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Contributing Editor

Paul P. Jebely

The Hague Court of Arbitration for Aviation



Chambers

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Published by
Chambers and Partners
165 Fleet Street
London
EC4A 2AE
Tel +44 20 7606 8844
Fax +44 20 7831 5662
Web www.chambers.com

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INTRODUCTION

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Paul P. Jebely is the founder and serves as the present Chairperson of The Hague Court of Arbitration for Aviation. Separately, Paul is also widely regarded as the leading private aviation lawyer globally, focusing exclusively on advising ultra-high net worth individuals and their businesses. He has served as lead counsel on nearly USD23 billion in aviation transactions in addition to restructuring, dispute and enforcement matters. Paul has been the recipient of numerous legal and aviation industry awards, including “Aviation Trailblazer”, “Outstanding Contribution to African Aviation Development”, “Private Aviation & Yachts Lawyer of the Year” and “Private Client Law-

yer of the Year”. He has been repeatedly noted by numerous aviation, legal and business publications and other media for his aviation expertise. He is qualified to practise law in England, the USA (New York and Washington State) and Canada (Ontario). He completed undergraduate and law degree programmes at Trinity College, University of Toronto and Osgoode Hall Law School. He also completed a two-year senior executive leadership programme at Stanford Law School. He is presently also Visiting Scholar at the Nelson R. Mandela School of Law at The University of Fort Hare, South Africa.

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Arbitration and Mediation for Aviation

Aviation v inertia

In physics, inertia is the tendency of an object to resist changes in its state. Newton's first law provides that every object will remain at rest or in uniform motion in a straight line unless compelled to change its state by the action of an external force. The vast global aviation industry has been at war with inertia every second of every day for over a century. In the most obvious sense, we prevail constantly in taking flight by using thrust and lift against inertia. Thankfully so, given that our industry is a crucial artery of world commerce which contributes nearly USD3 trillion to its gross domestic product annually. We have, however, largely failed in the battle against inertia in a less obvious sense over the last century.

Ours is an industry where contractual disputes have been an undeniable reality for over a century, yet our preferred methods of contractual dispute resolution have been grounded in the archaic. Thankfully, we are now amidst an industry and legal paradigm shift – slowly, then suddenly. But a paradigm shift does not happen in a vacuum. It starts as a whisper, an idea that slowly gains momentum, challenging the status quo, until, suddenly, the “new” becomes the norm.

Inertia is a key force behind why aviation was somehow left behind and so remained as one of the final nearly untouched frontiers of arbitration and mediation prior to the launch of The Hague Court of Arbitration for Aviation (The Hague CAA). Two years since that launch, The Hague CAA already stands as a beacon of specialised knowledge and expertise in aviation contractual dispute resolution, and it is just getting started.

Far from being a solution looking for a problem, The Hague CAA was born from an awakening by aviation professionals that aviation contractual disputes require not just resolution, but resolution through the lens that understood the complexities of aviation, the commerce of aviation, and the community of aviation. As a non-profit enterprise with the mission to “promote the use of arbitration and mediation as preferred methods of contractual dispute resolution throughout the vast global aviation industry, wherever and however helpful to the parties involved”, The Hague CAA

symbolises a movement towards evolved dispute resolution for the aviation industry. It is a cross-industry, cross-cultural, cross-discipline, and collaborative venture that is supported by a core group of nearly 150 senior aviation, arbitration and mediation professionals around the world – not to mention dozens of leading arbitrators and mediators on its lists of neutrals – and one of the oldest and most experienced international arbitration and mediation institutions in the world.

The way we were

The best aviation industry attorneys live in the blank white spaces between the lines and at the edges of contracts, where law meets commerce and strategy in real time rather than frozen in time. They can, at will, escape the gravitational pull of precedent where it best serves the needs of their clients and companies to do so. This includes advising their clients and companies to choose the method or methods of dispute resolution which put them in the best and least painful position should a contractual dispute or need to enforce arise. While a multitude of variables guide this choice in any specific transactional context, it is crucial to recognise that the best choice may no longer be the one that is square-bracketed in the precedent form of document used.

Historically, the hallowed halls of justice that are national courts of law in various jurisdictions have been the primary battlegrounds for contractual disputes within the aviation industry. Yet, litigation (particularly that involving multiple jurisdictions and complex engineering and technical subject matter) has proven to many in the aviation industry to be a ferocious, unedifying, publicly embarrassing and astoundingly expensive exercise when the only clear winners are the battalions of attorneys on either side. It is often a process that consumes vast reserves of bandwidth, capital and sanity. What is worse, the outcomes of litigation occasionally veer into the realm of absurdity when left to the judgement of those bereft of industry-specific knowledge or – worse still – neutrality.

While the exact global total is challenging to pinpoint, it is nevertheless clear that current worldwide arbitration alone represents a staggering sum in dispute that certainly exceeds USD300 billion. The inescap-

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able fact is that in many other industries the strain of litigation has helped usher in the renaissance of arbitration and mediation, which are now embraced as preferred methods for resolving complex transnational contractual disputes generally. The 20th century witnessed arbitration and mediation solidifying their place as the dispute resolution methods of choice in industries such as construction, commodities, shipping, and insurance, where the technical expertise of the arbitrator and mediator was highly valued; this was, in effect, what is now regarded as specialised arbitration and mediation. Indeed, this preference towards arbitration and mediation is not merely a sectoral phenomenon, but rather an international trend. It is also worth noting that courts around the globe, both common law and civil law jurisdictions, increasingly advocate for or at least endorse arbitration, particularly in the specialised context.

It is difficult to reconcile these facts with the fact that the vast global aviation industry somehow remained behind as one of the last nearly untouched frontiers of arbitration and mediation. Ignorance may have been an excuse, but no longer in the case of aviation attorneys at least. It is, however, apparent that two factors influencing persistent inertia within some corners of the industry are reliance on precedent documentation and, bluntly, the greater financial incentives often tied to litigation. On this latter, admittedly controversial point, it does often stem from entrenched litigation practices and the economic benefits they present to certain stakeholders, rather than an objective assessment of the benefits of arbitration and especially mediation to the parties involved.

In the realm of aviation, evolution is inevitable. The history of aviation shows that dismissing advancements based on past endeavours (especially in ignorance of their scope and calibre) while begging the nearly-rhetorical question “is it necessary?” often proves to be myopic in the end. Much like a finely aged wine poured afresh, these age-old methods of conflict resolution have matured. They have rapidly adapted to the demands of our modern industry and era, particularly specialised arbitration and mediation as offered by The Hague CAA, and now offer a panoply of benefits to the aviation industry that warrant much better informed consideration than in days gone by.

The benefits of arbitration for aviation

Historically, aviation industry market participants have been largely reticent towards due consideration of arbitration. Such resistance stems largely from cultural factors and has been fuelled by inertia and standardised documentation. Still, to seasoned deal-makers, litigation is often viewed as a last resort for settling contractual disputes after they arise, whereas arbitration is often viewed as a tool for managing business relationships in the context of contractual disputes that may arise.

In the complex and often turbulent landscape of cross-border aviation deal-making, the five key pillars of efficiency, confidentiality, flexibility, neutrality and finality serve to elevate arbitration as the preferred method of dispute resolution and as a sturdy foundation upon which rests what is by far the most expansive platform for enforceability around the world.

Efficiency

Arbitration can offer aviation market participants an effective antidote to the costly and time-consuming quagmire of litigation. It empowers these parties to shape the proceedings, curbing the scope of the dispute resolution process, and in turn, helping to reduce costs. Bypassing the often tortuous paths of court procedure, arbitration can assist in avoiding the pitfalls of delays and unanticipated costs. Of note, the traditional courtroom spectre of procedural gamesmanship or weaponisation of process is greatly diminished in arbitration. Moreover, the limited scope of discovery compared to litigation in some jurisdictions also serves to truncate timelines and preserve resources, thereby enhancing overall efficiency. This system thus preserves parties’ energies for their true purpose: reaching a fair and tenable resolution to their dispute. In arbitration, efficiency is not a mere buzzword but a fundamental design attribute.

Confidentiality

Among other things, aviation’s volatile landscape of fierce competition and rapidly evolving dynamics necessitates a measure of discretion in handling contractual disputes. In most jurisdictions (most notable in the context of international aviation by published case volume being the United States, England and Canada), court proceedings, by their public nature,

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can inadvertently expose business conflicts to the public. In contrast, arbitration in most cases offers a veil of confidentiality, protecting businesses' reputation and avoiding a "trial by press release". For an industry where public perception can significantly impact trajectories, confidentiality is not a mere benefit but a compelling requirement.

Flexibility

Arbitration's inherent flexibility affords parties significant control over the proceedings, much like a pilot and co-pilot commanding a flight. From the rules governing the proceedings to the choice of arbitral tribunal, language, and venue (including virtual venues), arbitration offers a level of customisation unique to each dispute, paving the way for a more efficient and palatable resolution for the parties compared to litigation.

Neutrality

In a courtroom, the tune of resolution is occasionally played in discordant notes that are bound by nationalistic or other strings that bind. In stark contrast, arbitration provides a platform of neutrality in the often multi-jurisdictional (and multicultural) theatre of aviation contractual disputes. By enabling the selection of unbiased arbitrators with no geographical or personal ties to the disputing parties, arbitration ensures an impartial approach to dispute resolution.

This process significantly reduces the notorious "home court" advantage occasionally sometimes apparent – sometimes subtle, but still evident – in court litigation, which can skew the balance of justice. The neutrality of arbitration dilutes any disproportionate influence of a party's domestic laws or practices on the proceedings. In essence, it offers an unprejudiced terrain, fostering a fair and balanced environment indispensable for effective dispute resolution in the international aviation industry.

Finality

Appellate review of arbitral awards is, in most cases, very limited. Judicial scrutiny of awards is typically confined to issues such as jurisdiction, procedural fairness or public policy. In contrast, many national court systems permit rigorous (and often very lengthy) appellate review of first instance judgments and often

permit reconsideration of both factual matters as well as matters of law. Avoiding appellate review mechanisms reduces additional litigation costs and delays and enhances the efficiency and finality of the process.

The New York Convention: a 172-state enforceability solution

Given the global footprint of the aviation industry, the enforcement of court judgments often requires a prevailing party to somehow navigate differing legal systems and potential for further contention. The task of ensuring that a resolution in one jurisdiction holds force in another is no small feat, and often a prescription for failure. This is where arbitration, under the robust enforcement framework of the New York Convention (the common name for the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards), stands very well apart from litigation.

Consider a simple but poignant illustrative truth: a properly constituted arbitral award is more readily enforceable in most circumstances in more foreign jurisdictions than, for example, either an English or New York court judgement. With the endorsement of 172 signatory nations, the New York Convention not only serves as a cornerstone of international arbitration, but is also often described as the single most successful treaty in all of private international law. Much like an international peace treaty that seeks to harmonise relations between nations, this convention provides a comprehensive framework to ensure the global enforcement of arbitral awards.

The New York Convention mandates contracting states to recognise and enforce arbitral awards issued abroad, subject to a narrow list of exceptions that relate to very serious defects in the arbitral procedure (such as lack of fundamental due process) or award, thereby casting a wide net of legal jurisdiction that spans the globe. While the undoubtedly high bar for refusal to enforce a foreign arbitral under the New York Convention has been confirmed by courts around the world, the key to successful enforcement of arbitral awards is for parties to nevertheless be aware of peculiarities and risks that arise in each particular jurisdiction where enforcement is sought. Still, in the context of an industry that crosses borders every

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second of the day, this global reach of the New York Convention provides a semblance of predictability and coherence in an otherwise complex and fluctuating international legal environment when it comes to enforcement. This level of certainty and predictability often proves invaluable.

The use of arbitration in aviation contractual disputes

The areas of deal-making where arbitration can potentially demonstrate its transformative potential in the aviation industry are as vast and varied as the industry's deal-making. Arbitration's scope in the aviation industry encompasses a variety of claim subject matters, all predominantly contractual in nature, and also embraces the more specialised segments of the industry.

From the ground up

The potential uses of arbitration extend from the high-stakes realm of aircraft sale and purchase, where many transactions involve monumental sums and critical business objectives, down to the ground-level services that keep our airports, heliports and – soon – vertiports functioning seamlessly.

In the whirl of hangars and tarmac, where maintenance, repair, and overhaul (MRO) services keep fleets airborne, disputes can cause significant delays and financial losses. Similar challenges can arise within the sphere of aviation supply chains and the domain of catering services, often operating under tight schedules and rigorous quality standards. Ground handling services are another area where swift conflict resolution can mean the difference between smooth operations and logistical nightmares. Disputes involving fuel services are often critical due to their direct impact on flight operations. Aircraft charter disputes are a further example, which often involve a complex interplay of contractual terms, operational realities, and international regulations. Aircraft lease returns can quickly trigger contention in a critical segment of the industry where equipment and time equals money. Finally, it is worth noting that arbitration can serve as a crucial tool for pursuing and managing investor-state claims, which can involve significant financial stakes and a complex interplay of national and international laws.

Despite the vastness of the forgoing list, it is critical to keep in mind the tenet that the aviation industry is far from monolithic, and its complexities and potential far exceed the scope of a single list.

Arbitration and aviation finance generally

Any blanket assertion that arbitration is unsuitable for aviation finance or leasing requires a change in perspective. Indeed, it has long been seen as suitable, but historically mostly in situations where there were jurisdictional limitations on the enforcement of court judgments. Regardless of whether purely in-rem actions are arbitrable, the value of arbitration in aviation finance is not diminished, given the wealth of other dispute contexts it can effectively address.

Contrary to the myth that arbitration is unsuited for financial disputes generally due to the limitations on the reach of interim measures ordered by arbitral tribunals, numerous mechanisms exist within arbitration that allow for emergency and interim relief and uphold the enforceability of such orders. Furthermore, depending on the applicable laws, disputing parties in arbitration can often also seek interim relief from courts in support of an arbitration. Moreover, many complex financial transactions can benefit from the procedural efficiency, flexibility, privacy, and expert knowledge that arbitration offers. The rising use of arbitration in the banking and finance sector testifies to this evolving perspective. In fact, the London Court of International Arbitration reported that, at 26%, disputes in the banking and finance sector represented its biggest industry sector in 2021, overtaking energy and resources disputes. It is not alone in this trend, as an increase in the sector can also be seen in other arbitral institutions as well.

Arbitration and the Cape Town Convention specifically

There exists a degree of mostly misinformed apprehension surrounding the interplay between the application of the Cape Town Convention (CTC) and arbitration. Importantly, it is not the intention of arbitration, particularly within specialised contexts, to undermine or supplant the CTC in any way. On the contrary, when the CTC does not apply or applies only indirectly, arbitration serves as a valuable adjunct tool, drawing its strength from the New York Convention's robust

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support for the enforcement of arbitral awards more generally.

The CTC, through its asset-based remedies, seeks to enable rapid and predictable recovery and redeployment of aviation assets, while arbitration's primary focus is addressing rights beyond the scope of these remedies where available. For the time being, no arbitral court is defined as a "court" under the CTC. Of note, this means that the CTC's Article 42 jurisdiction provisions do not apply to any arbitral court. As such, any arbitral order seeking enforcement lacks the CTC-backed authority of an equivalent court order. Furthermore, the New York Convention provides guardrails to prevent overreach by limiting the enforcement of arbitral awards in certain scenarios. Therein lies the true barrier between CTC and arbitration – the challengeability of an arbitral award that overreaches in so far as two of the rather limited bases for a New York Convention contracting state not recognising and enforcing an arbitral award apply: (i) if the subject matter of the arbitral award is not capable of settlement by arbitration under the law of the contracting state (which would be the case if the CTC applied), or (ii) if the award goes beyond the scope of the submission to arbitration (which, again, would be the case if arbitration applied).

The benefits and use of mediation in aviation contractual disputes

Though much substantive focus and bandwidth is placed on arbitration, it is crucial to highlight the equally significant role that mediation can play in resolving aviation contractual disputes. While there are many forms of mediation, with the three main categories being facilitative, evaluative and transformative, we will focus on the most common facilitative form for our purposes here.

Similar to arbitration, mediation offers numerous advantages tailored to the complex and cross-border nature of the vast global aviation industry. To begin with, mediation, like arbitration, provides an efficient, confidential, and flexible method of dispute resolution. The typically voluntary and collaborative nature of mediation can often lead to a time- and cost-efficient process to reach resolutions compared to the naturally more costly and adversarial processes of arbitra-

tion and especially of litigation. This efficiency is particularly valuable where operational delays can have substantial financial and logistical repercussions, for example. Additionally, mediation also maintains confidentiality, safeguarding sensitive business information and protecting the reputations of the parties involved. This is analogous to the confidentiality benefits offered by arbitration, ensuring that the aviation contractual disputes do not become public spectacles.

The flexibility of mediation allows parties to control the process and outcomes more directly even compared to arbitration, but especially compared to litigation. The mediator facilitates dialogue but does not impose decisions, enabling parties to explore creative solutions that might be unavailable in arbitration or litigation. This adaptability is crucial in the aviation industry, where disputes often involve a labyrinth of technical, regulatory, and commercial considerations. By encouraging open communication and fostering mutual understanding, mediation can preserve and even strengthen business relationships, which is invaluable in the interconnected world of aviation.

Much can also be said for an approach that allows parties to benefit from the collaborative and flexible nature of mediation while also having the option to transition to arbitration (or litigation, as the case may be) if a resolution cannot be reached. This ensures that the process remains efficient and that a binding resolution is ultimately achieved, providing parties with both the benefits of consensual agreement and the certainty of an enforceable decision. This approach is particularly useful in high-stakes, complex disputes where maintaining control over the process and outcome is essential.

Mediation also transforms the negotiation process by creating a structured environment that facilitates productive dialogue and mutual understanding. It encourages parties to move beyond entrenched positions and focus on underlying interests, enabling them to find common ground and reach agreements that are more likely to satisfy both parties' needs. This approach is particularly effective in emerging disputes in complex transactions where the stakes are high, and the relationships between the parties are critical to ongoing commercial dealings. It is fair to say that

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the role of the mediator(s) in managing emotions, facilitating communication, and helping parties generate options makes the negotiation process more efficient and outcome-oriented.

The Hague CAA

The landscape of arbitration and mediation is dotted with a multitude of generalist institutions around the world. The unique dynamics and needs of aviation fuelled the launch of The Hague CAA – a truly specialised, tenable and neutral arbitration and mediation service designed for and in the genuine service of the vast global aviation industry. It must be noted that the unique mission of The Hague CAA is “to promote the use of arbitration and mediation as preferred methods of contractual dispute resolution throughout the vast global aviation industry, wherever and however helpful to the parties involved.” In this light, the mission of the Hague CAA in service of the industry extends far beyond the institution itself and actually benefits other arbitration and mediation institutions as well. That noted, The Hague CAA has meticulously crafted and continues to meticulously craft the best specialised arbitration and mediation solution for the vast global aviation industry. Thus, the launch of The Hague CAA likely represents the single most significant legal development affecting the vast global aviation industry over the last decade.

Arbitration and mediation “for us, by us”

The Hague CAA truly exemplifies each of the benefits of arbitration and mediation discussed above, and further offers specialised arbitration fine-tuned to the distinctive dynamics of the vast global aviation industry. The true beauty of the “for us, by us” nature of The Hague CAA rests in the fact that it was and continues to be engineered to the contours of aviation contractual disputes by a diverse global consortium consisting of many dozens of senior aviation legal and technical professionals working alongside several dozen senior arbitration professionals under the guidance of a nearly 75 year-old arbitral institution – representing in sum well over 2,000 years of combined aviation expertise and over 2,000 years of combined arbitration (and mediation) expertise.

While generic arbitration and mediation has undoubtedly offered occasional solace, it has failed by design

to address the specialist needs of the vast global aviation industry, and thus failed to garner true engagement. The relatively minor and inconsistent use of arbitration by a global industry with more than USD3 trillion in annual economic activity, where the majority of transactions cross borders, amounts to a drop in the ocean. The Hague CAA's burgeoning efforts – which are even demonstrably benefitting large generalist arbitral institutions – are not just filling a necessary void, they are redirecting the industry's tide one clause at a time.

There are several aspects of the Hague CAA, beyond its specialised nature discussed below, that set it apart from most generalist arbitration and mediation institutions. To begin with, the Hague CAA is a genuine non-profit foundation, which not only lowers the administrative costs for parties involved relative to most other institutions, but also ensures that its mission remains focused on serving the aviation industry. Indeed, it is also notable that the mission of the Hague CAA is in the bona fide service of the aviation industry and not just the Hague CAA itself – to which end its mission statement reads “

The Hague CAA also mirrors the values of the aviation industry in a number of ways. In terms of gender, race, age, geography and other diversity, The Hague CAA stands as one of, if not possibly the most, diverse arbitral institutions globally. Moreover, the Hague CAA's commitment to diversity and sustainability are expressly embodied in its rules and procedures.

While arbitration remains a cornerstone of The Hague CAA's dispute resolution framework, the deep integration of mediation into its offering, underscores a commitment to providing comprehensive, adaptable, and effective solutions for the vast global aviation industry. As discussed above, the benefits of mediation, analogous to those of arbitration and then-some, make it an indispensable tool for managing and resolving the complex, cross-border disputes that characterise the aviation sector.

The role of the NAI and importance of the Hague

The Hague CAA is rooted in the rich arbitration and mediation soil of the Netherlands. To begin with, its arbitration and mediation cases are administered

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solely by the Netherlands Arbitration Institute (NAI). The Hague CAA may be “new”, but NAI was founded in 1949 and has successfully administered over 5,000 arbitration cases alone. It is one of the oldest and most respected international arbitration and mediation institutions in the world. In 2022 alone, the NAI administered a caseload representing more than USD2 billion in dispute worldwide.

It is noteworthy that for the past century or so, the municipality of the Hague has earned its reputation as the international city of peace and justice. Its unique position as an international centre of decision-making and influence has led to it becoming home to more than 200 international organisations, including the Permanent Court of Arbitration and the International Court of Justice. It is now also the default seat of the Hague CAA.

The seat of arbitration, distinct from its physical location, determines the legal framework. Parties may of course choose a seat different from the institution’s default seat. They may also choose a different physical location – though the majority of arbitration and mediation today occurs mostly via electronic means, avoiding much of the need for physical travel compared to the past. For example, an arbitration administered under the Hague CAA arbitration rules may be seated and/or physically held in, say, London, Paris, Dubai, Singapore, Hong Kong or New York. However, the seat affects crucial aspects of an arbitration, such as parties’ access to national courts (for example, for an order to freeze assets by way of interim measures), challenges to tribunal decisions, and enforcement provisions. Jurisdictional support varies, with interventionist courts posing risks and generally best avoided. The Dutch legal system, however, is highly supportive of arbitration, typically intervening only to assist and uphold the process – including, for example, by way of a comprehensive regime for interim measures before a Dutch court.

