

**International
Comparative
Legal Guides**



Aviation Finance & Leasing

2024

Fifth Edition

Contributing Editor:
Philip Perrotta
K&L Gates LLP

iba 
insights in flight

glg Global Legal Group



ISBN 978-1-83918-349-2
ISSN 2633-4968

Published by

glg Global Legal Group

59 Tanner Street
London SE1 3PL
United Kingdom
+44 207 367 0720
customer.service@glgroup.co.uk
www.iclg.com

Publisher

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Printed by

Ashford Colour Press Ltd.

Cover image

Fraser Allan

Strategic Partners



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1 General and Contractual

1.1 What are the typical structures available for financing the purchase of an aircraft?

In a wet lease arrangement, the lessor provides not only the aircraft but also the crew, maintenance, insurance, and other operational services to the lessee. Wet leases are often used for short-term capacity needs, such as seasonal fluctuations in demand or aircraft maintenance downtime.

The Nigerian Civil Aviation Regulations 2015 (NCAR) provides for dry lease, wet lease, damp lease and interchange operations. It further mandates that holders of air operation certificates who intend to borrow or lend aircraft between themselves must obtain prior approval from the Nigerian Civil Aviation Authority (NCAA).

In the case of a finance or capital lease arrangement, the lessor acquires the aircraft from a manufacturer, which it in turn leases to an airline or other lessees. The lessee also assumes most of the risks and rewards of ownership. The lease is usually structured like a loan, with fixed payments covering both principal and interest.

A leveraged lease resembles a finance lease, but in a leveraged lease arrangement, lenders extend loans to the owner or lessor to cover a significant portion of the aircraft's acquisition cost, while the remaining balance is covered by the owner. The owner utilises the lease payments to repay the loans and fulfil its commitments under the loan agreement. The loan is secured by a primary lien on the aircraft and associated assets, as well as receivables from lease rentals.

1.2 What are the key advantages/disadvantages and main issues arising in relation to these financing structures?

	Advantages	Disadvantages	Main Challenges
Direct Lending	Offers flexibility in structuring loan terms; it has a potential for lower interest rates for creditworthy borrowers; it allows borrowers to retain ownership of the aircraft from the onset.	Most often, there are stringent collateral requirements; lengthy approval processes; borrowers may be exposed to interest rate fluctuations.	The main issues that have been associated with this method of financing are currency risk due to potential fluctuations in exchange rates. There is also limited availability for smaller or riskier borrowers.
Operating Leases	The structure allows for a lower initial capital outlay; offers flexibility to upgrade or replace aircraft and offers off-balance sheet treatment for lessees.	Higher overall costs compared to ownership; limited control over the aircraft's residual value; lease terms may not align with the aircraft's useful life.	The maintenance and return conditions can be costly; there is risk of lessor bankruptcy or default; there is potential for lease rate escalation over time.
Finance Leases	Offers ownership rights at the end of the lease term; potential tax benefits; ability to spread cost over the useful life of the asset.	Higher initial capital outlay compared to operating leases; lessee assumes most of the risks and responsibilities of ownership; there may be maintenance and residual value risks.	There may be regulatory and accounting treatment complexities; limited flexibility compared to operating leases.

1.3 What types of leasing are possible under the laws of your jurisdiction? What are their essential characteristics?

Under the laws of Nigeria, various types of leasing arrangements are possible and these arrangements are typically governed by specific regulations. The major leasing arrangements are: 1) operating lease arrangements; and 2) finance lease arrangements. However, there is a clear tilt towards operating leases due to specific practicability issues.

In an operating lease arrangement, the owner or lessor procures or possesses the aircraft that is leased to an airline or other lessees and largely maintains all the risks and benefits associated with aircraft ownership. The lessee usually does not have an option to purchase the asset at the end of the lease term. Operating leases usually come in two forms, 'dry lease' or a 'wet lease'.

The dry lease involves leasing an aircraft without crew, maintenance or other operational services. The lessee assumes full operational control and responsibility for the aircraft during the lease term. Dry leases are suitable for airline with existing operational capabilities and infrastructure.

1.4 Are there any proposals for reform in the area of aviation finance?

There are wide-ranging reforms, with deep ramifications on taxation, registration and substance of aviation finance structure and operators alike. The 2020 Finance Act imposed an Economic Community of West African States (ECOWAS) Trade Liberalization Scheme charge on aircraft leases from outside ECOWAS, while the Finance Act 2023 imposed an additional 0.5% charge on imports from outside the region. The Finance Act 2023 also mandates operators and lessors with income derived from Nigeria to file tax returns as a condition of continued operation.

The recent inauguration of the Equipment Leasing Registration Authority (ELRA) is likely to import additional registration obligations on lessors and lessees within the country.

1.5 Is it possible according to the laws in your jurisdiction to enter into non-binding or partially binding pre-contractual agreements (e.g. 'letters of intent') that will NOT take effect as fully enforceable agreements?

In Nigeria, the law recognises the concept of nonbinding or partially binding pre-contract agreements. These may take the form of letters of intent (LOI), memorandums of understanding (MOU), Heads of Agreement (HOA), or even clear-cut offers made subject to contract.

However, whether a "pre-contractual agreement" will be construed as being legal and enforceable will depend largely on the intention of parties, which can be determined by negotiations and the provisions of the pre-contractual agreement.

