Aviation Finance & Leasing
in 25 jurisdictions worldwide

Contributing editor: Mark Bisset

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CONTENTS

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Getting the Deal Through is delighted to publish the first edition of Aviation Finance & Leasing 2014, a new volume in our series of annual reports, which provide international analysis in key areas of law and policy.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 25 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. Getting the Deal Through publications are updated annually in print. Please ensure you are always referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

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

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<table>
<thead>
<tr>
<th>Country</th>
<th>Page</th>
<th>Authors/Entities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nigeria</td>
<td>114</td>
<td>L Fubara Anga and Chinanu Osuji</td>
</tr>
<tr>
<td>Oman</td>
<td>119</td>
<td>Mansoor Malik and Nathaniel Armstrong</td>
</tr>
<tr>
<td>Panama</td>
<td>128</td>
<td>Maria de Lourdes Marengo</td>
</tr>
<tr>
<td>Portugal</td>
<td>134</td>
<td>Luis Soares de Sousa</td>
</tr>
<tr>
<td>Russia</td>
<td>142</td>
<td>Victoria Bortkevicha and Evgeniya Armstrong</td>
</tr>
<tr>
<td>Sweden</td>
<td>148</td>
<td>Fredrik Wilkens, Emma Stuart-Beck and Malin Sund</td>
</tr>
<tr>
<td>Switzerland</td>
<td>154</td>
<td>Frédéric Meyer, Raphaël Baeriswyl, Philippe Renz and Antoine Labaume</td>
</tr>
<tr>
<td>United States</td>
<td>160</td>
<td>Thomas A Zimmer</td>
</tr>
</tbody>
</table>

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Overview

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

The Netherlands has ratified and is a party to the following air law treaties:
- Convention for the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft, Rome, 29 May 1933 (Rome Convention 1933);
- Chicago Convention of 1944;
- Convention on the International Recognition of Rights in Aircraft, Geneva, 19–25 June 1948 (Geneva Convention 1948); and

The Netherlands has signed but not ratified the Cape Town Convention (2001). An instrument of ratification with respect to the Cape Town Convention and the Protocol thereto on Matters Specific to Aircraft Equipment was deposited by the Netherlands on 20 July 2010, but only in relation to the Netherlands Antilles (ie, the Caribbean islands of Curacao, Sint Maarten, Bonaire, Sint Eustatius and Saba). Following the modification of the internal constitutional relations within the Kingdom of the Netherlands, the reference to the ‘Netherlands Antilles’ is to be replaced by ‘Curacao, Sint Maarten and the Caribbean part of the Netherlands (the islands of Bonaire, Sint Maarten and Saba)’.

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

Rules relevant to aircraft finance and leasing are to be found in various statutes. With respect to the registration of aircraft in the Dutch nationality register, the Aviation Act, the Aircraft Decree 2008, and the Regulation regarding the Registration of Dutch Civil Aircraft must be consulted as these instruments provide for the relevant requirements for registration.

Book 8 of the Dutch Civil Code is of specific relevance as it provides, in section 8:3(a) a definition of the term ‘aircraft’ and, in sections 8:1300 to 8:1321, provisions on rights in aircraft as well as privileged claims. These provisions are based on the Geneva Convention (1948) and the provisions of the former Act on Registered Aircraft.

In addition, the Order on Registered Aircraft 1996 and the Registered Aircraft Regulation 2005, which deal with the formal requirements for the recordation of rights in aircraft in the Dutch Public Registry (ie, the registry maintained pursuant to the Geneva Convention 1948) and sections 729 and 729(a)–729(e) of the Dutch Code of Civil Procedure dealing with the precautionary arrest of aircraft, incorporating the provisions of the Rome Convention (1933), should be mentioned. Finally the general provisions on mortgages, as set forth in sections 3:260 et seq of the Dutch Civil Code, including the provisions regarding the exercise of rights and remedies of the mortgagee, apply to aircraft mortgages as well.

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

Yes, concerning the transfer of interests in or the creation of security over aircraft, Dutch rules of private international law prescribe the application of the laws of the jurisdiction where the relevant aircraft is registered as to nationality (section 10:127(3) of the Dutch Civil Code). Section 10:271(4) of the Dutch Civil Code provides that the laws of the jurisdiction where the aircraft is registered as to nationality determine, inter alia, which requirements apply to the transfer of title or the creation of security interests, the applicability and scope of accession rules, which rights can be vested in an aircraft and how such rights are created, transferred, amended and terminated. As a consequence, Dutch courts will, with respect to aircraft registered in the Dutch nationality register, only recognise title transfer instruments or security instruments governed by Dutch law. Similarly, Dutch courts will, with respect to aircraft registered in any other nationality register, only recognise transfer instruments or security instruments governed by the laws of the jurisdiction where the relevant aircraft is registered as to nationality.

