviation Act, the Ordinance on Aviation (OAv), the Federal Act on Aircraft Records Register (AARR) and its implementing Regulation.

3. Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

A distinction must be made between the obligating act (the agreement generating the obligations of the contractors) and the act of disposal (the actual performance of the obligations contracted under the obligating act).

The parties to an agreement are free to choose the law governing their obligating act (aircraft sale and purchase, loan, lease and mortgage agreement).

As regards the act of disposal (ownership transfer, creation of a mortgage), the parties’ choices depend on the registration of the aircraft.

If the aircraft is Swiss (HB) registered but is not on the Swiss Aircraft Records Register (see question 6) or has been removed from such register at the time of ownership transfer (no mortgage registration is possible in such situation), the lex rei sitae applies to the act of disposal (i.e., the Swiss movable properties law if the aircraft is located in Switzerland), with the right for the parties to agree on another governing law within the limits set forth above.

It is prudent to ensure any ownership transfer or aircraft mortgage creation complies with the AARR (as applicable), the lex rei sitae, the laws of the country of the current (or in case the aircraft is not registered, the previous) registration, the laws of the future country of registration (as applicable) and the law governing the agreement (obligating act).

Title transfer

4. How is title in an aircraft transferred?

If the AARR provisions apply because the aircraft is on the Swiss Aircraft Records Register (see questions 3 and 6), the transfer of ownership requires a valid cause (usually a sale and purchase agreement) and the registration, upon seller’s request, of the new owner as owner with the Swiss Aircraft Records Register.

If the Swiss movable properties law applies (see question 3), the transfer requires a valid cause (usually a sale and purchase agreement), an in rem contract (generally implicit, under which the parties express at the time of transfer their intent to complete the transfer) and the transfer of possession over the aircraft.

A bill of sale is not sufficient under Swiss law.

5. What are the formalities for creating an enforceable transfer document for an aircraft?

If the transfer of ownership occurs through registration of the new owner with the Swiss Aircraft Records Register (see question 4), the sale and purchase agreement must be in writing and an official notice (see question 8) must be filed with the Swiss Aircraft Records Register.

If the aircraft is not on the Swiss Aircraft Records Register, no specific form is required (the written form is, however, recommended for evidence purposes).

Registration of aircraft ownership and lease interests

6. Identify and describe the aircraft registry.

The Swiss Federal Office of Civil Aviation (FOCA) holds two aircraft registers, both of which are public:

- the Swiss Aircraft Registry, with which all Swiss (HB) aircraft are mandatorily registered. The Swiss Aircraft Registry mentions the name of the owner (nationality restrictions apply to aircraft operated non-commercially) and the operator of the aircraft; however, such mention of ownership does not provide any proof of title; and
- the Swiss Aircraft Records Register, with which a Swiss (HB) aircraft (already registered with the Swiss Aircraft Registry) may be registered upon request of its owner, provided that it has an address for notices in Switzerland. As soon as a Swiss (HB) registered aircraft is registered with the Swiss Aircraft Records Register, the Swiss legal system applies to such aircraft rules similar to those governing immovable property. An ownership interest, or any mortgage, is to be registered with the Swiss Aircraft Records Register.

There is no specific engine register in Switzerland.

Switzerland is a party to numerous delegation agreements on the implementation of article 83-bis of the Chicago Convention.
7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry?

The registration of interests in, or the annotation of other rights over, an aircraft requires such aircraft to be registered with the Swiss Aircraft Records Register (see question 6). The fact that a person or entity in possession of an aircraft is not the owner of such aircraft may be mentioned in a public registry (mentioning title retention agreements) held by the Debt Enforcement Office of the place of residence or principal place of business of such person or entity.

8 Summarise the process to register an ownership interest.

Before an aircraft can be registered with the Swiss Aircraft Records Register, it first has to be registered with the Swiss Aircraft Registry so as to become a Swiss (HB) registered aircraft (see question 6), and has therefore to comply with the relevant regulatory requirements, including nationality. If the aircraft is not yet registered with the Swiss Aircraft Records Register, the ownership interest is registered with the Swiss Aircraft Records Register at the same time as the aircraft itself. Such registration is effected by filing with the FOCA:

- the appropriate form (request for registration) signed by the owner, providing a description of the aircraft including its engines as integral parts and any accessories, and the name and contact details of the owner with an address for notices in Switzerland;
- any documentary proof of ownership such as an aircraft purchase agreement or an original bill of sale (a ‘Swiss’ bill of sale form is available, though not mandatory);
- an excerpt from the title retention registry of the place of residence or principal place of business of the owner (see question 7); and
- documentary proof of the signatory’s authorisation to act on behalf of the owner. Such documentary proof should be provided as originals or copies which will have to be notarised and apostilled or legalised in another way depending on the country in which the relevant documents and copies are processed.

The exact requirements of the FOCA as to the form of the documents can and should be discussed and agreed upon with the FOCA in advance. Provided that the owner is represented by an experienced and reliable Swiss counsel, it is reasonable to expect the registration of the aircraft to take place immediately upon the Swiss counsel’s instruction e-mail to the Swiss counsel, it is reasonable to expect the registration of the aircraft to take place immediately upon the Swiss counsel’s instruction e-mail to the FOCA for registration of the aircraft. Such celerity is possible only upon request, excerpts from the register mentioning:

- a PDF copy of all documentation has been submitted to and approved by the FOCA in advance (see questions 15 and 16); and
- the FOCA can confirm that the original documents are being couriered to the FOCA on the same day.

Aircraft registrations with the Swiss Aircraft Records Register are subject to publication with the Swiss Official Gazette of Commerce and with one or several newspapers. The cost of such publication is about 1,000 Swiss francs. Third parties have 30 days from such publication to notify the FOCA of any interest that they may have in the aircraft. Provided that the grantor becomes insolvent, and the insolvency is at any time. If the grantor becomes insolvent, and the insolvency is

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

Documents similar to those listed in relation to the registration of an ownership interest have to be filed by the owner with the FOCA, together with the same official notice (see question 8).

10 Summarise the process to register a lease interest.

Provided that an aircraft is registered with the Swiss Aircraft Records Register, the right to use such aircraft can be annotated with the Swiss Aircraft Records Register if the right is granted under a lease agreement or charter agreement with a term of at least six months. Documents similar to those listed in relation to the registration of an ownership interest have to be filed by the owner with the FOCA, together with the same official notice (see question 8).

11 What is the regime for certification of registered aviation interests in your jurisdiction?

Aviation interests are registered with the Swiss Aircraft Records Register (see question 6). The head of the Swiss Aircraft Records Register issues, upon request, excerpts from the register mentioning:

- the specification of the aircraft and its integral parts and accessories (if any) (see question 8);
- the identity and details of the owner;
- the identity and details of the mortgagee, or a registered lessee (if any); and
- if a mortgage is registered, the secured amount and the rank of such mortgage.

No excerpt can be issued in relation to separate engines (see question 7).

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The deregistration request (indicating, as the case may be, the country in which the aircraft is anticipated to be re-registered) must be executed by the owner, irrespective of whether the aircraft is registered only with the Swiss Aircraft Registry, or also with the Swiss Aircraft Records Register (see question 6). In the latter instance, the aircraft will not be deregistered without the prior written consent of a mortgagee (if any). The aircraft will not be deregistered until the FOCA is in possession of the originals of the Certificate of Registration and the Certificate of Airworthiness of the aircraft.

The operator has various means to block the deregistration, such as applying for provisional measures aiming at protecting its right to use the aircraft, or keeping the original board documents of the aircraft (in which event the FOCA is entitled to force the operator to return the original board documents). If a lease interest has been registered with the Swiss Aircraft Records Register (see question 10), the current practice of the FOCA (which has not been tested at court) does not allow the relevant lessee to oppose deregistration. The FOCA will, however, inform the lessee of the pending deregistration.

13 What are the principal characteristics of deregistration and export powers of attorney?

Deregistration and export powers of attorney are of limited interest in Switzerland. The self-help remedies of a mortgagee are very limited (see question 23), and the relevant mandatory legal provisions cannot be circumvented by the granting in advance of a power of attorney to the mortgagee or to any other third party. A power of attorney (governed by Swiss law) qualifies as an agency agreement and is as such mandatorily revocable at any time. If the grantor becomes insolvent, and the insolvency is
governed by Swiss law, no act could be performed by the attorney if such acts amount to disposing of the grantor’s assets.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Not applicable.

Security

15 What is the typical form of a security document over the aircraft and what must it contain?

The mortgage agreement must be made in writing. It must be filed in original form, together with an official form which summarises the main terms of the mortgage agreement and must contain:

- the designation of the aircraft, as or to be registered with the Swiss Aircraft Records Register;
- the name, registered address, address of Swiss representative (if the relevant party is not a Swiss resident) and contact details of the mortgagee and of the mortgagee;
- the name, description and date of the mortgage agreement;
- the maximum secured amount included principal and interests (in Swiss francs); and
- the rank of the mortgage.

The form must be signed by the owner. Considering that the form is only available and will necessarily be submitted in German or French, the FOCA is flexible as regards the language of the mortgage agreement itself.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The mortgage agreement and the official form (see question 15) must be submitted in original format. The authority of the relevant signatories must be evidenced by corporate documents or individual passports (provided as originals or as copies, which will have to be notarised and apostilled or legalised in another way depending on the country in which the relevant documents and copies are processed).

The exact requirements of the FOCA as to the form of the documents can and should be discussed with the FOCA in advance so as to allow a timely registration of the mortgage at closing (see question 17). No costs are charged by the FOCA in relation to the documents themselves.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

The aircraft mortgage does not exist unless and until it has been registered with the Swiss Aircraft Records Register. As a prerequisite, the aircraft itself must be registered with the Swiss Aircraft Records Register (see questions 6 and 8). Provided that the parties are represented by an experienced and reliable Swiss counsel, it is reasonable to expect the registration of a mortgage to take place immediately upon the Swiss counsel’s instruction email to the FOCA. Such speed is possible only to the extent that a PDF copy of all documentation (see questions 15 and 16) has been submitted to and approved by the FOCA in advance and the Swiss counsel can confirm that the original documents are being couriered to the FOCA on the same day. The fees charged by the FOCA for the registration of a mortgage depend on the secured amount (the maximum fee is 17,200 Swiss francs, and the minimum fee is 385 Swiss francs).

18 How is registration of a security interest certified?

The FOCA issues to the owner and the mortgagee upon registration of the mortgage, and to interested third parties upon request, an excerpt from the Swiss Aircraft Records Register (see question 11). If the aircraft has to be registered with the Swiss Aircraft Records Register at the same time as the mortgage, the availability of the excerpt will be delayed by the publication procedure (see question 8).

19 What is the effect of registration as to third parties?

Mortgages registered with the Swiss Aircraft Records Register are allocated a fixed rank for a maximum amount. Priority depends on the allocated rank (as opposed to the registration chronology).

The Swiss Aircraft Records Register being public, registrations are subject to a presumption of knowledge. Third parties acting in good faith are protected in their acquisitions based on information contained on the Swiss Aircraft Records Register. The Swiss Confederation may be liable for the damage incurred by third parties as a consequence of inaccuracies in the Swiss Aircraft Records Register.

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

A Swiss aircraft mortgage is a right in rem. It affects and follows the aircraft, so if the aircraft is sold to a third party. Under Swiss law, the mortgagee and the lender are traditionally one and the same entity. However, Switzerland recognises trust and fiduciary structures in general, and the FOCA accepts that a mortgagee is acting as a security trustee (if such is the role of the mortgagee under the financing documentation). This allows a group of lenders to change without amending the Swiss Aircraft Records Register, as long as the security trustee remains the same entity.