Specialised expertise

The arbitrators and mediators involved in The Hague CAA bring with them more than just expert proficiency in arbitration and mediation. An arbitrator or mediator’s insights into the operational, regulatory, technical, legal and commercial aspects of the aviation

industry, combined with his or her unique understanding of arbitration, provide a rare blend of expertise that enriches the dispute resolution process. The Hague CAA encourages the use of its two lists of vetted neutrals in both its arbitration and mediation rules.

In terms of arbitration, the first is a list of sole/chair-eligible arbitrators, which consists of highly experienced, “top name” senior arbitrators around the world, a high percentage of whom have experience arbitrating aviation disputes. The second is a list of co-arbitrators, which consists solely of seasoned legal and technical veterans of the aviation industry, with years of practical experience tucked under their wings, who are also trained arbitrators. All mediators on The Hague CAA list are highly experienced in aviation. The Hague CAA also maintains a large and diverse list of senior aviation technical experts, many of whom also serve as members of its one-of-a-kind Technical Standing Committee, which continually provides input and guidance to inform The Hague CAA’s design thinking and especially its rule-making processes.

Specialised rules

The specialised arbitration rules of the Hague CAA are not arbitrary, but carefully crafted to expedite proceedings, improve time and cost efficiency, and avoid absurd outcomes that do not reflect the realities of the industry. Both the arbitration and mediation rules seek to address the industry’s critical pain points with litigation before national courts. There are many, many unique examples to point to, from the electronic submissions to virtual hearings to early determination, but perhaps the most poignant example concerns speed in arbitration in particular. The Hague CAA has broken new ground in the realm of arbitration generally by mandating an unprecedented default expedited procedure with shorter time limits and more potent remedies to reduce delay, providing parties with an arbitral award within only six months from the date of the initial case management conference. The initiation of proceedings, and the proceedings themselves, under the rules are designed to go twice as fast as most international arbitrations. The contrast to litigation is even more pronounced – for example, the median length from the initiation of a claim to the conclusion of a jury or bench trial in civil

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cases in the United States is over 27 months, and that is not accounting for potential appeals.

Critically, The Hague CAA is not frozen in time or stuck to a founding text or treatise. Its very hallmarks are flexibility and party autonomy, which, along with the overall structure of the project, allow it to develop and adapt in response to the needs of its users. In that light, it is worth noting that although its launch was preceded by many months of work on its arbitration rules and procedures, The Hague CAA undertook a wide-ranging industry consultation process immediately following its launch, which resulted in the release of its first arbitration rule enhancements in February 2023, less than seven months of its launch. At the time of publication, a similar process concerning the mediation rules nears its conclusion, with the launch of a major mediation rules update imminent. These innovative rule enhancements bear testimony to the agility and dynamism of The Hague and reflect its commitment to evolving with the industry's needs, mirroring the aviation sector's constant push towards greater efficiency and excellence.

A decades-long mission

The unprecedented early adoption of The Hague CAA is evidenced by the fact that billions of dollars' worth of aviation transactions are known to have included provision for The Hague CAA arbitration and/or mediation in the two years since its launch. The mission of The Hague CAA extends "beyond the courtroom" to fundamentally alter perceptions and practices around arbitration and mediation in the vast global aviation industry. Thus, The Hague CAA is focused on its campaign to "engage, educate and encourage" as it works to demystify arbitration and mediation in large swaths of the vast global aviation industry. While there have been no final awards rendered by any Hague CAA tribunal yet, the absence of a miraculous early caseload should not be misconstrued as a failure or a true measure of The Hague CAA's utility or success. To leverage it as such is intellectually dishonest and adheres to a common trope that ignores the complexity of establishing any specialised arbitration and mediation institution, let alone one initiating a seismic shift in how the global aviation industry resolves disputes – a change that, by its nature, is gradual. The Hague CAA's growing adoption is a clear indicator of

its impact and the industry's readiness for innovative change in this respect, showcasing the potential for collective efforts to drive meaningful advancements.

Specialised arbitration and mediation presently stands as a promising alternative for the aviation industry to traditional court litigation in many cases, and The Hague CAA offers the industry greater expertise, efficacy and efficiency in the resolution of contractual disputes by its industry-specific approach – dynamic, responsive, and acutely attuned to the distinctive nuances of the global aviation industry. As arbitration and mediation slowly but surely continue to be woven into the fabric of aviation deal-making around the world in the years and decades to come, it will progress from "promising alternative" to "standard operating procedure." A new flight plan has been charted by The Hague CAA, the course set, and the destination clear.

The Hague CAA model clauses

The Hague CAA will continue to transform the vast global aviation industry, one clause at a time. To that end, the following short-form model mediation and arbitration clauses may be included in various aviation industry contracts wherever helpful to the parties involved. These short-form model clauses are only for quick reference, and further variations and detailed information and guidance is available on [The Hague CAA website](#):

- Mediation: "The Parties may, at any time and without prejudice to any other proceedings, mutually agree to seek to settle any dispute or part thereof arising out of or in connection with this Agreement through mediation in accordance with the Mediation Rules of The Centre for Mediation at The Hague Court of Arbitration for Aviation for the time being in force."
- Arbitration: "All disputes arising out of or in connection with this Agreement, including any questions regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of The Hague Court of Arbitration for Aviation for the time being in force, which Rules are deemed to be incorporated by reference into this clause."

INTRODUCTION

Contributed by: Paul P. Jebely, **Paul P. Jebely**

There are various optional matters which could be addressed in the arbitration clause, most typically including tribunal composition and place and language of arbitration. In the context of aviation finance and leasing, these also include court-ordered interim relief, conservatory measures and relief pursuant to The Cape Town Convention or other applicable law in the context of aircraft leasing or financing, for example:

- “The agreement of the Parties to arbitrate shall not preclude [the Lessor/a Finance Party] from obtaining orders from a court of competent jurisdiction for speedy interim relief, conservatory remedies and/or relief pending final determination pursuant to the Cape Town Convention or applicable law, for the prompt immobilisation, grounding, safe-keeping, possession, control, custody, maintenance and preservation of the Aircraft and its value, including preservation and protection from third party liens and claims, and the deregistration, export, recovery and delivery up of the Aircraft to [the Lessor/a Finance Party].”

ARMENIA



Law and Practice

Contributed by:

Narine Beglaryan, Arianna Adamyan and Anahit Aloyan

Concern Dialog

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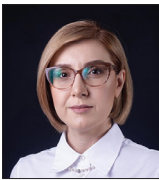
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Concern Dialog is a top-tier, full-service law firm, headquartered in Yerevan, Armenia. It has been a trusted partner for businesses and individuals seeking legal counsel and representation since 1998. The firm is renowned for its work in the areas of corporate law, labour law, competition law, tax law, contract law, family law (including child abduction cases), and regulatory issues. Concern Dialog has extensive ex-

perience in regulatory matters across the TMT, mining, energy, utilities, banking and finance, medical services, real estate, and not-for-profit sectors. In addition to its renowned consulting and transaction practice, the firm's litigation practice is regarded as one of the leaders in Armenia for landmark litigation and arbitration cases. Concern Dialog's a member of TagLaw and Nextlaw.

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

Generally, the transfer of ownership upon completion of the sale agreement is relevant for income/profit tax and VAT purposes. The execution of an aircraft or engine sale agreement, including the sale of an ownership interest in an entity owning an aircraft or engine, does not, in itself, create an obligation to pay tax in Armenia, irrespective of the location of the asset or the seller's domicile.

1.1.2 Enforceability Against Domestic Parties

Under Armenian law, it is not required for an aircraft sale agreement to be translated, certified, notarised, or legalised in order to be enforceable against a domestic party. However, if legal proceedings are initiated before Armenian courts, any documents in a foreign language must be translated into Armenian in order to be admissible as evidence in such proceedings.

1.2 Transfer of Ownership

1.2.1 Transferring Title

In Armenia, the title to an aircraft is transferred through a valid written agreement between the seller and the buyer. Although the owner or operator must record the transfer, such registration is declaratory only and does not, in itself, affect the transfer of title. The transfer of title extends to all parts of the aircraft included in the agreement, such as auxiliary power units (APUs).

The sale of ownership interests in an entity that owns an aircraft or engine does not, in itself, constitute a transfer of title to the aircraft or engine. In such cases, the legal owner of the aircraft remains the entity, notwithstanding any changes in the ownership structure of that entity.

1.2.2 Sales Governed by English or New York Law

Under Armenian conflict of law rules, the ownership rights and other proprietary rights over means of transportation and other property subject to state registration are governed by the law of the state in whose public register the rights over such transportation means or property are recorded. Accordingly,

if the recognition of title concerns an aircraft that is already registered, this rule would apply.

Where the recognition of title concerns an aircraft that is yet to be registered, the emergence and termination of ownership rights and other proprietary rights over the property that is the subject of the transaction shall be governed by the law chosen by the parties.

While Armenian law does not establish specific statutory requirements for the form of a bill of sale, to evidence the transfer of title in accordance with the essential elements of a sale and purchase agreement, the bill of sale must include:

- a complete description of the aircraft sufficient for identification purposes (including quantity, if applicable);
- a clear statement evidencing the full transfer of ownership; and
- identification of the parties to the transaction.

1.2.3 Enforceability Against Domestic Parties

A bill of sale does not need to be translated, certified, notarised or legalised in order to be enforceable against a domestic party under Armenian law. Translation may be required by competent state authorities only for purposes of filing or record-keeping. If the document is submitted as evidence before an Armenian court, an Armenian translation would be required for admissibility purposes (see **1.1.2 Enforceability Against Domestic Parties**).

1.2.4 Registration, Filing and/or Consent From Government Entities

An aircraft may be registered in the Republic of Armenia if:

- the owner and/or operator is:
 - (a) the Republic of Armenia;
 - (b) a municipality of the Republic of Armenia;
 - (c) a citizen of the Republic of Armenia; or
 - (d) a legal entity registered in the Republic of Armenia; and
- the aircraft has the aircraft type certificate issued or recognised by the Civil Aviation Committee; or
- the aircraft is not registered in another country.

The aircraft registered in Armenia and sold abroad may be deregistered from the Armenian register. The list of documents is determined subject to submission to the Civil Aviation Committee in order to register or deregister an aircraft. No requirement for prior consent of the Civil Aviation Committee is established.

Government consent may be required as a prerequisite to the execution of a bill of sale if the transaction involves the transfer of an ownership interest in an entity (rather than the aircraft itself), and such transaction results in a concentration subject to declaration to the Competition Protection Commission of the Republic of Armenia (CPC). In such a case, the CPC will assess the concentration and either approve or prohibit it. The concentration assessment process is initiated by submitting an application and notification in the prescribed form.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

Under the Armenian Tax Code, there are no special provisions regarding the sale of shares in an Armenian company based on whether the entity owns an aircraft or not. The following rules apply:

Resident Legal Entities

For resident legal persons, income derived from the alienation (sale or transfer) of shares, interests, or units in another organisation is not subject to profit tax, provided the alienation occurs after two full tax years following the tax year in which the shares, interests, or units were acquired.

Non-Resident Legal Entities

Non-resident legal entities are subject to a profit tax of 18% on capital gains from the sale of shares, interests, or units in another organisation.

Individuals

Income obtained from selling or exchanging shares, interests, units, or other securities representing investments in the authorised capital of an organisation is generally considered to be non-taxable income.

However, this exemption does not apply if the income is derived from the alienation of shares, interests, or other securities representing an investment in real

estate – such as a building, apartment, mansion, or other structure (including unfinished or partially constructed property) – and the alienation occurs within the same tax year as the acquisition or within the three tax years following the acquisition of such shares or interests.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

There are no express limitations under Armenian law based on the type of lease. In general, operating leases, wet leases, finance leases, and leases concerning only engines or parts are permissible and recognised. However, it is worth noting that due to the absence of aircraft manufacturing in Armenia, the demand for aircraft lease agreements is limited. As a result, there is no well-established market practice for entering into aircraft lease agreements; instead, parties commonly conclude bank loan arrangements or tenancy agreements.

Under the Armenian Civil Code, operating and finance leases may be structured to provide that the leased property either transfers into the ownership of the lessee upon or after the expiry of the lease term, or remains with the lessor. Wet leases are comparable to contracts on the rent of transportation means with crew (time charter), as regulated by the Armenian Civil Code. Additionally, the Civil Code provides for a separate type of contract for the rent of transportation means without the provision of management and technical operation services.

2.1.2 Application of Foreign Laws

As a matter of general rule, a lease involving a domestic party can be governed by a foreign law. Parties to a contract may not exclude or alter the applicability of Armenian public law, including currency regulations, taxes, and rules related to the registration and operation of an aircraft.

2.1.3 Restrictions Concerning Payments in US Dollars

According to the Armenian law on Currency regulation and currency control, the quotation of contract price and its payment may be in foreign currency only when:

- the payment is made via wire transfer; and
- the parties to the contracts are Armenian resident legal entities or private entrepreneurs, on one side, and the non-resident legal entities or private entrepreneurs, on the other side.

2.1.4 Exchange Controls

Under Armenian law, there are no exchange control restrictions that would prevent a domestic lessee from making rent payments under a lease to a foreign lessor or that would prevent the repatriation of realisation proceeds if a foreign lessor enforces such a lease.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

The execution of a lease agreement within the Republic of Armenia, as well as the presence of the original or a copy of such an agreement in Armenia, whether in physical or electronic form, does not automatically create any tax or duty obligations for the parties involved.

State duty obligations may only arise if the parties choose not to notarise the lease agreement. However, it's important to note that notarisation is not a mandatory requirement under Armenian law for aircraft lease agreements.

It should also be noted that the operator's information must be registered in the Armenian aircraft registry. Consequently, any change relating to the operator, including based on the execution of a lease agreement, must be reflected in the official registry documents, such as the aircraft registration certificate, the issuance of which requires the payment of a state duty.

2.1.6 Licensing/Qualification of Lessors

As a matter of general rule, no special license or permission is required to be or become the owner of an aircraft, as well as to lease (rent) that aircraft.

Meanwhile, according to the Armenian Civil Code, leasing operations themselves may only be carried out by banks or specialised entities that have obtained the relevant permission (licence) from the Central Bank to conduct financial operations, such as leasing operations. This means that the lessor, under the special type of financial tool specified in the Civil Code of Armenia as a leasing contract, needs to have a special license to finance the lease.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

If a contract is governed by foreign law and permitted under Armenian law, no mandatory terms are required in a lease under the latter. However, compliance with Armenian public order must be considered for any terms of contract or judgments to be enforced in Armenia. This is because both the recognition and enforcement of foreign court orders and foreign arbitration awards may be rejected if the underlying claim is based on a rule or principle that contradicts Armenia's public order.

2.2.2 Tax and Withholding Gross-Up Provisions

Under Armenian law, tax and other withholding gross-up provisions are permissible and enforceable.

2.2.3 Parts Installed or Replaced After a Lease's Execution

Under Armenian law, while leased property is generally deemed to include its accessories unless otherwise agreed, parts installed or replaced on an aircraft or engine after the execution of the lease agreement may not automatically fall within the scope of the lease. Therefore, to ensure such parts are captured under the lease, it is advisable to include an express provision in the lease agreement or to execute a subsequent written agreement that extends the lease to cover such components.

Improvements or modifications made during the lease term are subject to Article 626 of the Armenian Civil Code, which distinguishes between separable and inseparable improvements. Separable improvements typically belong to the lessee unless otherwise agreed. Inseparable improvements made with the lessor's consent entitle the lessee to compensation

upon lease termination unless otherwise agreed, while improvements made without consent are generally not compensated. Improvements made at the expense of amortisation funds belong to the lessor.

2.2.4 Risk of Title Annexation

Armenian law does not contain specific provisions governing title to aircraft engines as distinct from the airframe. As a result, there may be a risk of title annexation in respect of aircraft engines installed on an airframe, particularly in the absence of clear contractual terms to the contrary.

Under the Armenian Civil Code, if elements of different types form a unified whole intended for joint use, they may be treated as a single item of composite property. Any transaction involving such composite property will typically apply to all of its components, unless otherwise stipulated by agreement. Additionally, accessory property is deemed to follow the legal fate of the principal property, unless a different arrangement is specified in the contract.

2.2.5 Recognition of the Concepts of Trust/Trustee

The concepts of a common law trust and an owner-trustee under a common law trust structure are not recognised under Armenian law.

Nonetheless, Armenian law does provide for property trust management agreements. Under such agreements, the owner (trustor) retains legal title to the property, while a trust manager is authorised to manage the property in the interest of the owner or a designated third-party beneficiary. Importantly, this arrangement does not involve a transfer of ownership to the manager, who remains an agent acting on behalf of the owner, rather than holding title in trust.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

Under Armenian law, the aircraft register maintained by the Civil Aviation Committee (Committee) records the identity of the legal owner of the aircraft, as well as the operator, if different from the owner.

The register serves primarily to establish the nationality of the aircraft in accordance with Part I, Chapter III

of the Chicago Convention and has only a declarative (evidentiary) effect. It reflects the ownership interest as notified to the Committee but does not create or confirm legal title. Consequently, the registration of a person as the owner does not constitute proof of ownership as a matter of substantive property law. Any changes in ownership or operator must be reported to the Committee and registered accordingly, which results in the issuance of a new certificate of registration.

2.3.2 Registration If the Owner Is Different From the Operator

Under Armenian law, the application for aircraft registration must be submitted by the legal owner or their authorised representative. Accordingly, although the name of the aircraft operator will also be recorded in the register, an aircraft may not be registered in the name of the operator unless the operator is also the legal owner of said aircraft.

2.3.3 Aircraft/Engine-Specific Registers

There is no specific register in Armenia dedicated to leases concerning aircraft or engines.

However, lease arrangements related to aircraft may be reflected indirectly in the aircraft register maintained by the Committee, to the extent that the operator's rights are based on a lease agreement. That said, the aircraft register only records information about ownership and the operator; it does not constitute a lease register, nor does it establish or confirm legal rights under the lease itself.

Regarding aircraft engines, there is no specific register, and engine-related information is recorded only as part of the aircraft's airworthiness certification documents or the aircraft noise certificate, as applicable.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

Under Armenian law, leases are not subject to mandatory registration in the domestic aircraft registry, nor is prior consent or approval from a governmental authority required for the execution or delivery of a lease concerning an aircraft registered in Armenia or an engine. Likewise, no governmental applications or

consents are required as a prerequisite to the execution and delivery of such lease agreements.

However, where an aircraft is registered in a foreign jurisdiction but operated by an Armenian operator under a rent or other contractual arrangement, the Armenian operator is required to notify the Committee and submit the relevant documentation, including the rent agreement. The Committee keeps a separate list of foreign-registered aircraft operated by Armenian entities. In these cases, the Committee may establish contractual agreements with the civil aviation authority of the aircraft's country of registration to delegate oversight functions related to the aircraft. These agreements must be registered with the ICAO Council in accordance with the Chicago Convention.

2.3.5 Requirements for a Lease to Be Valid and Registrable

The only mandatory requirement for a lease agreement under Armenian law is that it must be concluded in writing. However, to be valid and registrable (if the title of the owner or operator arises from the lease agreement as explained in **2.3.3 Aircraft/Engine-Specific Registers**), the lease does not need to be in a specific form or translated, served, certified, notarised, or legalised to be valid and registrable in the Armenian aircraft register.

2.3.6 Taxes/Duties Payable for Registering a Lease

As explained in **2.3.4 Registration of Leases With the Domestic Aircraft Registry** leases themselves are not subject to registration, however, if the execution of the lease results in a change of the recorded owner or operator and consequently requires the issuance of a new aircraft registration certificate, a state duty of AMD50,000 is payable for the issuance of the new certificate.

2.3.7 Registration of Aircraft in Alternative Countries

Seemingly, the two most popular alternative countries, in which aircraft habitually based in Armenia may typically be registered, are the Russian Federation and Hungary.

2.3.8 Requirements for Documents Concerning Registration

For the initial registration of an aircraft in Armenia, the Civil Aviation Committee requires the submission of an application along with supporting documents, some of which must be submitted in original form. Specifically, the following documents must be provided as originals:

- document evidencing legal ownership of the aircraft;
- certificate of airworthiness and technical condition inspection;
- original lease agreement, if the owner is not also the operator; and
- original maintenance agreement, if maintenance is not performed (or only partially performed) by the operator.

In addition, a copy of the aircraft type certificate, the deregistration certificate from the previous state of registration (if applicable), and the operational and technical manuals of the aircraft must be submitted; however, submission in original form is not required.

Original documents submitted to the Committee are returned to the owner after being copied for filing purposes.

Armenian law does not specifically require that documents be notarised or legalised if they are executed in Armenia. However, foreign documents issued by state authorities may require legalisation or an apostille to be accepted. Translations into Armenian may also be required, but only for filing and record-keeping purposes, not as a condition for the validity of the documents.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

While the mere act of leasing an aircraft or engine to a domestic lessee does not automatically trigger taxation in Armenia, if the foreign lessor derives income as a result of enforcing or performing the lease agreement and that income is considered Armenian-sourced, it may be subject to Armenian profit tax or income tax, as well as value-added tax (VAT).

In most cases, VAT is accounted for by the Armenian lessee under the reverse charge mechanism, meaning the lessee reports and pays the VAT on behalf of the foreign lessor.

If the lease payments are subject to withholding tax, the Armenian lessee acts as the tax agent and is obligated to withhold the applicable tax from the payments and remit it to the Armenian tax authorities. If the lessee fails to withhold and remit the required tax, the Armenian tax authorities may seek to collect the unpaid tax from the lessee and, in certain cases, from the foreign lessor as well.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

Under Armenian tax law, a foreign lessor will not be deemed to be resident or domiciled in Armenia merely by entering into, or enforcing, a lease agreement with an Armenian lessee. However, if the foreign lessor derives income from the lease that is considered to have an Armenian source under Armenian tax law, the foreign lessor may become subject to Armenian taxation with respect to such income, subject also to the provisions of any applicable double taxation treaty.

2.4.3 Engine Maintenance and Operations

Under Armenian law, the lessee is generally responsible for the maintenance, preservation, and both major and current repairs of the leased property, including aircraft or engines, unless otherwise agreed in the lease agreement. Consequently, liabilities related to maintenance and operation are typically imposed on the lessee, not the foreign lessor, unless the lease agreement provides otherwise.

Responsibility for maintaining the airworthiness of an aircraft rests with the owner or the operator, depending on who is operating the aircraft at the time. Since a foreign lessor typically does not operate the aircraft, they are generally not responsible for these obligations by default.

