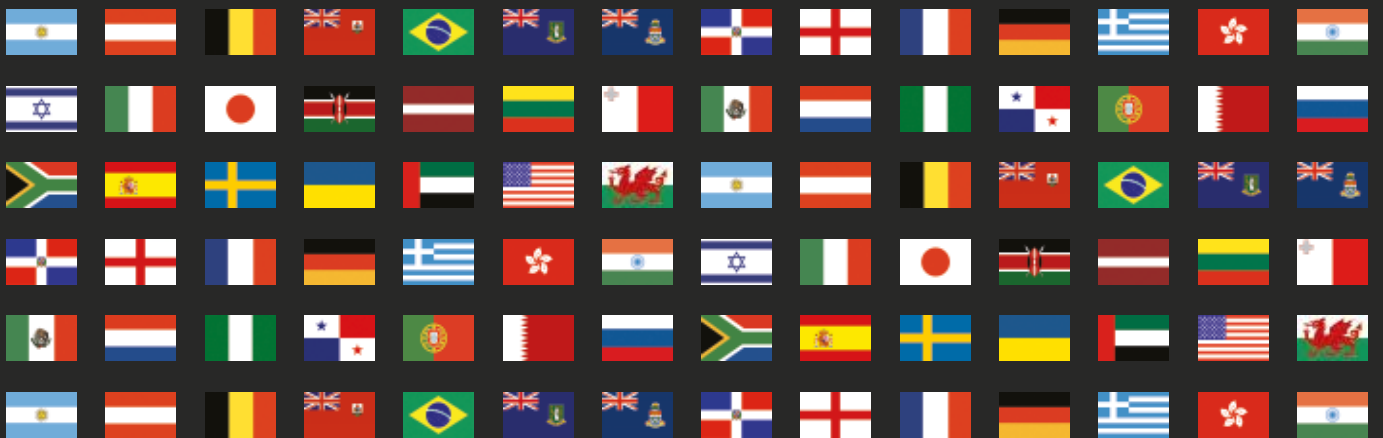


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Contributing editor
Mark Bisset



Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White

dan.white@gettingthedealthrough.com

Published by

Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

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Aviation Finance & Leasing

2019

Contributing editor**Mark Bisset**

Clyde & Co LLP

Lexology Getting The Deal Through is delighted to publish the sixth edition of *Aviation Finance & Leasing*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Argentina, Latvia, Nigeria, Qatar and Spain.

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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.

Lexology 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.



London
April 2019

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Nigeria

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Streamsowers & Köhn

OVERVIEW

Conventions

1 | To which major air law treaties is your state a party?

Nigeria is a signatory to the following significant air law treaties:

- 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 (Cape Town, 2001);
- Convention on International Civil Aviation (Chicago, 1944) and the Protocol relating to an amendment to the Convention on International Civil Aviation (article 83-bis (Montreal, 1980)); and
- Convention on the International Recognition of Rights in Aircraft (Geneva, 1948).

These multilateral treaties are in effect by virtue of their respective domestication into law in the Civil Aviation Act, Chapter 15 Laws of the Federation of Nigeria 2004 (CAA). Nigeria has not acceded to nor ratified the Rome Convention (1952).

Domestic legislation

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

There is no specific domestic legislation applicable to aviation finance and leasing in Nigeria. The CAA 2006 and the Nigerian Civil Aviation Regulations 2015 (NCAR) apply to aviation finance and leasing in Nigeria. In addition, other legislation that generally applies to financial transactions in Nigeria will apply to aviation finance and leasing transactions. In addition, the Cape Town Convention and Aircraft Protocol (Cape Town, 2011), which have been domesticated by Nigeria, also apply to aviation finance and leasing.

Governing 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?

The parties are free to choose either the laws of Nigeria or the laws of a foreign country to govern their contracts relating to transfer of interests in, or creation of security over, an aircraft. Nigerian courts uphold foreign governing law clauses in contracts.

TITLE TRANSFER

Transfer of aircraft

4 | How is title in an aircraft transferred?

Title in an aircraft is transferred by a written contract, usually a contract of sale. The parties can in the contract agree in precise terms when title is deemed to pass to the purchaser. A bill of sale is also effective to transfer title in an aircraft.