However, amending the name of the mortgagee (in the event that the relevant loan agreement or the mortgage have been assigned to a new lender or creditor) is also possible. Such amendment has to be notified by filing a form (similar to the form used for the registration of the mortgage – see questions 15 and 16) and providing documents evidencing the assignement and novation of the mortgage and the identity and details of the new mortgagee (similar to the documents mentioned in question 16).

The fee charged by the FOCA for the registration of the change of mortgagee is very small.

21 What form does security over spare engines typically take and how does it operate?

A spare engine cannot be subject to an independent mortgage.

If a spare engine is expressly designated and registered with the Swiss Aircraft Records Register with a specific mortgaged aircraft, it becomes an integral part of the latter and is subject to the same mortgage as the aircraft (even though it is not installed on it or if it is installed on another aircraft). The spare engine can be replaced by another engine provided the registration is modified accordingly with the Swiss Aircraft Records Register, and such modification does not reduce the mortgage value.

The legal regime applicable to a spare engine that is not on the Swiss Aircraft Records Register as integral partly depends on its use. As long as it has not been used, the engine is not considered as an accessory of the mortgaged aircraft and can therefore not become subject to the mortgage (save through application of certain restrictive provisions of the AARR, articles 29 et seq, governing the extension of mortgages to spare parts (such as engines to be stocked in a separate warehouse)).

As soon as the spare engine is used and installed on the aircraft, it becomes an accessory of the aircraft and, as such, it becomes subject to the mortgage registered against the aircraft (a mention may be made on the Swiss Aircraft Records Register) in replacement of the replaced engine. Such replacement is not allowed if it reduces the mortgage value.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

Repossession procedures are usually affected by the current location of the aircraft, rather than by the law applicable to the lease agreement. As owner (or with the assistance of the owner) of the aircraft, the lessor is usually in a position to lead third parties (such as maintenance companies, if the aircraft is undergoing maintenance) to consider its title to the aircraft rather than the right of a lessee.

However, general principles of law, such as the right of any person or entity to deny third parties access to its premises, will generally keep the owner or lessor from (lawfully) exercising any self-help remedy against the lessee. Considering that irrevocable powers of attorney are not valid under Swiss law (see question 13), the usual wording allowing the lessor to enter land and premises of or under the control of the lessee or third parties is of little help.
If the lessee is the owner of the aircraft, it may apply to court (by way of provisional measures) and claim for the return of the aircraft. The lessee may, on its part, apply (by way of provisional measures) and claim for protection of its right to use the aircraft. The FOCA may be entitled and willing, in some circumstances, to force the operator to return the original board documents. This applies in particular in situations where the lessor (as owner) has applied for deregistration of the aircraft (see question 12).

**23 Outline the basic measures to enforce a security interest.**

How may the owner lawfully impede the mortgagee’s right to enforce?

Aircraft mortgage enforcement must occur by way of forced execution procedure under the compulsory control of the authority. A mortgagee cannot unilaterally engage in the private sale of a mortgaged aircraft.

The mortgagee must file an application with the local Debt Enforcement Office. The Office then serves a payment order to the aircraft owner, upon which the Office takes over the administration of the mortgaged aircraft. The purpose of such administration is to ensure the aircraft remains grounded in Switzerland. While possible, it is therefore in principle not necessary to apply for a seizure of the aircraft. The owner can raise an opposition to the payment order and by doing so force the mortgagee to initiate court or arbitration proceedings. If the outcome of the proceedings is successful, the mortgagee may require the auction sale of the aircraft. A private sale may only be considered if all parties involved agree.

If the owner goes bankrupt, the aircraft becomes part of the bankruptcy estate and is sold as part of the liquidation of the bankruptcy. The mortgagee has a priority right over the proceeds of sale of the aircraft.

If the owner of the aircraft is not the debtor of the secured obligations, it has the right to settle the mortgagee’s claim to prevent the mortgage enforcement. In such case, the owner is subrogated to the rights of the mortgagee.

**24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?**

A reclamation right is available to the Swiss army and the civil protection in specific circumstances, which may extend to aircraft. In case of requisition, the Swiss Confederation has an obligation to pay the owner a fair indemnity for the use, loss in value and loss of ownership of the aircraft. The mortgagee of a requisitioned aircraft benefits from a legal mortgage over such claim.

HB aircraft that are on the Swiss Aircraft Records Register, and foreign aircraft registered in countries that are parties to the Geneva Convention, may be subject to a legal mortgage (taking priority over contractual mortgages) to secure claims resulting from aircraft salvage or assistance or extraordinary expenses for the preservation of the aircraft or for claiming against third parties having a liability for the confiscation, damage, destruction or loss of the aircraft.

No legal mortgage exists in respect of HB aircraft that are not on the Swiss Aircraft Records Register, but a creditor having possession of such an aircraft may exercise a retention right to secure his claims.

The status of customs legal mortgages is uncertain. If such mortgages seem to be available for HB aircraft that are not on the Swiss Aircraft Records Register, they are in general excluded for HB aircraft that are on the Swiss Aircraft Records Register and foreign aircraft registered in countries that are parties to the Geneva Convention.

**Taxes and payment restrictions**

**25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?**

Aircraft purchase prices are subject to Swiss VAT at the rate of 8 per cent if:

- the seller is or shall be registered as a Swiss VAT payer;
- the aircraft is located in Switzerland (on the ground or in the airspace) at the time of transfer; and
- the aircraft is not exported outside of Switzerland after the transfer.

Swiss VAT also applies at the rate of 8 per cent when the aircraft is not in Switzerland at the time of transfer but is subsequently customs cleared in Switzerland (which is generally the case for HB-registered aircraft).

Under Swiss VAT law, a leasing transaction qualifies as a supply of goods. Whether Swiss VAT is due on lease payments depends on where the aircraft is located at the time the lease agreement is entered into, respectively during its term. On the other hand, sale and lease back transactions do not qualify as two subsequent supplies of goods but as a VAT-exempt financial service, provided that the agreement provides for the mandatory (and not optional) re-transfer of title at the end of the lease period.

Swiss VAT on purchase price or lease payments or Swiss VAT paid by the owner or lessee upon customs clearance of the aircraft may be recovered if the owner or lessee may be registered as a Swiss VAT payer, which implies that the aircraft must be used for entrepreneurial purposes. This condition is denied if the aircraft is essentially or only used by its beneficial owner for his private needs, even if flights are invoiced to the beneficial owner at market rate. If the aircraft is mainly used within the frame of an entrepreneurial activity and only partly used by the beneficial owner for his private needs, a pro rata may apply to input VAT recovery in certain circumstances.

No withholding tax applies on lease payments or loan repayment from Switzerland.

Loans granted to Swiss entities by foreign affiliated companies shall comply with market conditions. In particular, interest rates shall not exceed safe harbour interest rates published by the Swiss tax authorities.

Corporate taxes applicable to the entity holding the aircraft shall also be carefully considered in case such entity is resident in Switzerland for tax purposes.

**26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?**

There are currently no restrictions on international payments and exchange controls in effect in Switzerland. Considering that such restrictions are almost impossible to apply and can easily be circumvented in an open economy, Switzerland is unlikely to introduce such restrictions.

Depending on the reasons that would lead to such restrictions, the relevant competent authority would be the Swiss National Bank (Switzerland’s central bank) for restrictions linked to monetary policy, or the State Secretariat for Economic Affairs for restrictions linked to economic or political decisions.

**27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?**

The parties to an agreement may determine the default interest rate in their discretion, but courts may adjust a rate they find excessive. The maximum rate acceptable under the consumers protection legislation (not applicable to aircraft finance) is 15 per cent per annum. By analogy, a default interest rate charged on lease or loan payments, which does not exceed 15 per cent, should not be found excessive by courts.

In the absence of a contractually agreed default interest rate, the legal rate that applies is 5 per cent per annum. However, if contractors agreed on a higher interest rate, the default interest rate is equal to such higher interest rate.

Compounding default interest is not allowed.

**28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?**

As a matter of principle, goods entering the Swiss territory, whether as part of a repossess process or otherwise, are subject to customs clearance, which generally entails the payment of import duties based on the aircraft weight and import VAT (see question 25). Aircraft intended for private use in civil aviation may be exempted from import duties (but not VAT). Other exceptions or exemptions may be available (for both import duties and VAT), based, for example, on temporary import (Switzerland ratified the Istanbul Convention on Temporary Admission (1990)), specific customs regimes (such as inward processing) or, under certain circumstances, in the case of aircraft imported by air transport enterprises operating mainly on international routes.

The responsibility for customs clearance attaches primarily to the persons having operational control over the aircraft (airline, owner or operator) at the time it enters the Swiss territory and their representatives. The liability for the payment of import duties and VAT may extend to certain persons indirectly involved in the operation on a joint and several basis, depending on the circumstances of the case (including owner, consignee or freight forwarding agent).

The export of an aircraft from Switzerland is not subject to customs duties or VAT.
Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There is no captive insurance regime in Switzerland.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Cut-through clauses are legally effective under Swiss law. They are, however, not market standard.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance are legally effective under Swiss law. They are, however, not market standard.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Liability for damage caused to third parties on the surface or in flight lies with the aircraft ‘operator’. The ‘operator’ is described for such purpose as the person having the power to dispose of the aircraft, using the aircraft for its own account and at its risks and exercising a direct and effective control over the aircraft. The risk that an owner, lessor or financier qualifies as ‘operator’ for third-party liability purpose is in general remote, but cannot be excluded (in particular in situations such as private flights or repossession).

Liability for death and injury of passengers and damage caused to baggage and cargo is principally governed by the Montreal and Warsaw Conventions and EU Regulation No. 207/97 as amended by the EU Regulation No. 889/2002. The risk for an owner, lessor or financier to qualify as ‘carrier’ under said rules is marginal.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

As described above, liability lies with the ‘operator’ or the ‘carrier’. An operational interest is therefore required.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?

The OAv sets out the minimum insurance cover (for damage incurred by third parties on the ground) as an amount expressed in special drawing rights based on the maximum take-off weight of an aircraft. These amounts and weights are in line with Regulation (EC) No. 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators.

Update and trends

The Federal Tax Administration has been in the process of elaborating its VAT Information on Air Traffic for several years. Once adopted, this document should clear some uncertainties faced by the Swiss aviation community, including financiers, since the entry into force of the Federal VAT Act in 2010. A third draft was submitted for consultation to the industry on 5 February 2015. A final version is expected to be adopted within the coming year.

The Cape Town Convention ratification process is still on hold and is unlikely to be completed within the next three years.

In general, Swiss financiers remain strong actors of the aviation finance market, especially in the private or business aircraft segment in spite of the consequences of the financial crisis (depreciation of aircraft values, margin calls and repossessions, new regulatory requirements (Basel III), increased monetary uncertainty, Ukraine crisis, etc.).
Overview

1 To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Turkey is not a party to the Rome Convention Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, which came into force in 1958.

Turkey is a party to the Convention on International Civil Aviation, namely the Chicago Convention was signed along with 18 annexes to establish the rules of civil aviation and civil air carriage on 7 December 1944. The Chicago Convention consists of five documents:
- the Temporary International Civil Aviation Convention;
- the International Air Transport Convention;
- the International Air Service Transit Convention;
- the Procedure document consisting of 12 technical procedural annexes; and
- a reciprocal format.

The Convention was ratified by the Republic of Turkey (Turkey) with the Law on the Endorsement of the Chicago Convention dated 5 June 1945 No. 4749 as published in the Official Gazette dated 12 June 1945 No. 6029. Turkey is a party to the Chicago Convention since its ratification and the Chicago Convention is still in effect in Turkey.

Turkey is not a party to the Geneva Convention on the International Recognition of Rights in Aircraft was signed by the signatory states in 1948.

The Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, namely the Cape Town Convention, was signed by Turkey on 11 November 2001. The Cape Town Convention was ratified by the Council of Ministers Decree published in the Official Gazette dated 4 July 2011 No. 27984. The Cape Town Convention came into force in Turkey on 1 December 2011 and it is still in effect.


Turkey has ratified the Warsaw Convention with the Law on the Endorsement of the Warsaw Convention dated 1 March 1977 No. 2073 as published in the Official Gazette dated 13 March 1977 No. 18577. Warsaw Convention came into force in Turkey on the date of its ratification by the state and it is still in effect in Turkey.

The Montreal Convention for the Unification of Certain Rules for International Carriage by Air to which Turkey is a signatory, has come into force in Turkey with the Law on the Approval of Convention for the Unification of Certain Rules for International Carriage by Air dated 2 April 2009 No. 5866 as published in the Official Gazette dated 12 April 2009 No. 27200. The Montreal Convention is still in effect in Turkey.

2 What is the principal domestic legislation applicable to aviation finance and leasing?

The principal domestic legislation applicable to aviation finance and leasing under Turkish law are as follows:
- the Turkish Civil Aviation Law (CAL); No. 2920 and dated 14 October 1983 as published in the Official Gazette on 19 October 1983 No. 18196;
- the Law Concerning the Organisation and Duties of the Civil Aviation Directorate General of Turkey; No. 5431 and dated 10 November 2005 as published in the Official Gazette dated 18 November 2005 No. 25997;
- the Regulation on the Establishment and Operating Conditions of Financial Leasing, Factoring and Financing Companies; published in the Official Gazette dated 24 April 2013 No. 28627;
- the Circular on the Procedures and Principles of Cross-Border Leases dated 31 July 2013, which entered into force with the Letter of the Banking Regulation and Supervision Agency No. 240.494.40-045.01 [11/1.1]-19623;
- the Directive on the Irrevocable Deregistration and Export Request Authorisation (IDERA) Form Registration, Cancellation and Execution dated 9 July 2014;
- the Bankruptcy and Enforcement Law; No. 2004 dated 9 June 1932 and published in the Official Gazette dated 19 June 1932 No. 2128;
- the Turkish Civil Code; No. 4721 dated 22 November 2001 and published in the Official Gazette dated 8 December 2001 No. 24607;
- the Turkish Code of Obligations; dated 11 January 2011 No. 6098 as published in the Official Gazette dated 4 February 2011 No. 27836;
- the Turkish Commercial Code; dated 13 January 2011 No. 6102 as published in the Official Gazette dated 14 February 2011 No. 27846;
- Omnibus Bill No. 6562, published in the Official Gazette dated 19 February 2014 No.28918;
- the Stamp Tax Code; dated 1 July 1964 No. 488 as published in the Official Gazette dated 11 July 1964 No. 117513;
- the Value Added Tax Code; 25 October 1984 No. 3065 as published in the Official Gazette dated 2 November 1984 No. 18653; and

3 Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

The choice of foreign law as the governing law in all kinds of contracts, including the transfer of interests in or creation of security over aircraft, is valid and binding under Turkish parties.

If either of the parties to a contract, as governed by a foreign law, files a court case in Turkey to solve a dispute arising from the subject contract, then the Turkish court would apply Turkish law to determine on whether it has jurisdiction to hear and resolve on the matter. If the Turkish court agrees then such court should recognise and give effect to the relevant provisions of the contract under which the parties thereto agree that the contract will be governed by the foreign law which the contract parties have agreed upon. The exception is that the application of the
relevant provisions of the chosen law to any specific issue before the court should, in the opinion of such court, not contravene public policy of Turkey.

Title transfer

4 How is title in an aircraft transferred?

Title transfer of an aircraft which is registered in Turkey requires registration of such fact with the Civil Aircraft Registry as maintained by the Civil Aviation General Directorate of the Ministry of Transportation, Maritime Affairs and Communication (CAD).

Under the CAL, aircraft is defined as a moveable property; on the other hand, in terms of perfection of propriety rights on the aircraft, CAL makes reference to the provisions of the Turkish Civil Law. Turkish Civil Law provides that the ownership on an immovable property can only be established and thus encumbered by registration at the relevant registry office. Consequently, for perfection of title transfer of an aircraft, registration of such fact with the Civil Aircraft Registry as maintained by the CAD is compulsory and not a formality. Registration has a constitutive effect for the establishment of title of ownership on an aircraft from a Turkish law point of view.

5 What are the formalities for creating an enforceable transfer document for an aircraft?

The formalities for transfer of title of an ownership of an aircraft with the CAD can be outlined as follows. An aircraft sale and purchase agreement in writing must be executed. If the execution is held in Turkey, then the signatures of the signatories must be certified by a Turkish notary public for authenticity purposes. If it is held outside of Turkey, then the CAD requires that the executed agreement is notarised and apostilled (or consularised by a Turkish consulate or embassy) in the jurisdiction where the execution took place. Furthermore, the official documents evidencing the signing powers of the signatories executing an aircraft sale and purchase agreement and their Turkish language translations (if issued outside Turkey) are required to be submitted to the CAD.

The CAD also requires that the bill of sale must be notarised and apostilled (or consularised) and filed together with a notarised Turkish language translation of the same.

Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry.

The Turkish Civil Aircraft Registry as maintained by the CAD is established on the ‘operator’ registry. Therefore, if a civil aircraft is eligible for being registered with the Turkish Civil Aircraft Registry as maintained by the CAD, then such civil aircraft will be registered in the name of its operator. The name and address of its owner of the aircraft are also included in the registration certificate of the relevant aircraft. A registration regime in Turkey is provided for aircraft engines as well, only in case an aircraft engine is leased under a financial leasing regime. No particular specific registration or recording regime exists for leasing of an engine, if the engine is directly purchased by an owner or leased by a lessor to a lessee under an operational lease agreement. If the lessee of a financial lease transaction is domiciled outside of Turkey and has no branch office in Turkey, then such financial lease will be deemed a cross-border financial lease from a Turkish law point of view. The Leasing Law requires that the cross-border financial lease agreements are registered with a special log as maintained by the Association of Financial Leasing, Factoring and Financing Companies (Association). This registration is a validity condition and if mandatory for the perfection of the lessor’s rights.

Finally, for registration purposes, the CAD requires for authorisation transfer agreements which are signed within the scope of ICAO 83-bis between the CAD and the civil aviation authority of the subject foreign jurisdiction in the case of a dry lease between any local and foreign airline operator.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry?

Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

Although in Turkey an ‘operator’-based registration system is recognised, the owner of the aircraft is also registered and annotated in the registration certificate of the relevant aircraft. Only Turkish aircraft operated by Turkish operators under an aircraft operation certificate can be registered with the Civil Aircraft Registry as maintained by the CAD. Under the CAL, an aircraft will be deemed a Turkish aircraft if the aircraft is owned (i) by public agencies whose executive positions are held by a majority of Turkish nationals; or (ii) by private companies, cooperative societies and their unions registered in the Turkish Trade Register, with a majority of Turkish nationals holding executive and representational powers and the voting majority of which, according to the articles of association, consists of Turkish stockholders or partners. Therefore, if the owner of the aircraft wants to register its aircraft with the CAD, then either the owner must meet the criteria as outlined either in (i) or (ii); or have the aircraft registered to an operator’s name. The Civil Aircraft Registry is the only registry where the title of ownership of an aircraft owner can be registered in Turkey.

The Leasing Law requires for the cross-border financial lease agreement to be registered with a special log as maintained by the Association. The CAD registers a financial lease agreement with its records following the registration of the Association.

For engines, a registration regime in Turkey is also provided for aircraft engines, provided an aircraft engine is leased under a financial leasing regime. In such case, the title of ownership of the engine owner/lessor and the lessee are registered with the Association. No special registration regime exists in Turkey for leasing an engine if the engine is directly purchased by an owner or leased by a lessor to a lessee under an operational lease agreement, in any case the engine records are referenced in the registration documents of the aircraft to which the engines are attached.

8 Summarise the process to register an ownership interest.

In order to register an ownership interest on an aircraft an application must be made to the CAD with the requisite documents. This registration requirement is compulsory for the perfection of an owner’s title of ownership. The application can be made by the owner, operator or its authorised representative. Because the application will be made to a Turkish authority, the application documents must be in the Turkish language. If the application documents are issued in a foreign language, then their notarised Turkish language translations must be submitted to the CAD. The signatures on the supporting application documents are required to be certified by a Turkish notary public or such documents must be notarised and apostilled (or consularised) if they are issued outside Turkey. The application documents provide for the status of the aircraft and its technical features. The CAD issues the list of application documents and it is entitled to make changes on such list at its discretion. This registration process with the CAD takes approximately three to four business days. The fee for registration of an aircraft with the CAD for the first time varies between 250 Turkish lira and 2,500 Turkish lira depending on the weight of the aircraft.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

Because of the fact that aircraft are treated as immovable with respect to perfection, the principles available to immovable registration apply to aircraft registry.

Registration of title of ownership with the Civil Aircraft Registry as maintained by the CAD is not a formality and it has constitutive effect for the establishment of title of ownership on an aircraft. The registration is sufficient evidence and is required to prove the title of ownership of the owner on the aircraft against the third parties.

10 Summarise the process to register a lease interest.

Ordinary leases are registered with the CAD and the term of ordinary lease agreements cannot be less than six months. A special log is maintained by the Association for registration of cross-border financial lease contracts and thus the interest arising therefrom. The initial step for registration of a cross-border financial lease agreement is making the application with the Association to such effect. The registration of cross-border financial
lease agreements with the Association takes approximately five to 10 days depending on the work load of the subject institution. The cross-border financial lease agreements are required to be drafted ex officio by a Turkish Notary Public in order to be registered with the Association, yet this is not a requirement arising from the law but a condition arising from the practice. Cross-border financial lease agreements are exempted from any stamp tax or notary charges which may arise from execution of the same, and furthermore no specific application fee is charged by the Association for registration of cross-border financial lease agreements. At the time of application for registration of cross-border financial lease agreements, the Association also seeks for additional supportive documents to be filed with its records, such as the certified documents evidencing the signature powers of the parties signing the cross-border financial lease agreement, pro-forma invoice for the aircraft, insurance policy concerning the leased aircraft, etc. In case of an ordinary lease, a lease agreement bearing for certification of signatures and certified documents evidencing the signing powers of the signatories, etc, are required to be submitted to the CAD, yet no exemption for transaction costs is provided for ordinary lease agreements.

11 What is the regime for certification of registered aviation interests in your jurisdiction? The CAD is the competent authority for issuance of Aircraft Registration Certificates for aircraft which are eligible for being registered with the Aircraft Registry. The Aircraft are registered in the name of their operators, since the Turkish Civil Aviation System accepts the operator based registration system. The registration certificate provides for the registration mark of the aircraft, aircraft’s manufacturer, type and model information, manufacturer’s serial number details, date of manufacture, name and address of the owner, name and address of the operator, maximum take-off weight of the aircraft, lessee information and issuance date and number of the aircraft registration certificate. The information with respect to the encumbrances on aircraft are not stated in the aircraft registration certificate of the subject aircraft but registered separately by the CAD.