1.6 Is there a doctrine of 'good faith' in your jurisdiction that applies to all pre-contractual agreement, financing and leasing transaction documents, and the conduct of parties connected to them?

In Nigerian contract law, the principle of good faith is recognised as an implied term in contracts including pre-contractual agreements, and can serve to validate an otherwise unenforceable contract, especially where non-enforcement will lead to manifest injustice.

The court will usually consider the following factors in enforcing the good faith duties:

- partial performance or alteration of the parties' position;
- the spirit and terms of the agreement;
- *Liberima Fidei*;
- subsistence of standard terms; and
- the balance of convenience.

2 Taxation and Related Matters

2.1 Which government authority in your jurisdiction has primary responsibility for the accounting for and regulation of revenue control and taxes?

The Federal Inland Revenue Service (FIRS) has primary responsibility for the taxation of the income of all companies in Nigeria. However, depending on the structure of the counterparty, the State Inland Revenue Service may take a portion of the tax responsibilities. Also, the Nigerian Custom Service, the Equipment Lease Registration Agency and the Nigerian Civil Aviation Authority also collect certain taxes, duties, fees, levies and charges that may significantly impact the revenue of the aviation owners and operators.

2.2 What are typically the taxes in your jurisdiction that may arise in relation to a sale, a lease or a financing of an aircraft or an engine?

The global income revenue of a Nigerian Company is taxable under the Companies Income Tax Act (CITA), while the income of a non-Nigerian company is duly taxable to the extent that they derive from Nigeria. For foreign-based lenders, their interest income is chargeable to income tax while the capital component of the transaction is exempted from taxation. For lessors, the gross rental income under an operating lease is chargeable to tax while only the net earnings of a lessor in a finance lease is chargeable to tax.

Aircraft import transactions are exempt from value added tax (VAT) and import duties but are subject to ECOWAS Trade Liberalization Scheme (ETLS) charges, as well as a 0.5% levy under section 4 of the Finance Act 2023. A 10% withholding tax is chargeable on earnings from aircraft leases and finance. While the capital gains of a Nigerian financier or lessor are subject to capital gains tax, the gains of a foreign lessor or financier are generally not subject to capital gains tax. Stamp duties are payable on every lease or financing agreement.

2.3 Is the provision of a current tax-residency certificate by a payee sufficient for a lessee or a borrower potentially subject to withholding taxes in your jurisdiction on rental or interest payments to avail itself of treaty access and the mitigation of tax liability?

A payee's residency certificate issued by a state party offers certain protection for the payee in relation to Double Taxation Agreements (DTAs) with Nigeria. The extent of the protection will depend on the specific DTA. DTAs do not serve to exempt the payee from the payment of withholding tax in its entirety, but rather modulate the applicable withholding tax payable on each financing/lease transaction based on the agreed maximum rate prescribed in the DTA. Thus, where the prescribed domestic withholding tax rate is below the one prescribed in the DTA, the domestic rate will apply. However, where the domestic rate is higher than the rate in the DTA, the DTA rate will apply.

The benefit of the DTA applies only to the passive income of the lessor/financier. Where the income of a foreign lessor/financier is attributable to a permanent establishment or fixed base of business, the domestic rate shall apply.

2.4 Has the advent of BEPS (the Base Erosion and Profit Shifting initiative of the OECD) had any effect as regards structures in aviation finance and leasing or their interpretation?

Nigeria declined to subscribe to BEPs for cited national economic concerns. The advent of BEPS and their implementation therefore does not have any effect on aviation finance and leasing in Nigeria. In place of BEPS, the Minister of Finance issued the Significant Economic Presence (SEP) Order of 2020, which prescribed a predictably lower annual turnover trigger (NGN25 million as opposed to the higher BEPS threshold of EUR20 billion) for multinational enterprises to be taxed.

The SEP Order also prescribes dispute resolution under the Nigerian Judicial System.

2.5 What are the typical thresholds in your jurisdiction for which a permanent establishment may be triggered under the terms of any relevant double-tax treaty or similar?

Generally, a foreign company will be deemed to have a permanent establishment in Nigeria if it registers and conducts its business through a related company in Nigeria. This will also be implied where the foreign resident utilises a dependent agency arrangement, runs an artifice-based structure to access tax benefits or avoid tax obligations, maintains an SEP under the 2020 Order, runs an improperly structured integrated project with a substantial local component, or in the case of an operating lease, runs an unstructured fully-crewed wet lease arrangement for an air cabotage operation in Nigeria.

2.6 Is the authority at question 2.1 likely to establish a 'look-through' right or similar as regards a lender or a lessor that is a special-purpose vehicle involved for the purpose of tax treaty access?

The FIRS enjoys a robust investigative mandate under its Establishment Act and the relevant federal tax statutes. The service often displays its right to look through agents, nominees, conduit companies, fiduciaries or any intermediating artifice set up to conceal the actual structure of subject transactions. To achieve this, it usually looks through layers of special purpose vehicles to ascertain the identity and status of the true beneficial owners of the payment.

The FIRS will withhold any tax benefits where it perceives that the transaction structure was designed solely to provide undue access to the advantages provided under the existing tax laws and DTAs.

2.7 Will the import of an aircraft into your jurisdiction and/or the sale or leasing of the aircraft give rise to any VAT, sales or use taxes or any customs import or excise duties?