Transfer document requirements

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

A transfer document for an aircraft must be in writing, duly stamped and registered at the Nigeria Civil Aviation Authority (NCAA) for it to be enforceable. There is no legal requirement for notarisation and legalisation of a transfer document for an aircraft under Nigerian law.

Translation of a transfer document is necessary if it is not in English. The translated document should be certified by the Nigerian Embassy. However, where there is no Nigerian embassy in a country, a copy certified by the British Embassy or High Commission or by a notary public may be accepted.

REGISTRATION OF AIRCRAFT OWNERSHIP AND LEASE INTERESTS

Aircraft registry

6 | Identify and describe the aircraft registry.

The CAA provides that the NCAA shall establish and maintain a system or register for recording the title to or any interest in any aircraft registered in Nigeria. Furthermore, the NCAR stipulates that the NCAA shall maintain an aircraft registry showing for each aircraft registered in Nigeria the information recorded on the certificate of aircraft registration and any other registration. The NCAA, however, has not created any distinct aircraft registry specifically for registration of aircraft in Nigeria. What typically occurs is that the NCAA records aircraft registration or any interests in aircraft in specific and distinct files opened and maintained for owners and operators of aircraft. The owner, operator or anyone who has an interest in an aircraft may apply to register its interest at the NCAA.

Currently, there are no existing article 83-bis arrangements in place between Nigeria and other jurisdictions. Previously, the NCAA and the Civil Aviation Authority of San Marino executed International Civil Aviation Organization article 83-bis Agreement. The arrangement was not made for any commercial aircraft and has ceased to be operational.

There is no specific engine register in Nigeria.

Registrability of ownership of aircraft and lease interests

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 NCAR provides that the NCAA shall establish and maintain a Legal Interests in Aircraft Registry showing for each aircraft registered in Nigeria proprietary rights, interests, liens and other dealings thereon. This registry has also not been established by the NCAA. An ownership interest, lease interest in, or lease agreement over an aircraft must be registered with the NCAA.

The NCAR defines an 'owner' for the purpose of aircraft registration as follows:

- 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; or
- 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.

In addition, any interest that constitutes a charge over the assets of a limited liability company must be filed at the Corporate Affairs Commission (CAC), the body that regulates corporate entities in Nigeria. The NCAA also registers interests in aircraft engines.

Registration of ownership interests

8 | Summarise the process to register an ownership interest.

The NCAA does not have a process for registering an ownership interest distinct from the process of registering an aircraft. It is at the point of an aircraft registration that the NCAA requires evidence of ownership interest ie, bill of sale or other documents. The process and supporting documents for an aircraft registration are as follows:

- submission of a duly completed prescribed application Form: AC-AWS 001A;
- a certificate or notice of deregistration from the previous state of registry (received by the NCAA directly from the 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;
- documents to prove the aircraft ownership (eg, bill of sale);
- a copy of a government-issued identification or passport if owned by an individual or any other identification card approved by NCAA or 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) (if applicable);
- a certified copy of a current aircraft insurance certificate;
- proof of payment of the prescribed fees; and
- a certified copy of the air transport licence, air operating permit or permit for non-commercial flight.

There is no legal requirement for notarisation and legalisation of a document required for registration of ownership interest in an aircraft under Nigerian law. The cost of registering ownership interest is not distinct from the cost of registering an aircraft. The cost of registering an aircraft depends on the weight of the aircraft in question. The fees are assessed as follows:

- under 3,000kg – 10,000 naira;
- more than 3,000kg but not exceeding 6,000kg – 20,000 naira;
- more than 6,000kg but not exceeding 15,000kg – 30,000 naira;
- more than 15,000kg but not exceeding 50,000kg – 50,000 naira; and
- 50,000kg and above – 100,000 naira.

An additional fee of 50,000 naira is payable if an applicant requests a special registration mark that is out of sequence.

Title over aircraft assets are as determined in contractual documents between the parties and the NCAA does not provide distinct registration for engines in host aircraft.

Title and third parties

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

As noted, the NCAA does not register ownership interests distinct from aircraft registration. An important notice on the certificate of aircraft registration states that the certificate is issued for registration purposes only and is not a certificate of title and that the NCAA does not determine rights of ownership between persons. It is therefore advisable to verify any aircraft registration with the NCAA via a search.

