

Netherlands

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Stek

OVERVIEW

Conventions

1 | To which major air law treaties is your state a party?

The Netherlands is a party to the following major air law treaties:

- the Warsaw Convention (1929), as well as the Hague Protocol (1955) amending the Warsaw Convention;
- the Convention for the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft (Rome Convention (1933));
- the Netherlands has signed but not ratified the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome Convention (1952));
- the Chicago Convention (1944);
- the Geneva Convention (1948); and
- the Montreal Convention (1999).

Furthermore, the Netherlands is a party to the New York Convention (1958).

The Netherlands has signed the Cape Town Convention (2001), but except for the Caribbean municipalities of the Netherlands (ie, the islands of Bonaire, Sint Eustatius and Saba) it has not been ratified.

Domestic legislation

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

The principal domestic legislation regulating aviation consists of the Aviation Act and the Act on Aviation (the latter replacing the Aviation Act in phases), containing general provisions on the registration of aircraft with the nationality register that are specified in further regulations based thereon, such as the Aircraft Decree 2008 and the Regulations on the Registration of Netherlands Civil Aircraft. Rules pertaining to the registration of mortgages on aircraft with the public register held by the Land Registry can be found in the Dutch Civil Code, the Rules on Registered Aircraft 1996 and the Regulations on Registered Aircraft 2005. Furthermore, Book 3 of the Dutch Civil Code contains rules on the vesting and enforcement of mortgages (including aircraft mortgages) and Book 8 of the Dutch Civil Code provides for certain specific provisions with respect to aircraft (including a definition of 'aircraft' and criteria for engines and parts being considered component parts of aircraft) and rights and privileged claims in respect of aircraft. Finally, provisions of the Dutch Code of Civil Procedure apply in respect of seizure of aircraft and enforcement of mortgages.

Governing law

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?

According to section 10:127 of the Dutch Civil Code, the transfer of interests in, and creation of security over, aircraft is governed by the laws of the jurisdiction where the aircraft is registered with the nationality register. In particular, the laws of the said jurisdiction among others determine the requirements that apply to the transfer of title to, or the vesting of security interests over, aircraft, the nature of security interests that can be vested and the requirements of a valid creation, amendment, transfer and cancellation thereof.

TITLE TRANSFER

Transfer of aircraft

4 | How is title in an aircraft transferred?

Title to an aircraft registered with the public register held by the Land Registry is transferred by the execution of a notarial deed of transfer by both the seller and the purchaser before a Dutch civil law notary and registration thereof with the public register.

Transfer of title to an aircraft that is not registered with the public register is effected by the seller transferring possession of the aircraft to the purchaser. Such transfer of possession is customarily effected by a bill of sale or other written instrument executed by the seller and the buyer. If the aircraft is in the possession of a third party (for instance when the aircraft is on lease), in order to be valid the transfer shall be notified or acknowledged by such a third party (ie, the lessee).

Transfer document requirements

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

Unless an aircraft is registered with the public register held by the Land Registry, in which case title to that aircraft can only be effectively transferred by the execution of a notarial deed of transfer by both seller and purchaser before a Dutch civil law notary and registration thereof with the public register, there are no formalities for creating an enforceable transfer document for an aircraft.

Although not a requirement to validly transfer title to an aircraft, the change of ownership must be registered with the nationality register.

REGISTRATION OF AIRCRAFT OWNERSHIP AND LEASE INTERESTS

Aircraft registry

6 | Identify and describe the aircraft registry.

In the nationality register, the holder of the aircraft (typically the lessee) is registered, as well as the owner if this is a natural person or legal entity other than the holder.

The Netherlands, pursuant to the Geneva Convention (1948), also maintains a public register, which is held by the Land Registry. Registration of an aircraft with the public register is optional. In the public register rights of ownership, mortgage and other rights on aircraft can be registered, provided that the relevant aircraft has a maximum take-off mass of at least 450kg, is registered with the nationality register, is not registered with any foreign nationality register and the request for registration of the aircraft with the public register has been approved by the court. The public register cannot be searched online, but extracts can generally be obtained within a few hours.