Title transfer

4. How is title in an aircraft transferred?

It is noted that the Netherlands maintains two registers, the nationality register (the register maintained pursuant to the Chicago Convention (1944); the Nationality Register) and the public register (the register maintained pursuant to the Geneva Convention (1948); the Public Registry). Dutch aircraft, in other words aircraft registered in the Nationality Register, can also be registered in the Public Registry, but such registration is not mandatory. If an aircraft is only registered in the Nationality Register, title transfer is achieved by transferring possession to the buyer. Transfer of possession can be achieved by physical delivery of the aircraft books and records, but usually takes place by the execution of a bill of sale by the seller and the buyer, which expresses that legal title and possession is transferred to, and accepted by, the buyer. If the aircraft is, and is to remain, in the possession of a third party, for example a lessee, the transfer will only be effective if the third party has acknowledged the transfer or has been served a written notice of the transfer. There are no formal requirements in relation to such notice.

If an aircraft is registered in the Nationality Register and in the Public Registry, transfer of title can only be achieved by the filing with the Public Registry of a notarial deed of transfer executed by
5 What are the formalities for creating an enforceable transfer document for an aircraft?

As indicated in question 4, no formalities apply in relation to the transfer of title to an aircraft which is only registered in the Nationality Register. If it concerns a Dutch aircraft which is registered in the Public Registry, the deed of transfer must be in the form of a Dutch law notarial deed.

Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry.

The Nationality Register requires the registration of the owner of the aircraft and, if the owner is not the ‘holder’ of the aircraft as well, the registration of the holder or operator. The Public Registry allows for the registration of ownership title to a Dutch aircraft, as well as for the registration of mortgages, purchase options and possession rights (pursuant to a lease agreement with a term of at least six months).

The Netherlands does not have any 83-bis arrangements in place.

There is no specific aircraft engine register in the Netherlands, because engines are generally considered to be component parts.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be 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?

Where an aircraft is to be registered in the Nationality Register the particulars of the holder or operator and the owner must be registered. There are no restrictions on who can be recorded as owner in the Nationality Register, except where it concerns owners with the nationality of a state with which the Netherlands has terminated diplomatic relations.

The Nationality Register is, however, not designed to record ownership rights or lease interests. It is generally recommended to register a Dutch aircraft with the Public Registry and to record ownership rights and other recordable rights with the Public Registry, as this will provide the owner and the holder of any recorded right with the protection of the Geneva Convention (1948).

There are no other registers in the Netherlands where an ownership interest or any other interest in an aircraft can be registered.

It is not possible to register any interest in aircraft engines in any public register in the Netherlands.

8 Summarise the process to register an ownership interest.

In order to register an ownership interest in respect of a Dutch aircraft with the Public Registry, an application must be filed with the Amsterdam District Court, requesting the court’s approval for the registration of the aircraft and the applicant’s ownership interest in the Public Registry. For this purpose, the form provided by the Public Registry must be used. The Application for the Recordation of an Aircraft must contain:

- full particulars of the applicant; and
- full particulars of the aircraft, including:
  - the name of the manufacturer of the aircraft;
  - the place where the aircraft was built;
  - the type and manufacturer’s serial number;
  - the name of the manufacturer of the engines;
  - the type and serial numbers of the engines; and
  - the maximum take-off weight.

The applicant must have a chosen domicile in the Netherlands. As the application is typically filed by a Dutch attorney-at-law representing the applicant, the office address of the applicant’s lawyer will usually serve as the applicant’s chosen domicile in the Netherlands. In addition the applicant must state that the aircraft is a Dutch aircraft which is not registered in the Public Registry and that, to the best of the applicant’s knowledge, the aircraft is eligible for registration in the Public Registry.

If the aircraft has ever been registered in the Public Registry or a similar register in another jurisdiction, the application must state all relevant information in respect of such previous registration, including the relevant jurisdiction, the date of registration and the registration number. If the application relates to an aircraft acquired by the applicant in a sale in execution of the aircraft in the Netherlands, the application should state the treaty register (being a register of a contracting state to the Geneva Convention (1948)) or similar register where the relevant aircraft is registered or, as the case may be, that the aircraft is not, and has never been, registered in any such register.