The NCAR provides that the NCAA shall not be liable for any damages, claims and actions arising from any defects in documents, records and depositions submitted to it in support of any application for registration or deregistration of an aircraft. It also stipulates that an applicant for registration or deregistration of aircraft shall indemnify the NCAA against any damages, cost liabilities arising from third-party claims and actions based on misrepresentation and defective documents submitted in support of an application for registration or deregistration. This provision presupposes that the registration of an aircraft with the NCAA is not effective against a third party who is able to show better title.

Registration of lease interests

10 | Summarise the process to register a lease interest.

A lease agreement for an aircraft must be in writing and the executed lease agreement is assessed, and the applicable stamp duties paid to the Federal Inland Revenue Service (FIRS). The stamped lease agreement is subsequently submitted to the NCAA to be placed in the file opened and maintained for the particular operator by the NCAA. There is no legal requirement for notarisation and legalisation of the document creating the lease interest under Nigerian law. However, if the document is not in English, it would be necessary to translate it into English. Typically, the translated document would be certified by the Nigerian Embassy or in the absence of the Nigerian Embassy, the British Embassy.

At the NCAA, depending on the type of aircraft, the minimum charge for registration of a lease interest under the fee arrangement is 10,000 naira, while the maximum charge is 150,000 naira.

Certificate of registration

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

There are no certificates issued for registered aviation interests, as there is no formal registry of legal interest. However, the NCAA confirms by letter when an interest has been registered. There is no separate engine certification issued as the NCAA does not register engines distinct from the aircraft.

Deregistration and export

- 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 person who registers an aircraft can deregister and export it. If a mortgage interest in an aircraft is registered with the NCAA, the NCAA is under the obligation to give notice to the mortgagee if there is any application to deregister, export or change ownership of the aircraft.

By virtue of the Cape Town Convention (2001) (CTC), the NCAA must honour an irrevocable deregistration and export request authorisation (IDERA). Most parties to recent mortgage agreements executed in Nigeria will have an IDERA signed and deposited with the NCAA.

A borrower may stop a proposed deregistration or export where it can prove that there has been no default or breach of agreed contract terms.

Powers of attorney

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

A deregistration power of attorney (DPoA) enables the donee to freely deregister and export the aircraft. It is normally irrevocable under Nigerian law where valuable consideration has passed, or an interest is being secured until the exhaustion of such consideration or discharge of the security. An irrevocable DPoA is usually granted to one attorney.

An irrevocable DPoA is stamped ad valorem with the FIRS at the rate of 1.5 per cent, while a revocable DPoA is stamped at the flat rate of 500 naira. A DPoA is usually registered at the NCAA along with other documents required for registration of a security interest in an aircraft.

Cape Town Convention and IDERA

- 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 form of an IDERA used in Nigeria is largely in the same form as that set out in the Aircraft Protocol to the CTC. The features include the statement that the creditor is the sole person to procure the deregistration of the aircraft from the registry authority and the export and physical transfer of the aircraft from Nigeria.

A DPoA or an IDERA is required to be filed with the NCAA. The former is used when the mortgagee is a Nigerian entity, while the latter is used when the mortgagee is a non-Nigerian entity. The form of IDERA is usually countersigned by the NCAA.

SECURITY

Security document (mortgage) form and content

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

Typically, security is created over aircraft and engines by way of legal mortgages. These are usually documented in English being the language of Nigerian courts. There is no special form that such a mortgage must take but such agreements would usually contain a granting clause setting out the specifics of the aircraft and the security interest created over it as well as clauses relating to the registration, maintenance and operation of the aircraft, replacement of parts, substitution of engines, events of loss, insurance, defaults and remedies, term of the mortgage, terms of release of the mortgage, filings to be completed for the perfection of the mortgage, applicable law, dispute resolution and so on.

Whether or not the secured amount or the economic terms of the transaction would be stated in the mortgage agreement or in a separate loan document is entirely up to the parties. However, upon stamping of the mortgage agreement, registration with the NCAA and filing of same at CAC, the secured amount is required for assessing the applicable stamp duties, registration and filing fees.

