

**International  
Comparative  
Legal Guides**



Practical cross-border insights into aviation finance law

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## 1 General and Contractual

### 1.1 What are the typical structures available for financing the purchase of an aircraft?

Kenya's comparatively small and less-developed aviation finance sector has three traditional forms of financing structure as follows:

- **Mortgage finance:** The buyer takes a loan to acquire the aircraft, which will serve as collateral. The buyer will be the legal owner of the aircraft while the financier takes a registrable security interest. In this structure, receivables related to the aircraft may serve as additional security. The buyer takes all the risks and rewards of ownership.
- **Finance lease:** See a description of finance leases at question 1.3.
- **Hire purchase:** The same as a finance lease but with an option to purchase the aircraft.

### 1.2 What are the key advantages/disadvantages and main issues arising in relation to these financing structures?

A key disadvantage of mortgage finance is the lack of understanding of the aviation industry by the Kenyan banking sector especially when it comes to valuation, insurance and maintenance of aircraft, or aviation-specific laws such as the Cape Town Convention. Finance leasing typically involves foreign lessors who have the advantage of understanding aircraft and aviation as well as the legal framework of the sector. This understanding, or lack thereof, factors into the pricing and risk assessment for undertaking financing.

### 1.3 What types of leasing are possible under the laws of your jurisdiction? What are their essential characteristics?

There are two types of leasing in this jurisdiction – operating leases and finance leases. Their essential characteristics can be summarised as follows:

- **Operating lease:**
  - a. Short-term hire where rent relates to the value of use.
  - b. Asset reverts back to lessor at end of term.
  - c. Risks and rewards remain with lessor.
  - d. Lessor warrants fitness for purpose, maintains and insures asset.
  - e. On loss or damage, rentals cease and lessor receives insurances.

f. Duration of lease means lessor can re-lease asset many times and recover capital outlay and return.

- **Finance lease:**

- a. Lessor leases equipment to lessee for a period of time and at a rental sufficient to recoup its cost of acquiring the aircraft plus profit.
- b. Lessee takes substantially all the risks and rewards of ownership.
- c. Lessee meets operating, maintenance and insurance costs.
- d. Residual value of the aircraft at the end of the lease belongs to the lessee and the lessee receives rebate of rental from proceeds of sale.

### 1.4 Are there any proposals for reform in the area of aviation finance?

At present, there are no specific proposals for reform specifically in the area of aviation finance.

### 1.5 Is it possible according to the laws in your jurisdiction to enter into non-binding or partially binding pre-contractual agreements (e.g. 'letters of intent') that will NOT take effect as fully enforceable agreements?

Yes, where the intention for the agreement to be non-binding or partially binding is expressed within the agreement. However, where the pre-requisites to the formation of a contract are present (offer, acceptance, consideration) and the clear intention of the parties to be bound can be ascertained, then, notwithstanding what the document is called, it may still be held enforceable as a binding agreement.

### 1.6 Is there a doctrine of 'good faith' in your jurisdiction that applies to all pre-contractual agreement, financing and leasing transaction documents, and the conduct of parties connected to them?

No. If such conduct is required by the parties, it would need to be expressly stated within the contract.

## 2 Taxation and Related Matters

### 2.1 Which government authority in your jurisdiction has primary responsibility for the accounting for and regulation of revenue control and taxes?

The Kenya Revenue Authority, a statutory government agency.

**2.2 What are typically the taxes in your jurisdiction that may arise in relation to a sale, a lease or a financing of an aircraft or an engine?**

The typical taxes that may arise are as follows:

- a. Income tax by way of:
  - i. withholding tax on interest income (the non-resident rate is currently 15%); and
  - ii. capital gains tax at 5% of the net gain (where the seller is a company not an individual).
- b. Value-added tax:
  - i. at 16% on the sale of an aircraft with an unladen weight not exceeding 2,000kg, an engine (when not installed on an aircraft) and a helicopter of any weight; and
  - ii. at 16% on the hiring, leasing and chartering of helicopters of any weight, or an engine (when not installed on an aircraft).

**2.3 Is the provision of a current tax-residency certificate by a payee sufficient for a lessee or a borrower potentially subject to withholding taxes in your jurisdiction on rental or interest payments to avail itself of treaty access and the mitigation of tax liability?**

It should be, but the Kenya Revenue Authority retains the discretion to seek additional documentation.

**2.4 Has the advent of BEPS (the Base Erosion and Profit Shifting initiative of the OECD) had any effect as regards structures in aviation finance and leasing or their interpretation?**

To our knowledge, the advent of BEPS has not yet had identifiable effect on aviation finance and leasing structures in this jurisdiction.