As a result, a foreign lessor will not usually face liabilities related to aircraft or engine maintenance and operations solely by being a party to the lease, unless specific terms in the lease agreement assign these obligations to the lessor.

2.4.4 Damage or Loss Caused by an Asset

Under Armenian law, a foreign aircraft or engine owner or lessor under a lease is generally not held strictly liable for damage or loss caused by the leased asset, unless there is fault or specific contractual liability.

As a general rule, the lessor does not bear responsibility for the selection of the asset or the seller, particularly where the lessee identifies the asset and the seller. This reflects the principle that the lessor's liability is limited when the lessee directs the acquisition of the goods.

However, the lease agreement may provide that the lessor selects the asset and/or the seller. In such cases, the lessor assumes greater responsibility. Specifically, unless otherwise stated in the lease, the lessor is not liable to the lessee for the seller's failure to fulfil obligations under the sale agreement, except where the lessor was responsible for selecting the seller. In that scenario, the lessee may bring claims against both the seller and the lessor, who will be jointly and severally liable.

Accordingly, liability for damage or loss caused by the aircraft or engine generally rests with the lessee or operator, who possesses and controls the asset, and not with the foreign lessor or financier (unless the lessor is expressly made responsible under the agreement or is at fault, such as by selecting a defective asset or negligent seller).

2.4.5 Attachment by Creditors

Under Armenian law, creditors of a domestic lessee generally may not attach or seize an aircraft leased to the lessee but owned by a different entity, as ownership remains with the lessor. Creditors are limited to enforcing claims against the debtor-lessee's assets, not property belonging to third parties.

The leased aircraft also does not form part of the lessee's bankruptcy estate and is not subject to enforcement proceedings, provided that the lessor's ownership rights are clearly documented.

In this context, proper registration of the owner and operator in the Armenian aircraft register can serve an important evidentiary function in demonstrating own-

ership and preventing third-party enforcement against the leased asset.

2.4.6 Priority of Third Parties' Rights

Under Armenian law, the rights of certain third parties can take precedence over a lessor's rights under an aircraft lease, regardless of whether the lease or the lessor's interest is registered in the national aircraft register.

For instance, creditors may assert retention rights related to repair and maintenance costs, warehousing and storage fees, preservation expenses, and judicial costs. These rights enable these third parties to make priority claims on the aircraft, even in the presence of the lessor's ownership or lease rights.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

Under Armenian law, there is no mandatory requirement that any part of the insurance for an aircraft or engine lease be placed with domestic insurance companies.

Parties may arrange insurance with either foreign or domestic insurers, provided that the insurance complies with applicable Armenian legal and aviation requirements.

2.5.2 Mandatory Insurance Coverage Requirements

Under Armenian law, mandatory insurance coverage requirements apply to aircraft operators conducting flights to, from, or within the territory of Armenia. Operators must maintain valid insurance covering liability for:

- passenger injury or death;
- third-party damage; and
- crew liability.

The minimum coverage levels are set by Armenian law and the 1999 Montreal Convention, which Armenia has ratified. Operators must provide proof of such insurance to the Committee as part of the certification and oversight process.

2.5.3 Placement of Insurance Outside of Jurisdiction

Reinsurance can be placed outside of Armenia for up to 100% coverage, as long as the reinsurers are deemed reliable and not prohibited by the Central Bank of Armenia. The Central Bank regulates and may restrict the use of reinsurers that are financially unstable or pose risks to insured parties.

2.5.4 Enforceability of "Cut-Through" Clauses

Regarding cut-through clauses in insurance contracts, no known regulatory or judicial restrictions exist to their enforceability.

2.5.5 Assignment of Insurance/Reinsurance

There are no prohibitions regarding the assignment of insurance or reinsurance under Armenian law.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

Under Armenian law, a lessor may unilaterally terminate the lease if:

- the lessee uses the leased aircraft inconsistently with the lease terms or intended purpose;
- the lessee obstructs the lessor's control over the leased asset; and
- the lessee repeatedly fails to pay lease fees within the agreed deadlines (usually more than twice consecutively), unless otherwise agreed in the contract.

If the lease is terminated on these grounds, the lessee bears all costs related to the return of the aircraft, including disassembly, insurance, and transportation.

The lease agreement may also specify additional grounds for early termination by either party.

In general, there are no restrictions under Armenian law on a lessor's ability to export an aircraft from Armenia following lease termination, except for cases involving exports to countries subject to sanctions or restrictions. Additionally, if the aircraft contains dual-use components (ie, parts with potential military applications), an export license may be required under Armenia's export control regulations.

The lessor, as the legal owner of the aircraft, retains the right to dispose of it, including selling it, even during the term of the lease. Armenian law does not limit this right, as ownership rights remain with the lessor throughout the lease period. If, following lease termination or a subsequent sale, the aircraft is no longer owned by an Armenia-registered company, the aircraft's registration with Armenian aviation authorities will be subject to cancellation.

Under Armenian law, there is no specific requirement for an aircraft to be physically present in Armenia at the time of its termination, re-export, or sale. However, the ability to enforce rights, such as repossession, may depend on the aircraft's actual location and the legal and procedural framework in the jurisdiction where the aircraft is located.

2.6.2 Lessor Taking Possession of the Aircraft

Under Armenian law, a lessor may unilaterally terminate an aircraft lease on specific statutory or contractual grounds as specified in **2.6.1 Restrictions on Lessors' Abilities**. In such cases, the lessee is obligated to return the aircraft and cover all associated return costs (eg, disassembly, insurance, transport).

However, while the law permits unilateral termination of the lease without court involvement, it does not specifically regulate the procedure for repossessing the aircraft. If the lessee refuses to return the plane voluntarily, the lessor would likely need to initiate judicial proceedings to enforce repossession. Therefore, although a court order is not required for termination itself, it may be required in practice for the physical recovery of the aircraft if the lessee does not cooperate.

2.6.3 Specific Courts for Aviation Disputes

In Armenia, there are no specialised courts designated exclusively for aviation disputes. However, such disputes are adjudicated by the general courts of civil jurisdiction, which have subject-matter competence over contractual and property-related matters, including those arising from aircraft lease agreements, financing arrangements, or damages.

Where the dispute involves administrative or regulatory issues (eg, decisions by the Committee), the

administrative courts may have jurisdiction. In matters related to the insolvency or restructuring of an airline or lessee, the bankruptcy court will handle such proceedings.

Importantly, the jurisdiction of Armenian courts is not affected by the nationality of the parties. Both Armenian and foreign entities have equal access to the courts and may bring or defend claims before them in accordance with Armenian procedural law.

2.6.4 Summary Judgment or Other Relief

Under Armenian law, the concept of summary judgment in the common law sense does not exist. However, a lessor may seek interim injunctive relief (interim measures) to secure its claims, either before or during judicial proceedings. The court may grant such relief if failure to do so would make enforcement of the final decision impossible or difficult, alter the legal or factual status of the disputed asset, or cause significant harm to the claimant.

Applications for preliminary interim relief are reviewed without a hearing within three days of submission. Applications for interim relief during proceedings are reviewed no later than the day following their submission.

Additionally, if the case meets the criteria under the Civil Procedure Code, the court may apply simplified or accelerated proceedings. In simplified proceedings, as per the Civil Procedural Code, the final judgment must be issued within three to four months from the decision to apply the procedure. In accelerated proceedings, the Civil Procedural Code required that the final decision be rendered within one month from the relevant court decision.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

While Armenian courts are legally empowered to adjudicate disputes under foreign substantive law, the practical implementation of this principle may present challenges. Armenian judges possess expertise in Armenian law and are prohibited from applying foreign law solely based on expert testimony. Additionally, obtaining consultative opinions from foreign courts may prove problematic. An Armenian court

shall not re-examine the applicable law to a contract if a foreign court or arbitration has previously resolved the dispute, unless the decision or award subject to recognition and enforcement in Armenia, contravenes Armenian public order.

Armenian courts respect valid agreements between parties to submit disputes to a foreign jurisdiction, as long as such a choice does not violate mandatory jurisdictional rules or Armenian public policy.

In circumstances provided for by law, Armenian courts will uphold a waiver of judicial immunity by a foreign state. Specifically, under Armenian legislation, filing a claim against a foreign state, involving it as a third party, imposing attachment on its property located in Armenia, or enforcing a judgment against it is permitted only with the consent of the competent authorities of that state, unless otherwise provided by an international treaty of the Republic of Armenia.

However, a foreign state is deemed to have waived its judicial immunity in the following cases:

- when it files a claim before an Armenian court and, on its own initiative, participates in the proceedings as a party; or
- when it submits a counterclaim in a case (and conversely, it is considered to have waived immunity with respect to counterclaims when it has itself initiated a claim in that case).

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Armenian courts recognise and enforce final foreign court judgments and arbitral awards without reconsidering the merits of the case.

For foreign court judgments, recognition and enforcement are permitted if:

- there is an international treaty between Armenia and a foreign state; or
- a basis for reciprocity exists.

The reviewing court does not reassess the substance of the dispute but only verifies whether the judgment

meets the formal requirements under Armenian legislation and applicable treaties.

The same general rules apply to the enforcement of foreign arbitral awards, particularly under the 1958 New York Convention, to which Armenia is a party.

2.6.7 Judgments in Foreign Currencies

Under Armenian law, a lessor cannot obtain a judgment strictly denominated in a foreign currency. However, courts may award a monetary sum equivalent to a specified foreign currency amount, expressed in Armenian drams (AMD) and may reference the foreign currency in the judgment.

When filing a claim, the claimant must specify the exact amount requested in AMD and provide its precise calculation. The final judgment will be issued in AMD, regardless of whether a foreign currency is used as a reference point.

2.6.8 Limitations on Lessors' Actions Following Termination

Under Armenian law, a lessor's remedies following termination of a lease due to default are primarily governed by the Civil Code of the Republic of Armenia, which follows the general principle of full compensation for damages. This allows the lessor to recover both actual losses and lost profits caused by the lessee's breach.

If no specific default interest is provided for in the lease agreement, Article 411 of the Civil Code permits the recovery of default interest on overdue monetary obligations at a rate determined by the Central Bank's refinancing rate, unless otherwise agreed upon or provided by law (however, interest rates must not exceed statutory limits).

Following termination of the lease, additional rent (such as holdover rent or continued lease payments) cannot be charged. If the lessee fails to return the aircraft after termination, the lessor may claim compensation under mechanisms such as unlawful possession, unjust enrichment, or tort-based damages.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

A lessor enforcing an aircraft lease in Armenia is not subject to any specific taxes solely because of the lease enforcement. However, depending on the method of enforcement used, state duties (court fees) and enforcement service fees may apply. These fees are considered procedural and administrative costs, rather than tax obligations.

2.6.10 Mandatory Notice Periods

Movable property lease (rent) agreements with an indefinite term can be terminated out of court with one month's prior notice.

For fixed-term movable property rental agreements lacking a clause on renunciation, judicial termination for valid reasons is necessary, requiring at least thirty days' prior notice.

Leasing agreements can be terminated out of court, provided notice is given according to the terms mutually agreed upon by the parties.

2.6.11 Lessees' Entitlement to Claim Immunity

For the answer, please see **2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments**.

2.6.12 Enforcement of Foreign Arbitral Decisions

Armenia is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and this, its courts recognise and enforce foreign arbitral awards in accordance with the Convention and the relevant provisions of the Civil Procedure Code and Law on Commercial Arbitration.

There is a well-established practice of Armenian courts enforcing foreign arbitral awards (provided none of the limited grounds for refusal apply). The civil courts of general jurisdiction handle enforcement proceedings.

2.6.13 Other Relevant Issues

No other significant lease enforcement issues are currently affecting Armenia.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Armenian law recognises both contractual assignment and novation, as outlined in the Civil Code of the Republic of Armenia.

Contractual assignment allows a creditor to assign their claim to another person, unless such assignment is prohibited by law, other legal acts, or the underlying contract.

An obligation may be terminated by novation, which means replacing the original obligation between the same parties with a new obligation that has either a different subject matter or a different method of performance. Unless otherwise agreed, novation also terminates any ancillary obligations, such as guarantees or pledges, related to the original obligation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Under Armenian law, the assignment of rights by the lessor does not require the lessee's consent, unless the identity of the creditor is of material importance to the lessee. However, the lessee must be notified of the assignment. In the context of an aircraft lease, this exception generally does not apply, as the identity of the party receiving payments is typically not considered materially important to the lessee.

In case of novation, it is required that the conclusion of the new agreement by the parties substitutes the previous obligation with a new one.

Armenian law does not impose any specific mandatory terms to be included in assignment or novation agreements. However, there are formal requirements relating to the assignment's form, and depending on the nature of the novated contract, certain formalities may also be required. Failure to comply with these may be considered contrary to Armenian public policy and overriding mandatory principles as established under Armenian conflict of law rules.

2.7.3 Enforceability of Lease Assignments/Novations

It is not strictly necessary for an aircraft or engine lease assignment, assumption, or novation agreement to be translated, certified, notarised, or legalised to be enforceable against a domestic party. However, such formalities may be required for registration purposes and to be used as evidence in judicial proceedings (see **1.1.2 Enforceability Against Domestic Parties**, **1.2.3 Enforceability Against Domestic Parties**, **2.3.5 Requirements for a Lease to Be Valid and Registrable**, and **2.3.8 Requirements for Documents Concerning Registration** for further details).

2.7.4 Filing/Registration of Lease Assignments/Novations

The aircraft lease assignment or novation can and must be registered if it results in a change of ownership or operator of a registered aircraft. In such cases, notification to the Committee is mandatory, and corresponding filings are required to effectuate the registration. Under Armenian law, the registration of an aircraft or engine lease assignment, assumption, or novation is not constitutive in nature; that is, legal rights under such agreements arise from the contract itself, not from registration. However, where the underlying transaction involves a change in ownership or operational rights, registration becomes a practical prerequisite for regulatory recognition and enforcement.

In particular, following a change in the owner or operator of an aircraft, the Committee issues a new registration certificate, and the prior certificate must be returned. Hence, registration is declarative and thus, its absence effectively hinders the enforcement of rights arising from the assignment or novation before the aviation authority.

- As for the formalities required for registration see **1.2.4 Registration, Filing and/or Consent From Government Entities** and **2.3.8 Requirements for Documents Concerning Registration**.
- As for government approvals, Armenian law does not generally require prior consent from any government body for the execution or delivery of an aircraft or engine lease assignment or novation (for possible exceptions and practical considerations,

see **1.2.4 Registration, Filing and/or Consent From Government Entities**).

2.7.5 Taxes/Duties Payable on Assignment/Novation

An agreement involving the assignment of a claim or a novation may give rise to tax liabilities, depending on the specific terms of the transaction. If a party derives a profit (for example, a positive difference between the value of the claim or obligation assigned or novated and the consideration received or paid), such profit is treated as taxable income.

The mere presence or exchange of the original or a copy of such an agreement within the jurisdiction of Armenia, whether in physical or electronic form, does not, in itself, affect taxation.

2.7.6 Recognition of Transfer of Ownership Interests

When the ownership interest of an entity, or the beneficial interest in a trust, owning an aircraft is transferred, no filing with the Committee is required, because the entity will remain the registered legal owner of the aircraft. However, consideration in the light of competition law as outlined in **1.2.4 Registration, Filing and/or Consent From Government Entities** may apply.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

In Armenia, an aircraft may be deregistered from the State Register of Civil Aircraft by its owner or the owner's authorised representative, who must submit an official application to the Civil Aviation Committee. Deregistration may occur voluntarily at the owner's request, including for export purposes, or ex officio in cases where the aircraft is dismantled, permanently withdrawn from use, or has been without a certificate of airworthiness for over three years.

To achieve deregistration, the owner must submit the aircraft's registration certificate and its certificate of airworthiness. If the aircraft is to be exported and registered in another country, the application must also include a request for a certificate of deregistration, as well as, if necessary, a permit for flight and an export certificate of airworthiness to facilitate the ferrying of the aircraft. Once the aircraft is registered in a foreign

jurisdiction or reaches the end of its permit validity, the Armenian-issued export certificate ceases to be effective.

2.8.2 Lessee's/Operator's Consent

Under Armenian law, the aircraft owner or their authorised representative may apply for deregistration of the aircraft without needing the lessee's or operator's consent. Similarly, if the owner is also the mortgagee or lessor, they can submit the deregistration application independently. However, practical issues may arise if the aircraft is in possession of the lessee or operator.

2.8.3 Required Documentation

See 2.8.1 Deregistering Aircraft in This Jurisdiction.

2.8.4 Duration of Deregistration Process

There is no fixed statutory timeframe for the deregistration process in Armenia. The duration will typically depend on factors such as the completeness and accuracy of the submitted documents, the termination of any underlying agreements with the operator, the operator's cooperation, and the physical availability of the aircraft.

2.8.5 Aviation Authority's Assurances

The Armenian aircraft register does not provide advanced written assurances to an aircraft owner, mortgagee, or lessor regarding the prompt deregistration of an aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

Under Armenian law, state duties are payable for the aircraft deregistration process and the issuance of related certificates. Specifically, a fee of AMD100,000 is charged for the deregistration itself, while the fee for issuing an export airworthiness certificate ranges from AMD60,000 to AMD100,000, depending on the size of the aircraft.

2.8.7 Deregistration Power of Attorney

The deregistration application can be submitted by the authorised representative of the aircraft owner (see 2.8.1 Deregistering Aircraft in This Jurisdiction), meaning that a power of attorney (PoA) is recognised for this purpose.

Under Armenian law, a power of attorney must be a written authorisation given by one person to another to act on their behalf before third parties. Key points have been outlined below.

- The validity period of a PoA cannot exceed three years.
- If no validity period is specified, the PoA remains effective for one year from the date it was granted. However, for PoAs intended for use abroad, notarised PoAs without an expiration date remain valid until revoked by the grantor.
- A PoA that does not indicate the year, month, and day of issuance is considered null and void.
- If the PoA is to be used later for judicial representation, it is advisable to explicitly specify the judicial actions the representative is authorised to perform, especially the ones not automatically assumed under Armenian procedural law.

To ensure enforceability in Armenia, a PoA issued abroad should be translated into Armenian, notarised, and legalised (apostilled). If the PoA is issued in Armenia but is in a foreign language, it must either be translated into Armenian or issued in both languages. Notarisation may be necessary depending on whom the PoA is given to or by whom it is issued; for instance, a PoA granted to attorneys-at-law typically does not require notarisation.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

To enforce a deregistration PoA in Armenia, you may need to provide additional documentation. This could include corporate documents that prove the authority of the individual signing the PoA on behalf of the company, such as:

- the charter;
- certificate of incorporation; or
- an extract from the commercial registry.

If applicable, board or shareholder resolutions authorising the issuance of the PoA may also be required, along with identification documents for the authorised representative.

All foreign documents must be translated into Armenian and, where necessary, notarised and legalised (apostilled). The Civil Aviation Committee may request these documents to verify the legal authority behind the deregistration request (the specific list of required documents may vary depending on whether they were issued in Armenia or abroad, as well as the legal status of the applicant).

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A PoA may be governed by foreign law, provided that it explicitly specifies the powers being granted. It must either be bilingual, with one of the languages being Armenian, or be issued in a foreign language; in this case, it must be notarised, then legalised or apostilled to include the Armenian translation with notary verification.

2.8.10 Revocation of a Deregistration Power of Attorney

Under Armenian law, a power of attorney cannot be irrevocable. The principal may revoke it at any time.

2.8.11 Owner's/Lessor's Consent

In Armenia, deregistration and export of the aircraft from the aircraft registry can only be initiated by the aircraft owner.

If the aircraft is pledged, deregistration cannot occur without the written consent of the pledgee. Should the pledgee wish to deregister and export the aircraft, a default under the secured obligation must occur first. Thereafter, the pledgee must exercise its right to enforce the pledge by realising the collateral and becoming the registered owner. Only once the register has been updated to reflect the pledgee's ownership can the aircraft be deregistered and exported by the pledgee as the owner.

The requirement for the lessee's and pledgee's consent to export the aircraft is governed by the contractual relationships between the parties. Armenian law does not provide a statutory mechanism to enforce such consent requirements; therefore, any breach of these contractual consent provisions results solely in contractual remedies as specified in the relevant agreements.

2.8.12 Aircraft Export Permits/Licences

Export airworthiness certificates for aircraft are issued in Armenia upon written request to the civil aviation authority. Standard processing is completed within 15 days of application receipt.

For the export airworthiness certificate, the owner shall submit a technical inspection report and any destination-state-specific requirements. The civil aviation authority may coordinate with foreign authorities as needed to meet the requirements. The export airworthiness certificate specifies the destination country, any agreed-upon exceptions, and its validity period. The export airworthiness certificate becomes invalid when the aircraft arrives in the destination state, upon expiry, or once it's registered abroad.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

No significant costs/fees/taxes are charged in respect of the export of an aircraft.

2.8.14 Practical Issues Related to Deregistration of Aircraft

If the aircraft is pledged, deregistration cannot be done without the consent of the pledgee.

To deregister the aircraft from the aircraft registry, the owner or the representative of the owner shall submit to the Committee:

- the aircraft registration certificate; and
- the aircraft airworthiness certificate.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

The primary legal framework governing corporate reorganisation, insolvency/bankruptcy in Armenia includes the Law of the Republic of Armenia on Bankruptcy and the Civil Procedural Code.

In cases involving bankruptcy proceedings with banks, credit organisations, investment companies, investment fund managers, and insurance companies, the applicable legal framework is the Law on Bankruptcy of Banks, Credit Organisations, Investment

Companies, Investment Fund Managers, and Insurance Companies (rather than the Law on Bankruptcy).

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Restructurings/Reorganisations

In Armenia, corporate reorganisations are carried out through consolidation, absorption (merger), division, separation, and restructuring of legal entities.

Both reorganisation and restructuring in Armenia can be either voluntary or involuntary. In practice, most are initiated voluntarily through corporate decisions made by the relevant governing bodies. However, involuntary restructuring may be required when the number of shareholders in a LLC or CJSC exceeds 49. In such cases, the company shall either reduce the number of participants or decide to restructure into an OJSC within one year. Otherwise, the company will be liquidated by the court decision.

Involuntary reorganisation may arise as a consequence of violations of the RA Law on Protection of Economic Competition.

In case of abusing the dominant position two or more times in a year, the Competition Protection Commission (the Commission) may adopt a decision on disaggregation (division, separation, alienation of unit shares or means), which shall be subject to enforcement by the economic entity not later than within 6 months following the entry into force of that decision.

