

# Aviation Finance & Leasing

In 27 jurisdictions worldwide

*Contributing editor*  
**Mark Bisset**



2015

GETTING THE  
DEAL THROUGH

GETTING THE  
DEAL THROUGH 

# Aviation Finance & Leasing 2015

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# Germany

Ulrich Stepler and Katja Helen Brecke

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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?

Germany has ratified the International Conventions of Warsaw (1929, effective 29 December 1933), including the Hague Protocol for the amendment of the Warsaw Convention (1955, effective 1 August 1963), the Conventions of Chicago (1944, effective 8 June 1956), Geneva (1948, effective 5 October 1959) as well as Montreal (1999, effective 28 June 2004). The Conventions of Rome (1933, amended 1952 and effective 4 February 1958), including the Montreal Protocol (1978, effective 25 July 2002) and the Cape Town Convention (2001, effective date 1 March 2006) have not been ratified by Germany. It is a signatory to the New York Convention (1958, effective date 7 June 1959).

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

The Air Traffic Act is the German basic law on aviation, modelled after the Chicago Convention, containing provisions on registration, operation, conduct and liability in regard to aircraft, personnel, air carriers and airports. It is, *inter alia*, supplemented by the Air Traffic Licensing Regulation on the prerequisite for aircraft to be allowed to fly in Germany.

The Aircraft Mortgage Act concerns aircraft used as collateral for loan agreements by way of a registered mortgage, and contains numerous specific regulations on registered liens (general, procedure of registration and contents, execution, transfer, change and expiry, extension on spare parts, organisation of register).

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

In the interest of legal security, German international private law restricts the parties' choice of law regarding property. Whereas commonly the rule of *lex situs* (the place where the property is situated) is applied on immovables as well as moveables, this is highly impractical for aircraft that, being means of transportation, typically cross borders several times a day. Therefore, by specific statutory rule, any interests in airborne vehicles are governed by the law of the country of origin, meaning their nationality (article 45 para 1, No. 1 Introductory Act to the (German) Civil Code). According to article 17, Chicago Convention aircraft have the nationality of the state in which they are registered. For example, registration of an aircraft in the German Aircraft Register (see question 6) results in making the aircraft a German one and consequentially making German substantive law applicable on any interests in the aircraft. The nationality of unregistered aircraft may be more difficult to determine. Nevertheless, with regard to internationally agreed legal principles, an aircraft owned by a national will have the same nationality (see section 3(1)(1) Air Traffic Act for the corresponding prerequisite for registration; see question 7).

The applicable law on securities over aircraft (see question 15) follows its property status. The law applicable on a secured claim is usually determined by the law of the country where the party required to effect the characteristic performance of the underlying contract (for example, the seller in a contract of sale) has its habitual residence (article 4(2) Rome I Convention). However, if the contractual status differs from the property

status, the latter also may be applied on the secured claim itself to avoid splitting up the statutes between security and secured claim.

## Title transfer

### 4 How is title in an aircraft transferred?

Title in an aircraft is transferred following general rules of German civil law on the transfer of ownership of moveables. Thus a bill of sale alone is not sufficient, as a sale and purchase agreement only imposes a contractual duty on the seller to transfer the ownership of the aircraft to the buyer (see section 433(1)(1) German Civil Code). To actually transfer title in an aircraft, the owner – in execution of the underlying contract of sale – usually has to deliver the aircraft to the buyer while both parties agree that the change of direct possession also results in a change of ownership (see section 929(1) German Civil Code). Other forms of transfer are permissible, especially if the aircraft is to be used as collateral security. In this case the former owner (debtor), while effectively making the acquirer (creditor) the new owner of the aircraft, will only provide him with indirect possession and remain in direct possession himself (see section 930 German Civil Code). This enables him to still use the aircraft and eventually pay back the loan from the proceeds of operation.

Registry of an aircraft in the Aircraft Register (see questions 6 and 9) does not have any legal impact on the transfer of title, it still follows the general rules for transfer of ownership of moveables (section 98(1)(1) the Aircraft Mortgage Act).

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

There are no such formal requirements in German law. The registration of aircraft ownership serves other purposes (see question 6).