**2.5 What are the typical thresholds in your jurisdiction for which a permanent establishment may be triggered under the terms of any relevant double-tax treaty or similar?**

The Income Tax Act defines a 'permanent establishment' to include:

- a. a fixed place of business through which business is wholly or partly carried on and includes a place of management, a branch, an office, a factory, a workshop, a sales outlet, among others; and
- b. a building site, construction, assembly or installation project or any supervisory activity connected to the site or project, but only if it continues for a period of more than 183 days.

**2.6 Is the authority at question 2.1 likely to establish a 'look-through' right or similar as regards a lender or a lessor that is a special-purpose vehicle involved for the purpose of tax treaty access?**

To our knowledge, the Kenya Revenue Authority is unlikely to establish a 'look-through' right in such circumstances.

**2.7 Will the import of an aircraft into your jurisdiction and/or the sale or leasing of the aircraft give rise to any VAT, sales or use taxes or any customs import or excise duties?**

- **VAT:** On importation of a helicopter of any weight or an aircraft with an unladen weight not exceeding 2,000kg, at a rate of 16%.
- **Customs:** On importation of a helicopter of any weight and an aircraft with an unladen weight not exceeding 2,000kg, at a rate of 25%.
- **Import declaration fee:** On importation of an aircraft of unladen weight not exceeding 2,000kg or a helicopter of any weight, at a rate of 3.5%.
- **Railway development levy:** On importation of any aircraft, a payment of a railway development levy of 2% of the customs value of the aircraft.

**2.8 Are there any documentary taxes (for example, stamp duty payable on the execution of documents)?**

Stamp duty is charged on certain instruments listed in the Schedule to the Stamp Duty Act, including agreements and security documents. Most agreements are chargeable to nominal duty while security documents are chargeable to duty at 0.1% of the amount secured. Instruments of transfer are also chargeable to duty at 2% of the consideration.

### 3 Registration and Deregistration

**3.1 Which government authority in your jurisdiction has primary responsibility for the regulation of aviation and the registration of aircraft? Is it an owner registry or an operator registry? If the aircraft register is an operator register, is it possible to record the details of an owner or lessor and any financier with an aircraft mortgage?**

The Kenya Civil Aviation Authority (the KCAA) is the statutory body responsible for regulating the aviation industry and registration of aircraft in Kenya. An application for the registration of an aircraft in Kenya is made by or on behalf of the owner making the registry an owner registry (Reg. 5(3), Civil Aviation (Aircraft Nationality and Registration Marks) Regulations, 2018) and it is possible to record details of any lessee, sublessee (if any) and financier.

**3.2 What is the effect of registration of the aircraft? Does registration on your national aircraft register confer proof of ownership of the aircraft and/or engine?**

The Kenya register for civil aircraft is not a register of legal ownership and therefore registration of ownership does not constitute proof of ownership; however, it often provides non-conclusive *prima facie* evidence.

**3.3 Can foreign-owned aircraft be registered on your national aircraft register and are there limits or restrictions on the age of aircraft that may be registered or operated?**

Yes, foreign-owned aircraft can be registered by the KCAA pursuant to the Civil Aviation (Aircraft Nationality and

Registration Marks) Regulations, 2018, which provide, in very broad terms, that a foreign-owned aircraft may be registered in Kenya where it is the subject of a lease, charter or hire-purchase agreement with a Kenya resident or Kenyan company. In addition, the Regulations permit the registration of a foreign-owned aircraft where it is owned by an individual foreign citizen who is lawfully admitted for residency in Kenya or a body corporate established under and subject to the laws of such country as the Authority may approve.

The Civil Aviation Act, 2013 and its Regulations do not limit or restrict the age of aircraft that may be registered or operated in Kenya.

**3.4 Can aircraft leases be registered? If so, in what circumstances? Must the lease be in a particular form if it is to be valid and enforceable (for example, must it be in a particular language or be notarised, legalised or apostilled)?**

Kenya does not have a requirement for a lease to be registered; however, according to KCAA Advisory Circular CAA-AC-AWS001D issued in July 2018, it is mandatory to submit an aircraft lease to the KCAA for approval. In terms of its content, the lease agreement must include various details as set out in KCAA Advisory Circular CAA-AC-GEN010 (see <https://www.kaa.or.ke/legislation-%26-publications/advisory-circulars/general-advisory-circulars>).

The Civil Aviation Act and its Regulations do not provide for a particular language in which a lease should be prepared. However, English is the official language of Kenya and any document not in the English language will require translation before submission to the KCAA. There is no requirement for a lease to be notarised, legalised or apostilled. However, any lease being submitted to the KCAA should be submitted as a certified copy of the original.

**3.5 How is deregistration affected and what steps can a lessor take to deregister the aircraft on termination of the lease?**

To deregister the aircraft, the registered owner must:

- return to the KCAA the original certificate of aircraft registration;
- settle any liens or encumbrances attached to the aircraft – this includes money due to the KCAA and the Kenya Airports Authority (the KAA);
- remove all nationality and registration marks assigned to the aircraft; and
- comply with any such other conditions as the KCAA may specify (this may include provision of an export certificate of airworthiness).