If a concentration is carried out without prior approval from the Commission and is later determined to be prohibited, the Commission may require:

- separating the legal entity that was absorbed; and
- dividing the entities that were consolidated.

Insolvencies/Receivership

A debtor can be declared bankrupt by a court decision, either voluntarily (at the debtor's own initiative) or involuntarily (at the request of a creditor), provided the debtor is insolvent.

A court may declare a debtor bankrupt in cases of either (i) involuntary bankruptcy or (ii) voluntary bankruptcy.

Involuntary bankruptcy

- If the debtor has defaulted for 90 days or more on undisputed payment obligations exceeding 2,000 times the statutory minimum wage, and this default continues at the time of the court decision (ie, actual insolvency).

Voluntary bankruptcy

- If the debtor's obligations exceed the value of their assets by at least 2,000 times the statutory minimum wage.
- If the debtor's public-law obligations (eg, taxes) exceed the value of their assets.

The minimum wage is equal to AMD 1,000.

The institute of receivership is not recognised under Armenian law; instead, some of the duties of receivership are conducted by a bankruptcy manager.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

Decisions made by foreign courts in insolvency (bankruptcy) cases are recognised in the Republic of Armenia based on international treaties and, in their absence, on the principle of reciprocity.

The Bankruptcy Law does not provide a special procedure for recognising foreign court decisions in insolvency (bankruptcy) cases; instead, the general procedure regulated by the Civil Procedure Code applies.

The law does not contain any statutory provisions that mandate cross-border cooperation.

Armenia has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

Irrevocable deregistration and export request authorisation (IDERA) is not recognised in Armenia because the country is not a party to the Cape Town Convention.

As a general rule, in the event of a company's liquidation, any previously issued power of attorney automatically terminates on the date the company is officially liquidated.

2.9.5 Other Effects of a Lessee's Insolvency

When a lessee in possession of an aircraft decides to enter into liquidation, it is required to notify all creditors of the commencement of the liquidation proceedings. Following such notification, the mutual obligations between the parties must be settled, and the aircraft is to be returned to the lessor in accordance with the terms of the lease. If, during liquidation, it is established that the debtor legal entity's assets are insufficient to fully satisfy creditors' claims, the debtor's liquidation commission (or liquidator) is obligated to file a petition with the court for the debtor to be declared bankrupt. In such a case, all further legal relations between the debtor and the lessor shall be governed by bankruptcy law.

When a lessee in possession of an aircraft enters an insolvency/bankruptcy process, the following principles generally apply:

- the lessor may apply to the court for early termination of the lease agreement and seizure of the subject of the lease in connection with the early termination of the agreement;
- the aircraft will not be treated as part of the lessee's insolvency estate, as ownership remains with the lessor; and, thus
- as a result, the liquidator or administrator cannot assert the rights of other creditors in priority to the lessor with respect to the aircraft, since it is not deemed part of the debtor's property.

However, any monetary claims the lessor may have under the lease (such as unpaid rent or damages) will be treated as unsecured claims and must be included in the relevant creditors' list in the insolvency proceedings.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The key risks associated with the insolvency of a borrower, guarantor or security provider have been outlined below.

In the event of the debtor's bankruptcy, if the pledge is not a first-ranking pledgee and there is no agreement with the first-ranked pledgee regarding the pro rata distribution of proceeds from the sale of the pledged property, there is a risk that the debtor's assets may be insufficient to satisfy all claims. As a result, the secured creditor may not recover the full amount of the debt.

If the pledged asset is subject to realisation through a public auction, even for a first-ranking pledge, the starting price is already set below the actual market value. Moreover, the price is subject to further reduction during the auction process, potentially resulting in the asset being sold at a value significantly lower than its market value.

In the event of the insolvency of a surety or guarantor, there is a risk that the secured creditor will not be included in the list of creditors. Specifically, if there has been no default under the principal obligation at the time of the surety's or guarantor's insolvency, the creditor's claim is not recognised as due and therefore may not be registered in the insolvency proceedings.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

Armenian law provides for a moratorium (a temporary stay) in both the threat of bankruptcy and bankruptcy proceedings.

Moratorium Under the Threat of Bankruptcy Proceedings

A moratorium is imposed from the moment a court decision approving the application for threat of bankruptcy and the financial recovery (rehabilitation) program takes legal effect and remains in effect until the completion of the financial recovery program.

Moratorium in Bankruptcy Proceedings

A moratorium is imposed from the moment the court accepts the bankruptcy application for proceedings and remains in effect until the conclusion of the bankruptcy case.

2.9.8 Liquidation of Domestic Lessees

When the debtor is declared bankrupt, they have the right to submit a financial recovery plan for approval

by the creditors' meeting. If the plan is not submitted, is rejected by the creditors, or is terminated early on grounds provided by law, the court is required to issue a decision initiating liquidation proceedings against the debtor. Upon issuance of the liquidation decision, the management and control of the company are carried out by the bankruptcy manager.

2.9.9 **Ipsa Facto Defaults**

Under Armenian law, ipso facto defaults are generally recognised; however, such a default does not automatically result in the termination of a lease agreement. If the lease agreement provides for it, the ipso facto default authorises the lessor to apply to the court for early unilateral termination of the lease (rent) or notify of out-of-court termination of the leasing agreement.

2.9.10 **Impact of Domestic Lessees' Winding-Up**

The leased aircraft would be regarded as the property of the owner or lessor and, therefore, would not form part of the lessee's insolvency estate.

With respect to lease rentals, any amounts unpaid at the time of the lessee's winding up, including penalties and interest arising from default under the lease, would be treated as unsecured claims. The lessor may submit a proof of claim in the insolvency proceedings for such amounts as a creditor of the debtor. The calculation of interest must cease since the announcement of the debtor's bankruptcy.

The treatment of lease security deposits depends on their contractual structure. In most cases, the lessor should be entitled to apply these deposits to satisfy the lessee's obligations in the event of an insolvency-triggered default.

Once the lessee is declared bankrupt, the performance of its obligations will be governed by the Law of Armenia on Bankruptcy.

2.10 **Cape Town Convention and Others**

2.10.1 **Conventions in Force**

The Convention and Protocol are not in force in Armenia.

2.10.2 **Declarations Made Concerning Conventions**

This is not applicable in Armenia.

2.10.3 **Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment**

This is not applicable in Armenia.

2.10.4 **Enforcement of Conventions**

This is not applicable in Armenia.

2.10.5 **Other Conventions**

Armenia is not a party to these conventions.

3. **Aircraft Debt Finance**

3.1 **Structuring**

3.1.1 **Restrictions on Lending and Borrowing**

Foreign lenders may finance the purchase of aircraft by Armenian residents. As such, there is no restriction on an Armenian company or a natural person obtaining funds from abroad. However, the place of financing cannot be Armenia because it may trigger the license requirements for the lenders, depending on the financial structure.

3.1.2 **Effect of Exchange Controls or Government Consents**

There are no exchange controls or government consents that would be material to any financing or repatriation of realisation proceeds under a loan, guarantee or security document.

3.1.3 **Granting of Security to Foreign Lenders**

Borrowers are permitted to grant security to foreign lenders.

3.1.4 **Downstream, Upstream and Cross-Stream Guarantees**

Downstream, upstream, and cross-stream guarantees are generally permitted in favour of lenders, subject to corporate approvals. No registration requirements apply.

3.1.5 **Lenders' Share in Security Over Domestic SPVs**

The advisability of accepting shares in a domestic SPV as collateral depends on the overall structure of the transaction. However, in transactions involving loans from financial institutions, it is both the com-

mon and recommended practice to include a share pledge as collateral.

3.1.6 Negative Pledges

Negative pledges are prohibited under Armenian law. An agreement restricting the pledgor's right to pledge property as collateral is null and void.

3.1.7 Intercreditor Arrangements

Debt Subordination

Armenian law does not explicitly regulate intercreditor agreements or the mechanisms for debt subordination. However, under the principle of freedom of contract, parties are generally free to enter into agreements that govern their mutual rights and obligations, including debt subordination arrangements.

Pledge Subordination

The Civil Code of the Republic of Armenia allows co-pledgees to enter into an agreement establishing the order of priority for the satisfaction of their claims against the debtor, including provisions for the disproportionate distribution of enforcement proceeds.

3.1.8 Syndicated Loans

Armenian legislation does not specifically regulate syndicated loan agreements. However, pursuant to the principle of freedom of contract established in Armenian civil law, parties are permitted to enter into any contract, provided that mandatory legal provisions are observed.

In practice, when a syndicated loan involves financing an Armenian entity, an Armenian bank is often appointed as a joint and several creditor, as well as the security agent for the facility and any collateral located in Armenia. In such cases, the relationships between the lenders, the agents, and the borrower are typically governed by foreign law, most commonly, English law.

Where the security package includes collateral over domestic assets registered under Armenian law, the corresponding security agreement is generally governed by Armenian law, and the Armenian bank acts as the local security agent.

3.1.9 Debt Subordination

Generally, debt may be subordinated through contractual subordination or by virtue of law, such as in the case of shareholder subordinated loans.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment by a creditor of all or part of an outstanding debt under a loan governed by English or New York law is permissible and recognised.

3.1.11 Usury/Interest Limitation Laws

At the time of entering into the loan agreement, the interest rate may not exceed twice the official bank interest rate set by the Central Bank of the Republic of Armenia.

The maximum annual amount of contractual penalties may not exceed four times the Central Bank's official interest rate.

In addition, the total amount of all penalties stipulated in the contract may not exceed the outstanding principal amount of the debt at the relevant time.

The concept of liquidated damages is not recognised under Armenian law.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

In a typical domestic aviation finance transaction, the forms of security commonly granted include: an aircraft mortgage, a share pledge, an account pledge, a guarantee and a security deposit.

The choice and structure of these security instruments depend on the specifics of the transaction and the arrangements agreed upon by the parties involved.

3.2.2 Types of Security Not Available

Under Armenian law, collateral may include any property, including property rights (claims), except for:

- property withdrawn from civil circulation (ie, not legally transferable);
- claims that are inextricably linked to the identity of the creditor (eg, alimony, compensation for personal injury or harm to health);

- certain government-issued securities that are non-pledgeable under their issuance terms;
- rights that are legally non-transferable to third parties.
- Additionally, indivisible property – which is property that cannot be divided without altering its purpose – cannot be pledged in part.

Whether an engine can be pledged separately from the aircraft depends on whether the engine is legally considered indivisible from the aircraft. In cases where the engine is not used for aircraft operation, it can be subject to pledge as a separate movable property.

Under Armenian law, when an aircraft is pledged, the description of the collateral typically includes engine information.

Warranties are not considered property or property rights under Armenian law, and therefore cannot be the subject of a pledge.

Insurance proceeds may be pledged as collateral.

3.2.3 Trust/Trustee Concepts

Under Armenian law, the concept of a trust is not recognised.

In cross-border financing transactions involving both foreign lenders and Armenian security, a typical solution is for an Armenian bank to act as both a joint and several creditor and the domestic security agent.

In such cases:

- the contractual relationship between the Armenian bank (acting as agent) and the foreign lenders is usually governed by foreign law, most commonly English law; and
- The relationship between the Armenian bank and the pledgor is governed by Armenian law, in accordance with Armenian legislation requirements for creating and enforcing security interests.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

Among the measures of securing the fulfilment of obligations, pledge and suretyship are traditionally recog-

nised under Armenian law as the primary forms of in rem and personal security, respectively. However, the list of available security instruments is not exhaustive.

Armenian law does not expressly regulate security assignments as a separate form of security. A security assignment is similar in structure to a pledge of claims, which is recognised under Armenian law. Due to the lack of specific legislative provisions and judicial practice, the enforceability of security assignments under Armenian law remains uncertain.

In practice, security assignments are governed by foreign law, under which they are common practice and enforceable.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It is possible to assign only the rights and benefits without also assigning the attendant obligations of the lessor in an aircraft lease.

3.2.6 Choice of Foreign Law

A security assignment or guarantee may generally governed by English or New York law, as long as its terms do not conflict with Armenian public policy to be enforceable in Armenia.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

Depending on the structure of the security assignment agreement, it may be necessary to notify the third-party debtor in order to prevent the debtor from fulfilling its obligations by making payments to the assignor rather than the assignee.

In the event of judicial proceedings in Armenia, the security assignment must be translated into Armenian and may also be required to be certified, notarised, apostilled or legalised in order to be enforceable against a domestic party.

3.2.8 Domestic Law Security Instruments

Armenian law applies to the pledge agreement for an aircraft registered in Armenia, except for agreements between the parties that do not regulate the creation, transfer, or termination of ownership and other property rights to the aircraft.

Armenia has not ratified the Cape Town Convention.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

Under Armenian law, only the rights arising from a pledge agreement on an aircraft registered in Armenia may be subject to registration in the Armenian aircraft registry.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests over an aircraft is recognised in Armenia.

3.2.11 Effect of Changes in the Identity of Secured Parties

If the identity of the secured parties changes after a security assignment is executed, the security interests may be at risk in cases where the consent of the person providing the security was not obtained.

3.2.12 “Parallel Debt” Structures

“Parallel debt” structures are not used domestically.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment is generally not considered to be resident, domiciled, carrying on business, or subject to taxation in Armenia merely by virtue of being a party to, or enforcing, such security assignment.

3.2.14 Perfection of Domestic Law Mortgages

The pledge can be perfected by notarising the pledge agreement, thereby allowing for extrajudicial enforcement of the pledged asset. Additional recommendations may apply depending on the transaction’s structure.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

There is no difference between the form of security (or perfection) taken over an aircraft and that taken over spare engines, except that the pledge of the aircraft is subject to registration in the aircraft registry, while the pledge of the spare engine may be registered in the online register of secured rights to movable property.

3.2.16 Form and Perfection of Security Over Bank Accounts

The typical form of security over a bank account is a pledge. This pledge can be perfected by notarising the pledge agreement, which enables some additional mode of extrajudicial enforcement of the pledged asset, including by notifying the bank holding the debtor’s account about the pledge. Additionally, the pledge may be registered in the online register of secured property rights.

3.3 Liens

3.3.1 Third-Party Liens

Under Armenian law, a lien may be imposed on the debtor’s property in the following situations:

Pledge: as a security measure to secure the performance of an obligation, whether monetary or non-monetary. It is the primary contractual mechanism that allows for the enforcement of rights against a secured asset. A pledge agreement may provide for both judicial and extrajudicial procedures for the realisation of the subject of the pledge.

Retention: by virtue of law, the creditor has the right to retain (ie, not return) the debtor’s property in his possession until the debt is repaid, under threat of satisfying the claims at the expense of the value of the retained property.

Proper performance of the obligation secured by retention terminates the right of retention. In the event of non-performance by the debtor of the obligation secured by retention, the creditor may satisfy its claim from the value of the property by enforcing the retention and selling it. In this case, the value of the property, the procedure for enforcing the claim at the creditor’s request, and the procedure for sale are determined in accordance with the rules established for satisfying the claims of the pledgee at the expense of the pledged property.

The arrest may be imposed on the property of the debtor within the framework of enforcement proceedings to ensure the enforcement of acts subject to compulsory enforcement (court acts, arbitration court decisions, public legal monetary claims, etc).

3.3.2 Timeframe to Discharge a Lien or Mortgage

A distinction should be made between the termination of a pledge as a legal right and its removal from the official register. As a rule, a pledge is automatically terminated when the claim secured by it is fully satisfied or ceases to exist. However, in order to officially reflect the termination of the mortgage, it is necessary to submit an application for removal from the Armenian aircraft register.

After submitting the necessary documents, it typically takes up to 15 days for the registry to remove the information about the collateral from its records.

3.3.3 Register of Mortgages and Charges

Information regarding the pledge of an aircraft must be submitted to the Armenian aircraft register. Additionally, the pledge may also be recorded in the public registry of secured rights over movable property.

Once the pledge is registered in the Armenian aircraft register, the aircraft cannot be deregistered without the written consent of the pledgee.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

The right of retention may arise by virtue of law as described in **3.3.1 Third-Party Liens** and by virtue of the court decision:

- the arrest may be imposed on the debtor's property within the framework of enforcement proceedings.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

The information about the aircraft's pledge must be registered with the aircraft registry. A prospective buyer may send a formal enquiry to the registry to obtain details of any registered liens on the aircraft. Additionally, the online registry of secured rights over movable property can be accessed.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

A loan or guarantee, which represents in personam obligations, is enforced by initiating legal proceedings

against the relevant debtor or guarantor and seeking a court judgment for payment or specific performance, as applicable.

A security assignment is an in rem interest and is usually enforced by the secured party by collecting the assigned claims or, in the case of other rights, by enforcing such rights through a private sale or auction.

3.4.2 Security Trustees' Enforcement of Their Rights

Please refer to **3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee**.

3.4.3 Application of Foreign Laws

Armenian courts are generally required to apply Armenian substantive law, except in contractual disputes where the parties have agreed to apply foreign law. However, even when a foreign governing law clause is enforceable, Armenian courts often face practical difficulties in applying foreign law, which can make its use problematic or unfeasible in practice.

While foreign law may govern a pledge agreement for an aircraft registered in Armenia, particularly with respect to the rights and obligations of the parties and liability for breach, Armenian law will mandatorily apply to matters concerning property rights in the aircraft, including their creation, transfer, and termination.

Armenian courts will recognise and enforce a final foreign judgment, provided that the matter does not fall within the exclusive jurisdiction of Armenian courts.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Armenian courts will recognise and enforce the final judgment of a foreign court or an arbitral award without re-examining the merits of the case. Under Armenian law, the enforcement of foreign judgments is permitted not only on the basis of an international treaty, convention, or agreement but also on the principle of reciprocity, which is presumed to exist unless proven otherwise.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

A secured party may take physical possession of the aircraft to enforce a security interest without the consent of the lessee and the operator.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

There are no specialised courts in Armenia with exclusive jurisdiction over enforcement actions arising from a security assignment or mortgage.

3.4.7 Summary Judgments or Other Relief

Armenian law does not provide for a summary judgment mechanism. However, in order to ensure the enforcement of a potential judgment, it is common in Armenia to apply for interim measures, such as freezing the defendant's assets, when filing a lawsuit. Courts may take such measures if the plaintiff proves that without them, the enforcement of the judgment may become difficult or impossible, or that significant damage may result. The threshold of proof for taking such measures is lower than for proving the claim.

3.4.8 Judgments in Foreign Currencies

Armenian court judgments are issued in AMD. However, they may specify that the amount payable is the AMD equivalent of a sum denominated in a foreign currency.

3.4.9 Taxes/Fees Payable

A tax in a non-nominal amount may arise in connection with the enforcement of a security agreement/ aircraft mortgage.

3.4.10 Other Relevant Issues

To enable the extrajudicial enforcement of the pledged asset via auction or direct transfer of ownership rights to the pledgee or the person named by the pledgee, the pledge agreement must be notarised.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

In Armenia, there are no such issues at present.

4.2 Current Legislative Proposals

There are currently no legislative proposals relating to the purchase, sale, leasing or debt financing of an aircraft in Armenia.

AUSTRIA

Law and Practice

Contributed by:

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FRESHFIELDS

1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

The execution of aircraft or engine sale agreements in and of itself (including the sale of an ownership interest in an entity owning an aircraft or engine) is generally not subject to taxes or duties, irrespective of the location of the aircraft or the engine or the seller's domicile. The transfer of economic ownership of the aircraft or engine is relevant for (corporate) income tax and VAT purposes.

1.1.2 Enforceability Against Domestic Parties

An aircraft or engine sale agreement is not required to be translated, certified, notarised or apostilled/legalised to be enforceable against an Austrian party.

Austrian courts may require a certified German translation of the sale agreement if it is submitted in evidence.

1.2 Transfer of Ownership

1.2.1 Transferring Title

A transfer of title to an aircraft or engine under Austrian property law requires a title agreement (eg, a bill of sale) as well as an act of transfer, ie:

- physical delivery of the asset;
- an agreement that the transferor shall hold possession of the asset to the instruction of the transferee or, if the asset is already with the transferee, that the transferee shall hold it as legal owner going forward; or
- an instruction to a third party to hold possession of the asset to the instruction of the transferee.

The title transfer would normally:

- extend to all “dependant” components (*unselbständige Bestandteile*) of the aircraft; and
- unless agreed otherwise, extend to all “independent” components (*selbständige Bestandteile*) and all “accessories” (*Zubehör*) which have been installed on or dedicated to the aircraft at the time of the title agreement – engines or auxiliary power

units (APUs) would usually qualify as independent components or accessories.

The sale of a legal entity owning an aircraft is not considered to be a sale of the aircraft (or any of its components/accessories) under Austrian law.

1.2.2 Sales Governed by English or New York Law

Austrian conflict of laws rules would determine the validity of a title transfer in an aircraft in accordance with:

- the law of the state of registration, if the aircraft is registered in a public register; or
- in all other cases, the *lex rei sitae* of the aircraft (or other tangible asset, such as a separate engine) at the time of completion of the (alleged) transfer.

If these rules point to Austrian law, the title transfer would be recognised under Austrian law if and to the extent that it satisfies the requirements for a valid title transfer under Austrian property law (ie, title agreement and act of transfer – see **1.2.1 Transferring Title**).

The title agreement (eg, bill of sale) itself may be governed by foreign law, and an Austrian court would look to that foreign law to determine the obligations of the parties thereunder (in accordance with and subject to the limitations of Regulation (EC) No 593/2008 – the “Rome I Regulation”). An Austrian court may, however, test the foreign law-governed title agreement against the minimum requirements applicable to title agreements under Austrian law (eg, the relevant asset and consideration should be determined in or capable of being determined based on the title agreement).

In addition, the court would test any act of transfer provided for in the title agreement against the requirements under Austrian property law (see **1.2.1 Transferring Title**). If an English or New York law-governed bill of sale does not provide for such an act of transfer or if the act of transfer falls short of such requirements, the title transfer would not be recognised in Austria on the basis of such bill of sale. Where Austrian conflict of laws rules point to foreign law as the governing law for title transfers, an Austrian court would test the relevant bill of sale against the requirements for title transfers under that foreign law.

1.2.3 Enforceability Against Domestic Parties

See 1.1.2 Enforceability against Domestic Parties regarding translations in legal proceedings.

1.2.4 Registration, Filing and/or Consent From Government Entities

For a bill of sale to be enforceable, it is not required to be registered or filed or subject to consent from any government authority in Austria.

An application for registration with the aircraft register (*Luftfahrzeugregister*) requires submission of proof of ownership, which can be established by way of (a chain of) bills of sale. The Austrian regulator, ACG, further requires, inter alia, the submission of an ownership transfer form available on its website, [Austro Control](#), which must be signed by the transferor and the transferee.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

The disposal of an aircraft or an engine by a corporate entity having its seat or place of management in Austria (unlimited tax liability) generally triggers Austrian corporate income tax on any capital gain from the sale, irrespective of where the aircraft or the engine is located.