## Registration of aircraft ownership and lease interests

### 6 Identify and describe the aircraft registry.

German aircraft are only allowed to fly in Germany when they are licensed for traffic after their airworthiness is proven, and when they are properly registered by the Federal Aviation Office, according to section 2(1) Air Traffic Act in conjunction with section 14 Air Traffic Licensing Regulation. In a narrow sense, the Aircraft Register is maintained at the Federal Aviation Office as one of two registers (see section 64(1) Air Traffic Act, the other one on 'aerial sports equipment' being irrelevant in this context). The registration serves the public purpose of supervising air traffic safety, identifying individual aircraft (compare section 2(5) Air Traffic Act) and enables the Federal Aviation Office to use the stored data to provide information in statutorily specified situations (see section 64(2)(7–9) Air Traffic Act). The data to be registered is comprehensive and encompasses type, design, identification number of the airframe, as well as the marks regarding nationality and unique code of the aircraft. In addition, the page number of the register, and in case of existing security the page number of the mortgage register (see question 17), as well as the name and address of the owner have to be put down (section 64(3) Air Traffic Act). Regarding planes as the most common type of aircraft, even more data has to be recorded, for instance concerning their usual location, liability insurance and design of engines installed (see section 64(4) Air Traffic Act).

In contrast to the German land register or ship register, the Aircraft Register does not have a comparable significance in private law (see

question 9), even if the data stored in the register under certain conditions may be used to facilitate enforcement of private claims (see section 64(8) Air Traffic Act).

Certificates and licences of foreign aircraft registered in a contracting state of the Chicago Convention are usually recognised in Germany (see article 33 of the Convention). In case such aircraft is operated pursuant to a lease or similar agreement by an operator residing in Germany, according to article 83-bis, together with section 3a(2 and 3) Air Traffic Act the state of registry may, by agreement with Germany, transfer to it certain functions and duties as state of registry in respect of that aircraft, for example, regarding its operation, airworthiness and the competency of its personnel as well as general 'rules of the air'. Germany has so far closed five bilateral agreements, with Italy (18 July 2007), Austria (1 January 2010), Sweden (3 November 2010), Spain (17 December 2010) and Denmark (26 September 2012).

There is no separate registry for aircraft engines (section 64(4)(3) Air Traffic Act; see question 7).

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

In order not to misunderstand the mechanics of the German Aircraft Register, it should be noted that following its main public function to provide for air traffic safety (see question 6), the register is not a 'table' to record existing ownership or lease interests as proof towards third parties. On the contrary, these interests are a prerequisite for registration in the first place.

Basically, an aircraft may only be recorded in the German Aircraft Register if it is not already registered in any other Aircraft Register in a foreign country and if it is wholly owned by a German or EU member state national, or at least by a national of a country where EU aviation law applies (section 3(1)(1) Air Traffic Act, together with phrase 2 and 3 respectively). 'Wholly owned' means that ownership may be divided between several individuals, but all of them have to be German or EU nationals. This also applies if several owners are members of a private partnership or an association without legal personality.

Should the aircraft be owned by a corporation (for example, a limited liability company or a stock corporation) or by a company according to commercial law (general partnership or limited partnership), following the provision's wording, the administrative seat of the company has to be in Germany, thus 'EU area' is not sufficient. In addition, more than 50 per cent of its assets have to be in the hands of German or EU nationals and the majority of its authorised representatives or persons personally liable have to be German or EU nationals.

An aircraft not owned in the manner described above may still be recorded in the German Aircraft Register, if German or EU nationals are entitled to acquire ownership of the aircraft following a contract of sale, for example, in the case of a hire-purchase agreement or payment in installments with reservation of title. Likewise it is sufficient that they have a right to possession of the aircraft according to a rental or similar agreement with a minimum duration of six months (section 3(1)(1)(2) Air Traffic Act; compare article 1 No. 1 of the Geneva Convention). Thus all typical kinds of leasing contracts are covered (for example, dry- or wet-lease agreements). The Federal Aviation Office may allow for exceptions in singular cases (section 3(2) Air Traffic Act), for example, if the rental agreement falls short of the statutory minimum duration by just a few days.

Ownership of an aircraft can additionally be registered in a German or EU Commercial Register in order to show it as an asset of a merchant or a company. Having a different function to the Aircraft Register (financial versus safety reasons), there is no conflict. The legal basis for both the registrations is still to be found in general property law, meaning the registering entity has to be owner of the aircraft or at least must be entitled to it in a comparable manner.

