



**Aviation Finance & Leasing 2014**

**Contributing editor:**  
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**Clyde & Co LLP**

*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](http://www.GettingTheDealThrough.com).

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**Getting the Deal Through**

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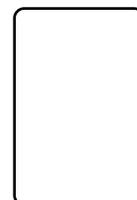
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# Panama

**Maria de Lourdes Marengo**

Patton, Moreno & Asvat

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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?

Panama is not a signatory to the Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

Panama has ratified the Chicago Convention (1944) on International Civil Aviation, the Geneva Convention on International Recognition of Rights in Aircraft (1948), the Cape Town Convention (2001) and the New York Convention of 1958 (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

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

Aircraft finance and leasing are governed by Decree Law 2 (1955), which regulates mortgages on chattel property; Law 29 (2013), which modernises the law of mortgages on chattel property; Law 21 (2003) on Civil Aviation; Law 29 (2003) which adopts the Cape Town Convention; the provisions of the Civil Code and the Commerce Code of the Republic of Panama and the administrative practices observed by the Civil Aeronautics Authority (AAC).

- 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?

Purchase contracts and aircraft mortgages would be deemed acts of commerce and the parties thereto may choose the applicable law to govern the terms thereof. However, the laws of Panama govern the title and mortgage with respect to particular requirements which should appear therein, as well as their registration and the effect thereof. The courts of Panama generally uphold choice of law clauses, but may refuse to enforce terms which are contrary to public policy in Panama.

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## Title transfer

- 4** How is title in an aircraft transferred?

Title is transferred by execution of a purchase agreement or a bill of sale between seller and buyer. However, such transfer does not affect third parties until the corresponding document is translated into Spanish by a Panamanian certified public translator if executed in another language, protocolised and filed with the Public Registry in Panama.

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

The purchase contract or the bill of sale, and acceptance thereof as applicable, should be translated into Spanish by a Panamanian certified public translator if executed in another language, protocolised and registered at the Public Registry together with a certificate of appraisal issued by the AAC.

Thereafter the following documents must be filed with the AAC:

- evidence of registration of the purchase contract or bill of sale with the Public Registry;
- a certificate of cancellation from the previous registry;
- a certificate from the Public Registry showing that the interested party is a valid legal entity in existence, together with the name of its legal representative in respect of companies organised in accordance with the laws of Panama. If the owner is a foreign entity, it must file an official certificate of existence from its place of incorporation; and
- a power of attorney in favour of a law firm in Panama to execute the required documents and complete registration proceedings.

All documents coming from abroad must be certified by a notary public. The notary must state that the signature is authentic and that, pursuant to sufficient evidence provided to him, the party signing is duly authorised to sign on behalf of the company. Thereafter, the signature of the notary must be certified according to the 1961 Hague Convention on the apostille or by a Panamanian consul in the place of issuance.

Once the information provided by the applicant has been verified by the AAC, the aircraft will be assigned its registration marks. Thereafter the interested party should complete various technical and legal requirements to obtain its certificate of registration, such as the issuance or validation of a certificate of airworthiness, as well as the payment of the relevant registration fees.

The AAC may issue a provisional certificate of registration if the owner of the aircraft demonstrates that proceedings have been initiated in order to conduct registration of ownership at the Public Registry.

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## Registration of aircraft ownership and lease interests

- 6** Identify and describe the aircraft registry.

The AAC is responsible for directing and regulating air transportation services in Panama. It maintains a National Aeronautical Registry where all aircraft with Panamanian registration marks are recorded. Such Registry maintains records of both owners and operators.

In addition, the Public Registry of the Republic of Panama has an Aeronautical Section where titles, leases and mortgages on aircraft must be registered in order to make them effective against third parties.

There are 83-bis arrangements in place between Panama and other jurisdictions.

There is no specific engine register. However, there is a Section of Mortgages on Chattel Property at the Public Registry, where mortgages on engines are registered together with the corresponding title.

- 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?

