COUNTRY COMPARATIVE GUIDES 2021

The Legal 500 Country Comparative Guides

Bahamas

AVIATION FINANCE & LEASING

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This country-specific Q&A provides an overview of aviation finance & leasing laws and regulations applicable in Bahamas.

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BAHAMAS
AVIATION FINANCE & LEASING

1. What international aviation conventions has your jurisdiction signed and/or ratified?

The Bahamas has ratified the following international aviation conventions:

1. The 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention) [ratified on 23/5/1975]
2. The 1944 Convention on International Civil Aviation (Chicago Convention) [ratified on 27/5/1975]
3. The 1944 International Air Services Transit Agreement [ratified on 27/5/1975]
4. The 1947 Convention on the Privileges and Immunities of the Specialized Agencies [ratified on 17/3/1977]
5. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) [ratified on 20/12/2006]
6. The 1961 Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier (the Guadalajara Convention) [ratified on 15/5/1975]
7. The 1963 Convention on Offences and Certain Other Acts Committed on Board (the Tokyo Convention) [ratified on 12/6/1975]
8. The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Convention) [ratified on 11/8/1976]
9. The 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the Montreal Convention) [ratified on 27/12/1994]
10. The 1991 Convention on the Marking of Plastic Explosives (the Montreal Convention) [ratified on 21/5/2008]

The Bahamas has signed the following international aviation convention on the 28th May 1999 but has not ratified the same:

1. The 1999 Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention)

2. If your jurisdiction has signed and ratified the Cape Town Convention: a. Which qualifying declarations (opt-in and opt-out) has your jurisdiction made under the Cape Town Convention? b. Does the Cape Town Convention take priority over conflicting national law?

a. Which qualifying declarations (opt-in and opt-out) has your jurisdiction made under the Cape Town Convention:

The Cape Town Convention has not been signed or ratified by The Bahamas.

b. Does the Cape Town Convention take priority over conflicting national law?

The Cape Town Convention has not been signed or ratified by The Bahamas.

3. Will a court uphold the choice of a foreign governing law in respect of the following contracts and if so, please also state any conditions or formality requirements to this recognition a. Lease and b. Security document (for example, mortgage)?

a. Lease

A Bahamian Court, in deciding an issue with respect to a lease which provides for a foreign governing law will uphold the choice of a foreign governing law.

b. Security document (for example, mortgage)

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A Bahamian Court, in deciding an issue with respect to a Security document which provides for a foreign governing law will uphold the choice of a foreign governing law.

4. Please confirm whether it is (i) customary and (ii) necessary to also take a local law mortgage and if so, why?

As, the Bahamian Supreme Court is placed with unlimited original jurisdiction in civil cases, it is not necessary for a local mortgage to be taken for a matter to be adjudicated by it. So long as the object or factual focus of the complaint, and the terms of the security document provide for or support the jurisdiction of The Bahamas / as the seat for arbitration (or other form of alternate dispute resolution), such a complaint can be commenced in The Bahamas.

5. Are foreign judgments recognized and enforceable by courts of your jurisdiction and if so, please also state any conditions or formality requirements to this recognition (for example, do you require a local court order confirming such recognition)?

The Bahamas is not a party to the 1971Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Additionally, despite its being signed on the 2nd July 2019 at The Hague, the Convention of 2 July 2019 on the Recognition and Enforcement for Foreign Judgments in Civil and Commercial Matters is currently not in force. However, subject to compliance with the Reciprocal Enforcement of Judgments Act (Chapter 77, Statute Laws of The Bahamas, 2009 Edition), a final and conclusive judgment for a specified sum of a superior court of the United Kingdom, or the courts of certain Commonwealth countries outside of the United Kingdom, may be registered in the Supreme Court of The Bahamas without the need to litigate the merits of the case in The Bahamas. An application to register a judgment must be made to the Supreme Court within 12 months after the date of judgment, unless the court, in its discretion, extends the period. Where a judgment is registered, the judgment, from the date of registration, has the same force and effect as if it had been a judgment originally obtained in The Bahamas.