The importing of airplanes and other aircrafts into Nigeria is exempted from VAT. Additionally, under the Finance Act 2020, all aircrafts and parts imported into Nigeria by a Nigerian registered airline providing commercial air transport services are exempt from import duties.

The ECOWAS Trade Liberalisation Scheme (ELTS) charge is payable at a rate of 1% of the FOB (Free On Board) value of the aircraft and a further 0.5% charge is imposed on the CIF value of the imported aircraft under the Comprehensive Import Supervision Scheme. The Finance Act 2023 Act imposes 0.5% tax on all imports of goods originating from outside Africa.

2.8 Are there any documentary taxes (for example, stamp duty payable on the execution of documents)?

The Stamp Duties Act mandates parties to a financing and lease agreement/documentation to present such agreement or documentation to the FIRS for stamping within 40 days of execution and payment of any stamp duties is a condition for any registration of interest in the subject aircraft.

3 Registration and Deregistration

3.1 Which government authority in your jurisdiction has primary responsibility for the regulation of aviation and the registration of aircraft? Is it an owner registry or an operator registry? If the aircraft register is an operator register, is it possible to record the details of an owner or lessor and any financier with an aircraft mortgage?

The primary responsibility for the regulation of aviation in general in Nigeria is the Ministry of Aviation. The NCAA, a statutory Agency under the Ministry of Aviation, is charged with the regulation of Civil Aviation by virtue of Section 8 of the Civil Aviation Act, which gives the NCAA primary responsibility for the regulation of the aviation industry and the registration of aircraft in Nigeria. The government authority makes regulations on issues such as aircraft registration, airworthiness standards, aviation safety, air navigation standards and airspace standards, amongst other things.

Statutorily, the NCAA is required to establish and maintain a national aircraft registry, recording information contained in the certificate of aircraft registration and any other information requested by the NCAA. In addition to this register, the NCAA is also required to keep a Legal Interest in Aircraft Registry. Here, all proprietary rights, interests, liens and other dealings are recorded with the NCAA.

However, in practice, the NCAA keeps records of the registration of an aircraft or any proprietary rights, interests, liens, etc., in specific files created and maintained for owners and operators of aircraft.

Further to this, it is possible to record information related to an owner, lessor and financier with an aircraft mortgage. In this way, the owner, operator or anyone with a legal interest in an aircraft may apply to register its interest at the NCAA.

3.2 What is the effect of registration of the aircraft? Does registration on your national aircraft register confer proof of ownership of the aircraft and/or engine?

Upon successful registration of the aircraft by its owner or operator, a Certificate of Registration for that aircraft would be issued by the NCAA, thereby enabling such an aircraft to be operated in Nigeria in line with Part 4.2.1.1 of the Regulations.

Registration of the aircraft with the NCAA does not confer conclusive proof of ownership of that aircraft and is not effective against a third party who can show a better title. The Certificate of Registration is issued for registration purposes only and does not act as a certificate of title.

3.3 Can foreign-owned aircraft be registered on your national aircraft register and are there limits or restrictions on the age of aircraft that may be registered or operated?

A foreign-owned aircraft can be registered in the aircraft register in Nigeria upon compliance with Regulation 4.2.1.2 of the Nigerian Civil Aviation Regulation. Such an aircraft may be registered where the foreigner is lawfully admitted for permanent residence in Nigeria or the foreigner has leased the aircraft to: (i) a Nigerian citizen; (ii) another foreigner lawfully admitted for permanent residence in Nigeria; (iii) a corporation lawfully doing business under Nigerian Law; or (iv) a government entity in Nigeria.

Furthermore, if the aircraft is leased out, it would only remain on the Nigerian registry for as long as the term of the lease. In addition, the aircraft must not have been registered under the law of any other country and must adhere to the age and noise restrictions under the law.

Yes, there are limits to the age of an aircraft that may be registered or operated in Nigeria. Such aircraft must be no more than 25 years old for the commercial air transport (CAT) cargo category, and no more than 22 years old for the CAT passenger category.

3.4 Can aircraft leases be registered? If so, in what circumstances? Must the lease be in a particular form if it is to be valid and enforceable (for example, must it be in a particular language or be notarised, legalised or apostilled)?

Yes, lease interest in an aircraft must be registered with the NCAA. The lease agreement is required to be in writing and stamped by the FIRS. Although the lease need not be notarised and legalised, the lease must be in English. Where it is in another language, it must be translated into English and certified by the Nigerian Embassy.

3.5 How is deregistration affected and what steps can a lessor take to deregister the aircraft on termination of the lease?

As provided under Part 4.2.1.3(a) of the Nigeria Civil Aviation Regulations, deregistration of an aircraft may be effected by the Nigeria Civil Aviation Authority upon application in writing by the holder of a certificate of registration, the owner or lessor or its duly authorised attorney. It may also be effected by the NCAA where the Authority is satisfied that the lease agreement upon which the aircraft was registered no longer endures either due to expiration or termination, and a duly executed Irrevocable Deregistration and Export Request Authorization (IDERA) is presented. The Authority may also deregister an aircraft where it is satisfied that such an aircraft has been destroyed, lost, permanently withdrawn from use, registered in a country outside Nigeria or where the Certificate of Airworthiness has lapsed for five years or more.

The lessor is expected to give reasonable prior notice in writing to the NCAA that the lease has been determined. Where the lease is determined due to a default, evidence must be provided that reasonable time had been given to address it, the lessee has failed to do so, and the default continues. Upon deregistration of the aircraft, the certificate of registration would be cancelled by the NCAA and then deleted from the aircraft register.