Security documentary requirements and costs

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

A legal mortgage is required to be executed as a deed and subsequently stamped. Thereafter, the document is required to be noted by the NCAA. Where the mortgagee is empowered under the mortgage to deregister and export the mortgaged asset, a DPoA or an IDERA is also required to be filed with the NCAA.

If the mortgagor is a company registered in Nigeria, the charge created over the aircraft or engine, or both, being one of the assets of the company would also be registered at the CAC by filing a Form CAC 8 (Particulars of Charge) with additional information setting out a high-level description of the asset being charged, including such details as the manufacturer's serial number and NCAA registration number of the charged asset.

In compliance with the CTC, most mortgages creating an international interest must also be registered at the International Registry.

The costs associated with the foregoing are calculated as follows:

- stamping – 0.375 per cent of the mortgage value; and
- registration with the NCAA:
 - on the first 100,000 naira of the secured sum, for each complete 10,000–500 naira;
 - on the next 900,000 naira, for each 100,000 naira or part thereof – 500 naira;
 - thereafter, for each 1 million naira or part thereof – 200 naira. However, the maximum charge for registration is capped at 150,000 naira;
- registration at the CAC:
 - if the mortgagor is a private company – 10,000 naira for every 1 million naira or part thereof; and
 - if the mortgagor is a public company – 20,000 naira for every 1 million naira or part thereof; and
- registration of an international interest with the International Registry – US\$100.

Security registration requirements

- 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, to effectively perfect the security against the debtor and third parties, the security document must be filed with the NCAA, CAC and the International Registry.

To register the security document at the NCAA, a cover letter requesting that the mortgage be registered as well as a copy of the deed of mortgage will be submitted to the NCAA. Thereafter, the applicable registration cost will be assessed and paid. Once the registration is complete, the NCAA will issue a letter stating that the interest has been noted in the Nigerian Civil Aircraft Register and the date on which it was entered.

At the CAC, the original stamped security document is required to be filed with a Form CAC 8 (Particulars of Charge). Once the filing fee has been assessed and paid, the CAC will issue a Certificate of Registration of a Charge setting out the secured sum, the date of creation of the charge and the person in whose favour the charge is created.

The registration of an international interest at the International Registry is completed on their dedicated website. Prior to the registration, the mortgagor and mortgagee must be registered as Transacting User Entities. The International Registry website provides a step-by-step guide on how an international interest can be registered.

For the respective applicable costs, see question 16.

Registration of security

- 18 | **How is registration of a security interest certified?**

The certification of a security interest in a mobile asset depends on the authority with which it is registered. If the registration is done in accordance with the CTC at the International Registry, no certificate is issued. However, the status of the interests in the asset can be confirmed by conducting a confirmatory search on the asset at the International Registry. The International Registry will then issue a Priority Search Certificate setting out all the registrations completed in respect of the asset. This will state the type of each registration completed up to the date of the search, whether or not each interest created is fractional or partial and the person in whose favour each registration is made.

With respect to registrations at the NCAA, the NCAA will issue a letter stating that the interest has been noted in the Nigerian Civil Aircraft Register and the date on which same was entered. The issued letter does not state the rank or priority of the security interest registered. Subsequently, a search may be conducted on the Nigerian Civil Aircraft Register following which the NCAA will issue a Report of Search setting out the details of the asset, its registered owner and all interest holders in respect of the asset.

The CAC issues a Certificate of Registration of a Charge setting out the type of security document registered, the secured sum, the date of creation of the charge and the person in whose favour the charge is created. Subsequently, a search can be conducted on the file of the mortgagor at the CAC to confirm the status of the charge as well as to obtain certified copies of the security document.

All the foregoing can be accessed upon completion of the registration process at each registry.

Effect of registration of a security interest

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

Registration at the International Registry confers priority over subsequent security interests in line with the terms of the CTC. Registration

with the NCAA and the CAC serves as notice to third parties that a security interest has been created over the asset and stamping and registering the security document is the best way to establish priority under Nigerian law.

There is no priority notice system in place, but the effect of the various registrations is to put all third parties on notice as to the security interest created over the secured asset. Any subsequent charge created over the same asset would be subject to and rank second to the interest already created and registered.