## 4 Security

**4.1 Is it possible to create a mortgage over an aircraft or engine in your jurisdiction? If so, what are the types of aircraft mortgage and engine mortgage available and what formalities are required in order to perfect it?**

Yes. It is possible to create a mortgage over an aircraft or engine in Kenya. Mortgages over an aircraft or engine may be either legal or equitable mortgages.

### Legal mortgage

A legal mortgage is created once the mortgagor and mortgagee enter into an agreement and the mortgagor transfers ownership of the aircraft or engine, but such transfer is subject to the provisions that once the debt or other obligations have been paid or discharged, the transfer will be voided.

### Equitable mortgage

This is a contract entered into by the mortgagor and mortgagee that fails to meet the formalities of a legal mortgage (e.g., transfer of ownership of the aircraft or engine) or only mortgages a beneficial interest in the aircraft or engine.

The registration of mortgages is dealt with in question 4.3 below.

**4.2 Can spare parts, including future parts, be subject to the aircraft mortgage or engine mortgage (as the case may be)? If not, are there any other forms of security that can be taken over spare parts?**

Yes, provided the mortgage entered into by the parties explicitly provides for it.

**4.3 Is there a register of mortgages or rights over aircraft and/or engine?**

Kenya ratified the 1948 Geneva Convention in 2000 but has yet to establish an aircraft mortgage registry. However, under the Companies Act, 2015, aircraft or engine mortgages created by a Kenyan company can be registered by the Registrar of Companies who maintains a register of certain types of charges (including mortgages) created by a company, failing which it shall be void against another creditor or a liquidator.

**4.4 What other forms of security can be taken over an aircraft and/or engine and can these other forms be registered?**

An alternative security that can be taken over an aircraft and/or engine would be a charge over shares of the company that owns the aircraft and/or engine. If issued by a Kenyan company, it is registrable under the Companies Act within a prescribed period, failing which it shall be void against any other creditor or liquidator of the company.

**4.5 What claims and rights would take priority in your jurisdiction over a registered mortgage?**

An aircraft or engine mortgage registered under the Companies Act will take priority over unregistered or subsequently registered mortgages. However, under the Insolvency Act, 2015, various preferential debts shall have first, second and third priority to all other debts including debts secured by a registered mortgage. See the response to question 8.7 for more details of preferential debts.

**4.6 What other forms of security can be granted over an aircraft and/or engine lease?**

It is possible to grant security over the interests of a party to a lease and lease receivables.



## 5 Enforcement and Repossession

**5.1 What are the circumstances in which a mortgagee or owner can take possession of the aircraft and/or sell the aircraft? What requirements must the mortgagee or owner comply with?**

Repossession and/or sale of an aircraft are remedies available to a lessor/mortgagee/owner typically upon the occurrence of an event of default or an enforcement event within an aircraft lease/mortgage. If there is a voluntary surrender of the aircraft, a lessor/mortgagee/owner ought to:

- requisition for the surrender of the aircraft's original certificate of registration and arrange for its execution notifying the KCAA of any transfer of ownership in the aircraft;
- settle outstanding parking, landing, navigation, hangarage and similar charges with respect to the aircraft and obtain the respective KCAA and KAA clearances; and
- if the aircraft is to remain on the Kenya register, procure the documents required to register the aircraft (see KCAA Advisory Circular CAA-AC-AWS001D <https://www.kcaa.or.ke/legislation-%26-publications/advisory-circulars/airworthiness-advisory-circulars?title=&page=1>) and (if necessary) provide a letter from the lessor/mortgagee/owner to the KCAA returning and confirming the revocation of the IDERA.

In the event of a contentious surrender of the aircraft, a lessor/mortgagee/owner ought to seek court orders authorising or compelling the assistance of the police and/or other appropriate government authorities to facilitate the physical repossession of the aircraft. Injunctive detention orders can be obtained to detain an aircraft on the grounds that there lies an immediate risk of the aircraft departing the court's jurisdiction. Similarly, under the court process, provided a lessee/mortgagor satisfies the legal requirements for the grant of injunctive orders, a court may issue orders restraining a lessor/mortgagee/owner from exercising its power of sale, repossession or leasing of an aircraft pending determination of the substantive suit.