Together with the application, the applicant must submit:

- a certificate of registration of the aircraft with the Nationality Register;
- a certificate issued by the Dutch civil aviation authority stating the maximum take-off weight of the aircraft;
- if the aircraft was previously registered in a treaty register or any similar register, a statement issued by the competent authorities confirming the deregistration of the aircraft from such register after it was determined that with respect to the aircraft no liens or encumbrances were registered or, as the case may be, that the holders of registered liens or encumbrances have consented to the deregistration;
- a bill of sale or other instrument evidencing that the applicant is the legal owner of the aircraft;
- if the application relates to an aircraft registered in a treaty register (being a register of a contracting state to the Geneva Convention (1948)) or similar register and was acquired by the applicant in a sale in execution of the aircraft in the Netherlands a certified copy of the minutes of the sale in execution evidencing the acquisition of the aircraft by the applicant; and
- if the applicant is a legal entity, the constituent documents of the applicant and a recent excerpt from the competent trade registry or similar registry or equivalent document confirming the existence of the applicant.

If the application is filed and executed by a Dutch attorney-at-law representing the applicant, a duly executed notarised power of attorney (with apostil) and a copy of the passport of the signatory must be submitted as well. Provided the application complies with the above requirement and is filed with the court prior to 10am, the court will usually approve the application the same day. The application, together with the court’s approval, can thereupon be electronically filed with the Public Registry. Filing is usually done by a Dutch civil law notary. Provided the filing is done prior to 3pm on a Dutch business day, the filing will be processed on the same day. The applicant will first receive (usually within 30 minutes after filing) an electronic confirmation of receipt which only confirms the filing; and subsequently (usually within two hours after filing) an electronic confirmation of registration, which confirms that the registration has been made. Filings made after 3pm will be deemed to have been made at 9am on the next Dutch business day. On the Dutch business day immediately following the date of filing, the Public Registry will be able to provide an excerpt from the registry evidencing the recordation of the aircraft and the applicant’s ownership interest in the Public Registry. The costs for registration of an aircraft in the Public Registry, including court fees, will be in the region of €776.
The Dutch Civil Code provides in section 8:3(a) inter alia that engines attached to, or only temporarily removed from, an aircraft are component parts of the aircraft. This accession rule is inspired by article XVI of the Geneva Convention (1948).

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

Registration of an ownership interest in the Public Registry requires court approval as set forth in question 8, and the owner of such registered interest will have the benefit of international recognition of his registered interest as awarded by the Geneva Convention (1948). Third parties can generally rely on the accuracy of registration of an ownership interest (and other interests, like a mortgage or a lease interest) in the Public Registry, unless such party was otherwise aware of the information being incorrect.

10 Summarise the process to register a lease interest.

Section 8:1309 of the Dutch Civil Code provides that a lessee’s lease interest can be registered in the Public Registry provided it concerns an aircraft which is already registered in the Public Registry and a lease agreement with a lease term of at least six months. This requires the filing with the Public Registry of a Dutch law notarial deed, executed by or on behalf of the owner or lessor and the lessee in the presence of a Dutch civil law notary. The deed must contain a clear description of the aircraft and the main characteristics of the lease agreement, including the lease term. Filing is done electronically. Provided filing is done prior to 3pm on a Dutch business day, the filing will be processed on the same day. The applicant will first receive (usually within 30 minutes after the filing) an electronic confirmation of receipt, which only confirms the filing; and subsequently, (usually within two hours after filing) an electronic confirmation of registration, which confirms that the registration has been made. Filings made after 3pm will be deemed to have been made at 9am on the next Dutch business day. On the Dutch business day immediately following the date of filing, the Public Registry will be able to provide an excerpt from the registry evidencing the registration of the lease interest with the Public Registry. A lease interest which is registered in the Public Registry operates as a right in rem.

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

With respect to aircraft recorded in the Public Registry, certificates can be obtained from the Public Registry. A certificate will contain the particulars of the relevant aircraft, namely the manufacturer of the aircraft, the place where the aircraft was built, type and manufacturer’s serial number, the manufacturer of the engines, the type and serial numbers of the engines and the maximum take-off weight, the name and address of the owner, the date of registration of the aircraft in the Public Registry and, if applicable, the jurisdiction where the aircraft was previously registered in a treaty register or similar register.

A certificate will also contain information of recorded consensual liens, in other words mortgages, lease interests and purchase options as well as any non-consensual liens such as arrests. Such information will include the name and address of the holders of such liens and, in the case of mortgages, the maximum secured amount.