Regarding the engines, it is not possible to register a movable asset to a registry in Turkey or to identify the rights or encumbrances on the same in order to put the third parties on notice of such rights and encumbrances. There is no separate registration for ownership of an engine in the absence of an aircraft. Therefore, because it is a moveable asset, it is neither possible to register an engine separately (be it an aircraft engine or not) nor to register the proprietary rights on the same. If an engine is leased to a Turkish lessee under a cross-border engine financial lease agreement, then the lessor will be registered as the owner/lessor of the engine with the special log as maintained by the Association. Registration of engines with such special log, which are imported into Turkey under cross-border financial leases, means that in the event of an execution proceeding against the lessee by third-party claimants or even in case of bankruptcy of the lessee, the leased engine will be segregated from the lessee’s remaining assets. Finally, the leased asset will be returned to the lessor by the bankruptcy or execution officers. Furthermore, following the completion of the foregoing registration process, any acquisition of rights in rem by the third parties on the leased asset (eg, the engine which is leased under a cross-border financial lease transaction) cannot be claimed against the lessor.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee? In order to deregister an aircraft or even transfer its title of ownership to another party, any registered encumbrances on the subject aircraft must be revoked and deregistered from the Aircraft Registry as maintained by the CAD. In practice, the CAD notifies the interest holder in the aircraft before taking any actions such as deregistration, export, and refinances from taking any actions in the absence of consent of these. This rule, however, does not apply in terms of enforcement of IDERA certificates by the interested holders, since the Cape Town Convention is in force and duly implemented in Turkey.

13 What are the principal characteristics of deregistration and export powers of attorney? Under Turkish law, a power of attorney is revocable by its nature and can be revoked by its issuer at any time. Any arrangement of the parties to the contrary such as issuing an irrevocable power of attorney will not be valid and enforceable because the provisions of Turkish law on the issuance of powers of attorney are of a mandatory nature.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process. Under the IDERA Directive as issued by the CAD, CAD accepts duly issued IDERAs. CAD requires IDERA forms to be issued by the operators and be notarised by a Turkish notary public (and notarised or apostilled (or consularised) if issued outside of Turkey).

Once an IDERA is duly signed by the operator and the signature thereon is notarised by a Turkish notary public, then a filing for recording the IDERA must be made with the CAD directly by the operator. The CAD charges 300 Turkish lira for recordation of each IDERA form with its records. In addition to the IDERA form, the CAD also requires the submission of a supportive document which is not contemplated under the Cape Town Convention. Such document can be outlined as an acknowledgement letter, which basically provides for a language stating that the issuer of the IDERA (ie, the operator) is aware of the consequences of issuing an IDERA form and the rights of the interest holder in case of enforcement of an IDERA.

Security

15 What is the typical form of a security document over the aircraft and what must it contain? The only registerable security interest with the Aircraft Registry is the aircraft mortgage under Turkish law. Under Turkish law, a mortgage must be established with a mortgage contract in the Turkish language and should be drawn up (ex officio) by a Turkish notary public. Mortgage contracts on aircraft must at the minimum contain descriptions of the following: the mortgagor, the mortgagee, the property to be mortgaged, the credit being secured by the mortgage, and the degree (rank) of the mortgage.

Mortgage contracts to be established on moveable property must be registered with the relevant registry (ie, the Aircraft Registry as maintained for the aircraft) to become valid and effective for perfection purposes. The mortgage contracts on aircraft must contain the amount of the debt together with the interest if applicable, or the maximum amount as guaranteed under the mortgage contract in the event that the amount of the debt is not certain or is subject to a change.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs? Mortgage contracts for establishment of mortgage on an aircraft which are registered with the Aircraft Registry as maintained by the CAD must be drafted ex officio by a Turkish notary public. Under Turkish law, a mortgage must be established with a mortgage contract in the Turkish language. If one of the parties to a mortgage contract is a foreign party, then the mortgage contract can be executed in any other language, in addition to its Turkish-language version. In order to establish a mortgage on an aircraft which is registered with the Aircraft Registry as maintained by the CAD, then such mortgage agreement must be registered with the CAD for perfection. The CAD charges 300 Turkish lira as a service fee for registration of mortgages.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest. The mortgage contracts for establishment of mortgages on aircraft must be registered with the CAD for perfection purposes, in order to be valid and effective against both the mortgagor and the third parties. The CAD seeks for the copy of the mortgage contract, the documents evidencing the signature powers of the parties executing the mortgage contract and an application petition, in order to register a mortgage on an aircraft that is registered with the Aircraft Registry as maintained by the CAD. The service fee for registration of a mortgage by the CAD is 300 Turkish lira. Therefore, the receipt confirming the payment of such fee must also be submitted to the CAD at the time of the application with the same. As with any application to be made with the CAD, prior online filing must be made by the applicant through the official website of the CAD.

© Law Business Research Ltd 2015
The registration of mortgage with the CAD usually takes two to four business days, provided that all the documents are made readily available to the CAD, depending on the workload of the CAD officers.

18 How is registration of a security interest certified?
Once the CAD registers a mortgage contract and establishes a mortgage on an aircraft which is registered with the Aircraft Registry as maintained by the CAD, then the CAD issues an official letter evidencing the establishment of the mortgage on the subject aircraft. Such evidentiary official letter as issued by the CAD also provides for the features of the mortgage, the parties and the aircraft on which the mortgage has been established (eg, degree and rank of the mortgage, name of the mortgagor and the mortgagee, amount of the mortgage, registration mark of the aircraft, etc).

19 What is the effect of registration as to third parties?
The priority of a mortgage is not determined by its date or time of registration. The priority of a mortgage is determined by the ‘degree’ which is given to a mortgage as determined under the mortgage contract between the mortgagor and the mortgagee. The mortgagee with the higher degree mortgage has priority in payment from the proceeds of the sale of the asset over the mortgagee of a lower degree (eg, a first degree mortgage has priority over a third-degree mortgage). The priority between the mortgages of the same level is determined considering CAD registry records (eg, a first-degree mortgage registered beforehand has priority over a first-degree mortgage registered at a later date).

Certain creditors will have priority over the proceeds of the foreclosure of a first-degree mortgage. They comprise taxes owed to the Turkish government in respect of the aircraft, liens related to the manufacture and repair of the aircraft provided that they are registered with the CAD, amounts for storage of the mortgaged property and custodians salaries.

20 How is security over aircraft and leases typically structured?
What are the consequences of changes to the security or its beneficiaries?
The trust concept is not recognised under Turkish law. Any change effecting the essential elements of an agreement (eg, parties, subject matter of the agreement, etc) requires a novation to be made to such effect. Therefore, any alteration in a mortgage contract affecting its essential elements such as its parties, asset, etc requires a novation agreement which will also be drafted ex officio by a Turkish notary public and registration of the same with the CAD.

21 What form does security over spare engines typically take and how does it operate?
Under Turkish law, an asset is considered as moveable if it can be moved from one place to another without having any damage to its essence. In this respect, cars, tables, books, aircraft engines and so on are regarded as moveable assets under Turkish law.

It is not possible to identify the rights or encumbrances on an aircraft spare engine to put the third parties on notice of such rights and encumbrances. Because it is a moveable asset, in Turkey it is neither possible to register an engine separately (be it an aircraft engine or not) nor register the proprietary rights on the same. The CAL does not provide for any provisions regarding the registration of the engines separately at the Aircraft Registry maintained by the CAD.

There is a special registration regime in Turkey for leasing an engine under a financial leasing regime. Also, if the aircraft is imported into Turkey under an operating lease, then the aircraft is registered with the engines on the same.

The security type which can be established on moveable properties is a pledge. According to the Civil Code, to establish a pledge, a pledge agreement must be entered into and the secured asset must physically be delivered to the pledgor (ie, in the case of a lease, the pledgor would be the lessor).

Because an engine is a moveable asset, the security type that can separately be established on an aircraft engine under Turkish Law is a pledge. Because the pledged asset must physically be removed from the possession of the debtor, establishing a pledge on an aircraft engine in favour of the lessor is not practically possible. In the event that a pledge is established on an aircraft engine, it will not be possible for the lessee to hold the physical possession of the engine and it conflicts with the lessee’s uninterrupted right to use the engine.

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

Under Turkish law, lessors cannot avail themselves of self-help remedies in Turkey. Self-help repossession by the lessor is not permitted. The lessor must bring a replevin action, in case the lessee does not voluntarily relinquish the possession of an engine. Any attempt to repossess the engine without judicial proceedings will be deemed as a tort and will have both criminal and civil sanctions against the lessor.

Turkey has ratified the Cape Town Convention, therefore the lessors may exercise their remedies arising therefrom against the lessees in default, if the lessee and the lessor have agreed to implement the terms of the Cape Town Convention. Pursuant to the Cape Town Convention, in the event of a default of the lessee of a leased aircraft engine among other remedies, the lessor may terminate the lease agreement and repossess or take the control of the leased property. Owing to the declarations that Turkey has made under the Cape Town Convention, the lessor can compel the lessee to repossess the engine if the lessee and the lessor have agreed to implement the terms of the Cape Town Convention.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

Lessor cannot avail themselves of self-help remedies in Turkey to enforce their security interests. In the case of default by the debtor under a mortgage agreement, an execution proceeding must be initiated by the security interest holder to such effect for the foreclosure of the mortgage.

Because of the lex commissoria principle, under the Civil Code, in case of default by the debtor, a creditor may only satisfy his receivables by foreclosing on the asset that is secured by a mortgage and collect his receivables from the proceeds of the assets foreclosed under the Civil Code.

In any case, if the parties have agreed to implement the terms of the Cape Town Convention, then three separate remedies types which are available in favour of the creditors in case of a default of the chargor under a security agreement: taking back the possession or control of any charged object; selling or granting a lease of the charged object; or collecting or receiving any income or profits arising from the management or use of any charged object. Such remedies can be exercised by the lessor either directly or by obtaining an order from the court to such effect. The Cape Town Convention stipulates the transfer of the ownership of the secured object to the chargor, towards the satisfaction of the obligation of the chargor. In the event of a default, the chargor may agree upon the direct transfer of ownership of the goods to the chargor which are under the ownership of the chargor.

Although the respective provisions contradict the lex commissoria principle which gives the entitlement to the creditor to collect his, her or its receivables only from the proceeds arising from the foreclosure of the secured assets and which is recognised under Turkish law, the relevant Turkish authorities (ie, the Turkish courts and the Turkish execution offices) should act in accordance with the Cape Town Convention.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?
Under Turkish law the priority of claims would be as follows:

- execution proceeding costs which have been incurred by the execution or bankruptcy offices;
- liens of public institutions such as the CAD, General Directorate of State Airports Authority;
- claims of employees and employment claims against the lessee;
- repairer’s claims against the lessee; and
- claims of other creditors.

The Turkish authorities may take possession of an aircraft and the engines attached to the same under certain extraordinary circumstances for civil defence purposes such as the event of war, invasion or other hostilities. The National Defence Commitment Law provides that the Turkish authorities may take possession of the third party’s assets (eg, aircraft
engines, etc) under certain extraordinary circumstances for civil defence purposes as referenced in the preceding paragraph and a compensation is paid in return. Other than the foregoing, no power has been granted under Turkish law to the governmental authorities on requisition of the assets of the third-party owners.

**Taxes and payment restrictions**

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

**Stamp tax**
Pursuant to the Turkish Stamp Tax Law, all documents executed in Turkey such as the contracts, agreements, commitments and guarantees attract stamp tax. Documents executed outside of Turkey are not subject to the stamp tax until such documents are submitted to a governmental authority in Turkey (eg, CAD, Association etc), are transferred, endorsed in Turkey, or their provisions are benefited in Turkey. In the case of either of those conditions, stamp tax will be applicable, even if the acts are executed outside Turkey. Stamp tax applies to a wide range of documents, including but not limited to agreements, financial statements and payrolls. Stamp tax is either levied as a percentage of the monetary value stated on the loan agreements at a rate of 0.948 per cent; or fixed.

Stamp tax is payable by the parties who sign a document. According to the Leasing Law, financial leasing agreements and the documents concerning the transfer and amendment of these contracts, as well as the ones prepared for their collaterals, are exempted from stamp tax.