If it has neither its seat nor its place of management in Austria (limited tax liability), the disposal is – subject to the application of relevant double tax treaties – only subject to Austrian corporate income tax on capital gains from the sale if it has sufficient nexus to Austria (eg, a permanent establishment to which the sale is attributable or if a permanent representative in Austria is involved). In such a case, where the asset is located is not relevant.

Such sale should be exempt from VAT if the aircraft is designated to be used by airlines mainly providing international flights or flights entirely outside of Austria in return for payment. The taxation of the sale of an ownership interest in an entity that owns an aircraft or an engine depends on the type of entity (eg, partnership or corporation) and the individual structure of the sale.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

Operating leases, wet leases, finance leases and leases concerning only engines or components are generally permissible and recognised under Austrian law.

2.1.2 Application of Foreign Laws

The parties to a lease agreement are generally free to choose the governing law in accordance with and subject to the limitations of the Rome I Regulation.

In a purely domestic context (ie, all parties and place of performance are in the same country), an Austrian court may apply the mandatory provisions of the law of that country, irrespective of the choice of law.

Austrian courts may refuse to uphold a choice of law if its application would be manifestly incompatible with Austrian public policy (*ordre public*), or apply overriding mandatory provisions of Austrian law or the law of the place of performance if the performance of the lease agreement would be unlawful under such law.

2.1.3 Restrictions Concerning Payments in US Dollars

There are no material restrictions imposed on an Austrian lessee making lease payments to a foreign lessor in US dollars (subject to applicable sanctions, if any).

2.1.4 Exchange Controls

There are no exchange controls under Austrian law which would prevent payments or the repatriation of realisation proceeds under a lease out of Austria. Austrian law may give effect to foreign exchange control provisions of a member state of the International Monetary Fund (IMF).

Further, parties may be subject to anti-money laundering or counter-terrorism regulations, and payments to foreign entities may be restricted under (international) sanctions.

Some cross-border transactions (including loans or leases subject to certain thresholds) must be reported to the Austrian central bank (*Oesterreichische Nationalbank*) for statistical purposes. If the transaction is

handled by an Austrian bank, it would usually take care of the reporting.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

The execution of a lease agreement in Austria is subject to 1% Austrian stamp duty on the basis of the total amount of rent paid under the lease agreement (capped at a maximum of 18 times the annual rent) or, if the lease is for an indefinite period, on the aggregate value of three-year rentals. Stamp duties are, however, only triggered if a document is physically or electronically signed in Austria or – in certain circumstances – if executed abroad and subsequently (as an original or certified copy) brought into Austria, or if written references to such lease agreements are produced or sent in, to or from Austria. There are several common methods to mitigate Austrian stamp duty, relying on the Austrian Stamp Duty Act's "form over substance" approach.

2.1.6 Licensing/Qualification of Lessors

Austrian leasing providers would usually require a business licence (*Gewerbeberechtigung*) for which no specific qualification is required. Leasing providers from the EU may instead be able to rely on a relevant business licence in their home country. Providers from outside the EU would normally be required to establish an Austrian branch office and obtain a licence.

Austrian leasing providers are subject to several supervisory laws, including with respect to AML compliance, controlling, confidentiality and reporting. Certain qualifying providers from the EU ("CRR-financial institutions") may be exempted from most Austrian supervisory laws under the EU-passporting regime.

Aircraft rental services (*Luftfahrzeug-Vermietungsunternehmen*) are required to obtain permission from the relevant regional governor (*Landeshauptmann*) in accordance with the Austrian Aviation Act (*Luftfahrtgesetz*). The distinction between an operating lease and a rental is not entirely clear; the latter term arguably refers to short-term operating leases (with many lessees during the lifetime of the asset and where each lessee bears no risk in relation to and does not benefit from the economic value of the asset and assumes no obligation in respect of its maintenance).

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

The authors are not aware of any mandatory terms under Austrian law that must be included in a lease and which are not typically already included in an English or New York law-governed lease agreement.

Parties may wish to reflect on the specifics of Austrian law in respect of:

- the perfection of security;
- administrative requirements (eg, registration, insurance, licensing, regulation and continuing airworthiness);
- stamp duty;
- release from duties of confidentiality and banking secrecy (if applicable); and
- include sanctions language where appropriate.

2.2.2 Tax and Withholding Gross-Up Provisions

Gross-up provisions with regard to any withholding tax levied on payments by a party to a lease agreement are permissible and enforceable under Austrian law.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease agreement may cover parts installed or replaced on an aircraft (and the parties may agree on whether the lessor or the lessee is obliged to replace components). As regards the property right in such components, the rules on the transfer of title of the law applicable in accordance with the conflict of laws rules (see 1.2.2 Sales Governed by English or New York Law) would have to be observed.

2.2.4 Risk of Title Annexation

Without a title agreement, the title to an engine would not automatically pass to the owner of the airframe merely because the engine is installed on the airframe.

2.2.5 Recognition of the Concepts of Trust/Trustee

Austrian law would test the validity and enforceability of a trust against the law of the state of registration (if an aircraft is registered) or the *lex rei sitae* in the case of any other tangible asset.

In principle, Austrian law recognises the division of title between legal and beneficial ownership (*Treuhand*) as well as the right of a beneficial owner to segregate trust property in an insolvency of the legal owner. It is also recognised that an owner may retain legal title to an asset sold and delivered to a purchaser until the full satisfaction of the purchase price (*Eigentumsvorbehalt*).

Conversely, Austrian law would not normally give effect to a division of legal from beneficial ownership if such division is used to circumvent the (strict) rules on the perfection of security interests under Austrian law (see **3.2.14 Perfection of Domestic Law Mortgages**). Thus, if legal title to an aircraft is transferred to a lender as security (*Sicherungsübereignung*), the (legal) title of the lender will not be recognised unless the perfection requirements applicable to Austrian law pledges are observed. Similarly, an Austrian court may require the satisfaction of security perfection requirements in “sale and lease back” transactions on terms economically amounting to a secured loan.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The owner (*Eigentümer*) and the operator (*Halter*) of the aircraft must be notified to the ACG when registering an aircraft with the Austrian aircraft register. However, only the operator is listed in the (publicly available) aircraft register.

2.3.2 Registration If the Owner Is Different From the Operator

An aircraft will always be registered in the name of the operator in the Austrian aircraft register, irrespective of whether it is also the owner of the aircraft.

2.3.3 Aircraft/Engine-Specific Registers

There is no register for leases concerning aircraft or engines in Austria.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

Leases and the lessor's interest therein cannot be registered with the Austrian aircraft register.

Nevertheless, aircraft lease agreements which involve an Austrian air operator require the prior approval of the ACG (or a notification in the case of a wet lease-out agreement). For wet lease-in agreements, the ACG provides a specific form on its website. Engine leases are not subject to a specific approval or filing requirement in Austria.

2.3.5 Requirements for a Lease to Be Valid and Registrable

Aircraft lease agreements are not subject to specific formal requirements in Austria, and no certification, notarisation or legalisation is required for the lease agreement to be enforceable.

For the purposes of submitting the lease agreement to the ACG for approval, a simple copy would usually suffice (see **2.3.8 Requirements for Documents Concerning Registration** for language requirements).

2.3.6 Taxes/Duties Payable for Registering a Lease

As an aircraft or engine lease cannot be registered in Austria, no taxes/duties apply (see **2.1.5 Taxes/Duties Payable for the Physical Execution of a Lease** for stamp duties payable on the lease agreement itself).

2.3.7 Registration of Aircraft in Alternative Countries

Commercial aircraft operated by Austrian carriers are commonly registered in Austria. Alternative countries occasionally used for the registration of corporate jets and general aviation aircraft are Germany and the USA.

2.3.8 Requirements for Documents Concerning Registration

Documents submitted to the ACG are generally not required to be certified, notarised or authenticated. The authority provides specific forms on its website that should be used when registering an aircraft with the Austrian aircraft register. The forms (including the supporting documents) may be submitted by email, fax or post.

If documents are provided in a language other than German, the ACG may request a (certified) German translation of the document or parts thereof. In prac-

tice, the ACG appears to accept documents in German and English.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A corporate lessor having neither its seat nor its place of management in Austria may – subject to the application of relevant double tax treaties – be subject to Austrian corporate income tax if it has a sufficient nexus to Austria (eg, a permanent establishment in Austria to which the aircraft or engine is attributable or an Austrian permanent representative).

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A non-Austrian lessor is not generally subject to (corporate) income taxation in Austria as a result of its being a party to or its enforcement of a lease agreement.

2.4.3 Engine Maintenance and Operations

The parties to an aircraft lease under Austrian law are generally free to allocate the responsibility for maintenance of the aircraft between them.

The default position for operating leases under the Austrian Civil Code (ABGB) is that the lessor is responsible for maintaining the aircraft or engine fit for purpose. Austrian operating leases would typically either derogate from or clarify this position (eg, distinguish between major overhauls and ongoing maintenance).

2.4.4 Damage or Loss Caused by an Asset

Under certain circumstances, Austrian law imposes strict liability on the operator (*Halter*) and the carrier (*Beförderer*) for damage caused by an aircraft to persons or property.

Neither an owner (who is not also the operator and/or carrier), a lessor nor a finance provider would typically be liable for damage caused by the asset, except to the extent such damage was caused by their negligence (eg, failure to maintain the asset in accordance with the agreed terms of a lease).

2.4.5 Attachment by Creditors

If a third-party creditor of an Austrian lessee attempts to attach an aircraft leased to the Austrian lessee that

the lessee does not own, the owner of the aircraft could raise a claim against such attachment (*Exszindierungsklage*).

2.4.6 Priority of Third Parties' Rights

A person who has paid expenses with respect to an asset on behalf of the owner is generally permitted to retain the asset until reimbursement by the owner unless a third party is liable for such expenses. Thus, third-party retention rights would not normally take priority over the owner's interest in an aircraft or engine unless the owner/lessor is itself liable to such third party (eg, the owner's liability for ATC charges in the event that the operator is unknown; liability for maintenance work assumed by the owner under the terms of the lease).

Further, Austrian law recognises that a third party may, under certain limited circumstances, acquire an in rem (security) interest in good faith from a person (eg, the lessee) who does not hold title to and is not otherwise permitted to dispose of such asset (*gutgläubiger Erwerb/Pfandrechtserwerb*). Such a risk can be mitigated by affixing signs and notices to the aircraft and advertising the title holder.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

Austrian law does not require that all or part of the insurance for the operation of an aircraft is placed with Austrian insurance companies.

2.5.2 Mandatory Insurance Coverage Requirements

The operator of an aircraft is obliged to maintain liability insurance that covers:

- death and injury of passengers;
- damage to, and destruction and loss of, transported goods;
- death and injury of third parties; and
- damage and destruction of third parties' property.

The minimum insurance amounts depend on the maximum take-off weight of the aircraft as provided for by European and Austrian laws. Proof of sufficient insurance cover is a prerequisite for the operating licence.

2.5.3 Placement of Insurance Outside of Jurisdiction

Austrian law does not restrict the placement of reinsurances outside of Austria up to 100% coverage.

2.5.4 Enforceability of “Cut-Through” Clauses

Austrian law generally does not prohibit “cut-through” clauses in insurance/reinsurance documents, and such clauses should be enforceable.

2.5.5 Assignment of Insurance/Reinsurance

Austrian law generally allows assignments of insurances/reinsurances. In practice, assignments of insurances are typical in aviation leasing and financing transactions, whereas assignments of reinsurances are not.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors’ Abilities

Prior to a lessee’s insolvency, the lessor may freely terminate an Austrian law-governed lease in accordance with its terms. In addition, a lessor would be permitted to terminate the lease at any time for cause (*aus wichtigem Grund*), such as a non-payment or a material breach.

If insolvency proceedings have been commenced with respect to the lessee, a lessor may – if the administrator intends to continue the operations – be prevented from terminating an aircraft lease for six months unless the operator/administrator defaults on lease payments due after the commencement of insolvency proceedings or otherwise commit a material breach. Similar restrictions may apply to the repossession of an aircraft or if the lessee has applied for restructuring proceedings. Even if the lessor’s termination right is temporarily restricted, the lessor would not normally be prevented from selling its ownership interest in the aircraft to a third party.

Without prejudice to the above, there are no generally applicable export restrictions regarding Austrian registered aircraft, other than:

- export and sanctions control legislation (eg, with respect to military aircraft or dual-use goods); and
- deregistration (and reregistration, respectively) of the aircraft with the ACG.

Austrian registered aircraft need not be physically present in Austria for the purposes of a termination of the lease or, as a matter of Austrian law, for a sale of the aircraft. Given that the conflict of laws rules at the place of the actual transfer may point to a law other than Austrian law to determine the validity of the title transfer, and the physical presence of the aircraft at the time of title transfer is recommended. Unregistered aircraft sold under an Austrian law-governed title agreement should, in any event, be present in Austria at the time of the title transfer.

2.6.2 Lessor Taking Possession of the Aircraft

The parties to a lease are generally free to agree on certain events that allow the lessor to repossess the aircraft (eg, an event of default under the lease). The agreement may be supported by a deregistration power of attorney.

Nevertheless, it should be noted that Austrian law recognises a right of self-help only in very limited circumstances when judicial relief would not be available in time (eg, imminent risk that the lessee will transfer the aircraft to a country where the lessor will not be able to enforce its rights due to lack of due process or rule of law). Thus, if an Austrian lessee attempts to frustrate the repossession (eg, by revoking powers of attorney or blocking access to the aircraft), the lessor will normally have to repossess the aircraft by way of enforcement proceedings.

2.6.3 Specific Courts for Aviation Disputes

Lease disputes would typically fall within the jurisdiction of the commercial courts (ie, a specialised subdivision of the civil law courts). There are, however, no specific panels for aviation-related disputes.

2.6.4 Summary Judgment or Other Relief

Where a claim is for payment only, an Austrian court may issue a payment order to an Austrian defendant without going into the merits (*Mahnverfahren*). Unless the defendant objects within four weeks, the payment order becomes enforceable. This instrument is available for claims up to EUR75,000. EU law offers a similar (uncapped) instrument for cross-border claims. Similar proceedings are available for bills of exchange.

It is possible to apply for a preliminary injunction (*einstweilige Verfügung*) under Austrian law if the applicant demonstrates a prima facie claim and an imminent threat to its legal position. The court may require a bond or security from the applicant to cover costs and potential damages if the claim ultimately fails.

In practice, injunctions are not frequently used or granted in Austrian commercial disputes.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Austrian courts will normally uphold a choice of law in accordance with and subject to the limitations of the Rome I Regulation (see 2.1.2 Application of Foreign Laws for details and limitations). Further, courts in Austria would uphold a jurisdiction clause in favour of the courts of an EU member state and certain other jurisdictions (eg, England, Iceland, Liechtenstein, Norway and Switzerland) in accordance with and subject to the limitations of Regulation (EU) No 1215/2012 (the "Judgment Regulation"), the Lugano Convention or the Hague Convention.

Forum clauses in favour of the courts of other countries are usually upheld only if there is a bilateral treaty on the recognition and enforcement of judgments between the relevant forum state and Austria (see 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards). Given the absence of such treaty between Austria and the USA, Austrian courts have accepted jurisdiction despite an exclusive choice of court clause in favour of New York courts.

A waiver of (sovereign) immunity granted by the competent person or body will generally be recognised by Austrian courts. A lack of waiver cannot normally be remedied implicitly by pleading on the merits without raising any objections.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Austrian courts would recognise and enforce judgments from EU member states and certain other jurisdictions (eg, England, Iceland, Liechtenstein, Norway and Switzerland) under either the Judgment Regulation, the Lugano Convention or the Hague Convention. Final and binding judgments from countries not

covered by these laws or treaties are recognised in Austria based on reciprocity provided in a bilateral treaty with such country.

Importantly, no such treaty currently exists between Austria and the USA. Thus, a judgment rendered by a New York court is prima facie not enforceable in Austria.

Austrian courts may refuse to recognise and/or enforce a foreign judgment, inter alia, if:

- recognition would be contrary to public policy;
- the defendant has not been duly served with the claim and has made use of any appeal available; or
- the judgment is irreconcilable with another (conflicting) judgment.

Foreign arbitral awards may be refused recognition and/or enforcement in accordance with the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") (see 2.6.12 Enforcement of Foreign Arbitral Decisions).

2.6.7 Judgments in Foreign Currencies

Austrian courts may give a judgment in a currency other than the euro. Such judgments may be required to be converted into euros for enforcement purposes.

2.6.8 Limitations on Lessors' Actions Following Termination

The parties to a lease are generally free to agree on default interest (including compounded interest). In addition, a lessor could claim damages from the lessee for failure to return the aircraft after termination in accordance with the lease.

A grossly imbalanced default or compounded interest clause may be unenforceable (*sittenwidrig*) under Austrian law (eg, if the interest exceeds the principal amount).

2.6.9 Lessor's Requirement to Pay Taxes/Fees

Subject to applicable double tax treaties, a lessor under an aircraft lease agreement is liable to pay Austrian (corporate) income tax in connection with the performance or enforcement of such lease agreement if the lessor is subject to unlimited income taxation or

limited income taxation (such as lessors having a sufficient nexus to Austria, eg, a permanent establishment in Austria or an Austrian permanent representative).

2.6.10 Mandatory Notice Periods

A termination for cause (*aus wichtigem Grund*) is not normally subject to a notice period.

In other cases, the parties are generally free to agree on specific notice periods in the lease. The lessor should comply with any mandatory notice periods under Austrian law (eg, a “reasonable” period if no notice period has been agreed, or one week of prior notice when enforcing security).

2.6.11 Lessees’ Entitlement to Claim Immunity

Sovereign immunity may prevent an Austrian court from rendering a judgment, even if the beneficiary of immunity has taken part in the proceedings. A waiver of immunity will be accepted if it has been granted by the competent authority or person.

2.6.12 Enforcement of Foreign Arbitral Decisions

Austria has ratified the New York Convention, and final and binding foreign arbitral awards are generally recognised and enforced in Austria in accordance with the New York Convention.

2.6.13 Other Relevant Issues

The authors do not know of any other relevant issues that lessors should be aware of in relation to the enforcement of their rights.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Austrian law recognises an assignment of rights (*Zession*) as well as a transfer of contract (comprising rights and obligations) to a third party with the consent of the debtor (*Vertragsübernahme*).

The term “novation” in Austrian law is usually used to describe the agreed replacement of an existing obligation with a new one between the same parties.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

An Austrian court would look to the law governing the lease to determine if the rights thereunder can be assigned or transferred and if the lessor’s consent is required (see 2.1.2 **Application of Foreign Laws** for details and limitations).

It should be noted that any transfer of title would have to be tested separately against the law applicable to property rights under Austrian conflicts of laws rules (ie, Austrian law in the case of an aircraft registered in Austria – see 1.2.2 **Sales Governed by English or New York Law**).

2.7.3 Enforceability of Lease Assignments/Novations

An aircraft and/or engine lease assignment or transfer agreement is not required to be translated, certified, notarised or apostilled/legalised to be recognised or enforceable as a matter of Austrian law (see 1.1.2 **Enforceability against Domestic Parties** for language requirements in legal proceedings).

2.7.4 Filing/Registration of Lease Assignments/Novations

An aircraft (or engine) lease assignment or transfer agreement is not required to be registered or filed in the Austrian aircraft register as such. However, an Austrian operator must submit a copy of the assigned or transferred lease agreement to the ACG and (if applicable) register the change in ownership of the aircraft (see 1.2.4 **Registration, Filing and/or Consent From Government Entities**).

2.7.5 Taxes/Duties Payable on Assignment/Novation

The execution of an assignment in Austria is subject to a stamp duty of 0.8% of the amount for which the assigned claim was acquired (*Entgelt*). Stamp duty may – inter alia and under certain circumstances – also be triggered if a signed document (or substitute documentation thereof) is subsequently brought into Austria. There are various commonly used methods to mitigate Austrian stamp duty risks.

2.7.6 Recognition of Transfer of Ownership Interests

A transfer of the ownership interest in the entity owning an aircraft would not directly affect lease agreements entered into by such entity or assets owned by such entity under Austrian law.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

The Austrian aircraft register is an operator-based register. The operator is in principle responsible and competent to apply for the deregistration of an aircraft. An application form must be duly completed, signed and submitted to the ACG with certain ancillary documents.

2.8.2 Lessee's/Operator's Consent

Apart from certain specific situations (eg, in the event of a court order), the operator requires the consent of the owner for the deregistration of an aircraft.

2.8.3 Required Documentation

For the deregistration of an aircraft, the operator must submit a duly completed and signed form to the ACG, together with evidence of the owner's consent, as well as originals of the certificate of airworthiness (*Lufttüchtigkeitszeugnis*), the certificate of use (*Verwendungsbescheinigung*), the certificate of registration (*Eintragungsschein*) and the noise certificate (*Lärmzeugnis*).

2.8.4 Duration of Deregistration Process

If the documents submitted to the ACG are complete and in the appropriate form, the deregistration of an aircraft should only take one to two weeks, or less, if discussed in advance with the ACG.

2.8.5 Aviation Authority's Assurances

The ACG will not provide advance assurances to the operator applying for the deregistration of the aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

Fees charged by the ACG for the deregistration of an aircraft range from EUR80 to EUR1,808, depending on the weight of the aircraft.

2.8.7 Deregistration Power of Attorney

A deregistration power of attorney by the operator is generally recognised, provided that it has been translated into German.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

The person using the deregistration power of attorney should be able to demonstrate (by way of acceptable documentation) that the signatory of the power of attorney was duly authorised and that the owner of the aircraft is duly incorporated and validly existing.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A deregistration power of attorney does not necessarily have to be governed by Austrian law. However, an Austrian law-governed deregistration power of attorney may be accepted more easily by the ACG.

2.8.10 Revocation of a Deregistration Power of Attorney

If a power of attorney is expressed to be "irrevocable" and granted for the purposes of enforcing a security interest or otherwise for the benefit of the addressee, it is accepted under Austrian law that the grantor may not freely revoke it other than for cause (*aus wichtigem Grund*). A power of attorney will lapse in the insolvency of the grantor.

2.8.11 Owner's/Lessor's Consent

The lessee's consent is usually required for obtaining an export certificate of airworthiness (see 2.8.12 Aircraft Export Permits/Licences). The owner and the mortgagee or lessor typically request a deregistration power of attorney from the operator so that the operator cannot block the deregistration of an aircraft.