Titles and leases over aircrafts must be registered at the Public Registry and filed with the AAC. Title and lease agreements must be translated into Spanish by a Panamanian certified public translator if executed in another language, protocolised and registered at the Public Registry. Only the person that holds the title can be registered as owner. Once the title and lease are recorded with the Public Registry, these must be filed with the AAC for issuance of the definite registration certificate that will show the title holder as owner and the lessee as operator.

There is no engine registry, but it is possible to register title on engines when registering a mortgage on engines at the Section of Mortgage on Chattel Property of the Public Registry.

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

Generally, a mortgage on an aircraft will cover the parts and engines incorporated therein whether they are present or future accessories or improvements. Ownership on engines capable of individualisation and determination can be mortgaged separately. The title and the mortgage over the engine must be translated into Spanish by a Panamanian certified public translator if executed in another language, processed and filed with the Public Registry for registration. If the documents are issued abroad, the notarisation and legalisation requirements stated in question 5 apply.

The registration fees are US\$100 for review by the Public Registry, plus US\$250 for each US\$100,000 or fraction with a cap of US\$4,200. Additionally, notarial fees in the amount of US\$14 per page and translation fees based on the length of the document apply.

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

Registration constitutes proof of title. Third parties may rely on the public records, as according to the Aviation Law, title, leases and mortgages become effective against third parties as of the time these are filed with the Public Registry. Law 129 of 2013, which modernises the mortgages on chattel property, provides that the mortgage is effective against third parties as of the date of registration. Regulation of Law 129 is pending and will hopefully clarify whether the mortgage will affect third parties as of the date of filing or the date of registration at the Public Registry.

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

Lease interests can be recorded with the Public Registry. The lease agreement, evidence of the existence of lessee and lessor, and the corresponding corporate authorities must be translated into Spanish by a Panamanian certified public translator if executed in another language, and processed and filed with the Public Registry.

Documents executed abroad must comply with the notarisation and legalisation requirements stated in question 5.

The registration fees are US\$100 for review by the Public Registry, plus US\$1.50 for each US\$1,000 or fraction. Additionally, notarial fees in the amount of US\$14 per page and translation fees based on the length of the document apply.

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

Records at the Public Registry and the AAC reveal complete details in respect of the ownership of the aircraft, mortgages, leases and any judicial measures against the aircraft and a complete description of the aircraft, its marks and registration details.

Public Registry certificates are issued to any interested party, and contain at least the above mentioned information.

Upon registration, the AAC issues a certificate of registration to the owner or operator showing the registration number, owner, operator and type of service.

When the mortgage on an engine is recorded at the Public Registry, it is possible to obtain a Public Registry certificate stating ownership and mortgage details.

- 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 registration of an aircraft will be deleted, upon request, by an interested party (ie, the owner or operator) or as a matter of course by the AAC whenever:

- it is requested by the owner or operator of the aircraft;
- the ACC authorises registration of the aircraft in another country, which will occur whenever the aircraft is free of any limitation or encumbrance or given the consent of its registered creditors;
- it is necessary to set the aircraft out of services;
- the ownership of the aircraft is going to be transferred to a person who is not qualified to register an aircraft in Panama;
- there is a total loss of the aircraft;
- the aircraft appears registered in another country; or
- in other cases as provided in the regulations.

Generally Deregistration Powers of Attorney are issued in favour of owner and mortgagee, and filed with the AAC in order to facilitate deregistration. Accordingly, in principle the lessee or operator should not be able to block deregistration.

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

Deregistration Powers of Attorney enable the owner or mortgagee to freely deregister and export the aircraft. Panamanian commercial and aviation law do not expressly regulate whether powers of attorney may be irrevocable. Panamanian shipping law expressly recognises irrevocable powers of attorney. In practice, irrevocable powers of attorney are widely used in aviation.

Powers of attorney may be issued to more than one 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.

IDERAs are filed with the AAC. The form of IDERA used in Panama is not countersigned by the AAC. The IDERA is not recorded with the Public Registry. It is filed with the AAC. The AAC has no preferred way of dealing with financiers.