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

A Dutch aircraft can be deregistered at the request of the owner or, if the aircraft no longer meets the requirements for registration, ex officio by the registrar of the Nationality Register. Deregistration at the request of the owner will only be effected if the aircraft is not, or no longer, registered with the Public Registry or, if it is still registered with the Public Registry, all holders of recorded rights have consented to the deregistration of the aircraft. This may include the lessee if its lease interest is recorded in the Public Registry. If this is not the case, the lessee cannot block deregistration of the aircraft from the Nationality Register.

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

Deregistration and export powers of attorney, which are sufficiently broadly worded, enable an owner or mortgagee to deregister the aircraft from the Public Registry and the Nationality Register. Powers of attorney can be granted to more than one attorney and can contain the power of substitution and delegation. Powers of attorney can be made irrevocable by expressly including wording to the effect that the power of attorney is granted in the interest of the attorney so appointed or a third party. Still the court may, at the request of the grantor, set aside the irrevocability of a power of attorney on the basis of serious grounds, such as unforeseen circumstances or apparent abuse of the powers granted. A power of attorney will terminate upon the grantor being declared bankrupt. There is no requirement to register or notarise deregistration powers of attorney.

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

The Cape Town Convention is not in effect in the Netherlands.

Security

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

Dutch aircraft which are not registered in the Public Registry can be encumbered by a Dutch law right of pledge. Non-possessory rights of pledge can be created by a deed in private writing which is properly registered with the Dutch tax authorities, but we would recommend working with a notarial deed of pledge. It is noted that a right of pledge in respect of an aircraft is not recordable in any publicly accessible registry, and will not enjoy the benefits of international recognition under the Geneva Convention (1948). On this basis it is recommended that financiers require that the relevant aircraft be registered in the Public Registry and made subject to a mortgage. The mortgage is created by the electronic filing with the Public Registry of a Dutch law notarial deed, executed by or on behalf of the mortgagor and the mortgagee in the presence of a Dutch civil law notary. The mortgage deed usually also contains a right of pledge in relation to the aircraft books and records. The mortgage deed, as filed with the Public Registry, must be in Dutch, but an English translation will be provided to the parties. The mortgage deed must clearly describe the aircraft (including the name of the manufacturer, type, manufacturer’s serial number and registration marks), the secured obligations, the rights and remedies of the mortgagee (to the extent not already applicable by operation of Dutch law) and the maximum secured amount, which is usually set at the amount of the initial principal amount of the loan plus 40 per cent thereof to cover interest, default interest, costs and expenses. There is no specific requirement to record the economic terms of the financing; it suffices to refer to the relevant loan or facility agreement.
16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

See question 15. Documentary costs for the filing of a mortgage with the Public Registry are in the region of €168.

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

See question 15. The notarial mortgage deed must be filed with the Public Registry. Filing is done electronically by the civil law notary. Provided filing is done prior to 3pm on a Dutch business day, the filing will be processed on the same day. Within usually 30 minutes after the filing, the Public Registry will send an electronic confirmation of receipt which confirms the filing; and subsequently, usually within two hours after filing, an electronic confirmation of registration, which confirms that the registration has been made. Filings made after 3pm will be deemed to have been made at 9am on the next Dutch business day. On the Dutch business day immediately following the date of filing, the Public Registry will be able to provide an excerpt from the registry evidencing the registration of the mortgage with the Public Registry. There is no requirement to renew mortgage registrations.

18 How is registration of a security interest certified?

The Public Registry provides excerpts of the registration of aircraft registered in the Public Registry to any person on request. The excerpt shows the name and address of the owner and of all holders of recorded rights. Copies of the relevant instruments, such as mortgage deeds, can be obtained from the Public Registry as well. The excerpt does not state the rank or priority of a recorded right.

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

The priority of recorded rights is determined by the time of filing with the Public Registry. It is possible to change the priority of recorded rights by filing a Dutch law notarial deed executed by the parties to the recorded rights, which expressly states that the parties agree to the change of priority. If, for example, the lessee’s lease interest was filed prior to a mortgage deed, the lessor, lessee, mortgagor and mortgagee can reverse the priority by the filing of a notarial deed, executed by or on behalf of each of them in the presence of a Dutch civil law notary, which expresses that the mortgage shall rank first and the lease interest shall rank second. Registration of a mortgage interest or lease interest with the Public Registry grants the owner of such registered interest the benefit of international recognition of his registered interest as awarded by the Geneva Convention (1948). Third parties can generally rely on the accuracy of registration of such mortgage or lease interest in the Public Registry, unless such party was otherwise aware of the incorrectness of the information.