If any final and conclusive judgment were rendered by the courts of a country which there is no statutory enforcement in The Bahamas, the courts of The Bahamas would recognize such foreign judgment as a valid judgment, and permit the same to found the basis of a fresh action in The Bahamas and should give a judgment based thereon without there being a re-trial or reconsideration of the merits of the case provided that:

a. such courts had proper jurisdiction under Bahamian conflict of law rules over the parties subject to such judgment;
b. the judgment is for a debt or definite sum of money other than a sum payable in
c. respect of taxes or charges of a like nature or in respect of a fine or penalty;
d. such courts did not contravene the rules of natural justice of The Bahamas;
e. such judgment was not obtained by fraud on the part of the party in whose favour the judgment was given or of the Court pronouncing it;
f. the enforcement of such judgment would not be contrary to the public policy of The Bahamas;
g. the correct procedures under the laws of The Bahamas are duly complied with;
h. such judgment is not inconsistent with a prior Bahamian judgment in respect of the same matter; and
i. enforcement proceedings are instituted within six years after the date of such judgment.

6. Is your aircraft registry an owner-register (registering ownership interests) or an operator-register (registering interests as operator)? Please also state any conditions, procedural steps or formality requirements for such registration and explain how this is evidenced (for example, the issuance of a Certificate of Registration)

The Bahamian aircraft registry is an owner-register. Registration in The Bahamas is evidenced by a Certificate of Registration.

An aircraft may be registered in the Bahamas domestic aircraft register if it is: a. owned by:

a. a natural citizen of the Bahamas;
b. an individual citizen of a foreign state who is lawfully admitted for permanent residence in the Bahamas;
c. a corporation lawfully organized and doing business under Bahamian law; or
d. an individual citizen or a corporation of another State at the discretion of the Director

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General.

An aircraft will not be eligible for a certificate of registration if the aircraft is registered under the laws of any other State.

The following items are required to enable the aircraft registration process to commence:

1. Applicants may request out-of-sequence registration mark after prefix C6- followed by three (3) letters, numbers, or a combination of letters and numbers, free of charge. Notification of availability for the desired registration mark should be received prior to completing forms for registration.
2. Form REG 08 – Application for an ICAO Mode-S Code. On receipt of this form the Authority will issue an ICAO Mode-S Code for C6 registration.
3. FORM REG 01 – Application for Registration of Private aircraft (Director General Discretion). This application must be signed by the aircraft owner, if an individual, company director or authorized representative holding a power of attorney.
4. For aircraft owned by:

i. a foreign company, a certificate of incorporation or equivalent document and a list of company directors not older than 3 months.
ii. a foreign individual, a copy of their passport will be required.
iii. a Bahamian company or an individual, the aircraft must be imported and customs must be cleared.

5. A Power of Attorney/Evidence of Authority, if the application will be signed by a representative on behalf of the aircraft owner.
6. If the aircraft owner choose to nominate an entity to be the Operator, a certificate of incorporation or equivalent document will be required.
7. Fees and Charges. The invoice presented in accordance with the current Scheme of Fees shall be paid at the time of application.

The following items are required prior to the issuance of a certificate of registration:

a. Proof of Ownership (Bill of Sale). The Authority will check for all transactions, so if there is more than one bill of sale all must be sent. When the aircraft owner is the same entity as stated for the de-registration, a bill of sale is not required.
b. De-registration or Certificate of Non-Registration. If the aircraft has been previously registered in another State, the Authority must receive from the previous State of Registry, confirmation of that last aircraft owner. This can be in the form of the deregistration or a separate notification. If the aircraft is new and has not been previously registered in another State, then a statement of non-registration is required from the State of Manufacturer. The Authority must receive notification directly from the previous State of Registry via email.
c. Form REG 09 –Application for Registration of a Mortgage, if applicable.Except for the proof of ownership, copies of the originals are sufficient to be sent to the Authority.

The registered owner or operator should nominate a representative to be the main point ofcontact throughout the process. Owners, or their nominated representatives, are therefore advised that if the aircraft does not meet certification standards then the registration exercise cannot be continued.