**VAT**
Delivery of goods and services related to commercial, industrial, agricultural and professional activities, Importation of all types of goods and services, Delivery of goods and services related to other operations are subject to a VAT rate of 18 per cent. However, pursuant to the VAT Law 'Delivery of sea, air and railway vehicles or floating establishment and vehicles', deliveries related to the production or construction of these vehicles and the services and activities arising from modification, repair and maintenance of these vehicles to taxpayers whose activities are renting or operating of sea, air and railway vehicles' are exempt from VAT. Of course, in order to benefit from this exemption the buyer must be a Turkish entity.

Furthermore, the VAT rate is 1 per cent for payments regarding an air vessel lease made by the lessee if the said lessee is mainly involved in the airline business.

**Motor vehicle tax**
The amount of the vehicle tax to incur on an aircraft will be determined depending on the age and the maximum take-off weight of the respective aircraft. The vehicle tax must be paid by the party under the name of whom the aircraft will be registered with the CAD. If the lessee has an aircraft operating certificate and if the lessee is the operator of the aircraft, then the vehicle tax is paid by and in the name of the lessee. If the lessee does not have an aircraft operating certificate and the aircraft is operated by another third party, then the vehicle tax is paid by the operator. Without the evidence proving that the vehicle tax is paid, the aircraft cannot be assigned, deregistered or exported.

**Corporate tax/withholding tax**
Under the Corporate Tax Law, certain Turkish source income, as specified therein – such as rental income – payable to non-resident companies are subject to Turkish corporate income tax by way of withholding deducted at source. The general withholding tax rate is 15 per cent. The Council of Ministers is authorised by the Corporate Tax Law to determine the rate of withholding tax which is applicable to different profits and incomes derived by non-resident entities based on their fields of operations and to reduce it to zero or to increase the rate to 30 per cent. In accordance with such authority, the Council of Ministers determined the withholding tax rate for the lease payments paid by Turkish residents to non-resident lessee at 20 per cent (1 per cent for financial lease).

Unless it is attributable to a permanent establishment run by a non-resident company in Turkey, withholding tax is the final Turkish tax on the income of a non-resident company, and the non-resident company is not further required to register and report in Turkey for such income from a Turkish source.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Funds can freely be transferred from Turkey to foreign countries or vice versa, provided that the transfer is made via bank transfer and its source is traceable.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

The annual contractual interest rate which will be agreed upon by the parties under an agreement cannot be more than 100 per cent of the legal default interest rate as stipulated under the pertinent legislation. The current legal annual default interest rate is 12 per cent. Furthermore, compound interest is not permitted under Turkish law (except for loan agreements and to the extent the application term is more than three months).

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

There are charges for parking the aircraft which are paid to the General Directorate of State Airports Authority and other than the foregoing, the CAD's service fees apply for registration and deregistration of aircraft in Turkey. In addition, before deregistering an aircraft, any and all debts must be cleared to the General Directorate of the State Airports Authority as well as the Eurocontrol charges. Although such costs are required to be paid by the operator, in case of repossession such costs will need to be paid by the party repossessing the aircraft if the operator fails to do so.

**Insurance and reinsurance**

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

No specific requirement exists for assets that are leased under an ordinary leasing regime.

The Leasing Law provides that the leased property has to be insured during the term of the financial lease agreement and the party who will be held responsible for insuring the leased property must be stated in the financial lease agreement.

Other than the foregoing, CAL mandates the operators to provide for a third party liability insurance for the aircraft that they operate under their aircraft operation certificate.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

According to the Insurance Law, cut-through clauses are optional and legally effective in Turkey.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance (by domestic or captive insurers) legally effective. Assignments of reinsurance are provided in aircraft finance and leasing transactions in general.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

According to the CAL, carriers are responsible for any corporal injury suffered by or, the death of a passenger which are caused by an accident occurring in the aircraft or while embarking or disembarking the aircraft. The carriers are further liable for the loss or damage of a registered luggage or cargo caused by an incident that has occurred during transportation by air; and also for the damages owing to delay in the transportation of passengers, luggage or cargo by air.

No liability provision is stipulated against the lessors, owners or financiers for the activities of the carrier operators, provided that the aircraft is operated by another party other than the financier or owner.
As of 20 October 2014 Turkey was added to the list of states on the Cape Town List as defined under the Sector Understanding on Export Credits for Civil Aircraft as issued by the Organisation for Economic Co-Operation and Development, which stands for the states qualifying for the reduction of the minimum premium rates and consequently whose airlines are eligible to enjoy the Cape Town Treaty discount. Therefore, Turkey will become increasingly popular in the aviation finance market.

Turkish Airlines declared that it is moving forward with the first enhanced equipment trust certificates financing. Furthermore, Islamic finance methods have started to be commonly used in Turkey.

Finally, a third airport is under construction in Istanbul, which ultimately will increase air traffic flow dramatically in Turkey within the coming decade and thus will open new market opportunities for both the airlines and financiers in this context.

<table>
<thead>
<tr>
<th>Category</th>
<th>AKA</th>
<th>Minimum Insurance (Special Driving Rights (SDR*))</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Up to 499kg</td>
<td>750,000 Turkish lira</td>
</tr>
<tr>
<td>2</td>
<td>Between 500kg - 999kg</td>
<td>1.5 million Turkish lira</td>
</tr>
<tr>
<td>3</td>
<td>Between 1,000kg - 2,699kg</td>
<td>3 million Turkish lira</td>
</tr>
<tr>
<td>4</td>
<td>Between 2,700kg - 5,999kg</td>
<td>7 million Turkish lira</td>
</tr>
<tr>
<td>5</td>
<td>Between 6,000kg - 11,999kg</td>
<td>18 million Turkish lira</td>
</tr>
<tr>
<td>6</td>
<td>Between 12,000kg - 24,999kg</td>
<td>80 million Turkish lira</td>
</tr>
<tr>
<td>7</td>
<td>Between 25,000kg - 49,999kg</td>
<td>150 million Turkish lira</td>
</tr>
<tr>
<td>8</td>
<td>Between 50,000kg - 199,999kg</td>
<td>300 million Turkish lira</td>
</tr>
<tr>
<td>9</td>
<td>Between 200,000kg - 499,999kg</td>
<td>500 million Turkish lira</td>
</tr>
<tr>
<td>10</td>
<td>500,000kg and more</td>
<td>700 million Turkish lira</td>
</tr>
</tbody>
</table>

* While changing the currency of the SDR Central Bank of Turkish Republic rates are taken as a basis.
Overview

1. To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

The US is a party to the following major conventions affecting aviation finance and leasing:

- the 1944 Convention on International Civil Aviation, effective April 7, 1947;
- the 1948 Convention on the International Recognition of Rights in Aircraft (Geneva Convention), effective 17 September 1953;
- the 2001 Convention on International Interests in Mobile Equipment (Convention) and the 2001 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Protocol), effective 1 March 2006 (collectively, the Cape Town Convention); and

The US is not a party to the 1933 Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft.

2. What is the principal domestic legislation applicable to aviation finance and leasing?

The legal framework applicable to the regulation of aviation finance and leasing transactions in the US is both the law of the state applicable to such transaction and, to the extent they pre-empt state law, US federal laws, regulations and treaties applicable to such transactions. In the US, the Federal Aviation Administration (FAA), to the exclusion of the states, regulates the registration of civil aircraft, airworthiness, safety and maintenance issues involving civil aviation, the issuance of operating certificates and licences for civil aviation and the recording of agreements and instruments conveying interests in aircraft registered with the FAA and certain aircraft engines, components and parts.

Many of the responses in this chapter concern issues involving conveyancing agreements or instruments (aircraft conveyancing agreements) for civil aircraft and their airframes and engines (aircraft items) that provide for one of the following:

- the transfer of title to an aircraft item (an aircraft transfer agreement);
- the lease of an aircraft item (an aircraft lease); or
- the grant of a security interest in an aircraft item (an aircraft security agreement).

As used herein, the term ‘grantor’ means the seller, transferee or grantor under an aircraft transfer agreement, the lessee under an aircraft lease or the grantor under an aircraft security agreement. The term ‘grantee’ means the buyer, transferee or grantee under an aircraft transfer agreement, the lessee under an aircraft lease or the grantee under an aircraft security agreement.

The State of New York law is commonly chosen by the parties as the governing law for aircraft conveyancing agreements involving commercial aircraft. Unless otherwise noted, the responses in this chapter will assume that the parties to a relevant aircraft conveyancing agreement have chosen New York law, and that the relevant aircraft item is a civil aircraft registered with the FAA.

The principal domestic legislation applicable to aviation finance and leasing in the US are:

- the Uniform Commercial Code (UCC) as adopted by the relevant states, particularly article 2 (governing sales of personal property), article 2A (governing leases of personal property) and article 9 (governing security interests in personal property). All 50 states have adopted a version of article 9, and all states other than Louisiana have adopted a version of article 2 and article 2A, although there are some variations from state to state;
- Title 49 of the US Code (Transportation Code) and Title 49 of the Code of Federal Regulations (CFR). The Transportation Code pre-empts state law, including the UCC, as to certain matters relevant to aviation finance and leasing transactions; and
- Title 11 of the United States Code (Bankruptcy Code).

The Cape Town Convention and the Geneva Convention and other aviation treaties to which the US is a party pre-empt the Transportation Code and state law as to certain matters relevant to aviation finance and leasing transactions.

3. Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

General rule

Generally, aircraft transfer agreements are governed by article 2 of the UCC, aircraft leases are governed by article 2A of the UCC and aircraft security agreements are governed by article 9 of the UCC, in effect in the applicable state, except as preempted in respect to certain matters by the Transportation Code, the Cape Town Convention and the Geneva Convention. With certain exceptions, the parties to a contract that is subject to the UCC are free to choose the governing law for their contractual relationship so long as the transaction bears a reasonable relationship to the chosen jurisdiction. However, there are variations in choice of law rules from state to state. Therefore, it is important to examine the state law chosen to govern a transaction.

A notable state statute is New York General Obligations Law Section 5-1401, which allows the parties to a non-consumer contract, notwithstanding the general ‘reasonable relationship’ choice of law rule in the UCC, to choose New York law to govern their contractual relationship without regard to whether a reasonable relationship exists to the State of New York (or any other state), provided that the obligations arising out of the transaction governed by the contract are not less than US$50,000. Most aircraft finance and leasing transactions would fall within this statute.

Pre-emption of state choice-of-law rule as to ‘validity’

If a particular state’s law governs an aircraft conveyancing agreement, that law will apply to both the ‘validity’ of the agreement and the contractual rights and obligations of the parties thereunder, except to the extent pre-empted by US federal law or treaties adopted by the US. State law is pre-empted as to the validity of an aircraft conveyancing agreement in respect to certain aircraft items, depending upon whether the aircraft or aircraft engine is registered with the FAA, and whether either the Geneva Convention or the Cape Town Convention applies or not. For this purpose, it is useful to differentiate among aircraft and aircraft engines as follows:

- ‘FAA aircraft’ means a US civil airframe that is registered with the FAA;
• 'CTC airframe' means an airframe that:
  • qualifies as an 'aircraft object' under the Cape Town Convention; and
  • is either registered in a country that has adopted the Cape Town Convention (a CTC country) or is the subject of an aircraft conveyancing agreement under which the grantor is situated in a CTC country. To qualify as an aircraft object under the Cape Town Convention, an aircraft must either: have an airframe that, when appropriate engines are installed, is type certified to transport at least eight persons including crew or goods in excess of 1,750 kilograms; or be a helicopter that is type certified to transport at least five persons including crew or goods in excess of 450 kilograms;
• 'FAA/CTC airframe' means an FAA aircraft that has a CTC airframe;
• 'FAA engine' means:
  • a specifically identified aircraft engine having at least 500 rated takeoff horsepower or its equivalent; or
  • an aircraft engine maintained for installation or use in an aircraft by a US-certified air carrier;
• 'CTC engine' means an aircraft engine that qualifies as an 'aircraft object' under the Cape Town Convention and is the subject of an aircraft conveyancing agreement under which the grantor is situated in a CTC country. To qualify as an aircraft object, the Cape Town Convention requires that an aircraft engine be powered by either: jet propulsion technology, having at least 1,750 pounds of thrust or its equivalent; or turbine or piston technology, having at least 500 rated take-off horsepower or its equivalent; and
• 'FAA/CTC engine' means an FAA engine that qualifies as a CTC engine.