4 Security

4.1 Is it possible to create a mortgage over an aircraft or engine in your jurisdiction? If so, what are the types of aircraft mortgage and engine mortgage available and what formalities are required in order to perfect it?

Engines and parts of aircraft are deemed to be part of the security interest in engines in Nigeria, although they can also be established as part of the security interest in the aircraft as a whole. If required, these interests should be endorsed on the certificate of registration and registered with the NCAA. Whether or not a spare engine is installed on an aircraft, security over them can be established by means of a legal mortgage. The security document needs to be submitted to the following authorities in order to successfully complete the security against the debtor and third party: 1) the NCAA; 2) the Corporate Affairs Commission (CAC); and 3) the International Registry.

1. NCAA: A copy of the mortgage deed and a cover letter seeking the registration of the mortgage will be filed to the NCAA in order to register the security document. The relevant registration fee will then be determined and paid. Following registration, the NCAA will send out a letter confirming that the interest has been registered and noting the date of entry into the Nigerian Civil Aircraft Register.
2. CAC: At this stage, a particular of charge (Form CAC 9) will be filed alongside the earlier document (the original stamped security document). A filing fee ought to be paid, once assessed. Upon payment of the filing fee, 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 was created.
3. International Registry: This is the last stage and is completed on the designated website. Before the registration, the mortgagor and mortgagee must be registered on the website as transacting user entities. The website provides detailed guidance on the process of registration for international users.

4.2 Can spare parts, including future parts, be subject to the aircraft mortgage or engine mortgage (as the case may be)? If not, are there any other forms of security that can be taken over spare parts?

In Nigeria, a legal mortgage can be created over engines/spare parts regardless of whether such engines are installed in the aircraft or not. When a mortgage is created over an aircraft, it does not automatically create a separate mortgage over the installed engine, except where it is expressly stated in the security agreements. Each aircraft and its installed engines are listed as independent secured assets when a security interest is to be created over them. In cases when a security interest is established over both the aircraft and its installed engines, the security document may specify how the installed engine may become unencumbered. When such engines are installed and replaced, the security document may specify that the security over an engine will continue to exist or it may allow for the replacement of engines under the security.

4.3 Is there a register of mortgages or rights over aircraft and/or engine?

Yes, there is an aircraft register. By the provision of the Civil Aviation Act 2022, the Authority in charge of maintenance of the aircraft register in Nigeria is the Nigeria Civil Aviation Authority.

4.4 What other forms of security can be taken over an aircraft and/or engine and can these other forms be registered?

Mortgages (legal or equitable): Mortgages are frequently utilised to secure funding for aircraft. Where there is a default on the part of the mortgagor, it gives the mortgagee the legal right to claim for both repossession and sale. This is registered with the NCAA.

Charges: This form of security is similar to a mortgage. However, in these instances, the aircraft remains with the debtor, but the creditor has a charge over it. A charge is also registered with the NCAA.

Liens: A lien is a right to keep possession of property belonging to another person until a debt owed by that person is discharged. Such debt usually relates to unpaid expenses, such as maintenance or repair costs. These can be registered under the NCAA and CAC.

Pledge and hypothecation: These are less typical forms of security interests in aircraft. A pledge entails giving possession of the aircraft to the creditor, while hypothecation permits the creditor to assert ownership if the debtor defaults.

4.5 What claims and rights would take priority in your jurisdiction over a registered mortgage?

Section 30 of the Secured Transaction Moveable Assets Act (STMA) 2017 grants overriding priority to possessory lien over and above any other security interest subsisting on the subject transaction. The subject of possessory lien is governed by common law and it will generally arise from obligations to pay for aircrafts, repairs, fuel supply, airport services, etc.

In addition, the following non-consensual rights assume priority under the Cape Convention:

- a person's right to attach an aircraft object under a court order;
- a lien or right of state to recover tax or other unpaid charges;
- liens in favour of workers that arose as a result of failure to pay their wage from the time of a declared default under a contract to finance or lease; and
- liens in favour of people who repair an object they own to the extent that work is done on it and value is added to it.

4.6 What other forms of security can be granted over an aircraft and/or engine lease?

The following forms of security can be granted:

- Mortgages.
- Charges.
- Liens.
- Pledge and hypothecation.

5 Enforcement and Repossession

5.1 What are the circumstances in which a mortgagee or owner can take possession of the aircraft and/or sell the aircraft? What requirements must the mortgagee or owner comply with?

A mortgagee or owner of an aircraft will become entitled to retake possession of such aircraft in any of the following circumstances:

- when the lessee or the mortgagor is in default of the agreement;

- upon the expiration of the lease or the mortgage term (in the event of mortgage, without full repayment of debt);
- if the lessee or mortgagor files for bankruptcy and the transaction agreement recognises the owner's right to retake possession;
- vesting in satisfaction – Article 9 of the CTC recognises the right of a chargee to reach an agreement with interested persons to take over the ownership or possessory right of the chargor in any object covered by a secondary interest; and
- relief pending final determination under article 13 (1) of the CTC.

A creditor in Nigeria does not need a court order to take possession or sell an aircraft in the event of default if such circumstance is provided for in the agreement. The mortgagee can also use self-help as long as it is included in the agreement between the parties and also in compliance with laws relating to Export and Deregistration of Aircraft in Nigeria.