Records kept of registrations by the NCAA, CAC and International Registry are largely reliable in confirming the status of assets sought to be secured.

Security structure and alteration

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

Syndicated aviation financing may utilise substantially the same structure as other types of syndicated financing. The concept of trust is recognised under Nigerian law and may be used in granting security over an aircraft by the appointment of a security trustee for the lenders in a transaction. How the trust will be managed, whether or not the security or the beneficiaries of same can be substituted or modified is largely dependent on the terms of the facility documents. Where the facility or security documents permit substitution of lenders or the inclusion of additional lenders, the security trustee may also be empowered to hold the security on behalf of the substituted or additional lenders.

Where a security trustee is appointed in syndicated financing, the registrations in respect of the security documents may be completed in the name of the security trustee. If this is the case, there would be no requirement to make changes where there are additional lenders or lender substitutions. However, when a loan is to be transferred to a new lender, filings of the change with the relevant authorities would be required.

Security over spare engines

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

Security over spare engines can also be created by legal mortgage whether or not any such engine is installed on an aircraft. The creation of security over an aircraft does not create an independent security over the installed engine except when expressly stated in the security document. Where a security interest is to be created over an aircraft and its installed engines, each of the aircraft and engines are listed as a separate secured asset. Where a security interest is created over an aircraft and the installed engines, the security document may make provision for how the installed engine may become unencumbered. The security document may provide for the substitution of engines under security where such engines are uninstalled and replaced or provide that the security over an engine subsists even after it is uninstalled from the charged aircraft.

ENFORCEMENT MEASURES

Repossession following lease termination

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

Nigeria made declarations under article 54(2) of the CTC to the effect that any remedies available to the creditor under the CTC that are not

expressed under the relevant provision to require application to court may be exercised without court action and without leave of court. Therefore, if the interest of the lessor in the aircraft is registered as an international interest under the CTC and Aircraft Protocol, a court order is not required to activate the remedies stipulated in article 11 of the CTC, which allows a lessor to terminate a lease agreement and repossess the aircraft. In practice, however, there have been cases where a lessee has impeded the right of the lessor by obtaining orders of injunction restraining the lessor from exercising the self-help remedies before such remedy is activated.

If the lease is not subject to the CTC and Aircraft Protocol, the lessee may proceed to court to have questions surrounding the lease determined by the court.

Notably, one of the grounds upon which an aircraft owned by a foreign person but leased to persons permitted to register aircraft in Nigeria can only remain in the registry is if the lease remains in effect. Upon the termination of such a lease, deregistration and repossession are treated together. The lessor gives reasonable prior notice in writing of the proposed repossession to NCAA that the lease has been determined.

If the lease is determined by default, the NCAA requires evidence that the lessee has been given time to remedy the default but has failed to do so and that the default persists. The NCAA ensures that the incident of default is within the terms agreed by the parties and that the lessee has indeed defaulted before it proceeds to notify the lessee and any other interest holder of the proposed deregistration and request for repossession.

Enforcement of security

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

In line with the declaration made by Nigeria under article 54(2) of the CTC to the effect that any remedies available to the creditor under the CTC that are not expressed under the relevant provision to require application to court may be exercised without court action and without leave of court, a chargee can exercise the default remedies set out in article 8 of the CTC (take possession or control of the object charged; sell or grant a lease of any such object; collect or receive any profit or income arising from the management of or use of such object) without recourse to court. It is usual to have terms in the mortgage agreement giving the mortgagee the right to exercise such self-help remedies without recourse to court.

Yes, the aircraft can be detained by way of an ex parte application once the conditions necessary for the grant of an injunction are present (eg, that the mortgagee has a legal right to the asset, that the mortgagor owes monies and is unable to pay and the security for the monies is the aircraft asset that, if not detained, may be made unavailable by the mortgagee).

If the security interest is created under the CTC and Aircraft Protocol, the procedure to be adopted in the event of an insolvency of the debtor is as set out in Alternative A of article XI to the Aircraft Protocol. This is in line with the declaration made by Nigeria pursuant to article XXX(3) of the Aircraft Protocol. As required, the waiting period within which the debtor is expected to give possession of the aircraft object to the creditor upon the occurrence of the insolvency-related event is 30 calendar days.