2.8.12 Aircraft Export Permits/Licences

Austrian law does not generally restrict the export of an aircraft. However, an export certificate of airworthiness is required for the export of an aircraft to certain countries. If the respective application is submitted completely and in the appropriate form, the issuance of the export certificate of airworthiness should only take one to two weeks, or less if discussed in advance with the ACG. An export certificate of airworthiness can be obtained in advance.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

Fees charged by the ACG for obtaining an export certificate of airworthiness range from EUR301 to EUR9,631, depending on the weight of the aircraft.

2.8.14 Practical Issues Related to Deregistration of Aircraft

Although the operator is responsible for the deregistration of the aircraft, both the operator and the lessor can apply to the ACG for a deregistration certificate. The ACG will only issue a deregistration certificate if the identification badge, livery colours and coat of arms of the Republic of Austria have been removed from the aircraft.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

The primary law governing insolvency proceedings in Austria is the Insolvency Code (*Insolvenzordnung*). It is supplemented by the Enforcement Code (*Exekutionssordnung*), the rules of civil procedure (JN, ZPO) and applicable company laws (GmbHG, AktG).

Preventive restructuring is available under the Restructuring Code (*Restrukturierungsordnung*), which implements Directive (EU) No 2019/1023, and the Reorganisation Act (URG), noting that the latter has no practical relevance.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Businesses which are either insolvent (ie, technically insolvent (*zahlungsunfähig*)) or over-indebted and likely to become insolvent in the future (*überschuldet*) are required to file for insolvency without undue delay and, in any event, within 60 days. The Insolvency Code offers two main routes for such companies: reorganisation proceedings (with or without self-administration) or liquidation. Reorganisation proceedings require the preparation of a reorganisation plan which must offer a minimum quota of 20% (or 30%, in the case of self-administration) to creditors. It can be approved by a double majority (in number and

value) of affected creditors and must be sanctioned by the competent court.

A business which is “likely” to become insolvent may apply for preventive restructuring under the Restructuring Order. This may include a stay of enforcement action. Restructuring plans may be approved by a majority of 50% of creditors holding 75% of claims in each class, provided that a cross-class cram-down is possible in certain circumstances. The restructuring plan must be sanctioned by the competent court.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

Insolvency proceedings in other EU member states are recognised in Austria in accordance with and subject to the limitations of Regulation (EU) No 848/2015 (the “InsReg”). In the case of parallel (primary and secondary) insolvency proceedings, the InsReg provides for communication and co-operation between the administrators and competent courts.

Proceedings in a non-member state may be recognised if the debtor’s centre of main interest is in the respective foreign country and the basic principles of the foreign proceedings are comparable to Austrian insolvency law. Austrian courts and administrators must provide competent foreign administrators with relevant information.

Except for the above, the authors are not aware of any other formal rules in Austria regarding the co-operation or exchange of information in international insolvency proceedings.

2.9.4 Effect of Lessee’s Insolvency on a Deregistration Power of Attorney

Any power of attorney granted by an Austrian debtor would lapse upon the commencement of insolvency proceedings over its assets. This would also apply to any deregistration power of attorney granted by an Austrian operator (*Halter*).

Irrevocable deregistration and export request authorisations (IDERAs) are not recognised as such under Austrian law because Austria has not ratified the Cape Town Convention.

2.9.5 Other Effects of a Lessee's Insolvency

A lease agreement with an Austrian lessee will not automatically be set aside due to the lessee's insolvency. The insolvency administrator may terminate the lease in accordance with the lease agreement or as provided under statutory law. If the administrator does not terminate the lease, any payments which fall due after the commencement of insolvency proceedings will qualify as preferential claims (*Masseforderungen*).

If an asset is essential for the continuation of the business of the lessee, the lessor cannot terminate the lease (or repossess the aircraft) for six months other than for cause (*aus wichtigem Grund*) or due to an imminent grave economic disadvantage of the lessor. During a six-month period, the lessor cannot terminate the lease based on an alleged material adverse change in the lessee's financial condition or based on a default prior to insolvency. If, however, the administrator defaults on lease payments after the insolvency, the lessor could terminate for cause.

If the lessor holds ownership in the leased aircraft, it will be possible to segregate (*aussondern*) the aircraft from the insolvency estate subject to the moratorium described above. Unsecured creditors will have no right to such assets.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The central aim of a lender in the borrower's insolvency will be the protection of its security interest. Holders of collateral (eg, pledges) will generally have a preferred claim on enforcement proceeds relating to the collateral (*Absonderungsrecht*).

The administrator would be responsible for the enforcement of collateral within its control (eg, by having the asset sold in an auction under the supervision of the court). The same will arguably apply if the asset is in the control of a third party. If it is in the control of the lender/pledgee, it may enforce the security interest itself in accordance with its terms. Enforcement proceeds will first be applied towards payment of the enforcement costs, second towards the settlement of the secured claim and third towards other insolvency claims.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

With effect from the beginning of insolvency proceedings, creditors will not be able to file claims against a debtor for non-payment until the administrator has had a chance to review and acknowledge the claim (*Prüftagsatzung*), and all pending proceedings will be suspended automatically. Austrian law does not, however, provide for a moratorium on payments as such.

2.9.8 Liquidation of Domestic Lessees

If an Austrian lessee is insolvent, any of its creditors may commence insolvency proceedings against the Austrian lessee (irrespective of whether the claim of the creditor is due or not) (see also 2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership). The lessee itself (and its managing directors, respectively) is also required to file for insolvency without undue delay and, in any event, within 60 days.

2.9.9 Ipso Facto Defaults

Termination clauses which allow one party to terminate a lease or loan agreement solely based on the commencement of insolvency proceedings over the assets of the other party are not permitted under Austrian law.

2.9.10 Impact of Domestic Lessees' Winding-Up

The commencement of insolvency proceedings would not affect the interest of the owner in the aircraft, who would retain its right of segregation (*Aussonderungsrecht*).

The lessee would, however, be prevented from making lease payments to the lessor without the consent of the insolvency administrator. In addition, the insolvency administrator could avoid certain lease payments (eg, payments received by the lessor during the last six months prior to the insolvency if the lessor was or should have been aware of the lessee's insolvency or insolvency filing).

If the insolvency administrator intends to continue the operations of the lessee (eg, with a view to selling a part of the business during the insolvency proceedings), the ability of the lessor to terminate the lease will

be restricted to termination for cause (see **2.9.5 Other Effects of a Lessee's Insolvency**). In that case, lease payments that fall due after the insolvency would constitute preferred claims.

Any lease security deposit would normally be kept on account of the lessor. It would thus not form part of the insolvency estate and remain available to the lessor to cover outstanding claims, and the same would normally apply to maintenance reserves.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

Austria has not ratified the Convention on International Interests in Mobile Equipment or the related Protocol on Matters specific to Aircraft Equipment, and consequently neither the Convention nor the Protocol are in force in Austria.

2.10.2 Declarations Made Concerning Conventions

See 2.10.1 Conventions in Force.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

See 2.10.1 Conventions in Force.

2.10.4 Enforcement of Conventions

See 2.10.1 Conventions in Force.

2.10.5 Other Conventions

See 2.10.1 Conventions in Force.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

Commercial lending to an Austrian borrower qualifies as a banking business under Austrian law and requires a banking licence.

Credit institutions from within the EU may rely on their EU passport to lend to Austrian borrowers if they have obtained the relevant licence in their home member state.

A banking licence will not be required in Austria if all elements of the loan are kept abroad, noting, however,

that the Austrian authorities have taken a strict view in the past as to what constitutes a sufficient nexus to Austria.

Subject to applicable sanctions (if any), the authors are not aware of any restrictions under Austrian law which would prevent a borrower from borrowing funds from a foreign lender.

3.1.2 Effect of Exchange Controls or Government Consents

See 2.1.4 Exchange Controls regarding exchange control restrictions and reporting to the Austrian National Bank.

3.1.3 Granting of Security to Foreign Lenders

Austrian borrowers are permitted to grant security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Austrian borrowers are generally free to provide security for the benefit of their direct or indirect subsidiaries ("downstream security").

Companies (and partnerships which do not have any natural person as an unlimited partner) are subject to capital maintenance rules under Austrian law preventing them from granting security for the benefit of their direct or indirect shareholders ("upstream") or sister companies ("cross-stream") unless such security is provided on arm's-length terms or, in some cases, where they receive another form of corporate benefit. In any event, there must be no doubt about the borrower's solvency.

If the test referred to above is not satisfied, the relevant security would prima facie breach capital maintenance rules. In practice, this would be mitigated by limiting the economic value of the security interest to an amount equal to the distributable profits of the security provider ("limitation language").

3.1.5 Lenders' Share in Security Over Domestic SPVs

Share pledges or pledges over partnership interests are recognised under Austrian law and frequently requested by lenders. In addition, Austrian law share

pledges commonly permit the pledgee to exercise voting rights on behalf of the pledgor following an event of default under the loan, which increases the lender's control in a default scenario.

3.1.6 Negative Pledges

Share pledges or pledges over partnership interests are recognised under Austrian law and frequently requested by lenders. In addition, Austrian law share pledges commonly permit the pledgee to exercise voting rights on behalf of the pledgor following an event of default under the loan, which increases the lender's control in a default scenario.

3.1.7 Intercreditor Arrangements

The authors are not aware of any material restrictions or requirements imposed on intercreditor arrangements under Austrian law or involving Austrian parties.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent under syndicated loan transactions are recognised and frequently used in the Austrian market.

3.1.9 Debt Subordination

Parties are generally free to agree on a contractual subordination of a claim. In practice, a distinction is sometimes made between "normal" and "deep" subordination, with the latter term referring to a waiver of the relevant creditor to consider the deeply subordinated debt for the purposes of determining whether a company is over-indebted. Further, a deeply subordinated creditor undertakes not to file for insolvency in the case of a default under such debt.

In addition to contractual subordination, structural subordination is sometimes used in financing transactions.

Austrian law also recognises a concept of equitable subordination with respect to certain loans provided by or on behalf of a qualifying shareholder during a time of economic "crisis" (*Krise*) in accordance with the Austrian Equity Substitution Act (EKEG).

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

An Austrian court would look to the law applicable to the loan to determine whether the contractual rights thereunder can be assigned and if the consent of the debtor is required for a transfer of the contractual position (see 2.1.2 Application of Foreign Laws for details and limitations). If an assignment or transfer is permissible under applicable law, it would normally be recognised by an Austrian court.

3.1.11 Usury/Interest Limitation Laws

An agreement that "must appear manifestly imbalanced to every reasonable and just person" would be contrary to public policy (*sittenwidrig*) under Austrian law and is, therefore, void. This concept puts an upper limit on interest that can be claimed.

Compounded interest is generally permitted under Austrian law, subject to an express agreement between the parties.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

Due to the (strict) perfection requirements in respect of Austrian pledges over tangible assets, parties often aim for structures where the finance provider remains the owner of the aircraft and leases it to the operator. If, however, the aircraft is already owned by the borrower at the time of the loan, any transfer of title to the finance provider may be subject to a re-characterisation risk (see 2.2.5 Recognition of the Concepts of Trust/Trustee).

If the owner and operator are different persons, a pledge could be perfected by instructing the operator to hold possession of the aircraft to the instruction of the pledgee. This structure is also used in the market.

Further, a typical security package in an Austrian aircraft finance transaction would include a share pledge agreement, receivables pledges (over lease receivables, insurance receivables, etc), account pledges, guarantees, airframe warranties agreement, engine warranties agreement, a security deposit and a deregistration power of attorney.

3.2.2 Types of Security Not Available

Austrian law does not know the concept of an aircraft mortgage registered in a public register. Pledges over moveable assets must be perfected in accordance with Austrian (property) law requirements (see **3.2.14 Perfection of Domestic Law Mortgages**). Further, where the debtor does not already own the aircraft, the seller/finance provider may retain the title to it until the satisfaction of the outstanding purchase price.

3.2.3 Trust/Trustee Concepts

Austrian law does not normally permit a person to enforce another person's claim in court. Nevertheless, the concept of a security trustee is widely used in syndicated loan transactions in the Austrian market. In order to put the security trustee in a position to enforce the security interest, parties typically use parallel debt language.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

Austrian law recognises the concept of a transfer of ownership in an asset for security purposes (*Sicherungsübereignung*), provided that Austrian courts would apply the same perfection requirements required for the valid creation of a pledge (see **3.2.14 Perfection of Domestic Law Mortgages**).

(Contractual) rights under a lease agreement or an insurance policy may be pledged or assigned for security purposes, provided that perfection requirements (eg, notification of the relevant third-party debtor and/or recording the security interest in the books of the pledgor) would apply.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

Subject to any contractual prohibitions, an assignment of rights would result in an assignment from the assignor to the assignee of the assignor's rights only. The obligations under the underlying agreement would generally remain with the assignor. If it is intended to transfer the entire contractual position (rights and obligations) of a party, this would have to be done by way of a transfer (*Vertragsübernahme*) which requires the consent of the debtor.

3.2.6 Choice of Foreign Law

Austrian conflict of laws rules would look to the law applicable to the underlying agreement to determine the validity of an assignment or pledge thereof. It is, therefore, recommended that a receivables assignment or pledge agreement follows the law of the underlying agreement. If that is not the case (eg, because receivables from different jurisdictions are pledged under a master security agreement), the perfection mechanism in that master agreement should also be tested against the minimum requirements applicable in each relevant jurisdiction.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

The perfection requirements applicable to Austrian law-governed security assignments (*Sicherungsbesetzungen*) and receivables pledges (*Forderungspfandverträge*) may take the form of:

- notification to the debtor of the receivables (*Drittschuldnerverständigung*); and/or
- recording the security interest in the books and accounts of the pledgor by way of a book entry referring to the assignment or pledge (*Buchvermerk*).

An Austrian law-governed security assignment/receivables pledge is not required to be translated, certified, notarised or apostilled/legalised in order to be enforceable (see **1.1.2 Enforceability against Domestic Parties** for language requirements in legal proceedings).

Austrian law security assignments should specify the assigned receivables (ie, they must be determined or capable of being determined based on the agreement) and describe the secured obligation. In addition, the security document would commonly include provisions allowing for out-of-court enforcement by the pledgee.

3.2.8 Domestic Law Security Instruments

If the parties enter into an English or New York law-governed security document with respect to an aircraft registered in Austria, an Austrian court will test the perfection of such security interest against the requirements imposed under Austrian law (see **1.2.1**

Transferring Title). If there is any doubt as to the compliance of the foreign law document with such requirements, the lenders may wish to consider taking an Austrian law-governed pledge over the aircraft in addition to the foreign law security document.

The Austrian law-governed aircraft pledge can be prepared at a relatively low cost, and there are no specific formal or registration requirements. The parties need to comply with perfection requirements imposed by Austrian (property) law.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

There is no public register for security assignments or receivables pledges in Austria for Austrian or foreign security interests.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

Engines would usually be considered either as “independent” components (*selbständige Bestandteile*) of an aircraft or as an accessory (*Zubehör*). Either way, engines would be capable of being subject to a security interest separate from the aircraft.

Any security interest created over the engines would also have to comply with perfection requirements for security interests under Austrian (property) law.

3.2.11 Effect of Changes in the Identity of Secured Parties

Depending on the circumstances, a change in the identity of the secured parties may have an impact on the security interest. In practice, the concept of a security trustee is used to mitigate the consequences of such a change.

3.2.12 “Parallel Debt” Structures

“Parallel debt” structures are commonly used in Austria to put the security trustee in a position where it may enforce a claim on behalf of the entire syndicate of creditors.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A non-Austrian secured party would not generally be deemed to be resident, domiciled, carrying on busi-

ness or subject to (corporate) income taxation in Austria as a result of its being a party to, or its enforcement of, a security assignment.

3.2.14 Perfection of Domestic Law Mortgages

As stated at 3.2.2 **Types of Security Not Available**, Austrian law does not recognise the concept of a registered aircraft mortgage, but the parties may create a pledge over moveable assets (*Fahrnispfandrecht*).

Traditionally, the following perfection requirements have been recognised in Austria:

- physical delivery of the pledged asset to the pledgee;
- otherwise removing the asset from the control of the pledgor (eg, by locking it up and restricting access);
- if the asset is already with the pledgee, an agreement that the pledgee shall hold the asset as pledgee going forward; or
- an instruction to a third party to hold possession of the asset to the instruction of the transferee.

In practice, perfection by way of instruction to the operator to hold possession of the aircraft to the instruction of the pledgee is the only commercially reasonable means for perfection of a pledge in the context of aircraft finance transactions. Usually, perfection is supplemented by affixing signs or notices evidencing the pledge to the aircraft, which makes it more difficult for a third party to argue that it has bona fide acquired a security or ownership interest in the aircraft ranking prior to the interest of the pledgee.

Moreover, it is recognised under Austrian law that the security interest under a pledge will not immediately lapse if – after the perfection of the security interest, eg, by physical delivery to the pledge – the asset is temporarily returned into the possession of the pledgor.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

The security interest available in respect of an aircraft and spare engines is the same (ie, pledge over moveable assets), and so are the perfection requirements.

3.2.16 Form and Perfection of Security Over Bank Accounts

A security interest over bank accounts in Austria would typically be created in the form of an account pledge (*Kontopfandrecht*). An account pledge may qualify as financial security under Austrian law, allowing for quick enforcement by appropriation or set-off.

Austrian law account pledges are generally perfected by way of notification to the account bank and recording the security interests in the books and accounts of the pledgor.

3.3 Liens

3.3.1 Third-Party Liens

Third-party creditors of the owner of the aircraft may attempt to enforce their claims against it by obtaining a statutory pledge (*Pfändungspfandrecht*) in enforcement proceedings, followed by a sale of the aircraft by a court bailiff.

3.3.2 Timeframe to Discharge a Lien or Mortgage

A contractually agreed and validly perfected pledge is normally discharged automatically upon payment of the secured obligation (*Akzessorietät*), although in practice, it is commonly agreed that the pledgee will issue a release (confirmation) letter.

3.3.3 Register of Mortgages and Charges

There is no register of mortgages or charges over aircraft available in Austria, and neither are the interests of a pledgee or security trustee in an aircraft registered in the Austrian aircraft register.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

Austrian law generally recognises a retention right (*Zurückbehaltungsrecht*) of a creditor in respect of the assets of the debtor. Thus, an airport may retain an aircraft operated by the owner for unpaid charges and a maintenance facility for unpaid work, in each case followed by enforcement proceedings against the owner and its aircraft (see 3.3.1 Third-Party Liens). The retention right does not normally extend to the assets of third parties.

Further, Austrian tax or customs authorities may seize and take enforcement measures against an aircraft to enforce the tax liabilities of the owner.

In the case of (alleged) involvement of the aircraft and/or its owner in criminal activity, the police or public prosecution service may seize and/or confiscate an aircraft.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

There is no public register available in Austria that provides conclusive evidence that an aircraft is free of encumbrances.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

Austrian security assignments typically include terms permitting the assignee to enforce upon default without the involvement of a court by instructing the third-party debtor to make payment to the assignee or by way of a sale or auction of the assigned rights.

Loans or guarantees are contractual obligations. If a dispute arises, the lender/beneficiary would have to obtain a judgment against the debtor, which could then be enforced against the assets of the creditor in enforcement proceedings.

3.4.2 Security Trustees' Enforcement of Their Rights

If a lessor assigns the rights under a lease to a security trustee under a market standard Austrian law security assignment, the security trustee could usually enforce the security interest by way of giving notice to the lessee and without the involvement of the courts.

3.4.3 Application of Foreign Laws

Austrian courts would generally uphold a choice of law in a finance document or a security document in accordance with and subject to the limitations of the Rome I Regulation. Any property rights created under a security document (and the relevant perfection requirements, respectively) would, however, be tested against the law applicable to property rights under Austrian conflict of laws rules (see 1.2.2 Sales Governed by English or New York Law).

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Austrian courts would enforce foreign judgments from other EU member states and certain other countries (including the UK) without re-examining the merits on the basis and subject to the limitations of applicable EU law or international treaties (see 2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments and 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards). Arbitral awards may be enforced on the basis of the New York Convention (see 2.6.12 Enforcement of Foreign Arbitral Decisions).

3.4.5 Secured Parties' Right to Take Possession of Aircraft

A secured party may not normally take possession of an aircraft without the consent of the operator (see 2.6.2 Lessor Taking Possession of the Aircraft), and any unlawful attempt to take control could result in a claim for trespass (*Besitzstörungsklage*) against the secured party.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

The district court (*Bezirksgericht*) of the place where a tangible asset is located when enforcement begins would be competent for enforcement action against an aircraft. It should be noted that market standard pledge agreements frequently allow for out-of-court enforcement by way of private sale or public auction following an appraisal of the asset.

3.4.7 Summary Judgments or Other Relief

Summary judgments are available for monetary claims up to EUR75,000 (or without a limit in the case of claims relating to a bill of exchange or certain cross-border claims under EU law). Injunctions may be available as a standalone instrument or as a preliminary measure (see 2.6.4 Summary Judgment or Other Relief).

3.4.8 Judgments in Foreign Currencies

Austrian courts may give judgment in a currency other than euros (see 2.6.7 Judgments in Foreign Currencies).

3.4.9 Taxes/Fees Payable

A secured party is required to pay court fees upfront when enforcing a security agreement in Austrian legal proceedings. Court filing fees depend on the sum in dispute and might amount to a nominal amount.

3.4.10 Other Relevant Issues

There is no applicable information in this jurisdiction.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

The factual, legal and tax background of each purchase, sale, lease or debt financing of an aircraft registered in Austria and/or involving an Austrian party needs to be assessed on a case-by-case basis to be able to render conclusive legal advice.

4.2 Current Legislative Proposals

As of 9 June 2025, there is no proposed Austrian legislation specifically addressing the purchase, sale, lease or debt financing of an aircraft registered in Austria and/or involving an Austrian party.

Trends and Developments

Contributed by:

Martin R. Geiger

GHP Attorneys at Law

GHP Attorneys at Law was founded in February 2024 in Vienna, Austria. In spring 2024, GHP opened an office in Salzburg. Several Austrian attorneys at law run an efficient, leanly-structured law firm. They are supported by a very experienced team that contribute to the law firm's success with their different backgrounds and previous experience in national and international law firms. For its international mandates, GHP draws on an extensive network of specialists.

The team of lawyers covers all areas of inter alia aviation law, advises on the registration and licensing of aircraft and solves even the most complex regulatory issues. Contract drafting for financing, leasing, ground handling or management is also carried out. Disputes and arbitration proceedings are coordinated worldwide so that clients can enforce their rights – regardless of where their aircraft are located.