**5.2 What is the procedure for repossession of the aircraft?**

It is worth noting that government agencies aside from the KCAA are not bound to recognise the implications of an IDERA. It is therefore advisable that a lessee/mortgagor issue an irrevocable deregistration power of attorney as part of the aircraft security documents. The deregistration power of attorney authorises a lessor/mortgagee/owner to take any action required from the lessee/mortgagor before the courts and government authorities in order to cause the aircraft to be repossessed and to take possession of the aircraft in the name of the lessee/mortgagor and to enter any premises under the control of the lessee/mortgagor and direct any pilots engaged by the lessee/mortgagor to fly the aircraft and/or take any other actions as may be necessary to ensure the delivery of the aircraft to the lessor/mortgagee/owner or to such location the lessor/mortgagee/owner may require.

Where it is anticipated that the lessee/mortgagor will resist repossession and/or deregistration, it may be prudent for the lessor/mortgagee/owner to obtain a court order to prompt any action required by the government authorities.

**5.3 Will local courts recognise a choice of foreign law in an aircraft mortgage? Are there any mandatory local rules that apply, despite a choice of foreign law?**

Kenyan courts generally recognise foreign governing law and jurisdiction provisions in contracts. However, the Constitution of Kenya, 2010 grants the High Court of Kenya unlimited jurisdiction notwithstanding foreign law provisions in a contract. Where parties have an agreement as to governing law and jurisdiction, the High Court of Kenya has discretion whether or not to stay proceedings brought in contravention of such provisions.

**5.4 Will local courts recognise and enforce a foreign court judgment in favour of a mortgagee or lessor? Are any interim relief measures available?**

The Foreign Judgements (Reciprocal Enforcement) Act, Chapter 43 of the Laws of Kenya provides that foreign judgments or orders of superior courts of the countries below are registrable by the High Court of Kenya:

- Australia;
- Malawi;
- the Republic of Rwanda;
- Seychelles;
- Tanzania;
- Uganda;
- the United Kingdom; and
- Zambia.

Once so registered, such judgment or order takes effect as though it were a judgment or order of the High Court of Kenya.

**5.5 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?**

A deregistration power of attorney is complementary to the requirements indicated in question 5.1 in enabling a lessor/mortgagee to deregister an aircraft. Such powers of attorney can be irrevocable, can be governed by foreign law and do not need to be in any prescribed form.

**5.6 If recovery of the aircraft is contested by the lessee and a court judgment is obtained in favour of the lessor, how long is it likely to take to gain possession of the aircraft?**

Upon the court's delivery of judgment in favour of the lessor, the lessor is required to serve judgment upon the lessee requesting the lessee's compliance with orders within the judgment. In the event the lessee fails to comply with such orders, the lessor shall be compelled to extract the judgment decree and attend to its execution by attachment of the aircraft. The timelines for extraction of a decree are not guaranteed as the same is subject to internal court registry processes.

**5.7 To what extent is there a risk from the perspective of an owner or financier that a lessee of aircraft or other aviation assets in your jurisdiction may acquire an economic interest in the aircraft merely by payment of rent and thereby potentially frustrate any rights to possession or legal ownership or security?**

Under section 20 of the Consumer Protection Act, 2012, a consumer under a future performance agreement that has paid two-thirds or more of his or her payment obligation as fixed by the agreement, any provision in the agreement, or in any security agreement incidental to the agreement, under which the supplier may retake possession of or resell the goods or services upon default in payment by the consumer, is not enforceable except by leave obtained from the High Court of Kenya. Section 20 refers to 'his' or 'her', which, in our view, ought to be interpreted that this section is not applicable to body corporates; however, as at the date hereof, there is to our knowledge no judicial precedent regarding the interpretation and application of this section to body corporates. Further, section 17 (2) of the Act provides that section 20 will only apply to future performance agreements if the consumer's total potential payment obligation under the agreement, excluding the cost of borrowing, exceeds a prescribed amount. No regulations of this nature have been published as at the date of this publication and our view is that, until such an amount is prescribed, section 20 is not operative.

**5.8 Are there any restrictions on the ability of the lessor to export the aircraft from your jurisdiction on termination of the leasing?**

The KCAA may require that an export certificate of airworthiness be obtained by the lessor prior to deregistration and export of the aircraft and may also require that it be enabled to carry out an inspection of the aircraft, or be supplied with maintenance and other records relating to the aircraft for such purpose, and this may prevent deregistration of the aircraft upon request until such certificate is obtained. The KCAA may also issue a special flight permit for an aircraft that is capable of safe flight but unable to meet applicable airworthiness standards for the purpose of exporting the aircraft.

In addition, the KCAA will require the return of the original certificate of registration of the aircraft, and payment of all outstanding landing, parking and navigation fees owed to it or the KAA prior to deregistration of the aircraft.

**5.9 Are exchange controls prevailing in your jurisdiction as regards payments in foreign currency? Will any consents be required for the remittance of the sale proceeds abroad?**

Foreign currency is freely repatriable from Kenya provided there is written evidence of an underlying business transaction and the respective bank handling repatriation is satisfied as to the genuineness of the transaction. For any amount above the equivalent USD 10,000, the Central Bank of Kenya requires that a commercial bank informs it as to the amount and purpose of the remittance. For any amount below the equivalent of USD 10,000, commercial banks are not required to obtain any documentary evidence to back the transaction although, in certain cases, banks may nonetheless seek an explanation.