## Security

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

The typical form of security over an aircraft is a mortgage. The mortgagor maintains the use and possession of the aircraft while mortgaged. It is possible to constitute several mortgages over an

aircraft, provided that written notice is given to all prior mortgagees. There is no specific form. The mortgage must be translated into Spanish by a Panamanian certified public translator if executed in another language, and must include the full names and details of the parties and their representatives, the economic terms including the maximum amount secured, the interest agreed, the manner in which payments will be made, a complete description of the mortgaged aircraft indicating its value, the place where the aircraft will be located and any other lawful conditions agreed to by the parties.

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

The mortgage, evidence of the existence of mortgagor and mortgagee, and the corresponding corporate authorities must be translated into Spanish by a Panamanian certified public translator if executed in another language, and processed and registered with the Public Registry.

Documents executed abroad must comply with the notarisation and legalisation requirements stated in question 5.

The registration fees are US\$100 for review by the Public Registry, plus US\$2.50 for each US\$1,000 or fraction with a cap of US\$51,250. Additionally, notarial fees in the amount of US\$14 per page and translation fees based on the length of the document apply.

- 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.

According to the Aeronautical Law, the mortgage is valid between the parties as of the time of execution but must be recorded with the Public Registry in order to be effective against third parties. The law of Mortgages on Chattel Property provides that the mortgage will be effective against third parties as of the date of registration with the Public Registry. This discrepancy must be resolved in pending regulations. Registration can be achieved within five to 10 days. Registration may be expedited if fast track registration fees in the amount of US\$300 are paid. The mortgage will remain valid throughout the term of the mortgage.

- 18** How is registration of a security interest certified?

Public Registry certificates and AAC certificates confirming title, leases, mortgages and operators can be obtained as stated in question 11. Other security interests cannot be registered in Panama.

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

It is not possible to register other security interests in Panama.

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

Security over an aircraft is constituted through mortgages. Any changes to the mortgage must be filed with the Public Registry in order to be effective against third parties. The aircraft mortgage creates a right in rem.

Trusts are recognised and regulated in Panama as a contractual arrangement and commonly used in finance transactions. Generally a trust is created and the security trustee acts as mortgagee. The trust does not need to be registered and accordingly changes to the beneficiaries of the trust do not require registration.

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

Generally, a mortgage on an aircraft will cover its accessories and improvements, such as spare parts and engines incorporated therein, whether they are present or future accessories of improvements. Engines and other spare parts capable of individualisation and determination and able of being sufficiently identified can be mortgaged separately from the aircraft.

#### 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?

Upon an event of default under the lease, the lessor would have to initiate either ordinary or special judicial proceedings to repossess the aircraft. Panamanian law does not recognise self-help remedies.

The termination of the lease must be recorded with the Public Registry and filed with the AAC, and the certificate of operation of the aircraft with lessee as operator must be cancelled. There are no other non-contractual procedures or requirements that apply to lease termination.

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

The mortgage may be executed judicially or extra-judicially when the parties have agreed to the latter form of enforcement in the contract.

The mortgagee may pursue either executive or special judicial proceedings for the enforcement of its rights under the mortgage.

If the debtor has repaid at least one half of the loan, the court will decree the sale of the aircraft in accordance with the terms of executive proceedings, save that there will only be one auction and the base amount will be the sum owed plus costs and expenses. If there is no bidder willing to pay the price, the aircraft will be adjudicated to the mortgagee. The obligations arising under the mortgage are extinguished by the judicial sale.

If the debtor has paid less than one half of the amount owed, the aircraft will be adjudicated to the mortgagee and the obligation secured will be extinguished. The debtor may, within 10 days after being notified of the sale, request the sale of the aircraft to a party other than the mortgagee, provided that it deposits with the court an amount sufficient to cover the expenses of the sale, and satisfies the court that it will pay the balance owed in the event that the sale price does not cover the amount owed. If the mortgage allows the mortgagee to take possession and administer the aircraft, the court may allow the mortgagee to take over the administration of the aircraft pending its judicial sale.

When the parties agree in the contract to an extrajudicial execution, they must appoint a legal representative who must take the necessary steps to notify the execution to the mortgagor. Once the mortgagor receives the notice of execution, he may deliver the aircraft to the mortgagee or file an opposition to the execution process.