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

Security over aircraft and leases is typically structured by having a security trustee or security agent act as mortgagee and pledgee respectively. The Netherlands is a party to the Convention on the Law Applicable to Trusts and on their recognition (The Hague, 1 July 1985) and trusts will be recognised in accordance with the provisions of that Convention.

Dutch law requires that the grantee of a Dutch law security right is also the creditor of the obligations secured by the relevant security right. This poses a problem as the security trustee or security agent is not the creditor of the secured obligations but is merely appointed to hold collateral on behalf of the lenders. Although untested in a Dutch court, it is market practice to create ‘parallel debt’, in other words an undertaking of the borrower or grantor to pay to the security trustee an amount equal to the underlying debt, namely the indebtedness owing by the borrower to the lenders under the relevant facility agreement. The security right will secure the parallel debt owing by the grantor to the security agent, as mortgagee or pledgee. All payments made by the borrower to the lenders in relation to the underlying debt reduce the amount of the parallel debt and, similarly, all payments made by the borrower to the security agent in relation to the parallel debt (and all proceeds collected by the security agent in the foreclosure of the relevant security right) reduce the underlying debt. This structure makes it possible for the security trustee to hold the security for a changing group of beneficiaries without affecting the security and without having to amend the existing security documents. In the event the transaction provides for a single lender – without the involvement of a security trustee or security agent – which is also the grantee of a security right, the transfer of the loan to a new lender does not affect the validity of the security right. The indebtedness, now owed to the new lender, will continue to be secured by the relevant security right. It is, however, recommended that where it concerns an aircraft mortgage a filing is made with the Public Registry to the effect that the name and address of the new lender, as mortgagee, is properly recorded in the Public Registry.

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

Section 8:3(a) of the Dutch Civil Code provides that ‘engines, the propellers, the radio equipment and all other articles intended for use in or on the aircraft, irrespective of whether they are attached thereto or temporarily separated therefrom, shall be component parts of the aircraft’. There is no Dutch case law which determines whether or not the words ‘intended for use’ only refer to ‘other articles’ or also refer back to ‘engines, propellers and radio equipment’. Similarly it is not clear what exactly the term ‘temporarily separated’ means. In legal literature is has been argued that an engine should only qualify as a component part if the owner or operator had the intention to install the engine to an airframe with a certain permanence. In other words, if an engine is temporarily installed only to keep the aircraft operational, for example where it replaces an engine taken off-wing for overhaul or repair, such engine should not qualify as a component part. As the replaced engine is still qualifying as a component part, because it was only temporarily separated from the aircraft, having the replacement engine also qualify as a component part would lead to undesirable conclusions, namely that the relevant aircraft, for example a Boeing 737, has three engines.

However, as a consequence of this provision, a mortgage over a Dutch aircraft will by operation of law include the engines installed on (or only temporarily separated from) that aircraft at the time of the execution and filing of the mortgage deed and at any time thereafter. Engines which are permanently (or in any event not temporarily) separated from an aircraft no longer qualify as component part and will no longer be encumbered by a mortgage over the aircraft.

With respect to spare engines, in other words engines which are not installed to (or only temporarily separated from) an airframe, which are physically located in the Netherlands, the appropriate security right would be a Dutch law right of pledge. A non-possessory right of pledge is created by way of a notarial deed of pledge or, alternatively, a deed in private writing which is duly registered with the tax authorities. This registration is only to be able to determine the time when the pledge was created and, consequently, the priority of the pledge. The registration does not entail a publicly accessible recordation. There is no public registry in the Netherlands for the recordation of rights of pledge on ‘loose’ aircraft engines or other
moveable goods. If an engine, encumbered with a right of pledge, is attached to an aircraft, the owner of the engine will in principle lose its title to the engine and the pledgee will lose its security interest in the engine if, as a result of the installation, the engine qualifies as a component part of the aircraft pursuant to section 8:3(a) of the Dutch Civil Code.

**Enforcement measures**

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

It is possible for parties to an agreement to agree that certain self-help remedies shall be permitted if certain circumstances arise. This may include contractual provisions in a lease, allowing the lessor to repossess the aircraft in the event the lease has expired or terminated in accordance with its terms. However, since aircraft are usually located at restricted facilities or areas, the exercise of those self-help remedies may be restricted if the lessor has no access to such facilities or areas (airport). It is therefore advisable to obtain a court order ensuring cooperation of the relevant authorities.