7. Is there a security document register in your jurisdiction where a mortgagee's interests will be recorded? If so, please also state any conditions, procedural steps or formality requirements for such registration and explain how this is evidenced (for example, the issuance of a certificate or official stamp on the security document)

Pursuant to Section 9 of the Civil Aviation Authority Bahamas Act, 2021 (CAABA), the CAAB must maintain records of all documents which affect title to, or any legal or beneficial interest in (a) any civil aircraft registered in The Bahamas; (b) any aircraft engine, propeller, rotor, appliance, or spare part intended for use on any aircraft registered in The Bahamas. No document affecting title to, or any interest in, such registered aircraft engines, propellers, rotors, appliances, or spare parts shall be valid, except between the parties thereto, unless it is recorded in that system. The validity of any document so recorded, unless otherwise specified by the parties thereto, shall be determined under the laws of The Bahamas. We understand that the system atthe CAAB is currently being implemented and there are no current formalities.

In addition, all security documents may be recorded at

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the Bahamian Registrar General's Department pursuant to the provisions of the Registration of Records Act (the "RRA").Once the document is duly presented for recording, upon its being processed it will bear an official stamp certifying its recording and a system reference for the same. To be clear, the RRA is the only Bahamian statute that deals with securing priorities in this jurisdiction. In particular, Section 10 of the RRA provides that where competing interests are involved, a document has priority from the date it is lodged for record at the Registry of Records (not from the date of the execution of the document). However, this protection is afforded only in respect of a document which deals with land, goods and effects situate in The Bahamas. If the assets provided as security are not situate in The Bahamas, then it will not be possible to secure priorities in this jurisdiction, although we would note that recording the relevant security document may have the benefit of placing a third party on notice of the existence of the same. With respect to recording at the Registry of Records, the formalities are as follows:

i. The original documents bearing original signatures must be submitted for recording;
ii. The margin on page one of the security documentmust bear the signature, name, address and occupation of the person responsible for preparing the security document.
iii. An affidavit must be sworn by each witness to the execution of the security documentbefore a notary public.If execution takes place outside of The Bahamas, the affidavit must be apostilled or legalised for use in The Bahamas.If the execution of the security documentis not witnessed, then each executing party must swear an affidavit of due execution.

8. What is the effect of registration of: a. Ownership interest (for example, proof of title to third parties of ownership) b. Lease (for example, perfects the status of the Lessor under the Lease) c. Security document (for example, secures priority over later registered security). If there are any interests that could rank prior to the security document please state these

a. Ownership interest (for example, proof of title to third partiesof ownership)

The effect of registration of Ownership interest in The Bahamas is proof of title to third parties of ownership.

b. Lease (for example, perfects the status of the Lessor under the Lease)

The effect of registration of a Lease in The Bahamas is proof to third parties of leasehold interest.

c. Security document (for example, secures priorityover later registered security). If there are any interests that could rank prior to the security document please state these

The effect of registration of a Security document in The Bahamas is to establish, where there are competing interests,priority over later registered security.Please see our response under question 7 above.

9. What types of lease are recognized in your jurisdiction (for example, translation, notarization, apostille, legalization etc.)?

Legal documents for use in The Bahamas must be authenticated by the Embassy or a Bahamian Consulate, or by means of an Apostille issued by the Secretary of State. (This only applies to countries which have signed the Hague Convention on Documents). In the absence of an Apostille, the document requires notarization by a Consular Officer. Documents executed in the United States in particular, must have a notarial certificate issued by the County or Circuit Court Clerk of the administering county. The signature of the County or Circuit Court Clerk certifies the signature of the Notary Public who notarizes the document.

10. What formalities are required to perfect Lessor's rights under a lease in your jurisdiction?

The perfection of rights held by a lessor is subject to the terms of the Lease which govern the Lessor's liberty to invoke specific rights. If not specifically provided for, the Lessor's may invoke its rights pursuant to the Lease. Please see our response at question 7 above which applies *mutatis mutandisto* a Lease.

11. Are the ownership rights relating to engines recognized as separate and distinct from the ownership of the rest of the aircraft in your jurisdiction? Please highlight any separate registration, filing or additional formalities that are required to be completed to perfect Lessor's

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interest in the engines

The ownership rights relating to engines are nowrecognized as separate and distinct from the ownership of the rest of the aircraft in The Bahamas, pursuant to Section 9 of the CAABA.Please see our response at question 7 above which applies *mutatis mutandisto* interests in aircraft engines.