**5.10 If the lease is governed by English law and a judgment is obtained by the lessor in the English courts, can that judgment be automatically enforced in your jurisdiction or will the case have to be re-examined on its merits?**

Please see the responses in questions 5.3 and 5.4.

**5.11 What is the applicable procedure for repossession of an aircraft under other forms of security interests?**

We are not aware of any other legal regime or procedure applicable for repossession of an aircraft or enforcement of a lessor/mortgagee/owner's security right.

## 6 Conventions

**6.1 Has your jurisdiction ratified any of the following: (a) The Chicago Convention of 1944 on International Civil Aviation (the Chicago Convention); (b) The 1948 Convention on the International Recognition of Rights in Aircraft (the Geneva Convention); (c) The 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (the 1933 Rome Convention); and (d) The Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Cape Town Convention) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment?**

Kenya has ratified the Chicago Convention, the Geneva Convention and the Cape Town Convention but is not a signatory to the 1933 Rome Convention.

**6.2 Has ratification of the Cape Town Convention caused any conflicts or issues with local laws?**

No. The International Interests in Aircraft Equipment Act, 2013 domesticated the provisions of the Cape Town Convention and, to our knowledge, no conflicts or issues with local laws have arisen thus far.

**6.3 What is the legal position regarding non-consensual rights and interests under Article 39 of the Cape Town Convention?**

Kenya has made the following declarations that will have priority over registered international interests:

- a. Section 39 (1) (a):
  - i. payments due to workers arising out of employment relations;
  - ii. liens created by repairmen on objects in their possession;
  - iii. liens created by bailees on objects in their possession; and
  - iv. taxes, duties and/or levies due to the government.
- b. Section 39 (1) (b):
 

Kenya declared that nothing in the Cape Town Convention shall affect its right or that of any entity of the state, any intergovernmental organisation or other private provider of public services to arrest or detain an object under its laws for payment of amounts owed to Kenya, any such entity, organisation or provider directly relating to the services provided by it in respect of that object or another object.

**6.4 Has your jurisdiction adopted the remedies on insolvency provided under Article XI of the Protocol to the Cape Town Convention?**

Yes. Kenya declared that it will apply Alternative A in its entirety to all types of insolvency proceedings with a waiting period of 60 days.

**6.5 What is the procedure to file an irrevocable deregistration and export request authorisation under the Cape Town Convention (IDERA)?**

The procedure to file an IDERA to request for the deregistration of the aircraft is for the authorised party under the IDERA to submit an original of the IDERA for counter-verification with the IDERA on record with the KCAA, and if a party is acting on behalf of the authorised party, they are to submit a certified copy of the power of attorney granting them the authority to act on behalf of the authorised party. In addition, the authorised party shall be required to provide the KCAA and KAA clearances certificates confirming that there are no outstanding parking, landing and navigational charges in relation to the aircraft, failure of which shall result in the KCAA not honouring the request to deregister the aircraft.

## 7 Liability for Damage and Environmental

**7.1 Can the owner be strictly liable – liable without a requirement to prove fault or negligence – for any damage or loss caused by the aircraft assuming the owner is an innocent owner with no operational control of the aircraft?**

Section 59 (3) of the Civil Aviation Act provides that where the aircraft has been demised, let or hired for a period exceeding 14 days and during such time the owner had no operational control over the aircraft, liability for material loss or damage caused by the aircraft to a third party or property shall be borne by the person to whom the aircraft has been demised, let or hired.

**7.2 Does the EU Emissions Trading System (EU ETS), or ICAO's Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), apply to aircraft and aircraft operators in your jurisdiction? Will charges levied according to the EU ETS, or its equivalent, give rise to any *in rem* rights in relevant aircraft that are part of the fleet of the operator concerned and, if so, will such rights rank in priority ahead of any mortgage interests properly registered in the relevant aircraft and/or engine?**

The EU ETS does not apply to aircraft and aircraft operators in Kenya. However, the establishment of the Kenya Emissions Trading System is reportedly under way and enactment of its framework would provide guidance on how to deal with rights in respect of charges levied according to the system.

CORSIA is applicable in Kenya and its monitoring, reporting and verification requirements apply to aeroplane operators that produce CO<sub>2</sub> emissions greater than 10,000 tonnes for the use of aeroplanes with maximum certified take-off mass greater than 5,700kg conducting international flights after 1 January 2019 except humanitarian, medical and firefighting flights.