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Overview

Austria continues to position itself as a reliable and strategically situated jurisdiction in the aviation finance and leasing space, offering a stable legal environment, strong adherence to EU regulatory frameworks, and a well-functioning aircraft registration regime. While the jurisdiction may not be a traditional hub for lessor headquarters, it is increasingly relevant in the European market, particularly for operators based in Central and Eastern Europe (CEE) and international lessors seeking secure and efficient platforms within the EU legal sphere.

In 2025, key developments in aviation finance and leasing in Austria have been shaped by environmental imperatives, advances in digital technologies, growing market preference for flexible leasing structures, and ongoing refinements to insolvency and enforcement mechanisms. The following analysis highlights these evolving trends through a legal and transactional lens, relevant to in-house counsel, lessors, banks, and cross-border legal practitioners.

Environmental Imperatives and Aviation Finance Structures

As with other EU Member States, Austria is under mounting regulatory and political pressure to align with the European Green Deal and the Fit for 55 legislative package. In the aviation context, this translates into intensified scrutiny of emissions, fleet modernisation initiatives, and the financing of sustainable aircraft.

Legal structuring of ESG-linked transactions

Sustainability-linked finance is no longer peripheral – it is fast becoming a key element in aviation transaction structuring. In Austria, we are witnessing increased deployment of sustainability-linked loans (SLLs), green leases, and hybrid instruments that integrate environmental performance into core covenants. Such structures are being applied both to lessees operating within Austria and to aircraft acquisitions where the asset is registered or based in Austrian territory.

From a legal perspective, structuring ESG-linked transactions presents particular challenges:

- The choice of ESG metrics must be specific, measurable, and verifiable. Common benchmarks

include carbon emissions per block hour, SAF uptake, and ground service electrification.

- Reporting obligations are now often incorporated as a condition precedent and maintained throughout the loan term via compliance certificates.
- Legal advisers must ensure that margin ratchets or default clauses linked to ESG compliance do not trigger unintended consequences or enforcement rights that could undermine the commercial integrity of the transaction.

Additionally, the Austrian banking regulator (FMA) has begun applying green finance classification principles in its oversight functions, creating pressure for aviation lenders to demonstrate that their sustainability credentials are not merely symbolic. This underscores the importance of legal certainty and enforceability in ESG-linked finance documentation.

Leasing Preferences and Contractual Innovation

The prevailing preference for operating leases over finance leases has become entrenched in Austria. Airlines and operators facing tight margins, high fuel costs, and continued post-COVID caution are leaning heavily on short- to medium-term operating lease structures to maintain fleet flexibility and reduce capital exposure.

Market adaptation and contract design

Operating leases in Austria are increasingly tailored with innovative clauses, including:

- power-by-the-hour (PBH) mechanisms for seasonal or ACMI operators;
- return condition flexibility, allowing for off-season extensions or early terminations; and
- maintenance reserve “pay-as-you-go” systems, replacing fixed contributions with actualised expenditure models.

These provisions require detailed legal drafting to address complex scenarios such as part-out situations, end-of-lease compensation, or disputes over wear-and-tear. Because Austrian law is not rooted in common law precedent, precision in contract construction is essential to avoid ambiguities that could be exploited in the event of dispute.

Moreover, lessors operating in Austria must pay close attention to asset tracking and compliance clauses, especially given increasing regulatory overlap between safety, environmental, and financial reporting obligations.

Non-Participation in the Cape Town Convention – Legal Consequences

A notable feature of the Austrian legal landscape is its non-participation in the Cape Town Convention and Aircraft Protocol.

Enforcement without Cape Town

Without Cape Town protections, parties operating in Austria must rely entirely on:

- domestic private law mechanisms to assert title and possession rights;
- properly documented lease agreements that withstand scrutiny in Austrian courts; and
- specific repossession and deregistration protocols that align with procedural requirements under Austrian civil and insolvency law.

Aircraft deregistration must be obtained via consent or court order, often with Austro Control's cooperation and with proper satisfaction of outstanding regulatory and maintenance obligations.

In cross-border leasing disputes, the lack of Cape Town protections may lead international lessors to push for arbitration, often governed by Austrian law and Rules of Arbitration ("Vienna Rules") of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber.

Enforcement of such – or arbitral awards of other international institutions such as ICC – in Austria still requires careful navigation of the Austrian Enforcement Act (EO) and compliance with local public policy standards.

Aircraft Registration and Title Assurance

Despite its non-participation in the Cape Town regime, Austria maintains a high-quality national aircraft registry, administered by Austro Control GmbH. Aircraft operated in Austria or under Austrian AOCs must be

registered in the national register, which functions under clear administrative and legal procedures.

Austrian Tax Treatment of Aviation Transactions

Austrian aviation finance is subject to a generally predictable tax regime, but deal-specific tax planning remains essential to ensure proper structuring and avoidance of double taxation or inadvertent liabilities:

- Careful structuring is required for cross-border leases, especially when lessors are based in non-EU jurisdictions or the aircraft operates outside the EU.
- Withholding tax may apply to lease rentals remitted to foreign entities, unless relieved under Austria's extensive DTT network. Key factors include beneficial ownership, economic substance, and compliance with principal purpose test (PPT) provisions.

Legal advisers must also consider stamp duties and registration fees.

Insolvency and Enforcement under Austrian Law

Austria's domestic insolvency framework – under the *Insolvenzordnung* (IO) – allows for both liquidation and restructuring proceedings. For aviation finance stakeholders, the primary concern is asset protection and timely repossession in the event of operator default.

Creditor protections and legal strategies

In practice, Austrian courts are open to enforcing title-based lease arrangements, provided that ownership is clearly established and documented. However, lessors may face procedural delays if the insolvency administrator challenges lease validity, argues economic ownership, or asserts that the asset is vital to the debtor's reorganisation.

To mitigate these risks, lessors increasingly:

- rely on tripartite arrangements involving security deposits, bank guarantees, or performance bonds;
- insert automatic termination and repossession triggers upon certain insolvency events; and
- use arbitration clauses such as the "Vienna Rules" (see above) to avoid entanglement in local litigation.

Given the absence of Cape Town remedies, aircraft repossession is more dependent on cooperation with Austro Control, local airports, and the Austrian judiciary. It is therefore advisable to engage local enforcement counsel early in the drafting phase.

Digitalisation and Smart Legal Instruments

Digital transformation in aviation continues apace, with Austria gradually embracing the use of digital lease administration, blockchain-based asset registries, and smart contracts in the management of aircraft transactions.

Smart contracts and legal enforcement

Although Austrian law does not yet have a statutory regime for smart contracts, general civil law principles apply. For such agreements to be enforceable, they must demonstrate:

- legal intent and mutual consent;
- certainty of obligations; and
- clarity in dispute resolution procedures.

Legal practitioners must assess whether certain terms – especially self-executing conditions – can be reconciled with Austrian contract interpretation standards and procedural fairness obligations under the Austrian Civil Code (ABGB).

Data protection

GDPR compliance is also a central concern, particularly in relation to:

- cloud-based lease platforms;
- engine and performance monitoring systems collecting operator data; and
- cross-border data transfers involving lessee personnel or maintenance logs.

All lease agreements involving digital processing of personal data must include data processing agreements (DPAs), appropriate data subject protections, and secure data localisation provisions where relevant.

Infrastructure and Project Finance Developments

Beyond aircraft leasing, Austria's aviation legal market is active in infrastructure project finance, particularly

in relation to Vienna International Airport's ongoing expansions and regional airport upgrades.

Legal structuring of projects

These projects involve a complex matrix of:

- EPC and O&M contracts;
- government concessions and operating licences;
- multilateral or ECA-backed financing agreements; and
- environmental and zoning compliance under Austrian and EU law.

Austrian procurement law, particularly the Federal Procurement Act (BVerG), imposes stringent tendering requirements, transparency obligations, and environmental due diligence. Legal advisors play a key role in facilitating stakeholder alignment, managing procurement challenges, and structuring multi-sourced finance across public and private sector participants.

Looking Ahead: Urban Air Mobility and Emerging Technologies

Urban Air Mobility (UAM) and the deployment of electric vertical take-off and landing (eVTOL) aircraft remain in exploratory phases within Austria. However, with EASA having issued the first set of guidance materials for certifying such aircraft, Austrian regulators are preparing to integrate these platforms into airspace management and local infrastructure planning.

From a legal standpoint, UAM raises questions of:

- airspace regulation and integration with traditional ATC;
- insurance, liability, and product certification;
- ground infrastructure financing (eg, vertiports and charging stations); and
- novel financing and leasing structures for aircraft types with uncertain secondary markets.

Legal practitioners advising on early-stage UAM transactions must prepare for a regulatory landscape that is fluid, multidisciplinary, and highly reliant on EU-level harmonisation.

Conclusion

Austria's aviation finance and leasing sector in 2025 stands at the intersection of traditional legal certainty and emergent regulatory complexity. While the lack of Cape Town Convention protections presents a material distinction from other European jurisdictions, Austria compensates with a mature legal system, EU-aligned regulatory frameworks, and a predictable enforcement environment.

Practitioners advising in this space must combine local Austrian legal expertise with international transaction fluency such as GHP Attorneys at Law. Key areas of focus include sustainable finance documentation, lease structuring under civil law constraints, asset enforcement, and compliance with emerging digital and ESG obligations.

As environmental and technological pressures continue to reshape the aviation ecosystem, Austria's aviation legal framework is adapting, with increasing emphasis on risk mitigation, regulatory coordination, and contractual precision.

BRAZIL

Law and Practice

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Basch & Rameh was founded in 2000 and specialises in international transactions, mainly project, corporate and asset-based finance (aircraft, vessels and oil rigs). It also focuses on corporate law matters, technology, foreign investment in Brazil, litigation and arbitration, representing Brazilian companies with foreign investments, joint ventures, banking, insurance, shipping, aeronautical and maritime law. Clients are

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

No taxes are due based on the execution of a sale agreement for an aircraft or engine. Taxes may become payable upon the completion of a sale, depending on the circumstances (eg, if the buyer or seller is Brazilian or an individual, or if the seller has realised a capital gain). Capital gains rates vary from 15% to 25%. If neither the seller nor the buyer is Brazilian but the aircraft is located in Brazil, capital gains tax might be due.

There is no clear definition of “location of the aircraft” for capital gains tax purposes. It might refer to a physical location or include any aircraft registered on the Brazilian register. Neither the sale of corporate interests in non-Brazilian special purpose vehicles that hold title nor the sale of beneficial interests in owner trusts is subject to tax.

1.1.2 Enforceability Against Domestic Parties

In most cases, sale agreements between non-Brazilian parties do not need registration for purposes of admissibility and enforceability. For formalities related to Brazilian buyers, see **2.3.8 Requirements for Documents Concerning Registration**.

Although sale agreements usually do not require registration, bills of sale do (see **1.2.1 Transferring Title**).

1.2 Transfer of Ownership

1.2.1 Transferring Title

To transfer title to an aircraft, a bill of sale must be registered with the Brazilian Aeronautical Registry (RAB). An aircraft is presumed to include engines and parts, unless the bill of sale expressly indicates otherwise. To transfer title to a spare engine, registration of a bill of sale with the RAB is advisable but not required. Auxiliary power units (APUs) and other parts require written documentation; however, RAB registration is not possible. The sale of an ownership interest in an entity that owns an aircraft or engine would not alter the details of its registered owner.

When aircraft are owned by owner trusts, the trust agreement, including amendments, must be submitted to the RAB, although such agreements are not registered and do not fall into the public domain. Aircraft bills of sale must follow the requirements listed in **2.3.8 Requirements for Documents Concerning Registration**. In addition, bills of sale must be:

- executed by each of the seller, buyer and two witnesses; and
- notarised or digitally signed on the execution date.

Due to the special notarisation requirement, the practice of signing and delivering undated bills of sale to be held in escrow does not usually work in Brazil.

1.2.2 Sales Governed by English or New York Law

The Brazilian Aeronautical Code stipulates that rights in rem over aircraft are governed by the nationality of an aircraft. Consequently, aircraft bills of sale gov-

erned by New York or English law might not effectively transfer title; see **1.2.1 Transferring Title**.

1.2.3 Enforceability Against Domestic Parties

See **1.2.1 Transferring Title**.

1.2.4 Registration, Filing and/or Consent From Government Entities

Depending on the gross revenues of the seller and buyer, the approval of the Brazilian antitrust authority might be required; see **1.2.1 Transferring Title**.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

No taxes or duties are payable for the execution and registering of bills of sale. Nominal translation costs will be due.

Note that most registration services have been made free of charge by the National Agency of Civil Aviation (ANAC) as part of an ongoing federal programme to reduce bureaucracy.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

There are no express limitations based on the lease type. Dry, wet, operating and finance leases are all permitted in Brazil, provided they abide by importation, registration, foreign exchange and other applicable Brazilian law regulations. There are restrictions on operators in Brazil, so cross-border wet leases are rare.

Due mainly to tax considerations, most commercial aircraft are on operating leases. Local airlines occasionally enter into financial leases, and some spare engine finance is structured through mortgages.

2.1.2 Application of Foreign Laws

Leases governed by foreign law are recognised and enforced in Brazil, provided they do not violate Brazilian sovereignty, good customs or public morality. Typically, aircraft finance documents do not violate these criteria, with the exception of:

- self-help remedies; and
- unilateral option provisions in certain cases (eg, provisions subject to the sole discretion of the lessor).

2.1.3 Restrictions Concerning Payments in US Dollars

There are no material restrictions on lessees making rent payments to foreign lessors, but there are foreign currency exchange controls in certain types of transactions (see **2.1.4 Exchange Controls**).

2.1.4 Exchange Controls

Brazil continues to be subject to foreign exchange controls. For decades, lessees have been required to register the terms of all leases with the Brazilian Central Bank, except for leases with terms of less than 360 days. In early 2023, the Central Bank eliminated the requirement for the registration of operating leases. Central Bank registrations are still required for finance leases and other financial acquisition transactions (eg, mortgage financing).

The Central Bank registration is commonly referred to as an “ROF”. ROFs include the amount the debtor may remit and the party to whom the remittances may be made.

ROFs approve regularly scheduled payments due under the finance lease or loan agreement. Irregular payments such as default interest or damages must be approved by the Central Bank on an ad hoc basis before remittance.

Holders of rights over aircraft – eg, owners and payees under all leases (including operating leases) or loan agreements (including the current or future holders of registered security interests) – are obliged to obtain taxpayer registration numbers from the Brazilian Revenue Service (SRF), even though lessors may not be subject to Brazilian tax. Such numbers are called CNPJs. Obtaining a CNPJ does not create tax liability per se.

Since 2016, the process of obtaining a CNPJ requires the registrant to:

- appoint an agent in Brazil to undertake the process from the SRF; and
- identify its ultimate beneficial owner to the SRF.

This process can be expensive and time-consuming. When aircraft are leased through trusts, the trustee must have a CNPJ number. Prior to 2016, the process was simpler and did not require compliance with these requirements.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

Nominal local fees apply to notarisation. It is customary for Brazilian airlines to bear the costs of registering leases; see 1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale.

2.1.6 Licensing/Qualification of Lessors

Except for the CNPJ requirement mentioned in 2.1.4 Exchange Controls, there is no prior qualification or licensing requirement for lessors in Brazil to do business with a local lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

The Aeronautical Code requires a description of the aircraft, confirmation of the registry (which must be Brazil for Brazilian operators), the amount of rent and other charges, the lease term and whether there are purchase or extension options. These terms tend to be included in most New York and English law leases.

2.2.2 Tax and Withholding Gross-Up Provisions

Gross-up provisions are permissible and enforceable.

On 31 December 2021, the President issued an Executive Order (later converted into a Law in May 2022) re-establishing the 0% rate on rents paid from 1 January 2022 until 31 December 2023, and established the following progressive tax rates:

- 1% from 1 January 2024 to 31 December 2024;
- 2% from 1 January 2025 to 31 December 2025; and
- 3% from 1 January 2026 to 31 December 2026.

At the time of writing, the applicable rate is 2%.

Many different import-related taxes are reduced to zero for commercial aircraft on operating leases, including:

- federal import tax;
- federal excise tax; and
- state circulation of goods and services tax (similar to VAT).

There is an additional tax on imports, called “COFINS”, which is applicable only to the import of spare engines. The Brazilian government has established progressive additional COFINS rates for commercial spare engine leases. In 2025, the applicable rate is 0.8%.

Operators regularly check the jurisdictions of the lessors or other finance providers, as the treatment given to payments to lessors/creditors located or established in “tax havens” (defined as jurisdictions with annual corporate income tax rates under 20%) may be subject to higher withholding tax. The SRF also publishes a list of countries (currently including Ireland) that are deemed to be tax havens.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease may include parts installed or replaced during its term. Leases should be precise in determining when replacement parts and engines become subject to a lease. Whenever an engine or APU is replaced, the lease should be amended, and that amendment should be registered with the RAB.

2.2.4 Risk of Title Annexation

Brazil does not adhere to the concept of title annexation of engines installed on airframes. Nonetheless, leases should be exact in determining if and when the title is removed and replacement engines transferred.

2.2.5 Recognition of the Concepts of Trust/Trustee

Brazil is a civil law country and the concept of a trust, as found in common law jurisdictions, is foreign to the Brazilian legal system. Brazil is not a party to the 1986 Hague Convention on Trusts.

However, the RAB and other Brazilian agencies are familiar with trust structures, and aircraft may be registered in the name of and leased by owner trustees.

The trustee is considered the owner for all legal purposes. The trust beneficiary would have no registered interests in the aircraft. Owner trusts have been and continue to be commonly used with aircraft registered in Brazil. Since 2013, ANAC has required parties using owner trusts to submit copies of the trust agreements to the RAB. The filing is for ANAC's internal purposes only, and trust agreements do not fall into the public domain.

For purposes of customs clearance for aircraft owned by owner trusts, a notarised, apostilled copy of the trust agreement must also be presented to the SRF.

In bankruptcy proceedings, airline debtors have occasionally confused the individuality of trusts and lumped together the aircraft held by a particular owner trustee. These misunderstandings have been resolved without difficulty. Commencing in late 2020, trust agreements relating to aircraft on operating leases must also be filed with the Brazilian customs authorities.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The RAB is an owner register, and the registration of the name of an aircraft owner confers title to an aircraft. When an aircraft title transfer occurs, registration with the RAB is necessary to perfect it. A lessor's interest under a lease with a Brazilian operator must be noted through the registration of the lease.

2.3.2 Registration If the Owner Is Different From the Operator

The RAB has no nationality requirements. Foreign owners of Brazilian-registered aircraft should always be registered. The RAB registers the respective interests of owners, lessee operators and mortgagees (when applicable).

2.3.3 Aircraft/Engine-Specific Registers

The RAB organises its register on a per aircraft basis. It also maintains engine registers, but this applies mainly to spare engines. In respect of engines, the RAB registers contracts and documents, rather than the object itself.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

Aircraft lease agreements executed by a Brazilian operator with respect to a Brazilian-registered aircraft must be filed with the RAB for registration. The Brazilian Aeronautical Code provides that if an aircraft lease or, if applicable, a sublease is not registered with the RAB, the lessor, sublessor and sublessee shall be liable for any damages and losses caused by the aircraft. If an aircraft lease is registered, the lessor should not be liable for operations.

Aircraft leases are not subject to any consent from government entities; however, the RAB assesses whether an aircraft lease meets the requirements listed in **2.3.8 Requirements for Documents Concerning Registration**. If not, the RAB may refuse to register the lease or may ask the parties to arrange for the missing formalities to be completed.

2.3.5 Requirements for a Lease to Be Valid and Registrable

Leases do not need to be in any specific form. Since leases must be registered with the RAB, they must be translated and comply with the requirements listed in **2.3.8 Requirements for Documents Concerning Registration**.

2.3.6 Taxes/Duties Payable for Registering a Lease

There are no fees to register leases with the RAB.

2.3.7 Registration of Aircraft in Alternative Countries

Aircraft habitually based in Brazil are typically Brazilian-registered. Brazilian carriers have generally been required to operate Brazilian-registered aircraft. Recently, however, ANAC allowed the registration of interchange agreements (increasingly referred to as sublease for hours agreements) for aircraft with foreign registration marks where the interchangee is Brazilian. Aircraft interchange agreements between air carriers based in different states must be approved by each relevant civil aviation authority through a bilateral agreement.

2.3.8 Requirements for Documents Concerning Registration

General Requirements

In order to be admissible in Brazilian courts and governmental agencies, any agreement that is not written in Portuguese or that is executed abroad must be:

- notarised and, if executed outside Brazil, apostilled (if signed in a state that is a signatory to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents);
- translated into Portuguese by a public translator in Brazil (called “sworn” translations); and
- registered with a public registry.

A document that is signed in a jurisdiction that does not adhere to the Hague Convention must be legalised by a Brazilian Consulate abroad.

To simplify and expedite RAB filings, most leases, bills of sale, security assignments (including notices and acknowledgements of assignments) and subordination agreements are signed in Brazil by local attorneys who are authorised to execute transaction documents under powers of attorney. The powers of attorney must comply with the formalities described above.

RAB Requirements

The foregoing are general rules for admissibility. The RAB recently abolished its longstanding requirement that registration documents must be signed by two witnesses. In practice, many documents are still witnessed for other reasons.

The RAB accepts documents that are digitally signed, provided that these signatures comply with the technical standards of ICP-Brasil (a cryptographic platform developed by the Brazilian Institute of Information Technology). Documents digitally signed and compliant have the same authenticity value as notarised documents (the digital user must obtain a digital certificate embedded in a USB token issued by ICP-Brasil). The implementation of digital signatures is not recent, but its usage increased throughout the pandemic.

Documents that have not been signed with signatures that are compliant with the ICP-Brasil can be registered with the RAB but must undergo an authentica-

tion process that adds unnecessary cost and delay to transactions.

The RAB filing system for commercial aircraft is also electronic, allowing parties to file aircraft documents for registration remotely.

Other Brazilian Registration Requirements

In addition to the RAB, there is another relevant type of registry, called a Registry of Deeds and Documents (RTD). Unlike the RAB, which is a singular specialised aircraft register, many RTDs in Brazil deal with documents of any nature. There is ongoing debate in Brazil concerning the need to register a RAB-registered document with an RTD. The majority view seems to accept that RAB registration is sufficient.