There are no 83-bis arrangements in place between the Netherlands and other jurisdictions.

The Netherlands does not maintain a separate registry for aircraft engines.

Registrability of ownership of aircraft and lease interests

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?

Pursuant to the Aircraft Decree 2008, to be registered in the nationality register, the holder of an aircraft must be a national or resident of, or a legal entity incorporated under the laws of, and having its corporate seat or actual place of business in, an EEA member state or any of the Caribbean municipalities of the Netherlands (Bonaire, Sint Eustatius or Saba). If the holder of the aircraft is not the owner as well, it is also required that the owner is not a national of, or a legal entity established in, a state with which the Netherlands no longer maintains diplomatic relations.

Ownership rights can be registered with the public register. Furthermore, pursuant to section 8:1309 of the Dutch Civil Code, a lessee's lease interest in an aircraft (which itself is registered with the public register) pursuant to a lease agreement with a duration of six months or more can be registered with the public register, such lease interest qualifying as a right in rem. In order for a lease interest to be so registered, the relevant lease agreement must be executed before a Dutch civil law notary in the form of a notarial deed governed by Dutch law. Often, such Dutch law notarial deed is a short summary referring to a more detailed (English or New York law governed) lease agreement.

There is no other registry with which an ownership interest can be registered.

There is no registry for the separate registration of interests in aircraft engines.

Registration of ownership interests

8 | Summarise the process to register an ownership interest.

For an ownership interest in an aircraft to be registered with the public register, the following steps are to be taken:

- filing of an application (in a standard format as provided by the public register) with the court for the court's approval of the

registration of the aircraft and the owner's ownership interest, such application being accompanied by certain underlying documents, such as a certificate of registration provided by the nationality register, documentation evidencing the deregistration of the aircraft from the previous register (if applicable), documentation evidencing ownership of the aircraft, corporate documents relating to the owner (if the owner is a legal entity) and a certificate stating the maximum take-off weight of the aircraft; and

- filing (by a civil law notary on the basis of a power of attorney) of the court's approval with the Land Registry.

The court's approval as referred to above is usually obtained within one or two business days and the costs involved amount to approximately €656. The subsequent registration with the public register is usually completed on the same day of (or one day after) filing and the fees charged by the Land Registry amount to approximately €144.50.

Title and third parties

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

The public register is maintained, and likewise, registered ownership interests are recognised, pursuant to the Geneva Convention (1948). In principle, third parties can rely on the accuracy of the ownership interest recorded with the public register, unless it is known to such a third party that the 'owner' has no or defective title.

Registration of lease interests

10 | Summarise the process to register a lease interest.

For a lease interest in an aircraft to be registered with the public register, the lease agreement executed in the form of a notarial deed before a Dutch civil law notary must be filed with the Land Registry.

Registration with the public register is usually completed on the same day of (or one day after) filing and the fees charged by the Land Registry amount to approximately €144.50.

Certificate of registration

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

Certificates of registration of aircraft registered with the public register are issued by the Land Registry. Said certificates contain details relating to the airframe and engines, the owner and, if applicable, registered rights in the aircraft (mortgages, lease interests, purchase options, arrests and privileged claims), including the names and addresses of the holders of such registered rights.

Deregistration and export

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?

An aircraft registered with both the nationality register and the public register can be deregistered by the owner with the consent of the lessee or any mortgagee in the event that any lease interest or mortgage, respectively, has been recorded. If the aircraft is only registered with the nationality register and not with the public register, then deregistration can be effected by the owner without any consent of the lessee being required.

