

What are the issues arising from aircraft mortgages?

An aircraft mortgage is a form of security usually required by the lender (mortgagee) to ensure repayment of the debt by the borrower (mortgagor). An aircraft mortgage involves the transfer of title and/or creation of a legal charge on the aircraft in favour of the mortgagee by the mortgagor.

Unlike mortgages over land, there is relatively little statutory interference in the terms and conditions of aircraft mortgages. The aircraft mortgage documents usually provide for all of the contractual terms and conditions which have been agreed between the parties.

There is however no prescribed form for aircraft mortgages as such documents are usually tailored to suit the specific facts and circumstances on each occasion, but certain common provisions are included in the aircraft mortgage document such as: representations and warranties that the owner owns the aircraft free of encumbrances, that the aircraft has been properly registered with the appropriate authority(ies), requirements to mark the aircraft displaying the mortgagee's interest, strict obligations concerning insuring the aircraft, covenants concerning the certificates, licenses, permits and authorizations required to operate the aircraft, circumstances when the mortgage may be enforced and the enforcement action that the mortgagee may take, etc.

The aircraft as well as the aircraft mortgage(s) must be registered with the appropriate authority (ies). The issue that may arise is 'in whose name would the aircraft be registered'. The general requirement is that the aircraft should be registered in the name of the Operator, i.e. the airline. There is also a column in the certificate of registration showing the name of the owner.

Where the mortgagee is not the owner of the aircraft, he can apply for a noting of his interest in the aircraft register and this fact should be a term of the Deed of Mortgage or other arrangement between the parties.

The issue of registration will however be resolved when the Registry of Legal interests in Aircraft is established, considering the fact that a mortgage is a registrable instrument.

Regarding the issue of aircraft deregistration, the question of who can apply for deregistration of the aircraft can be avoided if the parties make provision for this issue in the mortgage or lease

agreement as to when the mortgagee or mortgagor can exercise the right of deregistration. The person in possession of the certificate of registration, which is usually the Operator, is the party that can apply for deregistration of the aircraft because of the requirement to return the certificate upon deregistration. Where the Operator is not the owner of the aircraft, the authorities might be reluctant to deregister the aircraft and may request for a court order in favour of the party other than the Operator.

Mortgagees are advised to insist on deposit of the certificate of registration of the aircraft in their possession, whilst the Operator would hold a certified true copy of the original; to serve as an additional safeguard. A deregistration Power of Attorney may also be executed in favour of the mortgagee.

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