Aircraft and engines registered with the FAA
The Transportation Code provides that the 'validity' of a conveyance, lease or instrument that may be recorded in respect to an FAA aircraft or FAA engine is subject to the laws of the state at which the conveyance, lease or instrument is delivered, regardless of the place at which the subject of the conveyance or other instrument is located or delivered. If the conveyance lease, lease or instrument specifies the place at which delivery is intended, it is presumed that the conveyance, lease or instrument was delivered at the specified place. The applicable governing law in respect to the validity of an aircraft conveyancing agreement for an FAA aircraft or an aircraft lease or aircraft security agreement in respect to an FAA engine is the law of the state where the aircraft conveyancing agreement is delivered.

The Transportation Code does not address the applicable governing law with respect to the contractual rights and duties of the parties to an aircraft conveyancing agreement, which is left to state law, as preempted by the Cape Town Convention.

Where the Cape Town Convention applies
Where the Cape Town Convention applies, the Convention allows the parties to an aircraft conveyancing agreement to agree on the law to govern their contractual rights and duties whether or not a reasonable relationship exists to that jurisdiction (thus pre-empting any such requirement under state law). However, it does not address the choice of law as to its validity.

Where the Geneva Convention applies
Where the Cape Town Convention does not apply, but an airframe is registered in a country that has adopted the Geneva Convention (a Geneva Convention country) other than the US, the US would recognise and enforce a conveyance under an aircraft conveyancing agreement affecting the airframe if the aircraft conveyancing agreement:
• was 'constituted' in accordance with the law of the country where the airframe is registered (the country of registry); and
• was regularly recorded in a public record in the country of registry.

This would require an examination of the laws of the country of registry to determine:
• whether those laws would recognise the aircraft conveyancing agreement as a valid conveyancing agreement; and
• whether the aircraft conveyancing agreement is regularly recorded in a public record.

The Geneva Convention is silent on the choice of law governing the contractual rights and obligations of the parties. Therefore, there would be no pre-emption with respect to the choice of law governing the contractual rights and obligations of the parties.

Title transfer

4 How is title in an aircraft transferred?
Transfer of title to an aircraft in the US is governed by applicable state law. Pursuant to article 2 of the UCC, which has been adopted in all states other than Louisiana (subject to certain exceptions), title to goods passes from the seller to the buyer in any manner and on any conditions agreed on by the parties. However, title to goods cannot pass under a contract of sale prior to the time the goods are identified to the contract; that is, the goods must be existing and identifiable at the time title is transferred. Further, any reservation of title by the seller in goods delivered to the buyer is limited in effect to a reservation of a security interest. Typically in the US, aircraft transfer agreements provide that the transfer of title to the aircraft is evidenced by the delivery of a bill of sale from seller to buyer. However, under article 2 of the UCC, once the aircraft is physically delivered by the seller, title transfers whether or not a bill of sale or other written conveyance document is delivered.

As described in question 3, the applicable law governing the validity of an instrument for the sale and transfer of an FAA aircraft is the law of the state where the instrument is delivered. Under the Transportation Code, in order to be valid against third parties without notice, an instrument for the transfer of title to an FAA aircraft must be filed for recording with the FAA. Under the Cape Town Convention, in order to have priority over subsequently registered interests or unregistered interests, an interest in respect to a CTC airframe transferred pursuant to a 'contract of sale' must be registered with the International Registry established pursuant to the Cape Town Convention (an aircraft transfer agreement for a CTC aircraft is a contract of sale). The practice for the transfer of FAA aircraft is to provide for the delivery of a bill of sale that is in a form suitable under applicable state law contemporaneously with the physical delivery of the FAA aircraft, at which time a bill of sale in the FAA's prescribed form is filed for recording with the FAA Registry. If the transfer involves an FAA/CTC airframe with FAA/CTC engines, the transferred interests are registered with the International Registry.

5 What are the formalities for creating an enforceable transfer document for an aircraft?
The formalities required for an aircraft transfer agreement are determined by applicable state law (see question 4). As between a seller and buyer, while the applicable statute of frauds may require a written contract for the transaction, a written transfer document is not necessary, and title could transfer by physical delivery alone. However, in the case of an FAA aircraft, a conveyancing instrument must be filed for recording with the FAA Registry in order for the transfer to be effective against third parties without notice. Further, in the case of FAA/CTA aircraft, in order to have priority against subsequently registered interests and unregistered interests, the interest transferred must be registered with the International Registry.

The formalities for recording an instrument affecting title to, or any interest in, an FAA aircraft are set out in Part 49 of the Federal Aviation Regulations, 14 CFR Part 49. Typically, a separate warranty bill of sale under state law is issued, with an AC Form 8050-2 filed with the FAA. The formal requirements for filing a conveyance instrument for an FAA aircraft with the FAA are:
• the instrument must be in a form acceptable to the FAA, which has provided AC Form 8050-2 as an acceptable conveyancing form;
• the instrument must describe the aircraft by make and model, manufacturer's serial number and FAA registration number, or other identifying detail;
• the instrument must be an original document, or a duplicate original document, or if neither is available, a true copy of an original document. The signatures on the instrument must be ink originals. No notification or other authentication of the signatures is required unless requested by applicable state law. Most states, including New York, do not require authentication;
• the instrument must be accompanied by a filing fee of US$5;
• if the seller is not shown as owner on the FAA records, the instrument must be accompanied by bills of sale or similar documents showing the chain of title; and
• if the conveyance is made by a person or entity doing business under a trade name, or by an agent, corporation, partnership co-owner or

www.gettingthedeleathrough.com
unincorporated association, there are additional formal requirements to evidence the authority of the signer.

**Registration of aircraft ownership and lease interests**

6 Identify and describe the aircraft registry.

The FAA maintains a registry for civil aircraft in Oklahoma City, Oklahoma (the FAA Registry). The FAA Registry is an owner registry, and FAA aircraft may only be registered in the name of the owner, which must be:

- a US citizen;
- a US-resident alien;
- a US corporation that does not qualify as a US citizen but only if the aircraft is based in and primarily used in the US; or
- the US government or a state or territory or possession of the US.

To qualify as a US citizen, the owner must be:

- an individual citizen of the US;
- a partnership each of whose partners is an individual citizen of the US; or
- a US corporation or association of which the president and at least two-thirds of the board of directors and other managing officers are US citizens, which is under the actual control of US citizens, and in which at least 75 per cent of the voting interest is owned or controlled by US citizens.

The FAA has also permitted other ownership structures, including limited liability companies (which are treated as associations) and owner trusts, provided that the ownership entity qualifies as a US citizen or US resident alien. In the case of owner trusts, the trustee must qualify as a US citizen or US-resident alien and either:

- beneficiaries who qualify as US citizens must hold at least 75 per cent of the power and authority to influence, direct or remove the trustee; or
- the trustee must have the power and authority in respect of the ownership and operation of the aircraft to take actions which in its discretion are necessary to protect the interests of the US; without interference from the beneficiaries, in which case the beneficiaries need not qualify as US citizens (a ‘non-citizen trust’).

In connection with the registration of an FAA aircraft in the name of an owner trustee, the trust agreement and each document affecting a relationship under the trust agreement (such as an operating agreement with the beneficiary) must be submitted along with the application for registration of the aircraft.

There is no separate engine registry in the US.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners’, operators’ and lessees’ interests in aircraft engines be registered?

An ownership interest in an FAA aircraft can and must be registered with the FAA. The interest of a lessee under a ‘true lease’ cannot be registered with the FAA. However, if the lease does not qualify as a true lease and, instead, is treated as a conditional sale agreement or a security interest, the lessee could be characterised as the ‘owner’.

See question 6 as to ownership restrictions for FAA aircraft.

The owners’, operators’ and lessees’ interest in aircraft engines cannot be registered with the FAA.

8 Summarise the process to register an ownership interest.

In order to register an FAA aircraft in the name of the owner with the FAA, the following must be filed with the FAA Registry in Oklahoma City, Oklahoma:

- an aircraft registration using AC Form 8050-1. In the case of a corporate owner, the application must be signed by an officer or by an authorised person who presents a certified copy of an authorisation from any officer or manager. In the case of a partnership, the application must be signed by a general partner with the names of all general partners listed. In the case of a limited liability company, the application must include a statement of Support of Registration demonstrating the US citizenship status of the limited liability company;
- evidence of the ownership of the aircraft by the applicant, which can take various forms:
  - if the aircraft has not previously been registered in the US or any other country, the applicant must submit a bill of sale using Form 8050-2 signed by the seller or an equivalent conveyancing instrument or other evidence of ownership authorised by the Federal Aviation Regulations;
  - if the aircraft was last previously registered with the FAA and was purchased from the last registered owner, the applicant must submit a bill of sale using AC Form 8050-2, signed by the seller, or an equivalent conveyance instrument or other evidence of ownership authorised by the Federal Aviation Regulations;
  - if the aircraft was last previously registered with the FAA but was not purchased from the last registered owner, the applicant must produce evidence of ownership, such as the chain of title from the last registered owner with the FAA, satisfactory to the FAA;
- if the aircraft was registered in a foreign country, the applicant must submit evidence that the foreign registration has ended (normally evidenced by notice from the foreign registry to the FAA); a bill of sale using Form 8050-2 signed by the foreign seller or other evidence satisfactory to the FAA that the applicant owns the aircraft; and
  - if the foreign country has not ratified the Geneva Convention or the Cape Town Convention, evidence that the foreign registration has ended or is invalid;
  - if the foreign country has ratified the Geneva Convention but not the Cape Town Convention, evidence that the foreign registration has ended or is invalid, and that each recorded interest in the aircraft has been discharged or that each holder of such an interest has consented to the transfer; or
  - if the foreign country has ratified the Cape Town Convention, evidence that the foreign registration has ended or is invalid and that all recorded interests ranking in priority have been discharged or the holders of such interests have consented to the deregistration and export of the aircraft.

Pursuant to the UCC, title to an engine installed on an aircraft would not automatically vest in the owner of the aircraft upon installation on the aircraft as long as the identity of the engine is not lost.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

The Transportation Code provides that the issuance of a Certificate of Registration by the FAA is not evidence of ownership of an FAA aircraft in a proceeding in which ownership is an issue. The effectiveness or validity of title to an FAA aircraft is determined by applicable state law.

The Transportation Code provides for the establishment of the FAA Registry for the recording of:

- conveyances that affect an interest in US civil aircraft;
- leases and instruments executed for security purposes, including conditional sales contracts, assignments and amendments, that affect an interest in:
  - an engine having at least 550 rated take-off power or its equivalent;
  - an aircraft propeller capable of absorbing at least 550 rated take-off shaft horsepower;
  - an aircraft engine, propeller or appliance maintained for use in an aircraft, engine or propeller by an FAA-certified air carrier; and
  - spare parts maintained by an FAA-certified air carrier; and
- releases, cancellations, discharges and satisfactions related to any such conveyance, lease or instrument that is recorded with the FAA.

All types of aircraft conveyancing agreements in respect to FAA aircraft, and aircraft leases and aircraft security agreements (but not aircraft transfer agreements) in respect to FAA engines, may be filed with the FAA. The Transportation Code provides that any conveyance, lease or instrument executed for security purposes that may be recorded with the FAA, affecting an FAA aircraft or FAA engine, must be filed for recording with the FAA in order to be valid against third parties without notice.