12. What form does security over aircraft generally take in your jurisdiction?

There are no particular terms or characteristics a security document must take.

13. Are there any particular terms or characteristics that such a security document must take (for instance, a cap on the secured liabilities)?

N/A

14. Are there any perfection requirements for such security document? If so, please state any conditions, procedural steps, formality requirements or documentation (for example, corporates, list of directors etc.) required to effect this

There are no “perfection” requirements for such security document. However, please see our response under question 7.

15. Summarize any captive insurance regime in your jurisdiction as applicable to aviation.

The Bahamashas supported captive insurance industry for over 50 years. The insurance legislative frameworkin The Bahamas vests regulatory oversight of captives in the Insurance Commission of The Bahamas, a body which is known to be pragmatic in its approach.There is no captive insurance regime specific to aviation. The establishment, licensing and business operation of captive insurance companies in The Bahamas are governed by the External Insurance Act, Chapter 348 (“EIA”) and the various External Insurance Regulations.

Some of the principal features of a captive insurance company include that they (i) must be registered as External Insurers under the EIA and registration is renewable annually; (ii) must have a minimum of two directors; and (iii) must appoint a resident representative. Types of captives in The Bahamas include single parent captive, group captive, association captive, segregated cell captive. The capital requirements will depend on the type of captive and are approved by the Insurance Commission of The Bahamas.

16. Are cut-through clauses under the insurance and reinsurance documentation legally effective in your jurisdiction?

These clauses are not unlawful in The Bahamas.

17. Are there minimum requirements for the amount of third-party liability cover that must be in place in your jurisdiction?

There are no specified mandatory insurance requirements for third-party liability cover that must be in place in The Bahamas.

18. Can a mortgagee (or equivalent security interest holder) or lessor following an event of default under a mortgage (or equivalent security document) or lease, respectively, take possession of the aircraft without judicial intervention in your jurisdiction? Please also state any conditions, procedural steps, formality requirements or documentation (for example, original, legalized, translated Lease/Mortgage, corporates etc.) required to effect this

The liberty of a mortgagee to take possession of his security is only limited by the provisions of the relevant mortgage document. Customarily, in The Bahamas the possession of a mobile asset due to an event of default is effected by way of judicial intervention. In order to effect possession of security by way of judicial intervention, the original mortgage will be required to support the application.

19. How can a mortgagee (or equivalent security interest holder), lessor under a lease or designee/beneficiary of an IDERA deregister the aircraft? Please also state any conditions, procedural steps, formality requirements or documentation (for

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example, original, legalized, translated Lease/Mortgage/IDERA etc.) required to effect this

Deregistration would be effected by way of obtaining a Court Order which mandates the de-registration of the aircraft.In the event that the mortgagee / lessor is also the owner of the aircraft, deregistration can be effected directly by them as owner by submission of Form REG 03 -Application for De-registration. The application for de-registration, is reviewed primarily as an administrative formality. Once the application is complete a Certificate of Deregistration would be issued to the applicant.As The Bahamas registry is an owner registry, no consent is required of the mortgagee or lessor to deregister an aircraft from The Bahamas.Deregistration of an aircraft is a straightforward and typically can be effected between twenty-four (24) to forty-eight (48) hours; as indicated above no co-operation from mortgagee / lessor is required.

20. Can the government or the lessee lawfully prevent the repossession or deregistration and if so, in what circumstances

For the government or the lessee to prevent the repossession or deregistration such an entity would be required to be joined to the relevant action for repossession or deregistration and show cause why such steps should not be ordered.

21. If judicial intervention is required, please describe the process? Please also state any procedural steps, length of time to complete and advise as to documentation required

Judicial Intervention is effectedby the filing of an Originating Summons (in the main) or a Writ of Summons, setting out the particulars of the relationship between the parties and the event(s) of default which give rise to the request. The security document will need to be adduced and the relevant portions which empower the steps of the mortgagee identified. This process can range anywhere from three (3) to eleven (11) months if protracted. All of the relevant correspondence passing between the parties in relation to the security document will be required to support the application.