Powers of attorney

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

A deregistration power of attorney enables the owner of the aircraft or a mortgagee to deregister the aircraft from the nationality register and the public register. Such deregistration power of attorney can, depending on the wording thereof, be made revocable or irrevocable (albeit that the court may set aside the irrevocability on the basis of serious grounds, such as apparent abuse of the power of attorney) and be granted to one or more attorneys. Under Dutch law, a power of attorney terminates in the event of bankruptcy, and becomes ineffective upon the suspension of payments, of the grantor. Deregistration powers of attorney are not recorded with any registry.

Cape Town Convention and IDERA

- 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.

With the exception of the Caribbean municipalities of the Netherlands (ie, the islands of Bonaire, Sint Eustatius and Saba), the Cape Town Convention is not in effect in the Netherlands.

SECURITY

Security document (mortgage) form and content

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

The typical form of security document in respect of aircraft registered with the public register is a notarial deed of mortgage. The deed of mortgage is executed by or on behalf of the mortgagor and the mortgagee before a Dutch civil law notary. It must contain a description of the secured obligations and the maximum secured amount. Usually, the mortgage deed does not record the economic terms of the underlying finance documentation, but instead refers to said finance documentation in general terms. The deed of mortgage must be drawn up in Dutch and it must reflect that the mortgagee chooses domicile in the Netherlands. The deed of mortgage must be filed with the public register held by the Land Registry.

In respect of an aircraft that is not registered with the public register, a security right is created in the form of a possessory or non-possessory right of pledge. A possessory right of pledge is created by a (private or notarial) deed of pledge and bringing the aircraft into the possession of the pledgee or a third party acting on behalf of the pledgee. A non-possessory right of pledge is created by either a notarial deed of pledge or a private deed of pledge that is registered with the tax authorities. In contrast with a right of mortgage, a right of pledge is not recorded with any public register.

Security documentary requirements and costs

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

A right of mortgage over an aircraft is validly created by registration of a notarial deed of mortgage (drawn up in Dutch, but often accompanied by an English translation) with the public register held by the Land Registry. The documentary fees charged by the Land Registry amount to approximately €144.50.

Security registration requirements

- 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.

Yes. The typical form of security document in respect of aircraft registered with the public register is a notarial deed of mortgage. The deed of mortgage is executed by or on behalf of the mortgagor and the mortgagee before a Dutch civil law notary. It must contain a description of the secured obligations and the maximum secured amount. Usually, the mortgage deed does not record the economic terms of the underlying finance documentation, but instead refers to said finance documentation in general terms. The deed of mortgage must be drawn up in Dutch and it must reflect that the mortgagee chooses domicile in the Netherlands.

A right of mortgage over an aircraft is validly created by registration of a notarial deed of mortgage (drawn up in Dutch, but often accompanied by an English translation) with the public register held by the Land Registry.

The deed of mortgage must be filed with the public register held by the Land Registry. The deed of mortgage is filed by a Dutch civil law notary with the public register held by the Land Registry. The registration with the public register is usually completed on the same day of (or one day after) filing. No periodical renewals of the registration are required.

Registration of security

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

A certificate of registration of a right of mortgage can be obtained from the Land Registry. Such a certificate contains details relating to the airframe and engines, the owner and the mortgagee, as well as details relating to such owner's and mortgagee's interests in the aircraft and the maximum amount secured by the mortgage. A certificate of registration is usually available within one business day following filing of the notarial deed of mortgage with the public register held by the Land Registry. The certificate does not state the rank or priority of the right of mortgage.

Effect of registration of a security interest

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

The ranking of security interests (in the form of rights of mortgage) is established by the time of filing of such security interests with the public register held by the Land Registry: the security interest filed first has priority over any security interest filed thereafter. Pursuant to a notarial deed registered with the public register, it is possible to change the ranking of a right of mortgage, provided that from that deed it appears that the holders of any higher ranked mortgages have consented thereto.

The public register is maintained, and likewise, registered interests are recognised, pursuant to the Geneva Convention (1948). In principle, third parties may rely on the accuracy of the rights of a mortgage recorded with the public register, unless it is known to such third party that the information is incorrect or incomplete.