How to deal with the legal relationship between the aircraft and its engines still is much discussed in Germany. However, the independent economic value of the engines, their intentionally 'loose' connection with the aircraft in order to facilitate quick exchange and the statutory regulation of security interests in the aircraft and possible spare parts (see question 21) points to a classification of the engines not as an integral part, but as an accessory of the aircraft as the so-called 'main object' (section

97 German Civil Code). Therefore engines do not automatically share the legal fate of the aircraft itself (airframe, fuselage, etc), but may be the object of independent rights or claims of a third party. Nevertheless, as the Aircraft Register only asks for German or EU ownership of the aircraft itself as precondition for its registration, and merely mentions the engines as part of the data on the aircraft that has to be recorded in the course of registration (section 64(4)(3) Air Traffic Act), any legal interest in the engines by a third party cannot be registered separately.

**8 Summarise the process to register an ownership interest.**

There is no specific procedure for the registration of ownership interests in an aircraft. As German or EU ownership of the aircraft is a prerequisite for its registration (see question 7), the registering party has to prove its ownership in relation to the Federal Aviation Office. This may be done without regard to specific formalities, and even by only establishing prima facie evidence, for example, submitting the contract of sale or any other purchase certificate.

The title to an engine is not automatically vested in the owner of a host aircraft, but it may not be registered separately (see question 7).

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

The registration of an aircraft in the Aircraft Register aims to facilitate the supervision of air traffic safety and to disseminate selected information to certain authorised recipients (see question 6), so it remains without effect on private law rights or claims and does not provide any proof of title against third parties (section 98(1)(1) Aircraft Mortgage Act). In contrast, for example, to the land register, a registration in the Aircraft Register does not allow for an acquisition 'in good faith' (see section 932(2) German Civil Code) by a third party that erroneously believes the registered entity to be the owner of the respective aircraft. However, in the opposite case where the prospective acquirer knows that his contractual partner differs from the registered party, he usually will not be 'in good faith' and thus unable to receive title to the aircraft if his contractual partner actually did not own the aircraft.

**10 Summarise the process to register a lease interest.**

There is no specific procedure for the registration of lease interests in an aircraft. As certain lease interests in the aircraft by German or EU nationals are an alternative prerequisite for its registration besides ownership of the aircraft (see question 7), the registering party has to prove such interests as regards the Federal Aviation Office, usually by way of submitting the respective lease contract or another comparable certificate.

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

After registering an aircraft in the German Aircraft Register, the Federal Aviation Office issues a certificate of registration following international (ICAO) usage (according to section 14 of the German Air Navigation Certification Order, Annex 1, Sample 1). As part of the 'ship's papers' it must be carried on board the aircraft at all times. With nomenclature in German and English, it contains information on the register itself (volume, page), on the aircraft (class, nationality and registration marks, manufacturer, designation, serial number) as well as on the owner (name, address, possible entries on change of ownership on the backside) and certifies that the aircraft has been duly registered in the Aircraft Register and the rights to it are registered by the Local Court Braunschweig at the seat of the Federal Aviation Office. As there is no exclusive register for engines, no separate engine certificate of registration is issued.

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

The owner of the aircraft has to apply for deregistration, including cases of export, at the Federal Aviation Office, using a standard form (Federal Aviation Office-No. 11). The mortgagee does not have the authority to have the encumbered aircraft deregistered or exported. On the other hand, he also does not have to consent to such action by the owner, as a registered mortgage does not expire in case of change of ownership (see question 19). The operator may block deregistration or export only if he is contractually empowered to do so.



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

A representative of the owner with proper deregistration power of attorney, presenting the standard form signed by the owner (see question 12), may have an aircraft deregistered and exported. Powers of attorney usually are revocable; if not, they still may be revoked for good cause. They are grantable to more than one attorney but cannot be registered. If the grantor becomes insolvent, the power of attorney commonly expires (section 117(1) Insolvency Act) as the agent otherwise could unlawfully extract the aircraft from the insolvency assets by way of deregistration.

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

Not applicable, as the Cape Town Convention has not been ratified by Germany.

## Security

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

When using registered aircraft (see question 6) as security, the German Aircraft Mortgage Act provides for an exclusive (compare section 9 Aircraft Mortgage Act) registered mortgage (according to section 1 Aircraft Mortgage Act). The act resembles a mixture of general regulations on common mortgages on immoveable property and pledges on moveables. While in many legal aspects being similar to the latter, the debtor does not have to part with direct possession of the aircraft, as the content of the register assures the necessary legal certainty.