22. How is legal title transferred under the laws of your jurisdiction? Please also state any conditions, procedural steps, formality requirements or documentation (for example, corporates etc.) required to effect this

Legal title is transferred by way of, and effective at, the agreement of the parties to the transfer of legal title (whether for value or in the form of a gift).

23. Are there any restrictions on the sale of an aircraft following enforcement (for example, the requirement to obtain a court order or conduct a public auction or other action in order to sell the aircraft upon enforcement)

While there are no restrictions on the sale of an aircraft following enforcement, customarily a court order is obtained to provide for a public auction or sale through other means.

24. Would lease rentals be subject to tax (for example, withholding or income tax)? Please also state if there are any conditions for such tax to be imposed and any steps usually taken to mitigate this

Lease rentals in The Bahamas would trigger Value added tax chargeable at twelve percent.

25. Would a sale of an aircraft in your jurisdiction incur sales tax? Please also provide details of amount or calculation and any steps usually taken to mitigate this

The sale of an aircraft in The Bahamas would trigger Value added tax chargeable at twelve percent.

26. Are there any restrictions on the import or export of aircraft in your jurisdiction and would such importation or exportation incur any liability as to customs or taxes? Please also state if any consents or approvals are required and the procedural steps taken to obtain these, and any procedural steps or formality

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requirements to mitigate any taxes

There are no restrictions on the import or export of aircraft in The Bahamas and such import does not incur any customs liability in The Bahamas.

27. Are there any foreign exchange restrictions on transfers of funds

In The Bahamas resident individuals and companies for Exchange Control purposes require consent from the Exchange Control Department of the Central Bank of The Bahamas (Central Bank) to deal in foreign currencies. The permission is typically granted and entails the purchase of the foreign currency at a premium. Similarly, non-resident individuals or companies for Exchange Control purposes, require Central Bank consent to deal in Bahamian dollars.

Licensed business operating inside The Bahamas are permitted to establish and maintain foreign currency operating accounts, without reference to the Central Bank, of up to US$100,000 only to facilitate payments for trade, and to be financed only from revenues generated in foreign currency. The following conditions apply:

(i) Credits or deposits to the accounts would be restricted to foreign currency revenue earned in the normal course of business, except where such proceeds are converted into Bahamian dollars to meet expenses inside The Bahamas.

(ii) Utilization of the accounts would be confined to trade-related payments for goods and services obtained from outside The Bahamas, repayment of foreign currency loans and advances, and conversions into Bahamian dollars.

(iii) No payments would be permitted in foreign currency to companies or persons deemed resident in The Bahamas for Exchange Control purposes.

(iv) No cash would be permitted to be withdrawn from the accounts.

Stamp duty at a rate of 1½ % is incurred on amounts remitted or transferred outside of The Bahamas. This rate is fixed and cannot be reduced or eliminated. The stamp tax is deducted by the remitting bank and paid to the Government.

28. How successful have foreign creditors and lessors been in enforcing their security and lessor rights over and successfully repossessing aircraft in a timely manner?

Due to the sensitivity of Bahamian Courts to the need of Creditors to realize their securityin real time in matters of commerce;foreign creditors are successful in enforcing their security in a timely mannerin The Bahamas.

29. What government led reforms affecting creditor and lessor rights are currently underway in the aviation sector in your jurisdiction?

The Government of TheBahamas has expressed an interest in in becoming a party to the Cape Town Convention.

30. Please describe any interesting legal development in your jurisdiction (for instance, decided court cases or arbitral awards) which affect creditor and lessor rights?

Nil

31. Please discuss any relevant governmental regulations implemented in your country to help alleviate the financial and other difficulties faced by airlines in your jurisdiction caused by CoVid 19 and whether that will impact rights of lessors (who lease aircraft to the airlines) and lenders (who finance such aircraft which are mortgaged in favour of the lenders)? Are such governmental regulations expected to be in place until the difficulties faced by airlines caused by the CoVid 19 subside or are they more long term?

Nil

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