No priority notice system is in place.

Security structure and alteration

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

In a single lender transaction, the sole lender will act as mortgagee and pledgee. In the event the lender transfers or assigns the loan, the security interest will follow the indebtedness to the new lender. The security right is not affected as a result of such transfer of assignment. It is, however, recommended that where it concerns an aircraft mortgage a filing is made with the Land Registry to the effect that the name and address of the new lender, as mortgagee, is properly recorded in the public register.

In the case of multiple lenders, the security structure is slightly more complicated because Dutch law requires that the beneficiary of security rights is also the creditor of the indebtedness to be secured by the security rights. Without properly structuring the security, this would lead to joint security rights for the benefit of all lenders involved. Joint security structures are typically not used because the security will need to be released and recreated in the event of existing lenders resigning or new lenders acceding to the syndicate. To circumvent this problem, a solution has been developed in the form of 'parallel debt'. Pursuant to a parallel debt obligation (which can be included in the facility agreement or the security documents), the borrower is required to pay to the security agent an amount that is equal to its aggregate payment obligations to all lenders in the syndicate (the primary debt obligations). The security rights secure the repayment of such parallel debt obligation. This additional and independent debt exists 'in parallel' with the debt owed by the borrower to the lenders in the sense that any payments by the borrower to the lenders under the primary debt obligations decrease the parallel debt in the same amount and any payments by the borrower to the security agent under the parallel debt (including the enforcement proceeds of the security package) decrease the primary debt obligation in the same amount. As a result, there is no double financial obligation of the borrower. This parallel debt structure enables the security agent to hold the security for a changing group of lenders in the syndicate without affecting the security and without having to amend the existing security documents. Although the parallel debt structure is not tested in Dutch courts, it is widely used and accepted in the Dutch market.

In the Netherlands, typically a security agent is appointed by the syndicate. However, a security trustee is also recognised because the Netherlands is a party to the Convention on the Law Applicable to Trusts and on their recognition (The Hague, 1 July 1985).

Security over spare engines

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

Section 8:3(a) of the Dutch Civil Code provides that:

engines, the propellers, the radio equipment and all other articles intended for use in or on the aircraft, irrespective of whether they are attached thereto or temporarily separated therefrom, shall be component parts of the aircraft.

It should be noted that there is debate in the legal literature whether the phrase 'intended for use in or on the aircraft' refers back to 'all other articles' only or to 'engines, the propellers, the radio equipment' as well and as to how to interpret the words 'temporarily separated'.

A right of mortgage vested on an aircraft will by operation of law include the engines if they are component parts of the aircraft. An engine that is removed from the aircraft only temporarily (for instance for maintenance or overhaul) will continue to be a component part of

the aircraft and remain subject to the right of mortgage. However, in the case of a removal on a more permanent basis (ie, not merely temporarily), the engine will cease to be a component part and will no longer be subject to the right of mortgage vested on the aircraft.

It is safe to assume that a spare engine will not be a component part of an aircraft. Spare engines located in the Netherlands can be encumbered by a possessory or non-possessory right of pledge. A possessory right of pledge is created by a (private or notarial) deed of pledge and bringing the spare engine into the possession of the pledgee or a third party acting on behalf of the pledgee. A non-possessory right of pledge is created by either a notarial deed of pledge or a private deed of pledge that is registered with the tax authorities.

If a spare engine encumbered with a right of pledge is installed on an airframe on a non-temporary basis so that under Dutch law it qualifies as a component part of the aircraft, that engine ceases to be encumbered by the right of pledge (and title to the engine in principle is vested in the name of the owner of that aircraft pursuant to Dutch law accession rules).