To repossess the aircraft, the lessor as owner of the aircraft can file a claim for recovery based on section 5:2 of the Dutch Civil Code. This may also be done in summary proceedings. In both proceedings, the court may order the lessee to return the aircraft to the lessor subject to a penalty.

Once the lessor has obtained a judgment entitling it to repossess the aircraft, the lessor can levy an attachment in execution for the purpose of surrender of the aircraft. There are two different applicable regimes for such an attachment depending on whether the aircraft is:

- registered in the Public Registry or a Geneva Convention (1948) register; or
- not registered in such register.

In case the aircraft is registered in the Public Registry or in a Geneva Convention (1948) register, section 584(r) of the Dutch Code of Civil Procedure (CCP) applies. Pursuant to section 584(b) CCP, which equally applies, the execution commences with the service by the bailiff on the debtor of an order to comply with the judgment within 24 hours. The attachment in execution can in principle only be levied after this 24-hour period has lapsed. However, the competent judge in summary proceedings can determine upon request (including upon an oral request by the bailiff) that the executionary attachment can be levied without first serving this order on the debtor (section 584(b)(2) CCP). Execution is levied by the bailiff who takes possession of the aircraft and delivers the aircraft to the lessor (section 584(r)(3) CCP).

In case the aircraft is not registered in the Public Registry or in a Geneva Convention (1948) register, execution on the aircraft is levied in accordance with the rules applicable to moveable property not subject to registration (section 491 et seq CCP). Execution on the aircraft also commences by the service on the debtor of an order to comply with the judgment. Contrary to an ordinary attachment in execution, section 491(1) CCP provides that it is not required to wait for a two-day period after the service of the order in case of an attachment in execution for the purpose of surrender provided that the judgment obtained has been declared provisionally enforceable. Execution can therefore take place immediately after service of the judgment and the order to comply with the judgment.

Prior to obtaining a judgment entitling it to enforcement, a lessor may wish to secure its rights to repossession by grounding the aircraft by means of a precautionary arrest for the purpose of surrender in accordance with section 730 CCP. Since the debtor is normally not granted a hearing on the request for precautionary arrest, a debtor or lessee that wishes to lift the precautionary arrest either needs to provide sufficient security to the lessor or needs to file a claim to lift the precautionary arrest in summary proceedings, stating that the claim (of the lessor) is prima facie unjustified or that sufficient security has been offered (section 705(2) CCP).

Pursuant to section 729(e) CCP (in case the relevant aircraft is registered in the Public Registry or in a Geneva Convention (1948) register) and section 735(2) CCP (in case the relevant aircraft is not registered in such a register), a precautionary arrest is converted into an attachment in execution once a judgment entitling the lessor to execution has been rendered and served on the defendant. An appeal against or, in case of a default judgment, an application to set aside the judgment will suspend the enforcement unless the judgment has been declared provisionally enforceable at the request of the claimant.

Pursuant to section 729 CCP, incorporating article 3 of the Rome Convention (1933), certain aircraft are exempt from precautionary arrest:

- aircraft exclusively appropriated to a state service, including the postal service, but excluding commercial service;
- aircraft actually in service on a regular line of public transport, together with the indispensable reserve aircraft; and
- every other aircraft appropriated to the carriage of persons or goods for reward, where such aircraft is ready to start on such carriage, unless the arrest is in respect of contract debt incurred for the purpose of the journey which the aircraft is about to make, or of a claim which has arisen in the course of the journey.

Based on the (little) Dutch case law available, it could well be argued that courts (should) give a strict interpretation to these exemptions from precautionary arrest in the present day and age.

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

If the aircraft is encumbered with a Dutch law mortgage, in order to enforce its mortgage the mortgagee needs to levy an attachment in execution on the aircraft pursuant to sections 584(b) et seq CCP. Pursuant to section 584(j) CCP, the mortgagee should then request the court in whose jurisdiction the aircraft is located to set a date for the sale of the aircraft.

Regarding the enforcement of a right of pledge in respect of an aircraft not registered with the Public Registry, section 3:248 et seq of the Dutch Civil Code applies. The pledgee is entitled to summary execution. The pledgee may sell the aircraft in a public sale pursuant to local customs and applicable standard terms and conditions (section 3:250 of the Dutch Civil Code). Alternatively, the pledgee may sell the aircraft in a manner determined by an order of the president of the competent district court. The president may rule that the aircraft may be sold to (and therefore remain with) the pledgee in consideration of a price to be determined by the president (section 3:251 of the Dutch Civil Code). The pledgee and the pledgor may also agree to a private sale or any other solution without involvement of the president of the district court, provided such agreement is reached after the pledgee has become entitled to summary execution (section 3:251(2) of the Dutch Civil Code).