Because of the registration requirement that asks for extensive information to be provided in the process (see question 17), the security document itself is not subject to specific formalities. Its language typically will be German, but is subject to the envisaged use and context of the security. The document will at least contain a description of the secured claim, as the mortgage, being a strictly accessory collateral, in every aspect follows the claim like a 'mirror image' in existence and amount (compare section 4 Aircraft Mortgage Act). To create a registered mortgage, the owner of the aircraft – in case of aircraft financing usually also being the debtor of the claim to be secured – has to agree with the creditor to procure such mortgage and register the mortgage with the Aircraft Mortgage Register (section 5 Aircraft Mortgage Act). The parties may limit the liability of the mortgaged aircraft to a certain fixed amount (section 3 Aircraft Mortgage Act), which is usually documented.

Only German aircraft in the aforementioned statutory sense can be encumbered with a registered mortgage (see questions 6 and 17). Securities on foreign aircraft follow different provisions, even if enforcement rules are similar (see sections 103 ff Aircraft Mortgage Act).

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

In order to properly register a mortgage on an aircraft, the approval of registration by the owner of the aircraft has to be notarized at the very least (section 86(1) Aircraft Mortgage Act together with section 37(1) Ship Register Regulation). As the agreement to procure a mortgage does not become binding on the parties before registration (section 5(2) Aircraft Mortgage Act), the agreement itself, as well as the application for registration are commonly also notarised. Documentary costs vary in regard to the amount of the secured claim (see sections 34(1), 53(1), 97, 98 Act on Court and Notary Fees).

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

Registering an aircraft mortgage may be a lengthy process that asks for several steps to be taken one after the other:

- After the parties have agreed on procuring an aircraft mortgage, either of them (owner or debtor, or creditor) may apply for its registration (section 86(1) Aircraft Mortgage Act together with section 23 Ship Register Regulation). Like the Aircraft Register itself, the Aircraft Mortgage Register is maintained by the Braunschweig local court at

the seat of the Federal Aviation Office (section 78 Aircraft Mortgage Act). It will only carry out the registration if the person whose right is affected by the registration of the mortgage himself is already registered as legitimate party.

- In order to authorise himself in the aforementioned sense (compare section 86(1) Aircraft Mortgage Act together with section 46 Ship Register Regulation), the owner has to apply to have his aircraft registered in the Aircraft Mortgage Register before he can have the mortgage registered (section 79(1) Aircraft Mortgage Act). For every aircraft registered, a new page is reserved which is divided into two parts, one for the aircraft itself and one for any mortgages it might be encumbered with (section 81(1) Aircraft Mortgage Act together with section 2 Aircraft Mortgage Register Regulation).
- Only the person or entity that is registered as owner in the Aircraft Register is entitled to have an aircraft registered in the Aircraft Mortgage Register (section 79(2) Aircraft Mortgage Act, see question 6). The application has to contain the page number of the Aircraft Register, the marks regarding nationality and unique code of the aircraft, type and design of the aircraft, identification number of the airframe, as well as the name and address of the owner according to the Aircraft Register. The applicant has to prove that the data to be recorded corresponds with the data from the Aircraft Register. When applying as owner himself, ownership has to be substantiated with prima facie evidence (section 80 Aircraft Mortgage Act).
- Once the aircraft is registered in the Aircraft Mortgage Register, its now 'legitimate' owner may finally have the mortgage itself registered by approving his or the creditor's application for registration. The latter has to cover – as usually already covered in the (notarised) approval – the name of the creditor, the amount of the secured claim as well as any applicable interest rates or similar accessory performances due. In case of a mortgage with limited amount (section 3 Aircraft Mortgage Act), the respective limit has to be noted instead of the face value of the claim (section 24(1) Aircraft Mortgage Act). Registration costs vary in regard to the amount of the secured claim (see sections 34(1), 53(1), 55(2) Act on Court and Notary Fees).

### 18 How is registration of a security interest certified?

Concerning certificates about records in the Aircraft Mortgage Register, there is no equivalent to the official Certificate of Registration for the Aircraft Register (see question 11). In contrast to the Ship Certificate (as defined in Annex 4 to section 39(a) of the Implementing Regulation regarding the Ship Register Regulation), there is no designated space to record any encumbrances in the document. However, as the Aircraft Mortgage Register is public, the register court may be asked for (certified) copies of any registrations that serve as evidence (section 85(1)(2) together with section 15 Aircraft Mortgage Act).