For agreements made outside the CTC, the holder of a fixed charge over an asset takes precedence in insolvency proceedings over other creditors of the debtor.

Again, in practice, it is possible, contrary to the terms of the contract, for a chargor to impede the right of the chargee by obtaining

orders of injunction restraining the chargee from exercising the self-help remedies before such remedy is activated.

Priority liens and rights

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 line with the declarations made by Nigeria, the following categories of non-consensual right or interest have priority under the law over an interest in an object equivalent to that of the holder of a registered international interest and shall have priority over a registered international interest, whether in or outside insolvency proceedings:

- liens in favour of works for unpaid wages arising since the time of a declared default under a contract to finance or lease the subject object for services performed relating to that object; and
- liens in favour of repairers of an object in their possession to the extent of services performed on and value added to that object.

In addition, certain rights have been declared by Nigeria as registerable non-consensual rights and interest that are to be registered at the International Registry and regulated accordingly. These interests include:

- rights of a person obtaining a court order permitting attachment of an aircraft object in partial or full satisfaction of a legal judgment;
- liens or other rights of a state entity relating to taxes or other unpaid charges;
- liens of a salvor for unpaid charges in respect of salvage services provided to an aircraft object when it is waterborne;
- liens of a person providing towage services to an aircraft object when it is waterborne in respect of unpaid charges; and
- liens of a bailee of an aircraft in respect of unpaid charges for the bailment of that aircraft object.

It is usual to find terms relating to state confiscation or requisition in mortgage agreements executed in Nigeria. The Nigerian Constitution provides that no movable property shall be compulsorily acquired by the government except in the manner and for purposes provided by a law that among other things, provide for the prompt payment of compensation and gives any person claiming such compensation a right of access to a court of law or tribunal for the determination of his interest and the amount of compensation to a court of law or tribunal.

Section 44 of the Constitution is, however, without prejudice to any general law relating to, among other things, the imposition or enforcement of any tax, rate or duty. For instance, the FIRS is empowered to sell distrained goods or chattels to satisfy a taxpayer's assessed tax obligation if the taxpayer fails to pay the assessed tax and any cost or charges incidental to the distraint. By this provision, the FIRS can validly distraint and sell an aircraft or any of its parts or equipment to satisfy the tax obligation of the owner of the aircraft or equipment.

Enforcement of foreign judgments and arbitral awards

25 How are judgments of foreign courts enforced? Is your jurisdiction party to the 1958 New York Convention?

Foreign judgments are enforced in Nigeria in accordance with the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, Chapter F35, Laws of the Federation of Nigeria 2004 (the 2004 Act) and the Reciprocal Enforcement of Judgments Act 1922, Chapter 175, Laws of the Federation and Lagos 1958 (the 1958 Act). Section 3 under Part 1 of the 2004 Act (which contains provisions for the registration of foreign judgments) provides that where the Minister of Justice of the Federation of Nigeria is satisfied that in the event of the benefits conferred by Part

1 of the 2004 Act being extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured with regard to the enforcement in that foreign country of judgments made by a superior court in Nigeria, the Minister may, by order, direct the extension of Part 1 to that foreign country. No such order has been made by the Minister of Justice to date. Section 10(a) of the 2004 Act allows the enforcement of foreign judgments of countries to which Part 1 of the 2004 Act has not been extended, provided that such applications for enforcement are made within 12 months of the foreign judgment or within such other time as the court may permit. Judgment under the 2004 Act includes an arbitral award. Foreign arbitration awards are thus enforced in the same manner as foreign judgments under the 2004 Act.

Certain foreign judgments may also be enforced under the 1958 Act. This Act deals with the registration and enforcement of judgments obtained in Nigeria and the United Kingdom and other parts of Her Majesty's (Queen of the United Kingdom) dominion and territories and was not repealed by the 2004 Act as was decided by the Nigerian Supreme Court in the case of *Witts & Busch Ltd v Dale Power Systems plc*.

In addition to the above statutory provisions, Nigeria is also a party to the New York Convention and arbitration awards are enforced in accordance with the Convention.