**7.3 What liabilities (actual or potential) could an owner, lessor or financier of an aircraft incur in your jurisdiction because of a failure to comply with local environmental law and/or regulations on the part of an operator of aircraft leased or financed by it?**

The Environmental Management and Co-ordination Act No. 8 of 1999 regulates management of the environment, including operation of aircraft in accordance with specific emission standards and in accordance with the noise levels recommended by the Cabinet Secretary for Transport and the National Environmental Management Authority. The Act also mandates the Authority to investigate air pollution by aircraft and make regulations for the control and prevention of such pollution.

The Environmental Management and Co-ordination (Air Quality) Regulations, 2014 provide for the prevention, control and abatement of air pollution. The Regulations require every operator or owner of a mobile emission source, including air transport, to control the emission of priority air pollutants as set out in the Second Schedule thereto. Any person who contravenes the provisions of the Regulations commits an offence and is liable on conviction to a fine of KES 500,000 or imprisonment for a term not exceeding six months. Where the National Environmental Management Authority demonstrates that a person is not complying with the standards set out in the Regulations, the Authority may charge such person with a penalty of KES 10,000 for every parameter not complied with per day until such person demonstrates full compliance with the relevant standard related to such parameter.

## 8 Insolvency and Searches

**8.1 Are there any public registers in your jurisdiction where a search can be carried out to determine whether an order or resolution for any bankruptcy, bankruptcy protection or similar insolvency proceedings has been registered in relation to an operator or lessee?**

The Official Receiver deals with licensing and supervision of insolvency practitioners, administration and supervision of bankruptcy of natural persons and administration and liquidation of companies. The Official Receiver carries out the functions under the Insolvency Act No. 18 of 2015 and the Companies Act No. 17 of 2015.

Provisions of the Insolvency Act require that the Official Receiver maintains a public register of undischarged and discharged bankrupts, debtors subject to current summary instalment orders and persons admitted to (and discharged from) the no-asset procedure. According to section 711 (1) of the Insolvency Act, the Official Receiver is to ensure that all public registers are available for access and inspection by members of the public during the Official Receiver's ordinary business hours. Therefore, an interested person will be able to conduct a search and/or physically inspect documents registered with the Official Receiver. However, to the best of our knowledge, there is no corresponding registry in law in relation to companies.

Please note that there is a joint liaison committee formed by members of the Law Society of Kenya, Business Registry Services and certified public secretaries looking into necessary reforms to the Insolvency Act, which will include the maintenance of a digital insolvency registry.



**8.2 In the event that an operator or lessee were to become insolvent either on a balance sheet basis (assets less than liabilities) or is unable to pay debts as they fall due, would an operator or lessee be required to file for insolvency protection?**

The Insolvency Act provides that insolvent companies may first be administered in an attempt to improve their profitability before handing the company back to the directors for their control and management. The liquidation process is often employed, in practice, as the last resort in case the company cannot be steered back to profitability. Other than administration, insolvent companies can enter into voluntary arrangements as provided for under Part IX of the Insolvency Act.

Having said that, unless initiated by court or a creditor, the Act does not compel companies and/or their directors to file for insolvency protection. Any action by the company and/or its directors is considered a voluntary proceeding.

**8.3 Do the available forms of insolvency protection in your jurisdiction involve the appointment of either an officer of the court or a specifically court-appointed official to take control of the operator or lessee (an 'Insolvency Official') while in insolvency protection?**

The Insolvency Act provides for two forms of insolvency protection that involve the appointment of an officer or insolvency practitioner. The forms are administration and company voluntary arrangements (CVAs) as provided for under Part VIII and Part IX of the Act.

**8.4 Does the commencement of insolvency protection involving the appointment of an Insolvency Official in your jurisdiction have the effect of prohibiting the owner from taking the following actions to enforce the lease after commencement of such protection: (a) applying any security deposit held by the owner against any unpaid amounts due under the lease; (b) accepting payment of rent or other lease payments from the lessee, a guarantor or a shareholder; (c) giving notice of default under the lease; (d) obtaining a judgment or arbitral award for unpaid lease payments; (e) giving notice to terminate the leasing of the aircraft and/or engine; or (f) exercising rights to repossess the aircraft and/or engine?**

Other than applying any security deposit held by the owner against any unpaid amounts due under the lease, the owner will not be able to take any other action listed above for the reasons indicated below once the lessee or operator is in administration or is under a voluntary arrangement:

- **Company voluntary arrangement:** Under a CVA, the directors, having obtained the support of the monitor, may take steps to obtain a moratorium by lodging certain prescribed documents with the court, including a statement of the company's financial position. Once the moratorium is in place, the company is restricted from obtaining further credit and/or paying its liabilities during the moratorium. The company's creditors will require the monitors and/or the court's approval to enforce security over the company's assets or to commence proceedings against the company.
- **Administration:** Once an administration order is made, a moratorium comes into effect and a creditor may only take steps to enforce security with the consent of the administrator or with the court's approval.