It is crucial to note that any remedies available to a creditor under any applicable provision of the Cape Town Convention that do not require application to the court may be exercised without court action or permission, in accordance with Article 54(2) of the convention and related protocols, which came into force in Nigeria on 14 November 2006.

5.2 What is the procedure for repossession of the aircraft?

If a remedy is not expressly provided for under the Cape Town Convention and relevant provisions, and application to court is not required, repossession can be exercised without going to court. Thus, if the lessor's interest in the aircraft is registered as an international interest under the Cape Town Convention and its Protocol, there is no need for the lessor to make an application to the court to before they can terminate the agreement and repossess the aircraft.

On the other hand, where the lease is not subject to the Cape Town Convention and its Protocol, the lessee could make an application to the court to determine the procedure for repossession of the aircraft.

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 holders of the proposed deregistration and request for repossession.

Finally, where a deregistration process is initiated under IDERA, the authorised person may retake possession by way of a simple application to the NCAA.

5.3 Will local courts recognise a choice of foreign law in an aircraft mortgage? Are there any mandatory local rules that apply, despite a choice of foreign law?

The Nigerian courts respect the provisions in agreements which select a choice of foreign laws as the applicable law for the transaction. This disposition is summed up in the *maxim pacta sunt servanda*, which literally means that "agreements must be kept". However, the court will make an exception to this rule where strict application would be against public policy.

While the court will apply the provisions of substantive law to the transaction, the Nigerian procedural rules are mandatory for the conduct of the proceedings.

5.4 Will local courts recognise and enforce a foreign court judgment in favour of a mortgagee or lessor? Are any interim relief measures available?

The Foreign Judgments (Reciprocal Enforcement) Act, 2004, and the Reciprocal Enforcement of Judgments Act, 1922 govern the enforcement of foreign judgments in Nigeria.

Part 1 of the 2004 Act, which contains provisions for the registration of foreign judgments, stipulates in Section 3 that the Minister of Justice may, by order, direct the extension of Part 1 to that foreign country if the Minister is satisfied that, should the benefits conferred by Part 1 of the 2004 Act be 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 of Justice has not yet issued any such orders.

Foreign judgments of nations to which Part 1 of the 2004 Act has not been extended may be enforced pursuant to Section 10(a) of the Act, given that petitions for enforcement are filed within a year following the foreign judgment, or within any further time frame the court may allow.

The Reciprocal Enforcement of Judgments Ordinance, 1958 also permits the enforcement of some foreign judgments. This law pertains to the registration and execution of judgments rendered in Nigeria, the United Kingdom, and other regions under the sovereign authority of the British monarch.

The only available interim reliefs include declaratory reliefs, restraining orders and preservative orders. The owner may also apply to the NCAA to, *inter alia*, note its interest in the aircraft, register the Lessee's default, and record the owner's intention to repossess the aircraft.

5.5 Are powers of attorney from a local airline in favour of a lessor or mortgagee likely to be effective to allow the lessor or mortgagee to deregister the aircraft? Can such powers be irrevocable, be governed by a foreign law and/or do they need to be in any particular form for local recognition?

A local airline's power of attorney in favour of a lessor or mortgagee must be binding so that the latter can deregister the aircraft and the Power of Attorney can be irrevocable. If the Power of Attorney is signed by a Limited Liability Company, it must have the company's seal, a director's signature, and the company secretary's signature and it must also be stamped for it to be valid.

5.6 If recovery of the aircraft is contested by the lessee and a court judgment is obtained in favour of the lessor, how long is it likely to take to gain possession of the aircraft?

In a simplistic analysis, from judgment to possession should be concluded within 14 days. In practice, the length of time between such judgment and delivery of possession to the owner may depend on a number of factors.

In Nigeria, the decision of the Federal High Court (the forum for Aviation matters) is subject to two successive appeals at the Court of Appeal and the Supreme Court. In the event that the lessee elects to proceed on such appeal, then the waiting period becomes longer.

5.7 To what extent is there a risk from the perspective of an owner or financier that a lessee of aircraft or other aviation assets in your jurisdiction may acquire an economic interest in the aircraft merely by payment of rent and thereby potentially frustrate any rights to possession or legal ownership or security?

The lessee under a capital lease is considered to have significant equity interest in the aircraft and may, in certain circumstances, be considered the owner of the subject aircraft for all relevant tax, accounting, liability and bankruptcy purposes. In such instances, the recognised economic interest of the lessee in the aircraft may constitute a hindrance to the right of the lessor to repossess or assume legal ownership of the aircraft.

5.8 Are there any restrictions on the ability of the lessor to export the aircraft from your jurisdiction on termination of the leasing?

Generally, an aircraft billed to be removed from Nigeria by the owner must obtain an export certificate of airworthiness in the prescribed Form AC-AWS 044. This, in addition to a flight permit for export delivery issued by the NCAA, should enable the owner to export the aircraft unhindered.

The subsistence of certain third party liens may, however, create a specific restriction on the ability of the lessor to take the aircraft out of the country.

5.9 Are exchange controls prevailing in your jurisdiction as regards payments in foreign currency? Will any consents be required for the remittance of the sale proceeds abroad?

Generally, pricing or stating the cost of any goods or services in any other foreign currency is prohibited and considered a crime.