TAXES AND PAYMENT RESTRICTIONS

Taxes

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

Generally, aviation transport is taxed as a special regime. Its profits and losses are deemed to derive from carriages loaded into aircraft in Nigeria with a minimum tax of not less than 2 per cent of the full sum receivable in respect of such carriages.

Under aviation-related lease payments, loan repayments and transfers of aircraft, the tax treatments depend on whether the lease is an operating lease or a finance lease. Where the lease is an operating lease, it would be treated as an operating expenditure (opex) for the lessee while under finance leases, it will be treated as a capital expenditure (capex).

Operating lease, income tax on rent

Under the Companies' Income Tax Act (CITA), the income derived from a lease is a rent. Section 79(6) of CITA defines rent to include 'payments for the use or hire of any equipment, payments for charter of vessels, ship or aircraft and all such other payments for the use of or hire of movable and immovable property'. By section 79(1) and (2) of CITA, where any rent is due from or payable to a lessor, the person paying the rent (lessee) shall at the time of payment or credit deduct an amount equal to 10 per cent of the rent as withholding tax and remit to the tax authority. Where the rent is paid to a recipient resident in a country that has a double taxation agreement (DTA) with Nigeria, the rate is reduced to 7.5 per cent. The taxes withheld pursuant to section 79 above shall be the final tax payable if the lessor is non-resident.

Value added tax

The lessee is liable to pay value added tax (VAT), as imposed by the Value Added Tax Act. VAT is a consumption tax that is charged on the supply or sale of goods or services in Nigeria. The obligation to charge the tax is on the lessor, who should include the tax in its invoice to the lessee and remit the tax. The VAT rate is 5 per cent of the value of the rent payable to the lessor.

Finance leases and loan repayments

CITA places a charge on interests payable for the loan of an asset under a finance lease in Nigeria. Under section 78 of CITA, interest payments are liable to withholding tax. The rates are also 10 per cent and 7.5 per cent for residents of non-DTA and DTA countries respectively.

Under finance leases, Item 18(2) of the second Schedule to CITA, entitles the lessee to claim for capital allowances (where the agreement provides for the transfer of ownership, risk and reward to the lessee) on all capital amounts repaid to the lessor for the acquisition of the aircraft. Interest payments are also treated as allowable deductions for the lessee while the interest earned by the lessor is a return on investment and is not subject to VAT.

Aircraft transfers

Tax treatments on incomes earned on aircraft transfers by resident companies will depend on the transaction structure. For non-resident or foreign companies, the profits from a trade of business are taxable in Nigeria only if the profits were derived from Nigeria. Trade or business profits are deemed to derive from Nigeria in any one of the circumstances stipulated in section 13(2) of CITA. The circumstances are:

- where the company has a fixed base in Nigeria and derives the income through that fixed base;
- where the company has a dependable agent in Nigeria;
- where the trade or business involves a single contract (turnkey projects); and
- where the trade or business is between the foreign company and a related person in Nigeria.

Thus, where a foreign company transfers an aircraft to a Nigerian company through the former's fixed base or dependent agent in Nigeria the income would be taxable in Nigeria.

In relation to VAT, it should be noted that imports of aircraft and spare parts are zero rated.

Nigeria is a party to DTAs with various countries. A typical DTA either reduces or excludes taxes that would ordinarily be payable in respect of certain incomes. In an aircraft lease transaction for instance, if the lessor is resident in a country that has a DTA with Nigeria, Nigerian tax may be minimised.

Loan repayments, unlike rent payments, do not attract VAT. This has a bearing on the overall cost of the transaction.

Interest payments on foreign loans with certain repayment periods above two years attract varying levels of tax exemption.

In the case of aircraft transfers, there is no liability for income tax for a foreign transferor unless the aircraft is sold through a fixed base or dependent agent in Nigeria.

Under the Nigerian DTAs, the business income of a foreign company is only taxable in Nigeria if that foreign company does business in Nigeria through a Nigerian permanent establishment. It follows that if an aircraft transfer is done outside the territory of Nigeria, by a transferor who is a resident of a treaty country, the income may not be subject to Nigerian income tax or capital gains tax.