**8.5 Can the commencement of insolvency proceedings have retrospective effect in relation to any such actions taken before commencement? If so, for what period can there be a look back?**

Generally, insolvency proceedings only affect the future actions of the company. However, there are five instances under the Insolvency Act where commencement of insolvency proceedings will have a retrospective effect.

#### **A. An undervalued transaction (section 682)**

An administrator/liquidator may make an application to the court if the company offered a gift to the person or otherwise entered into a transaction with the person on terms that provide for the company to receive no consideration, or if the company entered into a transaction with the person for a consideration, the value of which is significantly less than the value, in money or money's worth, of the consideration provided by the company. In case the court finds that the transaction was undervalued, it shall make an order setting aside the transaction and restoring the position to that which would have existed if the company had not entered into the transaction.

Time period to be considered:

- a. two years prior to the onset of insolvency (that is, the time the company is unable to pay its debts or becomes unable to pay its debts as a consequence of the transaction); and
- b. in the case of a company under administration, the period between:
  - i. the filing of an administration application and the granting of an administration order; and
  - ii. the filing of a notice of intention to appoint an administrator and the making of the appointment.

#### **B. Power of the court to void certain preferences (section 683)**

An administrator/liquidator may make an application to the court if he/she is of the view that the company has, within the relevant time (defined below), given preference to a person in relation to transactions entered into or payments made to that person by way of a court order obtained by that person to be enforced against the company if:

- a. the person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities; and
- b. the company does any act or allows an act to be done that (in either case) has the effect of placing the person in a position that, if the company were in insolvent liquidation, is better than the position the person would have been in had that act not been done.

In order for the court to consider the application, the preference must have occurred within:

- a. two years immediately preceding the onset of insolvency;
- b. six months immediately preceding the onset of insolvency for a transaction that is not a transaction undervalue; and
- c. in the event the company is to enter into administration, between:
  - i. filing an administration application and the granting of an administration order; and
  - ii. filing a notice of intention to appoint an administrator and the making of the appointment.

#### **C. Extortionate credit transactions made to a company (section 686)**

An administrator/liquidator may apply to the court if he/she is of the view that the transaction is or was extortionate and was entered into during the three years immediately preceding the

date on which the company entered administration or on which a liquidator was appointed in respect of the company.

Under the Insolvency Act, a transaction is extortionate if, having regard to the risk accepted by the person providing the credit:

- a. the terms of it are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of the credit; or
- b. it otherwise grossly contravened ordinary principles of fair dealing.

Please note that following an application to the court under this section, in absence of evidence to the contrary, the transaction will be presumed to be or to have been extortionate.

#### D. Invalid floating charge (section 687)

According to the Insolvency Act, a floating charge made (a) two years immediately preceding the insolvency in favour of a person connected with the company, (b) 12 months ending on the onset of insolvency for a charge issued in favour of any other person (except a person connected with the company), and (c) in relation to administration of a company, between (i) filing an administration application and the granting of an administration order, and (ii) filing a notice of intention to appoint an administrator and the making of the appointment, is invalid.

#### E. Transactions defrauding a creditor (section 505)

A liquidator of a company may make an application to the court to make an order if:

- a. in the course of the liquidation of the company, the liquidator forms the view that a business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose; and
- b. the liquidator believes that specified persons participated (directly or indirectly) in the business with the knowledge that the business was being carried on in that manner.

On hearing an application made by the liquidator, the court may, if it finds that the persons specified in the application did, in fact, participate (directly or indirectly) in a business of the company with the knowledge that it was being carried out in such manner, order those persons (or any of them) to make such contributions to the company's assets as the court considers fair and reasonable.

Application made to the court on this ground is subject to the Limitation of Actions Act, Chapter 22 of the Laws of Kenya wherein there is no set limit for a fraudulent criminal prosecution. However, to recover money, there is a limitation period of six years.

**8.6** Is there, either under law or as a matter of practice in your jurisdiction, a period of time within which the Insolvency Official will either 'adopt' the lease and pay rent and other lease payments as an expense of the insolvency or 'reject' the lease and permit the owner to enforce such rights as it may have under the lease? (a) If the lease is 'adopted', will the Insolvency Official also pay any unpaid lease payments due as at commencement of the insolvency protection? (b) If not or if the lease is 'rejected', would the owner's claim for any outstanding sums rank equally with other ordinary unsecured creditors of the lessee?

Although the Insolvency Act envisages the completion of liquidation and administration within 12 months, it is difficult to provide a definite timeline within which payments will be made out to satisfy the company's debts.