Under the Central Bank of Nigeria Currency Substitution and Dollarization of the Nigerian Economy dated 17 April 2015 ("the Guideline"), no business transaction shall be completed in Nigeria in a currency other than Nigerian currency, with the exception of companies in the oil and gas sector, the marine industry, the aviation industry, operators in the free trade zone, and a few government entities.

Where an owner needs to import capital into Nigeria, then a Certificate of Capital Importation must be obtained. However, remittances of proceeds of foreign investment made purely by providing services into Nigeria does not require a Certificate of Capital Importation (ref. CBN update Aug 2020, page 4, ISSN NO:2695-2394/vol 2/No.8). A compliant owner can thus easily transfer its remittance (sales proceeds) through authorised dealers.

5.10 If the lease is governed by English law and a judgment is obtained by the lessor in the English courts, can that judgment be automatically enforced in your jurisdiction or will the case have to be re-examined on its merits?

There is no need to re-evaluate the decision's merits. A judgment must have been enforceable in the jurisdiction in which it was rendered to be valid for it to be recognised and enforced in Nigeria.

5.11 What is the applicable procedure for repossession of an aircraft under other forms of security interests?

In compliance with the declaration made by Nigeria under article 54(2) of the Cape Town Convention (2001), which states that a chargee may exercise the default remedies outlined in article 8 of the convention (take possession or control of the object charged; sell or grant a lease of any such object; or collect or receive any profit or income arising from the management of or use of such object) without going through the legal system, provided that the creditor's rights under the convention are not expressly stated under the relevant provision to require application to the court, such rights may be exercised without action and without permission of the court.

It is customary for the mortgage agreement to contain provisions granting the mortgagee the ability to use these self-help remedies without going to court. If the conditions required for the granting of an injunction are met, the aircraft may be detained through an *ex parte* application.

The process to be followed in the case of the debtor's insolvency is outlined in Alternative A of article XI to the Protocol, if the security interest is established under the Cape Town Convention (2001) and its Protocol. This is consistent with the statement Nigeria made in accordance with Protocol article XXX. When the insolvency-related event occurs, the debtor is supposed to deliver the creditor possession of the aircraft object within the required waiting period. This period is 30 calendar days.

In cases when agreements are formed outside of the Cape Town Convention (2001), the debtor's other creditors lose out to the holder of a fixed charge on an asset during the bankruptcy process. Again, in practice, a chargor may obstruct the chargee's right (against the provisions of the contract) by obtaining orders of injunction to prevent the chargee from using the self-help remedies prior to the activation of those remedies.

6 Conventions

6.1 Has your jurisdiction ratified any of the following: (a) The Chicago Convention of 1944 on International Civil Aviation (the Chicago Convention); (b) The 1948 Convention on the International Recognition of Rights in Aircraft (the Geneva Convention); (c) The 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (the 1933 Rome Convention); and (d) The Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Cape Town Convention) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment?

Nigeria has ratified the following conventions:

1. The Chicago Convention of 1944 on International Civil Aviation (the Chicago Convention).
2. The 1948 Convention on the International Recognition of Rights in Aircraft (the Geneva Convention).
3. The Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Cape Town Convention).
4. The Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment.

The 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft ("the 1933 Rome Convention") has not been ratified.

6.2 Has ratification of the Cape Town Convention caused any conflicts or issues with local laws?

No, but Nigeria made several declarations in 2007 which have been adopted by the regulators, and the Nigerian Civil Aviation Regulations draw substantially from the provisions of the convention.

6.3 What is the legal position regarding non-consensual rights and interests under Article 39 of the Cape Town Convention?

The Federal Republic of Nigeria lodged its Specific Declaration in Form No 1. on 26 March 2007, and stated that it will take priority, whether in or outside insolvency proceedings, and shall be equivalent to the holder of a registered international interest regarding:

- a. liens against an employer for unpaid wages for services rendered by the employee since the time of declared default under a contract to finance or lease the object; and
- b. liens in favour of an individual who repairs an object in their possession.

6.4 Has your jurisdiction adopted the remedies on insolvency provided under Article XI of the Protocol to the Cape Town Convention?

Yes, Nigeria has adopted the remedies on insolvency provided under Article XI of the Protocol to the Cape Town Convention.

In accordance with Article XXXIII (1) of the Aircraft Protocol, the Federal Government, on 26 March 2007, notified UNIDROIT of the making of the following additional declarations. According to Article XXXIII (2) of the Aircraft Protocol, these additional declarations came into effect on 1 October 2007. Article XI was part of the additional declarations. The declaration provides that:

"The Federal Republic of Nigeria declares that the waiting period for the purposes of Article XI(3) of the Alternative shall be thirty (30) calendar days and that it will apply Article XI, Alternative A in its entirety to all types of insolvency proceeding."

6.5 What is the procedure to file an irrevocable deregistration and export request authorisation under the Cape Town Convention (IDERA)?

The procedure to file an irrevocable deregistration and export request authorisation is as follows:

1. A CA50: Irrevocable De-Registration and Export Request Authorisation (IDERA) form must be completed by the current registered owner of the aircraft. In order to verify the details of the registered owner, the registration mark of the aircraft at G-INFO UK Register database must be input.
2. Subject to the condition that a registered holder has previously submitted an application to register the aircraft, they may make an IDERA request if the aircraft is not yet registered, or if a change of registered ownership is pending.
3. The IDERA form must be signed by the Authorised Signatory of the registered owner, most often by a director or someone at company secretary level. Someone with power of attorney may also be empowered to execute the IDERA on behalf of the registered owner.