The rank (absolute and relative) of a security interest which indicates its priority is clearly visible from the register's pages. A mortgage always is recorded in part 2 of the register (part 1 being reserved for the aircraft itself), starting at the top with no. 1 and continuing further downward if any additional mortgages are registered. Where a single aircraft is encumbered with more than one mortgage, their relative rank is discernible from the respective pages, as older mortgages have priority over newer ones (section 25(1)(1) Aircraft Mortgage Act). For example, an earlier registered mortgage at 'upper' position 1 outranks a later registered mortgage at 'lower' position 2, 3, etc. Should a registered security be deleted for whatever reason, any 'lower' entries will move up one position, so if no. 3 were deleted, nos. 1 and 2 remain untouched, but no. 4 becomes 3 and 5 becomes 4, etc.

Subsequent changes of rank as well as reservations of certain positions are permissible, but such alterations again have to be recorded in the register and thus are easily recognised (compare sections 26, 27 Aircraft Mortgage Act).

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

Registration of a security interest usually confers priority over other securities that might be registered subsequently (section 25(1)(1) Aircraft Mortgage Act; see question 18).

Third parties can rely on the accuracy of the public registration of the security interest, as it is presumed by law that the person who is registered as the mortgage's beneficiary in the Aircraft Mortgage Register is actually entitled to such right as long as there is no proof to the contrary (section 15(1) Aircraft Mortgage Act). A potential buyer of the mortgage is protected

as long as he does not know that the registered seller of the security actually is not entitled to such right (section 16(1)(1) Aircraft Mortgage Act). Should the ownership of the aircraft be transferred on a third party, the registered mortgage does not expire as would any other encumbrance following general property law, but remains intact and the buyer only acquires encumbered ownership (section 98(1)(2) Aircraft Mortgage Act).

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

In German law the concept of trust is well known, and according to modern majority view can be employed in different ways when providing security. However, as the concept itself is not free from criticism and crosses the border between obligation and property law, it is used as a form of 'stand-alone security' at the most. It will not be employed in addition to the registered mortgage on aircraft, itself already being comprehensively and exclusively regulated (compare section 9(1)(1) Aircraft Mortgage Act).

The registered mortgage as laid down in section 1 Aircraft Mortgage Act is a right in rem, as it rests on the ownership of the aircraft it encumbers, regardless of the owner's identity. Regarding changes to the security or its beneficiaries, several constellations have to be differentiated:

- Changing the aircraft's substance, in other words value, will generally just affect the proceeds resulting from a possible foreclosure (see question 23). Only in cases of severe degradation of the aircraft or its being extensively damaged by the owner, thus endangering the security in the sense of recoverability of the secured loan, may the creditor be granted an extraordinary right to immediately have the aircraft auctioned in order to provide for compensation (section 39 Aircraft Mortgage Act).
- Changing the aircraft's ownership leaves the encumbering security untouched (section 98(1)(2) Aircraft Mortgage Act, see question 19).
- Changing the secured claim, be it in amount or regarding the beneficiary, generally results in corresponding changes to the security (compare sections 4, 51 Aircraft Mortgage Act). Nevertheless, by agreement between owner and beneficiary, a novation is permissible as an exception which has to be recorded in the Aircraft Mortgage Register (section 55(1) Aircraft Mortgage Act). If the old claim not only is replaced by a new one, but the beneficiary is changing as well, the owner and the new beneficiary have to conclude an agreement with the previous one consenting, before the change can be registered (section 55(2) Aircraft Mortgage Act).

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

Engines are to be seen as an accessory of the aircraft (see question 7), so that a security interest in the aircraft itself also covers the engines installed at the time it is created, provided they are also owned by the owner of the host aircraft as recorded in the Aircraft Register (section 31(1)(1) Aircraft Mortgage Act). Though the qualification as an accessory is not precluded by the fact that the object in question is only temporarily used for a single host aircraft (section 31(1)(2) Aircraft Mortgage Act) - which is typical for engines because of their regularly being swapped between different aircraft - the engine is an accessory of a specific host aircraft as long as it is dedicated to it, which necessitates some kind of close spatial connection (compare section 97(1)(1) German Civil Code). In other words, the engine must at least be in the course of being installed in the host aircraft at the time of creating the security.