In insolvency, a mortgagee or pledgor may enforce its rights as if there was no insolvency. However, the competent court may as a general rule set a period of up to four months during which the mortgagee or pledgor may not, without the court's consent:

- claim the asset subject to the mortgage or pledge if it is under the control of the trustee in bankruptcy; or
- seek recourse against the asset.

During such period, repossession of the aircraft would not be possible without the court's consent. In addition, the trustee in bankruptcy may:

- give the mortgagee or pledgor a reasonable period to exercise its rights; and
• if the mortgagee or pledgee fails to sell the asset within that period, claim the asset and sell it, without prejudice to the mortgagor or pledgee's entitlement to the proceeds after deduction of a contribution to the bankruptcy costs, taking into account his rank.

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

In principle, any person rightfully in possession of the aircraft, such as repairmen, and having a claim against the owner or operator shall be entitled to exercise retention rights in respect of the aircraft and suspend its obligation to return the aircraft to the owner or operator, pending settlement of such claim, provided there is a sufficient connection between the claim and the obligation to return the aircraft to the owner or operator. Such retention rights can be invoked against the owner and holder of a security interest as well, provided the relevant claim resulted from an agreement validly entered into by the owner or operator (or where the person exercising the retention rights had no reason to doubt the owner or operator’s authority to enter into such agreement). As long as the aircraft is recorded in the Public Registry, such retention right does, however, not entail a right of priority in respect of sale proceeds of the aircraft.

Claims in respect of salvage and extraordinary preservation cost, within the meaning of section 8:1317 of the Dutch Civil Code, incurred by third parties in respect of the aircraft shall have priority over all recorded liens and rights.

Eurocontrol and other traffic control authorities do not have special detention rights in the Netherlands.

Section 57(1) of the Dutch Aviation Act provides that if extraordinary circumstances so require, sections 58 and 59 of the Aviation Act can, by Royal Decree following a proposal to that effect by the Dutch Prime Minister, be determined to be effective. Section 58 of the Aviation Act states that the Dutch Minister of Infrastructure and Environment can requisition aircraft and airfields for the transport of certain persons or objects. Section 59 of the Aviation Act states that the Dutch Minister of Defence can requisition aircraft and airfields for use by the Dutch military or can request the Dutch Minister of Infrastructure and Environment to do so on his behalf. These powers only exist after a Royal Decree has been issued on the basis of section 57 of the Aviation Act as referred to above.

Section 58 of the Aviation Act provides that measures taken pursuant to section 58 and 59 of this Act will give rise to compensation on the basis of rules to be determined by general decree. According to the Compensation Decree Aviation Act, compensation shall be determined on the basis of the lease rentals due under the lease during the relevant period. In addition, any extraordinary loss of value resulting from the requisitioning of the aircraft will be compensated. The operator of a requisitioned aircraft shall be entitled to (claim) loss of profit resulting from such requisitioning.

Taxes and payment restrictions

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

Aircraft lease payments, as well as the purchase price of an aircraft, are subject to Dutch VAT at a rate of 21 per cent, but may be reduced to 0 per cent if certain conditions are met as further set out below. Repayments of principal and interest payments made by a Dutch tax resident borrower are exempt from Dutch VAT.

The purchase price is subject to Dutch VAT at a rate of 21 per cent if the seller qualifies as an entrepreneur for Dutch VAT purposes and the aircraft is located in the Netherlands at the time of delivery (ie, title transfer). The seller of the aircraft would be liable for the payment of Dutch VAT due by the purchaser if the seller either resides or has a permanent establishment in the Netherlands to which the delivery of the aircraft is attributable; otherwise, the purchaser is liable for the payment of VAT provided that he qualifies as entrepreneur for Dutch VAT purposes (reverse charge).

In respect of an operational lease arrangement or a financial lease arrangement and assuming that (i) both the lessor and the Dutch lessee qualify as entrepreneur from a Dutch VAT perspective and (ii) the aircraft is not leased to a permanent establishment of the Dutch lessee located outside the Netherlands, the lease payments (including the interest element) are generally subject to Dutch VAT at a rate of 21 per cent. The lessor is liable for the payment of VAT due by the lessee if the lessor either resides or has a permanent establishment in the Netherlands to which the leasing of the aircraft is attributable. Otherwise, the lessee is liable for the payment of VAT (reverse charge).