4. Once complete, the form is submitted via the Application Form Submission Service. It is important to save a copy of your completed form to your device.
N.B.: You will require a CAA Portal.

7 Liability for Damage and Environmental

7.1 Can the owner be strictly liable – liable without a requirement to prove fault or negligence – for any damage or loss caused by the aircraft assuming the owner is an innocent owner with no operational control of the aircraft?

In Nigeria, aircraft owners can be held strictly liable for any damage or loss caused by their aircraft, as stated in Section 79(2) of the Civil Aviation Act 2022. The provision states that “damages shall be recoverable without proof of negligence or intention, as if the injury, loss, or damage had been caused by the willful act, neglect, or default of the owner or operator of the aircraft”. This means that the owner can be held liable for damages without the need to prove fault or negligence on their part, regardless of their level of involvement or control over the aircraft’s operation.

7.2 Does the EU Emissions Trading System (EU ETS), or ICAO’s Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), apply to aircraft and aircraft operators in your jurisdiction? Will charges levied according to the EU ETS, or its equivalent, give rise to any *in rem* rights in relevant aircraft that are part of the fleet of the operator concerned and, if so, will such rights rank in priority ahead of any mortgage interests properly registered in the relevant aircraft and/or engine?

Nigeria is not a member of the European Union (EU) and therefore does not participate directly in the EU Emissions Trading System (EU ETS). Furthermore, charges levied under the EU ETS will not directly apply to aircraft operators. However, Nigeria may still be affected indirectly if its aircraft operators conduct international flights to or from EU airports. In such cases, those operators may be subject to the EU ETS regulations for the portion of their flights within EU airspace. This means they would need to comply with the EU ETS requirements or face penalties for non-compliance. On the other hand, Nigeria is a voluntary participant of the ICAO’s CORSIA. This has been incorporated in Part 16 of the Nigeria Civil Aviation Regulations.

7.3 What liabilities (actual or potential) could an owner, lessor or financier of an aircraft incur in your jurisdiction because of a failure to comply with local environmental law and/or regulations on the part of an operator of aircraft leased or financed by it?

Failure to comply with the local environmental laws and/or regulations can lead to both criminal and civil liabilities. These laws and regulations have clearly highlighted sanctions and penalties attributable to certain offences.

8 Insolvency and Searches

8.1 Are there any public registers in your jurisdiction where a search can be carried out to determine whether an order or resolution for any bankruptcy, bankruptcy

protection or similar insolvency proceedings has been registered in relation to an operator or lessee?

Searches may be undertaken at the Federal High Court Registry to discover whether an order or resolution for bankruptcy, bankruptcy protection, or other insolvency proceedings has been issued.

8.2 In the event that an operator or lessee were to become insolvent either on a balance sheet basis (assets less than liabilities) or is unable to pay debts as they fall due, would an operator or lessee be required to file for insolvency protection?

An aircraft operator or lessee does not have to seek insolvency protection in the event they become insolvent or unable to pay their debts. However, creditors can request a Notice of Bankruptcy from the Registrar of the Federal High Court. This must be supported by a certified copy of the judgment and an affidavit saying that he had levied execution on the debtor’s goods and that the earnings of the sale were insufficient to satisfy the judgment obligation. The Registrar subsequently issues the bankruptcy notice, which requires the debtor to settle the debt within a specific time period.

8.3 Do the available forms of insolvency protection in your jurisdiction involve the appointment of either an officer of the court or a specifically court-appointed official to take control of the operator or lessee (an ‘Insolvency Official’) while in insolvency protection?

The most common forms of insolvency protection include administration and liquidation. Both administrators and liquidators are officers of the court, but they are not always appointed by the court. A holder of a floating charge, the company, its directors and the court can appoint an administrator.

8.4 Does the commencement of insolvency protection involving the appointment of an Insolvency Official in your jurisdiction have the effect of prohibiting the owner from taking the following actions to enforce the lease after commencement of such protection: (a) applying any security deposit held by the owner against any unpaid amounts due under the lease; (b) accepting payment of rent or other lease payments from the lessee, a guarantor or a shareholder; (c) giving notice of default under the lease; (d) obtaining a judgment or arbitral award for unpaid lease payments; (e) giving notice to terminate the leasing of the aircraft and/or engine; or (f) exercising rights to repossess the aircraft and/or engine?

Upon the appointment of an administrator, the administrator ensures the company’s survival by running the business and making expedient decisions for the administration of the company’s affairs and assets in line with section 496 of the Companies and Allied Matters Act (CAMA).

Subject to the provisions of Section 477 of CAMA, legal proceedings brought against the company on administration will be dismissed by the court. Accordingly, no action can be brought to enforce security over the company’s property without the administrator’s consent or the permission of the court. The officers of the company can still exercise managerial powers but they need the administrator’s consent.

8.5 Can the commencement of insolvency proceedings have retrospective effect in relation to any such actions taken before commencement? If so, for what period can there be a look back?

Yes, the rule against fraudulent preference under section 660 of CAMA and section 46 of the Bankruptcy Act, 1979 aims to reverse transactions between an insolvent company and a creditor which were effected within three months prior to the commencement of formal insolvency proceedings, with a view to preferring the creditor.

