

1. Which government authority in your country has primary responsibility for the regulation of aviation and the registration of aircraft?

The Directorate of Civil Aviation being a division of the Ministry of Works, Transport and Communication.

2. Can foreign-owned aircraft be registered on your national aircraft register, for example when leased to an airline based in your country?

Yes.

3. Are there any limits/restrictions on the age of the aircraft that may be registered or operated in your country?

No formal age restrictions.

4. Who is entitled to have their interests recorded on your national aircraft register?

The national aircraft register does not provide for the recognition of particular interests. It only provides that the owner of an aircraft may apply for registration of an aircraft as a Namibian registered aircraft.

5. Would a mortgage governed by a foreign law over aircraft and/or engines be recognised in your country?

In principle yes, although our law would require some sort of act of possession to give effect to security mortgages.

6. To be recognised under your laws, must a lease or mortgage over an aircraft and/or engines be in a particular form or language, are there any special terms that it must contain and/or must it be registered or filed anywhere?

There are no particular form or language requirements. However to constitute evidence in court documents would have to be in (or be translated into) English. There is no system of registration of mortgages over moveable objects in Namibia. Often notarial bonds are registered over moveable property to serve as security and those notarial bonds are then registered in the Deeds Office.

7. If an engine owned by a third party is installed on an aircraft, would your country's law treat that engine as being subject to the same ownership as the aircraft itself? In other words is there a risk that by physical installation, the engine owner loses its title to the engine or that the engine becomes subject to any mortgage which exists over the aircraft on which it is installed? Would a nameplate fixed on the engine, confirming its separate ownership, make any difference?

Engines would be considered part of the aircraft by accession. The above position would not be altered by affixing nameplates. However, the affixing of nameplates would be important to establish ownership in the case of insolvency.

8. Has your country ratified and brought into force any of the following aviation related conventions: 1944 Chicago Convention, 1948 Geneva Convention and 2001 Cape Town Convention (with its Aircraft Equipment Protocol)?

Namibia has ratified the Chicago Convention of 1944 on International Civil Aviation (it is part of the Namibian municipal law in terms of the Aviation Act, 1962). Namibia has not ratified the 1933 or 1948 Conventions nor the Cape Town Convention.

9. Does the local civil aviation authority provide assurances to lessors and financiers as to prompt deregistration of the aircraft (for example the IDERA under the Cape Town Convention)?

No.

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

It would be possible for a lessor to enter into a contract of mandate (which may be contained in a power of attorney), in terms of which the lessee agreed to irrevocably authorise the lessor to take certain action. If the "irrevocable" authority given by any counterparty to the Lessor allowed the Lessor to take action (particularly in relation to the deregistration or repossession of the Aircraft) without recourse to the Courts of the Jurisdiction, such authority would be at risk of a legal challenge.

11. Are there any charges which would have to be paid before an aircraft can be deregistered from your national register (e.g. local air navigation fees)?

There is a nominal fee charged for deregistration. The regulations are silent with regard to any other outstanding charges such as local air navigation fees.

12. Would courts in your country generally uphold a choice of law and jurisdiction clause in an aircraft lease or loan document entered into between commercial parties?

Yes.

13. If the lease is terminated for lessee default, would the lessor be entitled to repossess (by taking physical possession) of the relevant aircraft or engine or does it need the prior permission or order of a local court or agency?

The laws of Namibia do generally not permit any form of self-help and – more particularly – would not allow the removal of the Aircraft from the control of the lessee without an order of a competent court and a warrant of execution. Unauthorised action would give rise to a claim for spoliation, in which the lessee would be entitled to claim return of the Aircraft in question to restore the *status quo ante*.

14. In clear cases of a lessee default is there an effective summary procedure or interim relief available in your courts allowing lessor prompt repossession of the aircraft? Would security be required to avail of such process?

Under the laws of the Jurisdiction, and in the case of an action procedure commenced by summons, summary judgment can be obtained in respect of claims

- based on a liquid document;
- constituting a liquidated amount in money;
- for delivery of specified movable property; and
- for ejectment.

Accordingly, and with specific reference to a lease agreement, summary judgment can be obtained in respect of (i) rental or other payments required to be made under the lease agreement, provided these are liquidated amounts in money and for (ii) delivery of the aircraft. Summary judgment can, however, not be obtained in respect of any damages arising from the breach of a lease agreement.

The defendant may, in order to avoid the granting of summary judgment, (i) provide security to the satisfaction of the registrar of the High Court for any judgment including costs, or (ii) satisfy the court by affidavit that it has a *bona fide* defence, disclosing fully the nature and grounds of the defence.