An engine is released from joint liability as collateral together with the aircraft:

- if it is transferred on a third party and removed from the aircraft before it is seized by the mortgagee (section 31(2)(1) Aircraft Mortgage Act);
- if it loses its classification as accessory of the aircraft 'during the ordinary course of business', namely when being swapped with another engine following a typical maintenance schedule (section 31(3)(1) Aircraft Mortgage Act); and
- if it is placed in a spare parts storage (section 31(3)(2) Aircraft Mortgage Act).

To avoid the two latter cases of release, the owner of the aircraft may agree with the creditor to extend the mortgage to all spare parts in the inventory of a specific domestic or foreign spare parts storage and have the extension recorded in the Aircraft Mortgage Register. The extension depends on the existence of the aircraft mortgage itself and is subject to a comprehensive statutory regulation (see sections 68 ff Aircraft Mortgage Act).

An independent security interest in the engines cannot be created; thus if the engine in question is neither owned by the host aircraft's owner nor is the engine (about to be) installed in the aircraft at the time of creating the security, the engine is not covered by the mortgage at all.

**Enforcement measures**

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

There are no self-help remedies available to the owner or lessor. In order to repossess his aircraft, he has to proceed in accordance with the German laws of debt enforcement. That necessitates obtaining an enforceable title for this claim from the relevant German civil court. The title has to contain the necessary enforcement clause and needs to be duly served on the debtor. The owner can then apply for the enforcement title with a bailiff, who will put him in possession of the aircraft. However, as this procedure can be rather lengthy, in the lease agreement the lessee already may submit to subjecting the aircraft to immediate enforcement proceedings in case of default on his part. This allows the owner to directly apply for enforcement of his claim.

Requirements for terminating the lease agreement by the owner or lessor, as well as possibilities for the lessee to object against possible claims for damages by the owner, very much depend on the details of the respective agreement and the reasons giving rise to termination in the first place. Skipping contractual provisions because of their near endless variety, litigation over the repossession of the aircraft only will follow an extraordinary termination of the leasing agreement by the lessor which as severe interference with an ongoing contractual relation in turn requires a so-called 'good cause'. These typically are misuse of the leased object, repeated delays of payment or other serious breach of contract by the lessee. Thus it will be difficult for him to impede any claims put up by the owner, let alone denying willful misconduct on his part.

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

To enforce an aircraft mortgage, the beneficiary is limited to execution according to statutory regulations (section 47(1) Aircraft Mortgage Act) and may not avail himself of any self-help remedies or similar private measures of enforcement. Execution procedure follows slightly modified provisions on immovables, typically leading to a compulsory auction of the aircraft (section 99(1) Aircraft Mortgage Act together with sections 864(1), 870a(1)(1) Code of Civil Procedure). Competent for any execution is the Local Court Braunschweig at the seat of the Federal Aviation Office (section 171b(1) Act on Compulsory Auction and Administration).

Initiating compulsory auction procedures by the court results in seizure of the aircraft in favour of the creditor or mortgagee (section 20(1) together with section 171a(1) Act on Compulsory Auction and Administration). It encompasses all objects that are covered by the aircraft mortgage, for example, accessories like the engines mounted on the aircraft (section 20(2) Act on Compulsory Auction and Administration together with section 31 Aircraft Mortgage Act, see question 21). The aircraft then is delivered into custody and may not be operated anymore (section 171c(2)(1) Act on Compulsory Auction and Administration). As this measure usually is very detrimental to a lessee of the aircraft, the mortgagee by statutory order legally replaces the previous owner or lessor of the aircraft and thus will have to grant the lessee further use of the aircraft for the time being, if he was already in possession of the aircraft (sections 171f, 169 Aircraft Mortgage Act together with sections 578a(1), 567(1), 566(1), 535(1) German Civil Code). On the other hand, the lessee may not demand for the execution procedures to be suspended.

The auction itself is organised by the court and follows common practice (see sections 66 ff Act on Compulsory Auction and Administration). The mortgagee is entitled to the proceeds according to the yet unpaid amount of his secured claim, but among other things certain other costs will have to be settled first (see section 10 Act on Compulsory Auction and Administration). The highest bidder obtains ownership of the aircraft through public authority (section 90(1) Act on Compulsory Auction and Administration). He will automatically become party to an existing contract of lease (see above), but may exceptionally terminate the agreement subject to statutory notice periods (section 57a Act on Compulsory Auction and Administration). All other rights resting on the aircraft expire,

however they may continue in regard to the proceeds (sections 91(1), 92(1) Act on Compulsory Auction and Administration). Loss of a right to possession of the aircraft based on rental or leasing agreement of a duration of more than six months (compare section 3(1)(2) Air Traffic Act, see question 7) is compensated by regular payments corresponding to the contractual period as agreed upon (sections 171n, 92(2) Act on Compulsory Auction and Administration).