In the case of extra-judicial execution, the value of the aircraft will be fixed by an expert appraiser appointed jointly by both parties in the contract or in a later agreement.

The aircraft may be detained by way of an ex parte application.

The mortgage has priority over other creditors rights except for those listed in question 24.

**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?

According to the Aeronautical Law the following claims have priority over all other claims:

- national taxes over the aircraft;
- aircraft mortgage;
- the salaries and other social benefits due to the crew; and
- the amounts owed to the air transport sector on account of the operations of the aircraft in its last flight.

The priority among several mortgages on the aircraft will be determined by the date of registration at the Public Registry.

Furthermore, Panama has made the following declaration in respect of article 39 of the Cape Town Convention:

*In respect of article 39 of the Convention, the following non-consensual rights and interests shall prevail over an international interest registered in accordance with the Convention:*

- a) *any sums due from or capable of being demanded from the debtor by way of salaries, pensions and other social security benefits and employment allowances owed in respect of employees of that debtor;*
- b) *any sums due from or capable of being levied from the debtor by way of fiscal and parafiscal contributions owed in respect of employees of that debtor;*
- c) *any sums due or capable of being levied from the debtor, by way of taxes, duties or contributions payable to the Panamanian State or to the decentralised bodies that collect such revenue, in accordance with Panama's internal laws;*
- d) *the right of Panama to arrest, attach or confiscate mobile equipment and aircraft equipment in the event of breach of the customs or criminal laws of Panama; and*
- e) *courts' costs in connection with the foreclosure of the mortgage, and national taxes over the aircraft.*

These different priorities may create a conflict of laws which would have to be resolved by the Panamanian Judicial Branch once a case of this nature is presented.

Executive interference concerning expropriation or requisition of aircraft (or other property) is rare in Panama. The Panamanian Constitution expressly provides for the confiscation, or expropriation, of private property in the event of war, national catastrophe or suspension of constitutional rights. The government could decree the requisition of an aircraft upon payment of compensation.

In the event that an aircraft is mortgaged or attached, the amount of compensation for the expropriation thereof would be deposited with the National Bank and creditors would be notified of the proper action to be taken in respect thereof.

#### **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?

##### **ITBMS tax**

Panamanian tax laws provide for a specific tax for transfer of chattel property and services (ITBMS), which is applied to those assets transferred or services provided in the territory of Panama. This is regardless of the place where the contract has been entered into or the place where payment is made. ITBMS tax would apply for the sale of aircraft located within the territory of Panama.

Under general tax provisions, lease contracts are considered a service rendered by lessor and thus are subject to the ITBMS tax.

Currently the applicable ITBMS rate is 7 per cent.

##### **Income tax**

Payments made by the lessee to the lessor and payments made by mortgagor to mortgagee are subject to income tax. The applicable corporate tax rate is of 25 per cent of net taxable income.

##### **Withholding tax**

Payments made by the lessee or mortgagor to a non-domiciled lessor or mortgagee pursuant to a lease or a mortgage of an aircraft economically used within Panama, or by a local operator for international transportation, are subject to a withholding tax of 50 per cent of the applicable tax rate on 100 per cent of the amounts credited to the non-domiciled lessor, unless reciprocity agreements are in effect between Panama and the country of the lessor. The United States has a tax reciprocity agreement (exchange of notes) with Panama, whereas the gross income derived from lease or mortgage payments of aircraft engaged in international transportation are exempt from income tax.

##### **Import tax**

Aircraft operators engaged in public transportation services or aviation-related business are exempt from import taxes on aircraft and spare parts including engines.

Gross up provisions are not enforceable.

Tax liability may be minimised when double taxation treaties are in effect between the countries of the parties.

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

There are no restrictions on the remittance of funds abroad from Panama or exchange controls. No central bank or official consents are required.

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

There are no limitations on the amount of default interest that can be charged on a lease or loan.

**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?

For import taxes refer to question 25. There are no restrictions on the export of aircraft from Panama.