8.6 Is there, either under law or as a matter of practice in your jurisdiction, a period of time within which the Insolvency Official will either 'adopt' the lease and pay rent and other lease payments as an expense of the insolvency or 'reject' the lease and permit the owner to enforce such rights as it may have under the lease? (a) If the lease is 'adopted', will the Insolvency Official also pay any unpaid lease payments due as at commencement of the insolvency protection? (b) If not or if the lease is 'rejected', would the owner's claim for any outstanding sums rank equally with other ordinary unsecured creditors of the lessee?

When appointed, an administrator helps a company survive by running the business and taking incidental and expedient decisions for the administration of the affairs, business, and property of the company, which may include the adoption of the lease and payment of rent and other lease payments as an expense of the insolvency.

8.7 Are there certain types of preferred creditors whose claims will rank above claims of the owner?

The order of priorities is as follows:

1. Creditors secured by way of a fixed charge on any property (except if it is explicitly stated in the terms of an earlier floating charge that the said floating charge shall have priority and the holder of the fixed charge is aware of it).
2. Preferential creditors.
3. Creditors secured by way of a floating charge based on the date of creation.
4. Subordinated creditors.
5. Unsecured creditors.

8.8 If the aircraft is in the possession of a person other than the operator or lessee at the commencement of insolvency protection of the operator or lessee, for example, an independent maintenance facility, will such person be entitled, under the laws of your jurisdiction, to assert a lien arising under law or contract over the aircraft in respect of amounts then due and unpaid to such person by the operator or lessee?

Yes, in relation to sums owed and owing to them by the operator or lessee, such a person would have the right to assert a lien arising under law or contract over the aircraft. The declarations in Article 39(1)(a), submitted by Nigeria under the Cape Town Convention, state that:

"Certain non-consensual rights or interests, such as liens for unpaid wages by workers or repairers of an aircraft, have priority under Nigerian law over an interest equivalent to that of a registered international interest; and these liens take precedence over registered international interests, whether within or outside insolvency proceedings."

9 Detention and Confiscation

9.1 Other than insolvency laws (see section 8), are there any laws that may have the effect of defeating the owner's right in the aircraft – for example, government requisition? Do the laws of your jurisdiction provide for any compensation in such circumstances?

In certain instances, especially in a case of national interest, the government may confiscate or requisition an aircraft for state use. Another factor which could hinder an owner's right to use their aircraft is legal dispute, such as contractual disagreements, disputes over ownership or liability claims. Non-compliance with aviation regulations or even tax regulations could result in confiscation of an aircraft.

The Federal Inland Revenue Service also has the power to detain and sell an aircraft or any of its parts or equipment to satisfy the tax obligation of the owner of the aircraft. This power is derived from the provision of section 8(1)(g) of the FIRS Act which empowers the Service to adopt measures to identify, trace, freeze, confiscate or seize proceeds derived from tax fraud or evasion.

In each of these scenarios, the impact on the owner's rights and the available remedies may vary depending on the specific circumstances, applicable laws, and regulatory frameworks in Nigeria.

The Nigerian Constitution, for example, guarantees the right to compensation for the compulsory acquisition of property. Section 44(1) of the Constitution states that:

"No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things, requires the prompt payment of compensation."

9.2 Are there any rights in relation to third parties to detain or sell the aircraft pursuant to illegal activities, tax or any other laws if the operator or lessee fails to pay when due? If so, can the aircraft be forfeited and sold without the owner being made aware?

There are provisions within the law that address the rights of third parties to detain or sell an aircraft pursuant to illegal activities, tax, or other legal obligations. Where an aircraft or the owner of an aircraft is involved in illegal activities such as smuggling or trafficking, the Economic and Financial Crimes Commission may have the authority upon issuance of a court order to detain the aircraft as part of their investigation. Subsequently, upon due legal process, the appropriate action may then be determined, which may include forfeiture and sale of the aircraft if it is proven to have been used in the commission of a crime.

Where an aircraft owner fails to meet the requisite tax obligations related to the aircraft ownership or operation, the Federal Inland Revenue Service may validly detain and/or sell the aircraft or parts of the aircraft to fulfil the tax obligation owed to the Service.

In the case of a lessee who fails to pay when due, the lessor may have the right to repossess the aircraft.

10 Aircraft/Engine Technology

10.1 With the global commitment of IATA to zero-emissions by 2050, are there any particular developments regarding the associated new aircraft and engine technology which might be foreseeable as regards aviation finance in your jurisdiction, e.g. as regards taking security (battery powertrain equipment) or enforcement (different airport infrastructure environments)?

In an attempt to help aviation reach net-zero emissions by 2050, the International Air Transport Association (IATA) has created Net Zero roadmaps that include a detailed description of a set of essential tasks. These roadmaps encompass operations, financing, policy, energy infrastructure and aircraft technology.

To achieve the NDC target, Nigeria launched the first sustainable aviation Eco-Label programme in Africa. This programme will ultimately result in the development of unique climate finance, climate advocacy and climbing resilience projects. Nigeria is working towards developing conversations around the use of sustainable aviation.

Also, in a circular published on 8 April 2024, the minister of Aviation and Aerospace announced that the Nigerian government is working on a practice direction which will enable domestic airline operators to dry lease aircraft. Although this is still in the pipeline, it is expected that the commencement and adoption of the practice direction will put Nigeria in good standing with the Cape Town Convention which regulates aircraft leasing across the world and satisfies the Aviation Working Group.



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