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The Legal 500 Country Comparative Guides

South Africa

AVIATION FINANCE & LEASING

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This country-specific Q&A provides an overview of aviation finance & leasing laws and regulations applicable in South Africa.

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SOUTH AFRICA

AVIATION FINANCE & LEASING



1. What international aviation conventions has your jurisdiction signed and/or ratified?

- a. The Convention on International Civil Aviation (the Chicago Convention);
- b. The International Air Services Transit Agreement (the Transit Agreement);
- c. The Convention for the Unification of Certain Rules relating to International Carriage by Air (the Warsaw Convention);
- d. The Protocol to amend the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air (the Hague Protocol);
- e. The Convention on the International Recognition of Rights in Aircraft (Geneva 1948);
- f. The Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules relating to Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara);
- g. The Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention);
- h. The Convention on Offences and Certain other Acts Committed on Board Aircraft (the Tokyo Convention);
- i. The Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Convention);
- j. The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. (Montreal 1971); and
- k. The Convention on International Interests in Mobile Equipment and the Protocol to the Convention on Matters Specific to Aircraft Equipment (the Cape Town Convention).
- l. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York

Convention);

2. If your jurisdiction has signed and ratified the Cape Town Convention: a. Which qualifying declarations (opt-in and opt-out) has your jurisdiction made under the Cape Town Convention? b. Does the Cape Town Convention take priority over conflicting national law?

South Africa ratified the Convention on 18 January 2007

Opt- In – South Africa will apply Protocol Article VIII;

Protocol Art X (made) – 10/30 calendar days

Protocol Article XI , Alternative A in its entirety to all forms of insolvency proceedings- The waiting period for purposes of Article XI (3) is 30 days

Protocol Article XIII (made)

Convention Article 54(2) – non judicial remedies permitted

Opt Out : South Africa made no declarations prohibited under Article 3 of Annex I of Appendix III to the ASU.

The self-help provisions of the Cape Town Convention allowing a mortgagee or lessor to repossess an aircraft without an order of a South African Court is regarded as being in conflict with the South African Constitution, and is one area where national law is seen to take priority over the Convention.

3. Will a court uphold the choice of a foreign governing law in respect of the following contracts and if so, please also state any conditions or formality requirements to this recognition a. Lease and b. Security document (for example,

mortgage)?**a. Lease**

South African Courts generally uphold leases which have adopted a foreign governing law, and there are no formalities required to have the foreign law recognized so long as the lease is enforceable under the laws by which it is expressed to be governed. In addition, the Courts will refuse to uphold a choice of law provision in an agreement if the provision is contrary to public policy; contrary to natural justice or the law was chosen to deliberately to avoid a provision of South African law that would have applied.

b. Security document (for example, mortgage)

A mortgage subject to a foreign governing law would as in the case of a lease be upheld by a South African Courts without any formalities save for the mortgage having to be valid and enforceable under its governing law and does not contravene the criteria in question 3.a above.

4. Please confirm whether it is (i) customary and (ii) necessary to also take a local law mortgage and if so, why?

It is customary and preferable to register a local mortgage under South African law due to the inconsistency and supposed conflict with local law in the application of the Cape Town Convention mentioned in question 2.a above.

5. Are foreign judgments recognized and enforceable by courts of your jurisdiction and if so, please also state any conditions or formality requirements to this recognition (for example, do you require a local court order confirming such recognition)?

A foreign judgement merely creates a cause of action for a local court to confirm recognition, which is subject to certain requirements being met: the court granting the judgement had the jurisdiction to pronounce on the matter under principles recognized by South African law; and the judgement was: final and conclusive; not contrary to public policy; not obtained by fraudulent means; does not involve enforcement of a revenue law.

6. Is your aircraft registry an owner-**register (registering ownership interests) or an operator-register (registering interests as operator)? Please also state any conditions, procedural steps or formality requirements for such registration and explain how this is evidenced (for example, the issuance of a Certificate of Registration)**

The South African registry is not an owner (title) registry and is rather an operator register. There is no separate engine register.

Formalities for registration include submission of the original prescribed Form CA-47A1, and payment of a prescribed fee. The CA- 47A1 contains particulars of the aircraft and engine type, serial number and intended operation of the aircraft.

The registration is evidenced by a Certificate of Registration issued by the South African Civil Aviation (CAA) authority together with a ZS registration mark.

7. Is there a security document register in your jurisdiction where a mortgagee's interests will be recorded? If so, please also state any conditions, procedural steps or formality requirements for such registration and explain how this is evidenced (for example, the issuance of a certificate or official stamp on the security document)

The CAA maintains a Mortgage Register to record a security interest over an aircraft.

The formalities and procedure for registering a mortgage is done by way of completion and submission of the standard Form MAR 2.1 with the CAA, together with the prescribed fee. In addition, the MAR 2.1 must be accompanied by Form CA -47A2 to amend the registration of the aircraft.

The details of the mortgage are endorsed on the current Certificate of Registration together with confirmation of registration from the CAA.