Under Panamanian law an aircraft may be detained, and in some cases sold, by public authorities for liens created by the operator, or for failure to comply with legal requirements, or when the aircraft is used in illegal activities, or in the case of war, national catastrophe or suspension of constitutional rights.

#### **Insurance and reinsurance**

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

International aircraft carriers and airport concessionaires are obligated to obtain insurance coverage for damages to third parties on the ground, crew members, passengers and any other parties that may suffer harm as a result of their operations.

Maritime insurance regulations are also applicable to aviation insurance, to the extent that they are pertinent and compatible.

Pursuant to article 153 of Law 12 on Insurance (2012), it is mandatory for entities, companies and persons domiciled in Panama to enter into contracts with insurance companies authorised to do business in Panama with respect to all insurance on assets and persons located in Panama. Foreign insurers may not cover assets or persons located in Panama, unless there is a fronting arrangement

**Update and trends**

There are currently no emerging trends or hot topics in aviation finance and leasing. Law 129 (2013), which modernises the Law of Mortgages on Chattel Property (1955) has introduced the possibility of creating more than one aircraft mortgage, and the procedure for extrajudicial execution of the mortgage. This law must be regulated, but we are not aware of any advances to date regarding said regulation.

with a local insurance company or if any of the following exceptions apply:

- there is a breach of any treaties or international agreements entered into by the Republic of Panama;
- the insurance coverage does not exist in the Republic of Panama; or
- it is impossible to obtain insurance due to rejection of coverage by the licenced insurers in Panama.

The superintendence, prior to verification that it is not possible to obtain such insurance in Panama, may authorise its contracting abroad if all legal requirements are fulfilled, among which, the withholding and payment of income tax as provided by the Fiscal Code. The companies, entities or persons must register the authorisations granted in this connection with the Superintendent.

Reinsurance may be placed with local or foreign licenced reinsurers.

Under Panamanian law, captive insurance may apply to any foreign risks, including aviation-related risks. Captive insurance activities undertaken in Panama may not cover risks located in Panama.

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

Cut through clauses are permitted under freedom of contracting principles of Panamanian law.

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

Assignments of reinsurance are legally effective and are typically provided on aviation leasing and finance transactions.

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

An owner lessor is not liable for the operation of the aircraft or the activities of the operator. However, the aircraft may be detained for enforcement of liens or for acts 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?

Panama does not create a regime of strict liability for owners, lessors or financiers with no operational interest.

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

According to the Aviation Law the indemnification that the carrier must pay is:

- for damages to passengers, 25,000 balboas;
- for loss, damage or destruction of hand luggage, up to 33.20 balboas; and
- for loss, destruction or breakdown of cargo or paid luggage, up to 24.75 balboas.

If the cargo or paid luggage is transported according to the declared value, and the interested party has paid the additional fees according to the company's fee, the limit of indemnification will be the value declared.

The limits of liability provided in the former paragraph are not payable if it is proved that the damage is the result of an action or omission of the carrier or the operator or their dependents, with the intention of causing the damage, or recklessly or knowing that the damage would be caused; however in the case of an action or omission of the dependents, it is necessary to prove that these were acting in their duties as such.

The amount of compensation, subject to the preceding article, shall not exceed per aircraft event:

- 16,600 balboas per aircraft whose weight does not exceed 1,000kg;
- 16,600 balboas plus 13.25 balboas per kg over 1,000 kg for aircraft weighing more than 1,000kg and not exceeding 6,000kg;
- 82,850 balboas plus 8.3 balboas per kilogram over 6,000kg per aircraft whose weight is more than 6,000kg and does not exceed 20,000kg;



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- 199,000.5 balboas plus 5 balboas per kg over 20,000kg per aircraft whose weight is more than 50,000kg; and
- 349,000.5 balboas plus 3,325 balboas per kg over 50,000kg for aircraft weighing more than 50,000kg;

Indemnification in case of death or injuries shall not exceed 25,000 balboas per death or injured person.

For the purposes of these provisions, weight means the maximum weight of aircraft authorised by the airworthiness certificate for take-off.

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