Under the Cape Town Convention, in order to have priority against subsequently registered interests or unregistered interests, it is necessary to
register an interest in a CTC airframe or CTC engine with the International Registry.

10 Summarise the process to register a lease interest.

There is no registration of the interest of a lessee under a lease of an FAA aircraft or an FAA engine. However, a lease involving an FAA aircraft or FAA engine can be filed for recording with the FAA Registry, and must be filed for recording with the FAA in order to be valid against third parties without notice. The international interest in a CTC aircraft or CTC engine must be registered with the International Registry in order to have priority over subsequently registered interests or unregistered interests.

In order to file a lease of an FAA aircraft or FAA engine for recording with the FAA, a signed copy of the lease must be submitted to the FAA. Under established procedures, the FAA will allow certain economic terms of the lease to be set forth in a schedule and to redact such schedule from the lease filed with the FAA. There is no prescribed form of lease, but the lease should constitute a true lease under applicable state law. The same signing procedures for the filing of a transfer document for an aircraft described in question 5 must be met for a lease. The filing fee is US$5.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

Certificates of Registration for FAA aircraft are issued by the FAA. A Certificate of Registration, in the form of AC Form 8050-3, identifies an FAA aircraft by registration mark (commencing with the letter N), the manufacturer’s serial number, the manufacturer and manufacturer’s designation of the aircraft by model number, the name and address of the party to whom the Certificate of Registration is issued (the person who appears to be the owner based on the evidence of ownership submitted to the FAA), the date of issuance and the expiration date. A Certificate of Registration issued from or after 1 October 2010 expires three years after the last day of the month in which it is issued, unless it is renewed during the six months preceding its expiration date. The Certificate of Registration does not list the owner, operator or any holder of any interest in the FAA aircraft expressly states that it is not a certificate of title. There is no separate engine certificate of registration.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

As the holder of the Certificate of Registration for an FAA aircraft, the owner (not the operator under a lease) is the party who must initiate the deregistration of the FAA aircraft for export, subject to the rights of the holder of the IDERA, or a creditor of the owner that has been granted the deregistration of the FAA aircraft for export, subject to the rights of the owner (not the operator under a lease) is the party who must initiate the deregistration of the FAA aircraft, or FAA engine under an IDERA if one has been filed for registration with the FAA Registry. The IDERA must be ‘linked’ to a security instrument that is filed for recording with the FAA Registry. When seeking to deregister and export an FAA/CTC aircraft using an IDERA, the holder must submit to the FAA Registry a search certificate from the International Registry and evidence of the discharge of any senior registered interest or the consent of the holders thereof to the deregistration.

The US should recognise the holder of an IDERA in respect to an FAA/CTC airframe as the sole person who may procure the deregistration and export of the aircraft. If an IDERA has been filed with the FAA in respect to an FAA/CTC Airframe, the FAA Registry should only honour a cancellation request from the authorised party under the IDERA or its designee.

13 What are the principal characteristics of deregistration and export powers of attorney?

As ratified by the US, the Cape Town Convention allows for the issuance of an IDERA by an owner of an FAA/CTC airframe in the form prescribed by the Cape Town Convention. IDERAs, rather than deregistration powers of attorney, are the most common and appropriate instrument for an FAA/CTC airframe.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

IDERAs for FAA/CTC airframes must be in the form attached to the Protocol. The IDERA must be signed by the owner that holds the Certificate of Registration. It need not be countersigned by the FAA, but must be filed for recording with the FAA Registry. The IDERA must be ‘linked’ to a security instrument that is filed for recording with the FAA Registry. When seeking to deregister and export an FAA/CTC aircraft using an IDERA, the holder must submit to the FAA Registry a search certificate from the International Registry and evidence of the discharge of any senior registered interest or the consent of the holders thereof to the deregistration.

The US should recognise the holder of an IDERA in respect to an FAA/CTC airframe as the sole person who may procure the deregistration and export of the aircraft. If an IDERA has been filed with the FAA in respect to an FAA/CTC Airframe, the FAA Registry should only honour a cancellation request from the authorised party under the IDERA or its designee.

15 What is the typical form of a security document over the aircraft and what must it contain?

The typical form of aircraft security agreement over an FAA Aircraft is an English language agreement, normally called a security agreement or mortgage, under state law, creating a security interest in the FAA aircraft under article 9 of the UCC. In order to be valid against the grantor granting the security interest, the following requirements must be satisfied:

- the grantor must have rights in the collateral;
- value must be given; and
- the grantor must sign or otherwise authenticate the security agreement that identifies the aircraft and the obligations that are secured.

The FAA aircraft security agreement need not be in any specified form as long as it creates a valid security interest under applicable state law. It need not state a maximum secured amount. The economic terms of the transaction do not need to be recorded in a public record.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The documentary formalities will be determined by applicable state law. If the aircraft security agreement is governed by New York law, there are no documentary formalities besides being duly signed by an authorised signature. The only document expenses would be in connection with the filing or perfection of the security interest.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties?

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties?

Summarise the process to register a mortgage interest.

An aircraft security agreement creating a security interest against an FAA aircraft need not be filed or registered to be valid between the grantor and the grantee. However, in order to be valid against third parties without notice, an aircraft security agreement for an FAA aircraft must be filed for recording with the FAA. For an FAA/CTC aircraft, an international interest must be registered with the International Registry.

For FAA aircraft, perfection is accomplished by submitting a signed original of the mortgage or security agreement to the FAA Registry, along with evidence of the authorisation of the signing party, and a filing fee of

www.gettingthedealthrough.com
US$5. As the entry point under the Cape Town Convention for FAA/CTC aircraft, the FAA will issue an authorising code to allow for the registration of the international interest created by the aircraft security agreement with the International Registry.

Perfection requirements will vary from the foregoing if an aircraft security agreement grants a security interest in an aircraft that is not registered with the FAA. For these aircraft, perfection is not accomplished by filing with the FAA Registry. If the aircraft is a CTC aircraft, the registration of an international interest with the International Registry should take priority over subsequently registered interests and unregistered interests, and perfection under the UCC should be pre-empted. If the Cape Town Convention does not apply, but the aircraft is registered in a Cape Town Convention country, if the country of registry has a central filing system and the aircraft security agreement is duly constituted under its laws and duly recorded under its filing system, the effect of such recording and rights under the aircraft security agreement under the laws of the country of registry will be recognised in the US. If neither the Cape Town Convention nor the Geneva Convention applies, then under article 9 of the UCC, perfection would be determined by the law of the jurisdiction where the grantor is located. In the case of foreign grantors, if the grantor is a ‘foreign air carrier’ under the Transportation Code, it is deemed located at the designated office for its agent for service of process by the US Department of Transportation. If the grantor is not a ‘foreign air carrier’ and the foreign jurisdiction provides for perfection by filing in a public filing system, perfection according to that system may be sufficient. If the foreign jurisdiction does not provide for perfection by filing in a public filing system, perfection can be accomplished filing a financing statement in the District of Colombia.

It is customary to also file a precautionary financing statement under article 9 of the UCC for the security interest granted by the grantor, even in respect to FAA aircraft.

18 How is registration of a security interest certified?

After an aircraft security agreement against an FAA aircraft is recorded with the FAA Registry, the FAA sends a Conveyance Recordation Notice, AC Form 8050-41, to the grantee, identifying the recorded conveyance document by its date, the parties, the FAA recording number and the date of recordation and describing the FAA aircraft. The Conveyance Recordation Notice does not state the rank or priority of the security interest created by the recorded conveyance document. Registered interests appear in a searchable database maintained by the FAA.

Upon the registration of an international interest in an FAA/CTC aircraft with the International Registry, the registered interest will appear on the International Registry’s searchable database.

19 What is the effect of registration as to third parties?

Pursuant to the Transportation Code, in order to be valid against third parties without actual notice, a security agreement against an FAA aircraft must be filed for recording with the FAA. The validity and priority of the security interest in an FAA aircraft created by an aircraft security agreement is determined by applicable state law, and in particular article 9 of the UCC. Under article 9 of the UCC, subject to certain exceptions, the general rule is that the priority of a security interest in personal property is determined by the order of filing of a financing statement or security agreement in the appropriate location, subject to certain exceptions (see question 24).

The Cape Town Convention preempts the Transportation Code and state law as to CTC airframes and CTC engines. Under the Cape Town Convention, a registered interest in a CTC airframe or CTC engine has priority over a subsequent registered interest or an unregistered interest, subject to certain exceptions (see question 24).

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Security over aircraft in the US is created by the grant of a security interest against the aircraft pursuant to article 9 of the UCC as adopted in the applicable state. The document by which the security interest is granted is typically called a security agreement or mortgage. A security interest may be granted to a trustee or agent on behalf of a group of beneficiaries; however, in such a case, the secured party would be the trustee or agent, not the beneficiaries.

If a security interest is granted to a lender to secure the loan from the lender and the lender transfers the loan to a new lender, the security agreement under which the security interest was granted would have to be transferred to the new lender. As between the grantor of the security interest, the original lender that was granted the security interest and the new lender, no filing or registration in respect to the assignment would be necessary in order for the assignment to be effective, although notice of the assignment would have to be given to the grantor. However, in order for the assignment to have priority over third parties, the assignment would need to be perfected.

Under the Transportation Code, in order to be effective against third parties without notice, an assignment of a security interest in respect to an FAA aircraft or FAA engine would need to be filed for recordation with the FAA Registry. Under the Cape Town Convention, in order to be effective against third parties (whether or not they have notice), the assignment of associated rights in respect to the international interest would have to be registered with the International Registry.

21 What form does security over spare engines typically take and how does it operate?

The form of security over spare engines in the US is the same as that for aircraft – a security interest granted pursuant to article 9 of the UCC, with the typical document being a security agreement or mortgage (see question 20). In the case of engines that are installed on an airframe, a single aircraft security agreement covering the airframe and its installed engines is most commonly used. In the case of spare engines that are not installed, an aircraft security agreement covering that engine or other uninstalled engines may be used.

Engines are typically treated separately from the airframe and, therefore, an aircraft security agreement covering both an airframe and its installed engines should separately identify the engines by manufacturer, model and serial number. An engine need not be installed on the airframe in order to be covered by an aircraft security agreement that appropriately identifies the engine. Subject to the terms of the aircraft security agreement, the engine should remain encumbered by the aircraft security agreement if it is removed from the airframe.

While an engine encumbered by an aircraft security agreement that is installed on another airframe should not cease to be encumbered under the UCC, this could depend upon applicable law where the engine is located when it is installed on the other airframe.

Enforcement measures

22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner’s rights to exercise default remedies?

Subject to any limitations under the aircraft lease, upon termination of the aircraft lease following the expiration of its term or an event of default by the lessee, the lessor may exercise self-help measures to repossess an aircraft without judicial intervention if it can do so without breach of the peace. If the lessee physically opposes the lessor’s repossession efforts, the lessor cannot forcibly take the aircraft and would likely have to seek assistance from a court through a judicial proceeding. The typical procedure for repossessing an aircraft in the US will be to pursue an action in state or federal court where the aircraft is situated under state law procedures. In the same proceeding, the lessor could seek to recover damages under the aircraft lease. In such court proceedings, the lessee could seek to resist the repossession of the aircraft by lessor or counter sue the lessor; actions that could interfere or delay the lessor’s attempts to repossess.

If a bankruptcy proceeding is commenced by or against a US lessee, an automatic stay under the Bankruptcy Code would bar any efforts by the lessor to repossess the aircraft absent an order from the bankruptcy court except in respect to an aircraft lease involving certain aircraft that are subject to section 1110 of the Bankruptcy Code. Section 1110 provides that in respect to aircraft, aircraft engines and certain other items subject to a security interest granted by, leased to or conditionally sold to, a grantor that is an FAA-certified air carrier for aircraft capable of carrying 10 or more individuals or 6,000 pounds or more of cargo, the automatic stay is lifted unless the bankruptcy trustee cures all defaults and agrees to assume all obligations under the security agreement, lease or conditional sale contract within 60 days after the commencement of the bankruptcy proceeding.
23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee’s right to enforce?