8. What is the effect of registration of: a. Ownership interest (for example, proof of title to third parties of ownership) b. Lease (for example, perfects the status of the

Lessor under the Lease) c. Security document (for example, secures priority over later registered security). If there are any interests that could rank prior to the security document please state these

a. Ownership interest

As the CAA maintains an operator's register, it is not possible to register the owner's interest and thus 3rd parties would not be able to ascertain the identity of the legal or beneficial owner of an aircraft on the South African register.

b. Lease

It is not possible to register an aircraft lease under the South African aircraft register.

c. Security document

Registration of the security interest creates priority and constitutes constructive notice to 3rd parties of the existence of the aircraft mortgage over the aircraft, and such 3rd parties can rely on the information on the Certificate of Registration, although the Certificate will not list the priority of the relevant mortgage over the aircraft.

9. What types of lease are recognized in your jurisdiction (for example, translation, notarization, apostille, legalization etc.)?

All types of leases are permissible and recognized concerning both aircraft and engines, and for use in South Africa, the lease would be required to be translated, notarized and apostilled.

10. What formalities are required to perfect Lessor's rights under a lease in your jurisdiction?

There are no requirements for a lessor's interest to be registered or filed under South African law, nor is there any particular requirement on the form for a lease to be valid, save that if an application is made to Court to enforce a term of the lease that is executed outside of South Africa, it would have to be translated, notarized and apostilled.

It is customary to file a copy of a finance lease and the CAA will issue a letter confirming a receipt thereof if requested.

11. Are the ownership rights relating to engines recognized as separate and distinct from the ownership of the rest of the aircraft in your jurisdiction? Please highlight any separate registration, filing or additional formalities that are required to be completed to perfect Lessor's interest in the engines

Although there is no separate engine register, separate ownership rights in engines is recognized. A mortgage cannot however be registered over an engine separate from an aircraft. Separately, only a special notarial bond over an engine could be registered with the Registrar of Deeds, but this is not a common practice.

12. What form does security over aircraft generally take in your jurisdiction?

The only form of recognizable and registrable security interest over aircraft is a mortgage registered with the CAA and the International Registry under the Cape Town Convention.

13. Are there any particular terms or characteristics that such a security document must take (for instance, a cap on the secured liabilities)?

The registration of a local mortgage may only be taken and registered on application to the CAA by way of the prescribed Form MAR 2.1. The cause and the underlying indebtedness, and the amount secured must be disclosed and it is customary to include a mortgage agreement in finance transactions.

14. Are there any perfection requirements for such security document? If so, please state any conditions, procedural steps, formality requirements or documentation (for example, corporates, list of directors etc.) required to effect this

An authorized 'signatories list' and the signing authority must accompany the prescribed Form MAR 2.1. Where the prescribed form is executed locally by an agent or attorney, a power of attorney is required. Where the power of attorney is obtained from a foreign entity, the power of attorney must be accompanied by a signing authority. Full particulars and signature in respect of each director or office bearer of the Mortgagor and the

Mortgagee must be stated on the prescribed Form.

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

There is no captive insurance regime that is applicable specifically to aviation in South Africa.

16. Are cut-through clauses under the insurance and reinsurance documentation legally effective in your jurisdiction?

Because the majority of aviation insurance's are placed in foreign aviation insurance markets, cut through clauses are governed by the laws of the issuing state and will be recognized under South African law subject to the requirements and provisions outlined in questions B above relating to choice of law, and particularly if the cut through clauses are enforceable under the governing law of the insurance contract.

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

Third party liability cover is mandatory for all local and international air services and the minimum requirements for cover are regulated by the Regulations to the Air Services Licensing Act and the International Air Services Act.

18. Can a mortgagee (or equivalent security interest holder) or lessor following an event of default under a mortgage (or equivalent security document) or lease, respectively, take possession of the aircraft without judicial intervention in your jurisdiction? Please also state any conditions, procedural steps, formality requirements or documentation (for example, original, legalized, translated Lease/Mortgage, corporates etc.) required to effect this

It is not possible to take possession of the aircraft without judicial intervention despite the fact that South Africa is a party to the Cape Town Convention. In order to obtain a court order, the documents relied up will have to translated, notarized and apostilled if not executed in South Africa. It is also worth noting that the

Courts will first determine whether they have the necessary jurisdiction to hear the application.

19. How can a mortgagee (or equivalent security interest holder), lessor under a lease or designee/beneficiary of an IDERA deregister the aircraft? Please also state any conditions, procedural steps, formality requirements or documentation (for example, original, legalized, translated Lease/Mortgage/IDERA etc.) required to effect this

A mortgagee holding an IDERA may apply to the CAA for the deregistration of the aircraft without the mortgagor's consent. It would also be necessary to discharge the mortgage by registering on filing of prescribed Form MAR 3. Note that repossession of the aircraft will require due process as set out in Question 21 below.