The remedy of summary judgment is not dependent on any particular form of execution (including notarial execution) of the Agreement or requirement of publicity with regard to such Agreement.

As part of the rules of court, a *peregrinus* (a foreigner of the court) plaintiff may be required to furnish security for costs where proceedings are instituted in the Courts of the Jurisdiction.

15. What is the procedure for a lender to enforce a mortgage over the aircraft or engine in your country when the borrower is in default? For example must the aircraft be sold by the court or can the lender itself take possession and arrange a sale?

Please see comments under point 13 above.

16. Do the courts in your country have experience of repossession / foreclosure action involving aircraft? If so, please provide some details and indicate the time such proceedings generally would be expected to take from start to finish.

The Courts do not regularly repossess or foreclose on international aircraft leases, and we would submit that this may inter alia be on account of such leases ordinarily being subject to the laws of foreign jurisdictions. We do, however, have no doubt that the Courts will be able to deal with such a matter, if brought to them for adjudication.

17. Where an aircraft is leased to (i.e. not owned by) the airline operating it, can that airline create liens or encumbrances over the aircraft for example if it fails to pay suppliers, airport charges or maintenance providers? If so, would the existence of any such liens (e.g. in respect of unpaid airport charges) prevent an owner or mortgagee from repossessing the aircraft?

Under Namibian common law, creditors may under certain circumstances exercise a possessory lien over the property of another party. Where a person has incurred expenditure on property in pursuance of a contractual obligation existing between himself and the person enjoying a possessory right over the property, his right of retention against the latter is termed a debtor and creditor lien. In the absence of such an agreement, a person who has spent money or done work on another person's property generally has a right of retention over that property, operating against the entire world. His right may be either a real lien, a salvage and improvement lien, or an enrichment lien. A lien enables the retaining party to keep the property in question in his possession until he has been compensated for his expenditure on that property. Accordingly, we can foresee that, for example, both the Lessee or a repairman in Namibia could keep a lien over the Aircraft for money spent or work done on the aircraft. Such lien would, as the case may be, be against both the Lessee and the Lessor / Owner.

18. Are there any circumstances under your country's laws where a non-operating lessor, owner or a mortgagee could be held liable for damage caused by the aircraft whilst operated by an airline, even if there is no fault on the part of lessor, owner or mortgagee?

Section 11 (2) of the Aviation Act, 1962 determines that where material damage or loss is caused by an aircraft in flight, taking off or landing, or by any person in any such aircraft, or by any article falling from any such aircraft, to any person or property on land or water, damages may be recovered from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action as though such damage or loss had been caused by his wilful act, neglect or default. Accordingly, the Aviation Act, 1962 imposes strict liability on the owner of an aircraft for damages caused.

The expression "owner" is defined in the Aviation Act, 1962 to include any person who has been acting as agent in the Jurisdiction for a foreign owner, or any person by whom the aircraft is hired at the time. Furthermore, and for the purposes of the Regulations, the expression "owner" is defined to include a person which has the right of possession of the aircraft for 14 days or longer.

However, in section 11 (6) of the Aviation Act, 1962 it is stated that where any aircraft has been bona fide leased or hired out for a period exceeding fourteen days to another person by the owner thereof, and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner, "this section" – seemingly referring to the entire section 11 – shall have the effect as though for references to the owner, there were substituted references to the person to whom the aircraft has been so leased or hired out.

Inasmuch as the Aviation Act, 1962 is based on the South African Aviation Act, 1962 as amended in the Jurisdiction before and after independence of Namibia, there exists South African legal authority for the view that the provisions of section 11 (6) may exonerate the owner from the strict liability imposed under section 11 (2) where a lessee as contemplated in section 11 (6) was hiring the aircraft in question.



## |Namibia

19. Are there any legal requirements in relation to insurance and/or reinsurance of an Aircraft registered in or operated to/from/within your country? For example is there a minimum liability insurance amount required and must some or all of the cover be taken out with local insurers?

Insurance cover, and the extent thereof is a requirement for an Air Services Licence. The operator of an aircraft as the holder of an Air Service Licence would ordinarily secure the appropriate insurance cover as requested by the transportation board issuing or renewing the Air Services licence.

20. Are there any other specific issues arising under your country's laws that you feel a lessor or financier of aircraft or engines ought to be aware of when considering whether to lease or finance an aircraft to be based or registered in your country?

No.