ENFORCEMENT MEASURES

Repossession following lease termination

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

Lease agreements entered into between a lessor and a lessee usually contain provisions relating to repossession of the aircraft following termination of the lease. Nonetheless, depending on the physical location of the aircraft and possible practical difficulties, obtaining a court order may be necessary for the lessor to bring back the aircraft in its possession. The lessor can file a claim for repossession with the competent court in summary proceedings or substantive proceedings. In summary proceedings, the urgency of the claims filed by the claimant is to be demonstrated to the court, but in claims regarding the repossession of aircraft this is generally fairly easy.

Often, prior to filing a repossession claim, the claimant requests the court's approval for a precautionary arrest of the aircraft in accordance with the provisions of the Rome Convention (1933), which have been incorporated in Dutch law. The precautionary arrest must be recorded with the public register. Certain aircraft cannot be made subject to a precautionary arrest (eg, aircraft that are actually used for scheduled public air transport services). Once the aircraft has been arrested, court proceedings will have to be initiated by the claimant within the time frame set by the court.

As soon as a judgment entitling the claimant to repossess the aircraft has been obtained from the court, an order to comply with the judgment within 24 hours is served on the defendant by the bailiff. If the judgment is not so complied with within 24 hours, an executory attachment is levied by the bailiff. The bailiff then takes possession of the aircraft and returns it to the claimant. With the court's approval, the executory attachment can be levied without first serving on the defendant the order to comply with the judgment. If the aircraft is not registered with the public register held by the Land Registry and the court's judgment has been declared provisionally enforceable, no 24-hour waiting period needs to be taken into account and the executory attachment can be levied immediately following service of the judgment and the order to comply with it.

A precautionary arrest is converted into an attachment in execution as soon as the judgment entitling the claimant to repossess the aircraft has been served on the defendant.

Enforcement of security

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

Enforcement of a mortgage requires the mortgagee to levy an executory attachment on the aircraft, followed by a request to the court to set a date for the sale of the aircraft.

A right of pledge on an aircraft entitles the pledgee to summary execution and to sell the aircraft in a public sale pursuant to local customs and applicable standard terms and conditions. The pledgee and the pledgor may agree to another form of sale (such as a private sale), provided such agreement is reached after the pledgee has become entitled to summary execution (so that it cannot be agreed upon in advance in the deed of pledge). The president of the competent court can, at the pledgor's or pledgee's request, order that the aircraft be sold in a different manner than a public sale or, at the pledgee's request, order that the aircraft remains with the pledgee for a price to be set by the president.

In the case of bankruptcy or a suspension of payments of the mortgagor or pledgor, the mortgagee or pledgee may enforce its security right as if there was no insolvency. However, the court may order a freezing period of up to four months during which the mortgagee or pledgee may not, without the court's consent, demand surrender of the aircraft if it is under the control of the mortgagor or pledgor or seek recourse against the aircraft. This effectively means that during such a period, repossession of the aircraft would not be possible without the court's consent.

In addition, a trustee in bankruptcy may require the mortgagee or pledgee to enforce its security right within a reasonable period and, if the mortgagee or pledgee fails to do so, demand the surrender of, and sell, the aircraft, without prejudice to the mortgagee's or pledgee's right to the sale proceeds, subject to a pro rata contribution to the bankruptcy costs.

Priority liens and rights

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

In the Netherlands, there are no specific rights to detain aircraft in respect of unpaid airport or air navigation charges. In general, the provisions of the Dutch Code of Civil Procedure on seizure of aircraft apply in respect of unpaid charges or other debts. Under Dutch law, an asset can be detained by a creditor holding the said asset (eg, a repairman) until the related amount owed to it is paid in full. In principle, this right of detention also exists in respect of aircraft, with the understanding that with respect to aircraft registered with the public register the Dutch Civil Code provides that a right of detention shall not entail a right of priority over such aircraft in relation to sale proceeds in case of execution, so that it merely serves as a pressure tool.

Claims in respect of salvage costs and extraordinary preservation costs have priority over all recorded liens and rights other than costs of the sale by execution.