In response to points (a) and (b), payments shall be made according to the rank provided at the Second Schedule of the Act (see our response to question 8.7 below). However, claims having the same priority rank equally among themselves and, subject to any maximum payment level prescribed by or under any written law, are payable in full, unless the property of the company is insufficient to meet them, in which case they diminish in equal proportions.

#### 8.7 Are there certain types of preferred creditors whose claims will rank above claims of the owner?

Yes, there are. Under the Second Schedule of the Insolvency Act, preferred creditors shall rank above claims of the owner in three categories:

- **First priority:** Costs and expenses incurred by a liquidator, the remuneration of the liquidator, and reasonable costs of the person who placed the company in liquidation or protected/preserved assets of the company.
- **Second priority:** These relate to unpaid wages and entitlements due to the employees of the company.
- **Third priority:** Unpaid income tax and customs and excise tax payable by the company.

#### 8.8 If the aircraft is in the possession of a person other than the operator or lessee at the commencement of insolvency protection of the operator or lessee, for example, an independent maintenance facility, will such person be entitled, under the laws of your jurisdiction, to assert a lien arising under law or contract over the aircraft in respect of amounts then due and unpaid to such person by the operator or lessee?

No, they shall not be entitled to do so if the administrator, monitor or liquidator seeks the court's intervention. According to section 678 (2) of the Insolvency Act, if a person has control over money, documents or other property to which the company appears to be entitled, the court may require that person to immediately, or within such period as the court may direct, pay the money or deliver the documents or other property to the administrator in case the company is under administration and to the monitor or the liquidator.

In addition, in section 688 of the Act, a lien or other right to retain possession of any documents of the operator or lessee is unenforceable if its enforcement denies the administrator, in case the company is under administration, and to the monitor or liquidator, possession of any of the documents.

## 9 Detention and Confiscation

#### 9.1 Other than insolvency laws (see section 8), are there any laws that may have the effect of defeating the owner's right in the aircraft – for example, government requisition? Do the laws of your jurisdiction provide for any compensation in such circumstances?

The Kenya Defence Forces Act, 2012 provides that an officer of the defence forces may, if necessary in the interests of defence or public safety, where the necessity is reasonable justification for causing any hardship that may result in any person having an interest in or right over an aircraft, issue a requisitioning order authorising the requisitioning of an aircraft for meeting the needs of any unit of the defence forces. The person by whom an aircraft is furnished under a requisitioning order shall be entitled to be paid:

- i. a sum for the use of the aircraft calculated by reference to the period for which possession of the aircraft is retained,

at the rate of payment commonly recognised or generally prevailing in the area at the time at which the aircraft is furnished or, if no such rate is readily ascertainable, at such rate as may be just;

- ii. a sum equal to the cost of making good any damage caused to the aircraft, not being damage resulting in its total loss or damage attributable to fair wear and tear, which may have occurred during the period for which possession of the aircraft is retained and which has not been made good during that period by the government; and
- iii. if, during the said period, a total loss of the aircraft occurs, a sum equal to the value of the aircraft immediately before the occurrence of the damage that caused the loss.

The Preservation of Public Security Act, Chapter 57 of the Laws of Kenya provides the President powers to publish regulations for the preservation of public security that may make provision for the compulsory acquisition, requisitioning, control or disposition of any movable property. It is worth noting that regulations of this nature are yet to be published.

**9.2 Are there any rights in relation to third parties to detain or sell the aircraft pursuant to illegal activities, tax or any other laws if the operator or lessee fails to pay when due? If so, can the aircraft be forfeited and sold without the owner being made aware?**

Yes. Ideally, the aircraft mortgage/lease/security documents oblige the lessee/mortgagor to notify the lessor/mortgagor/owner of any adverse action that is or could be occasioned on the aircraft by a third party by reason of the lessee/mortgagor's actions or omissions.

Please see below examples of instances when third parties may be entitled to detain or dispose of an aircraft:

- a. The KCAA and/or the KAA may acquire a lien over an aircraft for unpaid parking, landing, navigational, hangarage and similar charges owed to it by a lessee/mortgagor as operator.
- b. A maintenance organisation may acquire a lien over an aircraft for unpaid maintenance charges and expenses.
- c. Under the Tax Procedures Act No. 29 of 2015, an aircraft may be seized by the Kenya Revenue Authority for failure to pay taxes.
- d. Under the East African Community Customs Management Act, 2004, an officer under the Act or a police officer may seize or detain any aircraft liable to forfeiture under the Act or which they have reasonable ground to believe is liable to forfeiture and that aircraft may be seized or detained regardless of the fact that any prosecution for an offence under the Act that renders the aircraft liable to forfeiture has been or is about to be instituted.

Under the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994, an aircraft may be seized if used in the commission of an offence under the Act. Where a person is convicted of an offence under the Act, any aircraft utilised by him/her in the commission of an offence shall be liable to forfeiture to the government.



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