Similar to the rights of a lessor under an aircraft lease described in question 22, upon a default under an aircraft security agreement covering an aircraft, pursuant to article 9 of the UCC, the grantee may exercise self-help measures to repossess the aircraft or render the aircraft unusable by the grantor without judicial intervention if it may do so without breach of the peace. If the grantor physically resists the grantor’s repossession efforts, the grantor will likely not be able to proceed without breaching the peace, in which case the grantor would need to seek a court order in order to repossess the aircraft. The typical procedure for repossessing an aircraft in the US is to pursue an action under state law procedures in state or federal court where the aircraft is situated. In the same proceeding, the lessor could seek a deficiency claim against the grantor if the value of the aircraft is less than the amount secured and other damages. In such a court proceeding, the lessee could seek to resist the repossession of the aircraft by lessor or countersue the lessor; actions that could interfere or delay the lessor’s attempts to repossess.

If the grantee under an aircraft security agreement is able to repossess the aircraft, either through the exercise of self-help or pursuant to a court order, under the UCC, the grantee would be able to dispose of the aircraft either through a public or private sale in accordance with the UCC and the aircraft security agreement, with the net proceeds from the sale, after payment of expenses, being applied against the secured debt, with any surplus proceeds going to the grantor.

Similar to an aircraft lease agreement, if a bankruptcy proceeding is commenced by or against a US grantor of an aircraft agreement, the automatic stay under the Bankruptcy Code would bar any efforts by the grantee to repossess or dispose of the aircraft absent an order from the bankruptcy court except in respect to an aircraft security agreement involving certain aircraft that are subject to section 1110 of the Bankruptcy Code (see question 22).

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The following liens or rights could have priority over a security interest created under an aircraft security agreement:

- US federal tax liens, which are filed with the relevant state and cannot be filed with the FAA Registry or registered with the International Registry;
- possessory mechanics and warehouse liens to the extent provided under applicable state law;
- non-possessory mechanics liens to the extent provided under applicable state law, although these may be subordinate to any perfected security interest and may need to be filed for recordation with the FAA Registry;
- purchase money security interests, which may be filed up to 20 days after the grantor receives possession and will take priority over any intervening security interests; and
- buyers purchasing goods in the ordinary course from persons in the business of selling that type of goods.

The US Customs Service may seize an aircraft for transporting drugs (except for airplanes involved in common carriage).

The US government has the power to require all or any part of the US airline transportation system to be turned over for government use during times of war. The US government would be obligated to provide compensation for any such taking under the US Constitution.

Taxes and payment restrictions

25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Aviation finance and leasing transactions in the US give rise to a significant number of tax issues, and before entering into such a transaction the parties should thoroughly examine the US and foreign tax consequences and factor them into the structuring and pricing of the transaction. The following is a brief discussion of a few selected tax issues that are commonly addressed in the case of foreign corporation selling, financing or leasing an aircraft to a US resident.

Sales and use taxes

Upon the sale of an aircraft when physically located in a state, or the lease of an aircraft that will be based or used in a state, generally the state will require that the seller or lessor collect from the buyer or lessee and remit to the state’s tax authorities a sales tax on the gross sale proceeds or use tax on the gross rentals under a lease when based or operated in such state. State sales taxes are typically around 8.5 per cent of gross sales proceeds. There are often exemptions available, including in many states an exemption for sales or leases of aircraft to air carriers for use in foreign or interstate commerce. Delivering an aircraft when it is located either outside international airspace or in another state or jurisdiction that does not impose a sales tax or has an exemption can be an effective way to eliminate sales taxes, but not use taxes. The seller or lessor should require that the buyer or lessee deliver a tax exemption certificate to evidence the availability of any tax exemption. There are no federal sales or use taxes, although there are both federal and state income taxes that could be imposed in respect to income or gain from sale proceeds or rentals.

Federal withholding tax on aircraft lease rentals

Without an exemption or reduction under an international tax treaty or federal tax laws, gross rentals payable by a US lessee to a foreign lessor that is not engaged in the leasing business in the US are generally subject to US federal withholding tax at the rate of 30 per cent, to the extent that the rentals are attributable to periods of time when the aircraft is located or operated within the US. The US is a party to numerous treaties with other countries that either exempt or reduce the withholding tax on gross rentals.

Federal corporation income tax on aircraft lease rentals

A foreign corporate lessor that is engaged in the leasing business through a permanent establishment in the US is subject to US federal income tax at the graduated rate applicable to US domestic corporations. However, all or part of the lessor’s leasing income may be exempt from US federal income taxation under an international treaty or a ‘reciprocal exemption’ under the US federal income tax statute.

A foreign corporate lessor that is engaged in the leasing business in the US that does not have a permanent establishment in the US will be subject to a US federal gross transportation income tax at the rate of 4 per cent on one-half of its rental income for the period when the aircraft is operated between a place within the US and a place outside the US. However, all or part of the lessor’s leasing income may be exempt from US federal income taxation under an international treaty or a ‘reciprocal exemption’ under the US federal income tax statute.

State income tax on aircraft lease rentals

A foreign corporate lessor that carries on the business of leasing at a place of business within a state will be subject to income taxation by the state. A foreign corporate lessor that does not have a place of business within a state may nonetheless be subject to income taxation by the state if aircraft leased by the lessor are based or operated within the state.

Property taxes

Certain states and local taxing authorities impose a property tax on the owner of tangible property located within a state during all or a portion of a tax year. Such taxes are usually based on the value of the property.

Federal withholding tax on interest payments

Absent an exemption or reduction under an international tax treaty, interest payments by a US resident to a foreign lender that is not effectively connected to a US business of the lender are generally subject to US federal withholding tax at the rate of 30 per cent. If the interest payments are effectively connected to a US business of the lender, the lender would be subject to US federal income tax at the graduated rate applicable to US domestic corporations. The US is a party to numerous treaties with other countries that either exempt or reduce the withholding tax on gross rentals.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

The US does not have restrictions on international payments or foreign exchange controls other than certain bank reporting requirements, and
certain restrictions on dealing with barred or listed countries, persons or entities.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Pursuant to state usury laws, there are limits on interest payments that may be charged on borrowed money. In New York, the maximum amount of interest that may be charged is 16 per cent, although certain exemptions may apply. Usury limits may not restrict the amount of interest that may be paid following a default on a loan or lease payment if they are not determined to be payments for borrowed money.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

The export of commercial aircraft from the US, and sale or transfer of a US-origin aircraft outside the US, is subject to US export laws. Most commercial aircraft are considered US origin aircraft. Generally, the export of a US aircraft does not require a special licence, although certain transfers are prohibited including transfers:
- to certain embargoed countries;
- of aircraft incorporating certain military or technologically advanced components; and
- to certain persons or entities or barred lists, or those located in certain countries.

If an aircraft is being permanently exported from the US, there is certain required paperwork in connection with the export.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There are no captive insurance regimes applicable to commercial aircraft and insurance coverage in the US. Aviation insurance is normally placed through aviation commercial markets.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

A cut-through clause (or endorsement) in an underlying primary insurance policy allows the insured to seek payment directly from the reinsurer in the case of the insolvency or similar events affecting the primary insurer policy. The enforceability of cut-through clauses is determined by the governing law for the primary insurance policy and the governing law for the reinsurance policy. For the primary insurance policy, the main issue is whether, under the state law applicable to the primary insurer, the proceeds from reinsurance can be paid to the insured, rather than to the primary insurer or a conservator or administrator of the insolvent insurer. While the results vary from state to state, many states, including New York and California, permit cut-through endorsements. Among the issues affecting the enforceability of a cut-through endorsement against the reinsurer is whether there needs to be privity between the reinsurer and the insured. Generally, such privity should not be required in the US. However, the safest approach is to include a cut-through endorsement in the reinsurance policy and have the insured named as an additional insured and loss payee under the reinsurance policy, so that the insured has a direct claim against the reinsurer.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

With the exception of California and Louisiana, assignments of insurance policies (including reinsurance policies), other than health-care insurance, are excluded from coverage under article 9 of the UCC. There is no uniformity from state to state regarding the process to obtain priority in an assignment of aviation insurance or reinsurance over competing assignments. As a consequence, assignments of insurance and reinsurance policies are not customary for aviation finance and leasing transactions in the US. The normal approach is for the financier or lessor to be named as an additional insured and loss payee under the insurance and reinsurance policies, and include cut-through endorsements in the policies, rather than assignments.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

If an accident or incident involving an FAA aircraft causes death, injury or damage to third parties, it is not clear under what circumstances an
owner, lessor or secured party without any operational control or authority over the aircraft would be liable to such third parties. Pursuant to the Transportation Code, a lessor, owner or secured party of an FAA aircraft can be liable for personal injury, death, or property loss or damage 'on land or water' caused by a civil aircraft, engine or propeller only if it was in the actual control of the lessor, owner or secured party. In Vreeland v Ferrer, 28 So 3d 906 (2010), the Florida Supreme Court construed section 44112 narrowly to only exclude liability for loss or damage to people or property 'on the ground' and, therefore, looked to applicable state law as to whether liability should be imposed on a passive owner. While the decision in the Vreeland case has been severely criticised, a few other states have reached similar results.

If the Vreeland decision is followed, then the liability of an owner, lessor or financier could depend upon the applicable law in the jurisdiction where a lawsuit is filed or where the accident or incident occurred. There is no uniform standard under state laws for imposing liability for aircraft accidents upon an owner, lessor or secured party that does not have operational control over the aircraft. Some states impose strict liability upon an owner. Other states might impose liability if an owner, lessor or secured party is found to be negligent either on its own or vicariously through its selection of an operator. Although there is very little authority actually holding an owner, lessor or financier liable for aircraft accidents or incidents, the standard practice is to obtain broad indemnification from the operator covering all operational risks, and to require broad liability insurance covering those rights.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

This is a matter of state law, possibly where the accident occurs or where the defendant is located, or where the legal proceeding is held.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?

There are no required amounts of third-party liability insurance under US federal law for general aviation aircraft that are not operated by air carriers or air taxi operators. Generally, air carriers are required to have $300,000 coverage for any one person and a total of $20 million per aircraft, with lesser amounts of coverage required for aircraft with fewer than 60 passengers and 18,000 pounds maximum takeoff weight and for air taxi operators. There are a limited number of states that require third-party liability insurance for aircraft.
Getting the Deal Through

Acquisition Finance  
Advertising & Marketing  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Arbitration  
Asset Recovery  
Aviation Finance & Leasing  
Banking Regulation  
Cartel Regulation  
Climate Regulation  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
Dominance  
e-Commerce  
Electricity Regulation  
Enforcement of Foreign Judgments  
Environment  
Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Labour & Employment  
Licensing  
Life Sciences  
Mediation  
Merger Control  
Mergers & Acquisitions  
Mining  
Oil Regulation  
Outsourcing  
Patents  
Pensions & Retirement Plans  
Pharmaceutical Antitrust  
Private Antitrust Litigation  
Private Client  
Private Equity  
Product Liability  
Product Recall  
Project Finance  
Public-Private Partnerships  
Public Procurement  
Real Estate  
Restructuring & Insolvency  
Right of Publicity  
Securities Finance  
Securities Litigation  
Ship Finance  
Shipbuilding  
Shipping  
State Aid  
Structured Finance & Securitisation  
Tax Controversy  
Tax on Inbound Investment  
Telecoms & Media  
Trade & Customs  
Trademarks  
Transfer Pricing  
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

iPad app

Available on iTunes