The Aviation Act provides that if extraordinary circumstances so require, section 58 of the Aviation Act relating to requisition of aircraft can be made effective by Royal Decree following a proposal to that effect by the Dutch Prime Minister of the Netherlands. Pursuant to section 58 the Minister of Infrastructure and Water Management can requisition aircraft with the purpose to transport certain persons or objects. Such requisition will give rise to compensation, which in principle will be set at the amount of the lease rentals during the requisitioning period. In addition, any extraordinary loss of value as a result of the requisitioning will be compensated.

Enforcement of foreign judgments and arbitral awards

- 25 | How are judgments of foreign courts enforced? Is your jurisdiction party to the 1958 New York Convention?

This depends on whether or not an enforcement treaty between the Netherlands and the country involved applies. If not, the foreign court judgment cannot be enforced in the Netherlands. In such case, in order to obtain a judgment that can be enforced in the Netherlands, in principle the dispute will have to be relitigated before the competent Dutch court.

As to English and New York court judgments, the following applies.

Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters continues to apply in relation to proceedings commenced prior to the end of the Brexit transition period (running until 31 December 2020). As such, a run-off period for the current regime has been created. The framework of jurisdiction and recognition and enforcement of judgments following the end of the transition period at this point still remains largely unclear. In principle, if no other treaty or arrangement is entered into, the Convention on the Enforcement of Judgments between the Netherlands and the United Kingdom dated 17 November 1967 would revive. Said Convention provides for an enforcement procedure by means of an enforcement order (or exequatur) to be obtained from the Dutch courts.

As to New York court judgments, there is no enforcement treaty between the Netherlands and the United States. Consequently, a judgment of the New York courts cannot be enforced in the Netherlands. To obtain a judgment that can be enforced in the Netherlands, the dispute will have to be relitigated before the competent Dutch court. This court will have discretion to attach such weight to the judgment of New York courts as it deems appropriate. In principle, the court can be expected to give conclusive effect to a final and enforceable judgment of such court without re-examination or relitigation of the substantive matters adjudicated upon, provided: (1) proper service of process has been given; (2) the proceedings before such court have complied with principles of proper procedure; (3) the judgment is not contrary to the public policy of the Netherlands; and (4) the judgment is not irreconcilable with an earlier judgment between the parties in respect of the same dispute (if that earlier judgment is capable of being recognised in the Netherlands).

The Netherlands is a party to the New York Convention (1958).

TAXES AND PAYMENT RESTRICTIONS

Taxes

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

No VAT applies in respect of repayment of principal or payment of interest by a Dutch tax resident borrower.

If the seller of an aircraft qualifies as an entrepreneur for Dutch VAT purposes and the aircraft is located in the Netherlands at the time of transfer of title to the aircraft, the purchase price is subject to VAT at a rate of 21 per cent. The seller of the aircraft will be liable for the payment of Dutch VAT due by the purchaser if the seller either resides in the Netherlands or has a permanent establishment in the Netherlands to which the delivery of the aircraft is attributable. Otherwise, the purchaser is liable for the payment of the VAT (reverse charge), provided the purchaser qualifies as entrepreneur for Dutch VAT purposes and resides in the Netherlands or has a permanent establishment in the Netherlands to which the delivery of the aircraft is attributable. In cases where neither the seller nor the purchaser resides in the Netherlands or has a permanent establishment in the Netherlands to which the delivery of the aircraft is attributable, the seller will need to register in the Netherlands for VAT purposes and will be liable for the payment of the VAT.

The Dutch VAT rate of 21 per cent will be reduced to zero per cent if the aircraft is operated by an airline operating for reward chiefly on international routes or the purchaser of the aircraft is an airline qualifying as such.