20. Can the government or the lessee lawfully prevent the repossession or deregistration and if so, in what circumstances

The lessee's consent is not required to deregister an aircraft if the lessee or mortgagee has signed the deregistration power of attorney and the IDERA authorization favour of the mortgagee, and the local authority or government agency will not stand in its way.

21. If judicial intervention is required, please describe the process? Please also state any procedural steps, length of time to complete and advise as to documentation required

Re-possession of an aircraft requires judicial intervention in the form of an application to the High Court of South Africa having jurisdiction for an interim attachment order. The application can be brought on an urgent basis and *ex parte* (without notice to the other party/ies), and on the return date (usually 6 weeks later), and dependent upon opposition by an interested party, the attachment order will be made final, after which aircraft can be deregister and exported under the IDERA. The application must be supported by the underlying documents such as the finance or lease agreement and proof of indebtedness.

22. How is legal title transferred under the laws of your jurisdiction? Please also state any conditions, procedural steps, formality requirements or documentation (for example, corporates etc.) required to effect this

Title transfer of an aircraft takes place by means of an Aircraft Bill of Sale without any further formalities or registrations required. There are no formal requirements as regards the transfer documents save that the instrument should be executed in accordance with the laws of the state governing the document. If executed in a foreign language it would need to be translated certified and notarized.

23. Are there any restrictions on the sale of an aircraft following enforcement (for example, the requirement to obtain a court order or conduct a public auction or other action in order to sell the aircraft upon enforcement)

Only if the aircraft was attached in satisfaction of a judgement debt by a 3rd party would the aircraft be sold by public auction, or in the event of an attachment under the insolvency laws, the liquidator would be entitled to sell the aircraft by private treaty or public auction.

24. Would lease rentals be subject to tax (for example, withholding or income tax)? Please also state if there are any conditions for such tax to be imposed and any steps usually taken to mitigate this

Lease rentals are subject to Vat if the lessor and lessee are south African residents . If the lessor is a foreign resident it may have to register as a vendor for local Vat purposes but it would be entitled to apply for certain exemptions.

Depending on the nature of the lease, withholding taxes may apply to interest payments from South African residents to foreign lessors typically in regard to finance leases.

25. Would a sale of an aircraft in your jurisdiction incur sales tax? Please also provide details of amount or calculation and any steps usually taken to mitigate

this

If the aircraft is physically located in South Africa or being exported abroad by a South African resident, or the sale is between two non-residents, no taxes or duties are payable.

If the sale is between South African resident's VAT will be payable. (Vat is taxable at 15%).

26. Are there any restrictions on the import or export of aircraft in your jurisdiction and would such importation or exportation incur any liability as to customs or taxes? Please also state if any consents or approvals are required and the procedural steps taken to obtain these, and any procedural steps or formality requirements to mitigate any taxes

Import Vat is payable on the permanent importation of an aircraft.

27. Are there any foreign exchange restrictions on transfers of funds

Foreign exchange controls on the transfer of funds abroad are imposed on South African residents, particular in regard to the payment of the purchase price abroad where prior approval of the Exchange Control Department of the South African reserve Bank is required.

28. How successful have foreign creditors and lessors been in enforcing their security and lessor rights over and successfully repossessing aircraft in a timely manner?

There are a number of reported court cases in which foreign creditors and lessors have successfully enforced their security and rights including repossessions although the majority of disputes have been settled by private arbitrations which is becoming the preferred method of enforcing such rights.

29. What government led reforms affecting creditor and lessor rights are currently underway in the aviation sector in your jurisdiction?

The establishment of the Commercial Court in the High

Court will go a long way in improving enforcement of rights both in time taken to hear the matter, having an experienced judiciary determining the matter and from a cost perspective.

In addition, changes to the regulations affecting the full implementation of the Cape Town Convention will when promulgated lead to the necessary reforms required.

30. Please describe any interesting legal development in your jurisdiction (for instance, decided court cases or arbitral awards) which affect creditor and lessor rights?

The most notable developments in the aviation sector effecting creditors and lessors rights have been the placing of three major commercial airline's (SAA, SA Express and Comair) under Business Rescue proceedings (a form of judicial management), which has had an impact on unsecured creditors, passengers and employees (preventing for example the retrenchment of employees during the Business Rescue proceedings).

31. Please discuss any relevant

governmental regulations implemented in your country to help alleviate the financial and other difficulties faced by airlines in your jurisdiction caused by CoVid 19 and whether that will impact rights of lessors (who lease aircraft to the airlines) and lenders (who finance such aircraft which are mortgaged in favour of the lenders)? Are such governmental regulations expected to be in place until the difficulties faced by airlines caused by the CoVid 19 subside or are they more long term?

Unfortunately, the government has not provided any specific relief for the airline industry and with the harshest restrictions being in place for over five months, the tourism sector has been hardest hit, with very little direct support from Government. The suspension of local and international traffic, together with the Business Rescue proceedings involving the three major airlines referred to in the question above has seen the airlines handing back aircraft to lessors. The regulations appear to be easing slightly for local business travel and repatriation flights but leisure and international flights are not expected to resume before 2021.

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