Should the debtor be insolvent, the insolvency administrator in certain limited cases may suspend conflicting execution measures for an interim period (section 30d Act on Compulsory Auction and Administration). In turn the creditor or mortgagee may apply for continuation of execution procedures if the reason for suspension has ceased to exist or if the administrator or the debtor respectively assents to continue (section 30f(1)(1) Act on Compulsory Auction and Administration).

Anyone risking losing a right to the aircraft as a result of its compulsory auction, for example, the owner or even the party in possession of the aircraft, may prevent impending execution measures by fulfilling the creditor's claim through payment, set-off or deposit, in this way also legally stepping into the creditor's shoes (section 50 Aircraft Mortgage Act).

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

Any existing security interests because of salvage or inevitable maintenance measures by third parties will have priority (section 76(2) Aircraft Mortgage Act). On the other hand, liens for repairs and comparable statutory pledges are not applicable on registered aircraft (see section 9(1)(2) Aircraft Mortgage Act). Aircraft may be seized when enforcing a private claim, with the result of creating an ordinary registered mortgage (section 99(2) Aircraft Mortgage Act). However, most aircraft are protected from such seizure by specific provisions (see section 1 Act on Inadmissibility of Seizure of Aircraft).

**Taxes and payment restrictions**

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

The sale (including the transfer of title) of aircraft is generally subject to German VAT of 19 per cent whenever:

- the delivery of the aircraft originates in Germany, regardless of its final destination (section 1(1)(1) together with section 3(6) VAT Act). The tax burden rests on the seller (section 13a(1)(1) VAT Act); or
- the delivery of the aircraft, originating in another EU member state, according to the terms of contract ends in Germany (sections 1(1)(5), 1a(1), 3d(1) VAT Act). The tax burden rests on the purchaser (section 13a(1)(2) VAT Act).

The sale is subject to German import VAT whenever the delivery of the aircraft ends in Germany, originating in a non-EU member state (section 1(1)(4) VAT Act). The tax burden rests on the person who legally owes duties for a customs debt incurred on importation, namely the applicant (sections 13a(2), 21(2) VAT Act together with article 201(3)(1) Community Customs Code).

However, sales of aircraft benefit widely from tax exemptions, so that in all three cases no VAT is commonly due (sections 4(2), 4b(2), 5(1)(2), each together with section 8(2)(1) VAT Act). To be precise, delivery, refurbishment, repair, maintenance, chartering and leasing of aircraft is tax free, if intended for a company that in its everyday business mainly is engaged in non-gratuitous cross border or purely foreign transportation. Regardless of such business, no VAT applies in case of an aircraft's export from Germany to a third, in other words non-EU member state (section 4(1)(a) together with section 6(1)(1) VAT Act).

German VAT does not apply to lease payments or loan repayments as they do not constitute a performance in a fiscal sense. Also there is no withholding tax on lease payments or loan repayments from the German jurisdiction to another.

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

Germans, in other words 'natives' (according to section 63 Foreign Trade Ordinance together with Appendix A, Chapter 2, No. 2.05 of the Regulation

(EC) No. 2223/96), have to report all international payments executed or received in an amount over €12,500 to the German Central Bank within seven days of the transaction (section 67(1) and (4)(1) together with section 71(7) Foreign Trade Ordinance) using a specific document (Z4) that, inter alia, contains information on the reporting party as well as on the purpose and the amount of the payment.

There are no exchange controls in effect in Germany, as imposing any payment restrictions is prohibited for EU member states (article 63(2) Treaty on the Functioning of the European Union).

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

The statutory default interest rate is 7,37 per cent as of 1 January 2014, if none of the parties qualifies as consumer (sections 288(2), 247(1) German Civil Code). There is no statutory limit for individual agreements on higher interest rates, but if contained in (the more commonly used) general terms and conditions the rate is limited by the amount of damage actually suffered because of delayed payment (see section 309(5)(b) German Civil Code).

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

No. According to the (European) Community Customs Code that governs exchange of goods between EU member states like Germany and third countries (article 1), the duties legally owed where a customs debt on importation or exportation is incurred (see articles 201 and 209 respectively), are based on the EC Customs Tariff (article 20(1)). In its 'combined nomenclature', civil aircraft are declared exempt from duty.