(Income) tax is chargeable only if the aircraft is sold or transferred by a Nigerian company or by a foreign company through a fixed base, permanent establishment or dependent agent in Nigeria. The place of transfer would only be relevant if it qualifies as a fixed base or permanent establishment.

Exchange control

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

Nigerian laws permit the repatriation of proceeds of valid transactions and other international payments in any convertible currency provided

the necessary documentation are duly completed and provided to an authorised dealer. Authorised dealers are banks licensed by the Central Bank of Nigeria to operate in the foreign exchange market. The documentation required will depend on the type of payment or remittance – aircraft lease payments, maintenance fees, spare parts costs, insurance premiums, etc. The authorised dealer will process the payment or remittance and make the appropriate notification or returns to the Central Bank of Nigeria.

Default interest

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

No. This is a matter of contract between the parties. Default interest should, however, be reasonable as Nigerian courts, generally, do not enforce clauses that appear to be punitive.

Customs, import and export

29 | 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. Custom duty may be waived if the aircraft is being imported under a temporary import permit. Payments due on the aircraft to statutory bodies must be settled to clear the way for export.

INSURANCE AND REINSURANCE

Captive insurance

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

Section 72(1) of the Insurance Act 2003, which is applicable to the aviation industry prohibits the insurance or reinsurance of a risk of a property in a Nigerian business except with a Nigerian insurance or reinsurance company. This provision is interpreted and enforced by the Nigerian Insurance Commission to bar the insurance or reinsurance of aircraft or aircraft equipment with a foreign company. The Insurance Act does not provide a percentage of the risk that is required to be mandatorily insured or reinsured in Nigeria.

There are, however, situations where the National Insurance Commission (NAICOM) may permit in writing for a risk to be insured or reinsured with a foreign insurer or reinsurer upon an application of a person seeking to maintain a foreign insurance or reinsurance. Such a person must satisfy NAICOM that by reason of the exceptional nature of risk in or emanating from Nigeria or such exceptional circumstances, the risk cannot be placed with an insurer or reinsurer in Nigeria.

The Insurance Act does not restrict the insurance or reinsurance of risk in Nigeria to any particular insurance or reinsurance company or group of insurance companies. A person is therefore at liberty to spread the risk among different insurance or reinsurance companies. In practice, a percentage of aviation risk is retained in the Nigerian market and is spread among insurance companies. The bulk of the risk is reinsured with foreign reinsurance companies.

Cut-through clauses

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

There is no prohibition of cut-through clauses under the Insurance Act, and in the absence of such prohibition, cut-through clauses are legally effective in Nigeria.

STREAMSOWERS & KÖHN

BARRISTERS, SOLICITORS & ARBITRATORS

Tamuno Atekebo

tamuno@sskohn.com

Chinasa Unaegbunam

chinasa@sskohn.com

Omolayo Latunji

omolayo@sskohn.com

Oluyemi Oyewole

yemi@sskohn.com

16D Akin Olugbade Street

Victoria Island

Lagos

Nigeria

Tel: +234 1 291 0589 / 271 2276 / 271 3846

Fax: +234 1 271 2277

www.sskohn.com

Reinsurance

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

Yes, an assignment by an insurer or reinsurer subject to the terms of the contract would be legally effective.

Liability

33 | 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 of an aircraft is in the eye of the law a distinct legal entity from the operator of the aircraft. Unless where there is an agency relationship, the former is not liable for the activities of the latter. There is no provision of the law that imposes such liability.

Strict liability

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

There is no provision for strict liability for owners, lessors, financiers with no operational interests under the CAA or the extant regulations.

Third-party liability insurance

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

The minimum amounts of third-party insurance cover to be maintained by aviation service providers are specified in the NCAR. The minimum amount of third-party cover required to be maintained by aviation service providers under the regulations depends on whether the aircraft involved is a fixed wing aircraft or rotary wings aircraft and range from US\$375 million to US\$150 million.

UPDATE AND TRENDS**Current developments**

36 | Are there any emerging trends or hot topics in aviation finance and leasing in your jurisdiction?

The federal government of Nigeria has begun series of consultations geared towards the establishment of a national carrier and an aviation leasing company. The core feature will be a partnership with established foreign entities.

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