In the case of an operational or financial lease between a lessor and a Dutch lessee who both qualify as entrepreneur for Dutch VAT purposes, and the aircraft is not leased to a permanent establishment of the Dutch lessee located outside the Netherlands, the lease payments are generally subject to Dutch VAT at a rate of 21 per cent. The lessor is liable for the payment of VAT due by the Dutch lessee if the lessor either resides in the Netherlands or has a permanent establishment in the Netherlands to which the leasing of the aircraft is attributable. Otherwise, the lessee is liable for the payment of VAT (reverse charge).

However, if the financial lease qualifies as a hire purchase agreement for Dutch VAT purposes (ie, title to the aircraft passes automatically from lessor to lessee before or upon payment of the final lease payment), title to the aircraft is deemed to be delivered to the lessee at acceptance of the aircraft (ie, at commencement of the lease). If at acceptance the aircraft is located in the Netherlands for Dutch VAT purposes the present value of all future lease payments is deemed to be paid as per that date and is subject to Dutch VAT at a rate of 21 per cent (the interest element of that amount is excluded only if such interest has been separately calculated). In the case of a financial lease that qualifies as a hire purchase agreement for Dutch VAT purposes, the actual lease payments will not be subject to Dutch VAT.

The Dutch VAT rate of 21 per cent in each of the scenarios referred to above will be reduced to zero per cent if the lessee of the aircraft qualifies as an airline operating for reward chiefly on international routes.

Any VAT that is due in connection with the lease or purchase of an aircraft should not necessarily constitute costs for the Dutch lessee or purchaser because it may be entitled to claim a refund of the VAT if and to the extent that it will use the aircraft for the supply of goods or services that are subject to Dutch VAT.

Exchange control

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

International payments may be subject to restrictions imposed pursuant to sanctions and measures implemented or effective in the Netherlands under the Sanctions Act 1977 or European Union regulations. Other than that, in principle, there are no restrictions on international payments and exchange controls in effect in the Netherlands.

Default interest

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

In principle, there are no limitations on the amount of default interest that can be charged on lease or loan payments. However, the courts may mitigate such amounts of default interest on the basis of the legal principle of reasonableness and fairness.

Customs, import and export

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

Pursuant to the EU Community Customs Code, no tariff applies if an aircraft is exported or imported from one EU member state to another EU member state. Generally, bringing an aircraft into the Netherlands from a non-member state or taking it out of the Netherlands to a non-member state is subject to customs duties at a rate of zero per cent.

INSURANCE AND REINSURANCE

Captive insurance

30 | Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There is no Dutch law requirement that insurance is placed with insurers or underwriters in the Netherlands.

Regulation (EC) No. 785/2004, as amended by Regulation (EC) No. 1137/2008 and Regulation (EU) No. 285/2010, which is applicable in the Netherlands, contains minimum liability insurance requirements for air carriers and aircraft operators in respect of passengers, baggage, cargo and third parties, for both commercial and private flights. Under Regulation (EC) No. 785/2004, air carriers and aircraft operators are required to be insured to cover the risks associated with aviation-specific liability (including acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion).

Cut-through clauses

31 | Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Yes, cut-through clauses are legally effective.

Reinsurance

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

Yes, assignments of reinsurances by the insurer in favour of the lessor, and a reassignment of reinsurances by the lessor in favour of the financier are common in lease transactions. However, as pursuant to section 3:84(3) of the Dutch Civil Code, security assignments are not valid under Dutch law, these assignments are usually governed by English (or other foreign) law. If valid and enforceable under English (or such other foreign) law, the security assignment would be given effect to by the Dutch courts if and to the extent that the security assignment fits in the closed system of Dutch security rights and preferred rights.

Liability

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

No, an owner, lessor or financier cannot be held liable for the operation of the aircraft or the activities of the operator (provided that any such liability is not based on the owner's, lessor's or financier's own acts or omissions that would qualify as an act of tort).

Strict liability

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

No, in the Netherlands there is no regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft.

Third-party liability insurance

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

Yes. There is no Dutch law requirement that insurance is placed with insurers or underwriters in the Netherlands.

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UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgements and policy and legislative developments of the past year?

No updates at this time.

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