**Insurance and reinsurance**

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

The most common specific insurances in German aviation practice are:

- aviation hull insurance, covering damage to aircraft from the outside because of adverse weather conditions, crashes or forced landings, etc;
- aviation casualty insurance, covering damage to persons' health on board an aircraft because of accidents; and
- aviation liability insurance, covering damage to third parties on the surface and on board of an aircraft in the course of its operation.

Liability insurance is of special importance as it is compulsory under EU law and a prerequisite for an aircraft to be operated in Germany (see question 34). The respective insurance company has to be licensed for business in Germany (section 105(1) Air Traffic Licensing Regulation) to ensure that it is properly supervised by German or EU authorities.

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

The answer to this question depends on content of the specific agreement.

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

Generally, such assignments can be effective. It depends, however, on the specific clauses of the agreement.

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

No. Liability for any damage resulting from the operation of an aircraft according to EU and German law is limited to the aircraft operator for damage to third parties on the surface (article 1 ff Rome Convention and sections 33 ff Air Traffic Act) and to the air carrier for damage to third parties on board of the aircraft itself (article 17 ff Montreal Convention and sections 44 ff Air Traffic Act). Thus a lessor or financier never will be liable, and the owner only in case of simultaneously being aircraft operator or air carrier (compare article 4(2) Regulation (EC) No. 785/2004).



**Update and trends**

Pension funds suffer from the notoriously low interest rate environment. The expected interest rate increase for the US market may cause an absorption in the Eurozone of the capital market interest rate which could result in a decline in the federal bond price level. In absence of a risk buffer when looking at margins of 0.2 per cent many funds will face serious troubles when honoring contracts based on a 4.0 per cent level. Institutions such as pension schemes, social security entities or municipal retirement facilities will be forced to leave their alleged comfort zone and consider investments in alternative asset classes. Aircraft finance transactions (senior and/or junior secured) could mean a robust and sustainable investment for such institutions that will have to diversify their exposure in terms of geography, economy and finally currency. German DekaBank ([www.dekabank.de](http://www.dekabank.de)) seems to be at the forefront as the central asset manager of 'Deutsche Sparkassen' when it comes to sourcing and structuring such transactions as well as managing the asset beyond the cycle time of the investment.

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

No. See question 32.

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

EU, as well as subsidiary German, law (see sections 43(1), 44 Air Traffic Act and section 101 Air Traffic Licensing Regulation) again distinguishes between liability for damage suffered on board of the aircraft itself, resting on the air carrier, and liability for damage suffered on the surface, resting on the aircraft operator:

- Insurance for (inside) passengers, baggage and cargo. According to article 6 Regulation (EC) No. 785/2004 as amended by Regulation (EU) No. 285/2010, minimum insurance cover is 250,000 Special Drawing Rights (SDR) per passenger, equaling €280,498 (conversion date: 28 March 2014); 1,131 SDR (€1,269) per passengers' baggage and 19 SDR (€21) per kilogramme of cargo.
- Insurance for (outside) third parties. According to article 7 Regulation (EC) No. 785/2004, minimum insurance cover per accident for each aircraft operated is determined by its maximum take-off mass or weight (MTOM or MTOW). Operators of common aircraft within the 'heavy' class (ICAO/FAA) with a MTOM usually between 50 and 200 or 200 and 500 tons have to provide insurance amounting to 300–500 million SDR (€337 million–€561 million). Only the Airbus A380-800, with a MTOM of over 500 tons, falls into the top bracket necessitating an insurance cover of at least 700 million SDR (€785 million).

German provisions contain the same amounts for German aircraft (see section 103(2)(1) Air Traffic Licensing Regulation; section 103(2)(3) Air Traffic Licensing Regulation together with section 47(4) Air Traffic Act; section 104(3)(1) Air Traffic Licensing Regulation and section 102(2) Air Traffic Licensing Regulation together with section 37(1) Air Traffic Act respectively).

A foreign aircraft entering German airspace has to carry a certificate proving the existence of equivalent liability insurance for third parties to avoid being grounded on its first landing on German surface (section 99(4) Air Traffic Licensing Regulation). When taking on board additional passengers in Germany, the existence of liability insurance for such passengers must also be proven by certificate in order to continue the journey (section 99(5) Air Traffic Licensing Regulation).



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