However, if the (financial) lease arrangement qualifies as a hire purchase agreement for Dutch VAT purposes (ie, title to the aircraft passes automatically from lessor to lessee before or upon payment of the final lease payment, so without the lessee first having to exercise a purchase option), title to the aircraft is deemed to be delivered to the lessee at acceptance of the aircraft on the lease commencement date. This means that if at that time the aircraft is located in the Netherlands the present value of all future lease payments under the hire purchase agreement is deemed to be paid all at once for Dutch VAT purposes as per the delivery date and subject to Dutch VAT at a rate of 21 per cent (the interest element (VAT exempt) of that amount is excluded only if such interest has been separately calculated for); and consequently none of the actual future lease payments would be subject to Dutch VAT. The lessor would be liable for the payment of VAT due by the lessee if the lessor either resides or has a permanent establishment in the Netherlands to which the delivery of the aircraft is attributable; otherwise, the lessee is liable for the payment of VAT (reverse charge).

The Dutch VAT rate of 21 per cent in each of the scenarios referred to above will be reduced to 0 per cent if the Dutch lessee demonstrates that it qualifies as an airline operating for reward predominantly (‘chiefly’ in the words of the European Court of Justice) on international routes. In determining whether that is the case, all information may be taken into account which indicates the relative importance of the type of operations concerned, turnover in particular.

Moreover, any VAT that is due in connection with the lease or purchase of an aircraft should not necessarily constitute costs for the Dutch lessee or purchaser because it may be entitled to claim a refund of the VAT if and to the extent it will use the aircraft for the supply of goods or services that are subject to VAT (VATable activities). If, for example, 70 per cent of the turnover generated from the use of the aircraft would be subject to VAT, the Dutch lessee could claim a refund of 70 per cent of Dutch VAT (subject to, in the case of a purchase or hire purchase only, a revision period of four years following the fiscal year in which the delivery of the aircraft took place).

For completeness sake, it should be noted that in case no Dutch VAT would be due over any of the transactions described above, VAT (or a similar tax) may be due in another jurisdiction involved.

Lease payments, repayments of principal, interest payments and payments in consideration for the purchase of an aircraft made by the Dutch lessee are not subject to any Dutch withholding taxes.

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

In principle, there are no restrictions on international payments and exchange controls in effect in the Netherlands. However, based on the Sanctions Act 1977, the Netherlands has several sanctions orders in force implementing national and international sanctions.
The provisions of financial services, such as transferring money, to certain (legal) persons or countries may be prohibited or restricted under these sanctions orders.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?
Dutch courts may, on the basis of the requirements of reasonableness and fairness, mitigate amounts payable as default interest.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?
Pursuant to the EU Community Customs Code, one external tariff applies to goods (including aircraft) imported into or exported from the EU (subject to relief rules) and no tariff applies if such goods are exported or imported from one member state to another member state. Generally, bringing an aircraft into the Netherlands from a non-member state or taking it out of the Netherlands to a non-member state is subject to a customs duties rate of 0 per cent. No further restrictions apply in principle, except that export to certain countries may be subject to limitations under domestic or international sanction orders.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.
There is no requirement that insurance be placed in the Netherlands.

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

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?
Although a security assignment under Dutch law is not valid pursuant to section 3:84(3) of the Dutch Civil Code, under Dutch private international law parties are free to choose the law governing the security assignment. If the security assignment is governed by a foreign law and such foreign law also governs the reinsurance agreement, that law governs all aspects of the security assignment (its validity and enforceability against the assignor, the assignee and the insurer). If valid and enforceable under such foreign law, the security assignment would also be recognized and enforced in the Netherlands.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?
Unless an owner, lessor or financier has committed a tort itself, for example by impeding the necessary maintenance of the aircraft or not taking adequate (maintenance or repair) measures while knowing, on the basis of reports, that such measures are warranted, it cannot be held liable under Dutch law for (damages caused by) the operation of the aircraft or the activities of the operator.

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

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?
Under EC Regulation No. 785/2004 on insurance requirements for air carriers and aircraft operators (as amended by EC Regulation No. 1137/2008 and EU Regulation No. 285/2010), the operator has to ensure a proper minimum level of insurance to cover third-party liability. The minimum insurance cover per accident and per aircraft depends on the maximum take-off weight (MTOM) of the aircraft. For aircraft with less than 500kg MTOM, the minimum insurance cover is 750,000 SDR. For aircraft with 12–25 tons MTOM (eg, regional jets), the minimum insurance cover is 80 million SDR. For aircraft with 200–500 tons MTOM (eg, long-haul jets), the minimum insurance cover is 500 million SDR.
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