Not all aviation-related documents are registered with the RAB. Bills of sale, leases, local law mortgages and related amendments must be registered. Lease security assignments, notices and acknowledgements of assignment may also be registered. Documents not registered with the RAB should be registered with an RTD in order to be enforceable in Brazil.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

See 2.2.2 Tax and Withholding Gross-Up Provisions regarding the withholding tax applicable since 2022. The Brazilian lessee is responsible for withholding and paying such tax when remitting the rent payments. The withholding is usually accomplished automatically by the bank handling the wire transfer.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

Foreign lessors are not deemed tax residents in Brazil, although they must obtain Brazilian corporate identification numbers to enable the Brazilian lessee to remit rent abroad (see 2.1.4 Exchange Controls). Applicable Brazilian taxes, if any, would be imposed on the Brazilian lessee.

2.4.3 Engine Maintenance and Operations

A lessor would not be liable in respect of aircraft or engine maintenance and operations if the lease was registered as described in 2.3.4 Registration of Leases With the Domestic Aircraft Registry.

2.4.4 Damage or Loss Caused by an Asset

When financing an asset on a lease, a foreign aircraft or engine owner, lessor or financier would not be liable under the doctrine of strict liability as a result of damage or loss caused by the asset, provided the lease has been registered as described in 2.3.4 **Registration of Leases With the Domestic Aircraft Registry**.

2.4.5 Attachment by Creditors

The lessee's indebtedness does not apply to an asset that belongs to a third party.

However, from time to time, airport authorities in Brazil have threatened to impose a lien or hold leased aircraft grounded for overdue and unpaid airport charges; see 3.3.1 **Third-Party Liens**.

2.4.6 Priority of Third Parties' Rights

Generally, owners' or lessors' interests have not been subordinated to third-party interests, with the possible exception of tax, airport and air traffic control authorities (see 3.3.1 **Third-Party Liens**).

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

Brazilian operators must purchase primary insurance from Brazilian underwriters.

2.5.2 Mandatory Insurance Coverage Requirements

The Brazilian Aeronautical Code states a minimum obligatory level of liability insurance, which does not meet industry standards. Lease agreements usually require industry-standard cover to complement the statutory insurance.

2.5.3 Placement of Insurance Outside of Jurisdiction

A minimum of 40% of all reinsurance risks must be offered by Brazilian primary insurers to Brazilian-based reinsurers (who typically take considerably less).

2.5.4 Enforceability of "Cut-Through" Clauses

Cut-through clauses are valid only if the primary insurer is insolvent. Otherwise, proceeds must be processed through the primary underwriter. Nevertheless,

cut-through clauses are common in aviation insurance policies.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurance/reinsurance are permitted in relation to aircraft leases or finance agreements. Increasingly, parties rely on loss beneficiaries named in policies in lieu of assignments.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

Upon an event of default under a lease agreement, the lessor has the right to exercise remedies provided thereunder, including, without limitation, terminating the lease. This right is covered by the Brazilian Civil Code, the Code of Civil Procedure and the Cape Town Convention (Articles 10 and 13). Termination must be preceded by a notice of default extending a last opportunity to cure the default. Subsequently, if the lessee does not remedy the event of default, a new notice should be sent, unilaterally terminating the lease agreement.

Other than the irrevocable deregistration and export request authorisation (IDERA), self-help remedies are not valid or enforceable in Brazil. If an operator does not voluntarily tender the aircraft in Brazil, then a lessor would have to file a lawsuit seeking repossession. If the aircraft is physically located in another jurisdiction, then the repossession rules of that jurisdiction might apply for the taking of physical possession.

Since the implementation of the Cape Town Convention, it has been important to separate the deregistration and exportation processes. For deregistration through IDERAs, ANAC acts expeditiously and issues the deregistration confirmation within five working days. For the exportation process, the tax authorities have never issued regulations relating to export clearances. Therefore, export authorisation must be considered on a case-by-case basis.

There are no restrictions on a lessor's ability to sell the aircraft following termination of the lease; however, a sale would not necessarily relieve the buyer of export authorisation requirements.

Aircraft do not need to be physically located in Brazil for deregistration purposes.

If a lessor requires a certificate of airworthiness for export to the next jurisdiction of registration, it must be obtained prior to deregistration.

2.6.2 Lessor Taking Possession of the Aircraft

See 2.6.1 Restrictions on Lessors' Abilities.

2.6.3 Specific Courts for Aviation Disputes

No specific specialised courts decide aviation disputes and enforcement, which are adjudicated in state courts in Brazil as disputes between private parties.

2.6.4 Summary Judgment or Other Relief

A summary judgment is possible but rare in Brazil, and almost unheard of in aircraft repossession cases. It is common to obtain an interim repossession order quickly if the lease default is objectively demonstrated. These orders are not equivalent to summary judgments because they are issued before the lessee has had an opportunity to present a defence. According to Brazil's Cape Town Convention Declarations, lessors are entitled to "speedy relief", defined as ten working days.

In theory, a pre-judgment attachment for a monetary award based on a lease default should be possible, but they have only been sought or obtained by a lessor in a small number of cases.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Brazil's declarations to the Cape Town Convention reinforce the principle of the parties' contractual freedom to elect the governing law for lease agreements.

Likewise, a submission to a foreign jurisdiction should be binding and upheld by domestic courts. Notwithstanding the Cape Town Convention's express recognition of exclusive jurisdiction for certain disputes, it is not clear whether the Brazilian judiciary would stay a similar action first filed abroad. The procedure to enforce foreign judgments (described in 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards) is slow and rarely appropriate in aircraft lease disputes.

In June 2024, the Brazilian Code of Civil Procedure was amended to stipulate that courts adjudicating contractual disputes should have a relationship to the parties or the location where the contractual obligations are to be performed. This requirement of a contact is contrary to the terms of Article 42 of the Cape Town Convention, which expressly provides that parties' freedom to elect a jurisdiction is complete regardless of whether the venue has a relationship to the transaction.

Most aircraft leases include exclusive or non-exclusive elections of courts located in New York or England to resolve disputes. Under the new drafting of the Brazilian Code of Civil Procedure, it is possible that a Brazilian court might not recognise the validity of such a choice if none of the parties is domiciled or otherwise located in New York or England (as applicable), or if none of the contractual obligations, such as payments, are due to be performed in the chosen jurisdiction.

Considering that the Cape Town Convention is a specific law intended to apply narrowly to particular types of aircraft contracts, its terms should have primacy over the new law. However, as the change is still very recent, there have not yet been any tests to determine how Brazilian courts might consider the applicability of the new provisions of the Code of Civil Procedure to aircraft agreements.

See also 2.6.11 Lessees' Entitlement to Claim Immunity.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

A foreign judgment will be valid in Brazil only after ratification by the Superior Court of Justice. The procedure does not re-examine a judgment's merits, provided it meets the following formal requirements:

- compliance with formalities under the laws of where it was rendered;
- proper service of process on the parties or after sufficient evidence of the parties' absence, pursuant to applicable law;
- not subject to appeal;

- not conflicting with Brazilian sovereignty, public policy or morality;
- apostilled or authenticated by the competent Brazilian Consulate and accompanied by a sworn translation into the Portuguese language; and
- not covering any matter over which the Brazilian judiciary has exclusive jurisdiction.

An urgent interlocutory decision given by a competent foreign court against a Brazilian entity would be recognised and accepted by the Brazilian courts without re-trial or examination of the merits after ratification by a federal court with proper jurisdiction, provided these formal requirements are met (except for not being subject to appeal).

2.6.7 Judgments in Foreign Currencies

Judgments can be rendered in foreign currency; however, defendants are entitled to satisfy such judgments by effecting payments in Brazilian currency at the exchange rate effective on the payment date. The foreign plaintiff needs to withdraw the amount in Brazilian currency and request authorisation from the Central Bank to wire the funds in foreign currency. Due to currency fluctuations, it is possible for there to be a discrepancy between the amount awarded and the amount finally wired.

2.6.8 Limitations on Lessors' Actions Following Termination

Charging rent following the redelivery of an aircraft might be deemed unenforceable. Damages, however, should be enforceable.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

No taxes are due in connection with lease enforcement, but there are court filing fees and bond requirements; see 2.6.13 Other Relevant Issues. In addition, the need for many services might arise, with significant expenses. For example, a customs broker might be needed to obtain an export authorisation. Aircraft parking fees and ground maintenance costs during litigation would be for the account of the lessor from the date of repossession. The legal fees can be significant.

2.6.10 Mandatory Notice Periods

To terminate a lease, a lessor must give a lessee written notice in a manner that complies with the lease and local law. In most cases, the notice should give the lessee a cure period of not less than two business days.

2.6.11 Lessees' Entitlement to Claim Immunity

No commercial airlines or air taxi companies currently operating in Brazil are entitled to immunity.

2.6.12 Enforcement of Foreign Arbitral Decisions

Brazil adopted the New York Convention through Decree No 4.311 of 23 July 2002. However, foreign arbitration awards must still be ratified – see 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards.

2.6.13 Other Relevant Issues

Non-Brazilian plaintiffs seeking to enforce a lease in Brazil must file a bond in the court set by the judge, usually of between 10% and 20% of the cause of action's value. This bond is intended to cover opposing counsel's fees should the plaintiff lose the action. Court filing fees equivalent to 1.5% of the action's value are also due. The Cape Town Convention allows parties to waive bond requirements.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Under Brazilian contractual law, the concepts of assignment and novation are recognised and habitual in aviation transactions involving aircraft on lease to Brazilian lessees.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Both a New York law assignment assumption agreement and an English law novation would be valid and upheld (see 2.3.8 Requirements for Documents Concerning Registration).

2.7.3 Enforceability of Lease Assignments/Novations

See 2.3.8 Requirements for Documents Concerning Registration.

2.7.4 Filing/Registration of Lease Assignments/Novations

Lease assignments, assignment assumption agreements and novations relating to aircraft must be registered with the RAB. Similar agreements relating to spare engines may be registered, but registration is not required. Failure to complete registration causes the document to be inadmissible in Brazilian courts or other governmental offices.

See **2.3.8 Requirements for Documents Concerning Registration**, **1.2.4 Registration, Filing and/or Consent From Government Entities** and **2.7.6 Recognition of Transfer of Ownership Interests** regarding possible antitrust authority authorisation required for an aircraft sale that might be connected to an assignment assumption agreement or novation.

2.7.5 Taxes/Duties Payable on Assignment/Novation

No taxes or duties arise in connection with an assignment assumption agreement or novation. There are translation costs. There is no consequence to an original or copy of any document being brought into Brazil per se.

2.7.6 Recognition of Transfer of Ownership Interests

Except for antitrust considerations regarding the sale (see **1.2.4 Registration, Filing and/or Consent From Government Entities**), the transfer of ownership of an owner entity would not require any particular registration or disclosure to the RAB.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

Brazilian operators usually obtain deregistration over leased aircraft. The current basic requirements to export and deregister an aircraft, upon either the expiration or termination of a lease, are as follows:

- a termination agreement or relevant court order;
- a single export registration issued by the customs authority (called a “DU-E”; see **2.8.12 Aircraft Export Permits/Licences**);
- the return of the original register and airworthiness certificates issued by the RAB;

- certification from the authorised party that all prior interests against the object have been discharged or that interest holders have consented to the deregistration and export; and
- a certificate showing that the aircraft has no amounts due in terms of taxes, expenses and airport fees.

It is also possible for the authorised party under an IDERA to request deregistration. IDERAs must be granted in accordance with Cape Town Convention terms and registered with the RAB. ANAC has promulgated procedures for exercising IDERAs and regularly honours them, even in cases of opposition from a Brazilian lessee. Some of the documents listed above are waived when deregistration is obtained pursuant to an IDERA.

If no IDERA has been granted, a lessor may try to deregister by applying to ANAC and demonstrating that the circumstances of the request are similar to those of an IDERA. The Brazilian Aeronautical Code stipulates that owners have the right to deregister aircraft, but deregistering aircraft without IDERAs is less certain and a Brazilian court order confirming the leasing terminated and deregistration might become necessary.

If the receiving aviation authority requires an export certificate of airworthiness, the lessor must obtain it prior to filing the deregistration request.

2.8.2 Lessee's/Operator's Consent

Deregistration through the use of an IDERA does not require lessee or operator consent. Authorised parties under IDERAs can also grant certified designee confirmation letters (CDCLs) to other parties, such as a mortgagee. For a mortgagee that is not an authorised party under an IDERA or a CDCL, it is advisable for an acknowledgement of assignment to extend to the mortgagee the ability to enforce the rights of the lessor against the lessee (see **2.3.8 Requirements for Documents Concerning Registration**).

2.8.3 Required Documentation

An IDERA registered with the RAB is required so that an authorised party is able to deregister an aircraft. The applicant signing the deregistration request will

need evidence of being appointed to act for the authorised party.

2.8.4 Duration of Deregistration Process

If deregistration is requested by an operator, approximately two weeks are necessary to conclude deregistration. Using IDERAs, aircraft are typically deregistered within five business days. In accordance with the Cape Town Convention, the RAB will request evidence of the consent of any superior lien holders to confirm the deregistration process. If a lessor, owner or mortgagee is required to file a lawsuit, the period is less certain.

2.8.5 Aviation Authority's Assurances

ANAC does not provide specific assurances as to the prompt deregistration of the aircraft. Deregistration pursuant to IDERAs is expressly covered in published ANAC regulations.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

There are no fees applicable for the deregistration of an aircraft.

2.8.7 Deregistration Power of Attorney

Since 2014, when the effectiveness of IDERAs was established, deregistration powers of attorney (DPOAs) have become less common in Brazil. They are valid in principle, but the five days stipulated for IDERAs might not apply.

See also 2.3.8 Requirements for Documents Concerning Registration.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

Enforcement of DPOAs has rarely been tested in Brazil, and there is no specific rule for supporting documents.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

See 2.8.1 Deregistering Aircraft in This Jurisdiction regarding IDERAs. It is advisable to stipulate that a DPOA be governed by Brazilian law.

2.8.10 Revocation of a Deregistration Power of Attorney

The Brazilian Civil Code allows irrevocability clauses in powers of attorney, but there is some controversy regarding their effectiveness.

2.8.11 Owner's/Lessor's Consent

The process of physically exporting an aircraft, controlled by the SRF, is entirely distinct from the deregistration process. No SRF regulations have ever been issued in respect of the export of aircraft by parties other than Brazilian operators.

In principle, any party (mortgagee, owner or lessor) in possession of an aircraft by a court order or amicable redelivery may fly the aircraft out of Brazil – in the case of a court order, provided the international movement of the aircraft is not restricted. Whether the consent of another party is needed depends on the terms of the court order or, in the case of amicable redelivery, the terms of the relevant documents.

The best measures a mortgagee, owner or lessor can take when negotiating a lease or mortgage are to require and register an IDERA with the RAB and clearly stipulate in the lease or security agreements rights to repossess and remove the aircraft from Brazil.

See also 2.8.12 Aircraft Export Permits/Licences.

2.8.12 Aircraft Export Permits/Licences Temporary Admission

An aircraft operating under an operating lease (which is most aircraft in Brazil) is imported under a set of customs rules called “temporary admission”. Aircraft operating on finance leases and aircraft purchased by Brazilian parties are imported under definitive import rules. Regardless of whether an aircraft is operating under the temporary admission or definitive import rules, the only party that may deal with the SRF in relation to export matters is almost always the importer (ie, the Brazilian operator).

When an aircraft is exported, the import process should be closed through an export registration called a unified export declaration (DU-E). However, there are doubts about the ability of parties other than the original importer to obtain DU-Es.

Exporting Repossessed Aircraft

This has not prevented lessors and owners from exporting repossessed aircraft. In most cases, aircraft can be flown to locations outside Brazil without the prior issuance of a DU-E, which can be obtained after an aircraft has left Brazil. In 2019, this procedure was used with approximately 35 aircraft redelivered by a bankrupt airline. However, due to inconsistencies between the SRF offices in different locations in Brazil, some problems have arisen with repossessed aircraft that lessors intend to move out of Brazil prior to the issuance of a DU-E.

Most cases were resolved without litigation, but there is a chance a lessor might need to seek a court order for removal. According to the Cape Town Convention, the SRF should assist authorised parties named in registered IDERAs to export aircraft. This has not yet occurred. Consequently, export procedures should be carefully reviewed on a case-by-case basis.

A DU-E cannot be issued in advance; once issued, it is valid for a limited number of days.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

There are nominal fees for DU-Es.

2.8.14 Practical Issues Related to Deregistration of Aircraft

As mentioned in 2.6.1 Restrictions on Lessors' Abilities, a lessor should confirm if it will need a certificate of airworthiness for export, since these can only be obtained prior to deregistration. Therefore, when dealing with repossessed aircraft, it is preferable for the next registry to be one that does not require a certificate of airworthiness for export.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

Insolvency proceedings are regulated in the Brazilian Bankruptcy Law (2005; amended 2020), including restructurings, reorganisations, insolvencies and liquidations.

Article 199 of the Bankruptcy Law relates specifically to commercial aircraft leases, and stipulates that rights under aircraft (and engine) leases are not subject to suspension or stay due to a judicial recuperation proceeding. In addition, claims arising under such leases are excluded from judicial recuperation proceedings. Thus, a lessee under judicial recuperation may not prevent or delay lessors from repossessing leased aircraft unless the lessee is up to date with its obligations under the relevant lease.

Furthermore, the Cape Town Convention became effective in 2013 when Brazil adopted Alternative A. A close analysis of Cape Town Convention Aircraft Protocol Article XI(2) demonstrates that there is no applicable stay period against lessor repossession. This zero-day stay applies to leases only. Aircraft financed through other means, such as mortgages, are subject to the 30-day waiting period contained in Brazil's Cape Town Convention Declarations.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

There are two main types of insolvency proceedings provided by the Brazilian Bankruptcy Law:

- reorganisation under the auspices of a bankruptcy court, called judicial recuperation (Brazil's rough equivalent to the US Chapter 11); and
- liquidation (similar to Chapter 7).

See 2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations regarding the laws and articles relevant to a lessee domiciled in Brazil.

If a Brazilian airline seeks judicial recuperation protection, leases will not be set aside.

In a 2019 case (Oceanair, dba "Avianca Brasil"), however, lessors were erroneously stayed from repossessing aircraft for approximately 120 days, during which Oceanair paid one month's rent. The last court decision on the merits in the Oceanair matter upheld the lessor's right to repossess aircraft, so there should be

no erroneous decisions in future judicial recuperation cases.

Leased aircraft are not deemed part of a lessee's property during a bankruptcy proceeding. If an airline is placed into liquidation, the aircraft or engines would be returned to the lessors/owners, as applicable. In liquidation, claims of lessors would usually be grouped with unsecured claims.

The liquidation of Brazilian airlines is a lengthy process that tends to persist for years. There are seven airlines currently in liquidation:

- Transbrasil;
- Varig;
- VASP;
- VarigLog;
- BRA;
- Pantanal; and
- Oceanair.

Two Brazilian airlines, Gol Linhas Aéreas and Azul Linhas Aéreas Brasileiras, filed for protection with New York courts under the US Chapter 11 proceeding. There are no parallel proceedings in Brazil. Both insolvency proceedings are taking place entirely outside Brazil, with no participation or protection from the Brazilian judiciary.

The Gol and Azul Chapter 11 proceedings are the first time a Brazilian airline has sought to reorganise outside Brazil. The airline known as “Latam” also reorganised itself in New York using the Chapter 11 procedure, but the primary entity in that proceeding was a Chilean debtor that happened to own a Brazilian airline. Therefore, the Gol case was one of first impression, followed by the Azul case in 2025. Both cases are still ongoing at the time of publication.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

In late December 2020, the Brazilian Bankruptcy Law was amended to simplify and standardise cross-border insolvency proceedings. Brazil adopted the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law (the “Model Law”) (also corresponding to Chap-

ter 15 of the United States Bankruptcy Code). This is intended to foment co-operation among Brazilian and foreign judges, and to increase the legal security of cross-border business activities and investments.

The same definitions provided in Article 2 of the Model Law have been incorporated into the Brazilian Bankruptcy Law, which contemplates the following:

- a foreign proceeding;
- a foreign main proceeding;
- a foreign non-main proceeding;
- a foreign representative;
- a foreign court; and
- an establishment.

The scope of application of the Model Law is now mirrored in the Brazilian Bankruptcy Law, and a foreign representative may seek recognition of a foreign proceeding in a Brazilian court. Upon receipt of a legal representative filing, Brazilian courts should recognise the foreign proceeding as either the main or a non-main proceeding, depending on the country where the debtor's centre of main interests (COMI) is located.

The new law confirmed the provision of the Brazilian Federal Constitution, which established that foreign judgments are valid in Brazil only after ratification by the Superior Court of Justice in Brazil; see **2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards**.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

Both a DPOA and an IDERA should survive a bankruptcy restructuring. Conversely, in cases of liquidation, powers of attorney are usually deemed revoked but, according to the Cape Town Convention, IDERAs should remain valid. Since the Brazilian airlines that have been placed in liquidation no longer had possession of any aircraft, the validity of an IDERA after a declaration of liquidation remains untested.

2.9.5 Other Effects of a Lessee's Insolvency

See **2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership**.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

Brazilian parties are rarely borrowers in aircraft transactions. In the few cases where the borrower is Brazilian, insolvency would result in the claims of the lender being grouped with other similar claims, secured or unsecured, depending on the loan terms. If a guarantor were to become insolvent, the lender would lose the benefit of the guarantee.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

The Brazilian Bankruptcy Law contains a 180-day moratorium to protect debtors generally. However, as noted in **2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations**, Brazilian aircraft and engine leases are subject to a special article thereunder that prohibits any stay or moratorium.

2.9.8 Liquidation of Domestic Lessees

See **2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership**.

2.9.9 Ipso Facto Defaults

There are no reported cases of ipso facto defaults forming the basis of a lessor request for repossession. Many practitioners doubt that ipso facto defaults alone are sufficient to obtain lessor relief. Payment performance defaults have been the most common causes of action.

2.9.10 Impact of Domestic Lessees' Winding-Up

To date, no Brazilian airlines under liquidation were still operating when the liquidation orders were issued, so no impact on aircraft, rentals, security deposits and maintenance reserves has arisen. If a court determines that a lessee should be wound-up and liquidated, a liquidator is appointed. The liquidator has the discretion to terminate or preserve bilateral contracts (aircraft leases). If the liquidator elects to preserve them, the airline, acting through the liquidator, would be obliged to comply with all the terms thereunder, including payment obligations. In the context of airlines, the chances that a liquidator would maintain a lease for extended periods are remote, except possibly to continue operations for tickets already sold.

Since leased aircraft do not belong to a lessee, its creditors cannot encumber the aircraft to secure amounts due. The lessor would be entitled to repossess the aircraft. Thus, if the lessee does not redeliver the aircraft, the lessor may begin repossession action.

The Bankruptcy Law does not expressly deal with cash security deposits or maintenance reserves. In past airline insolvency cases, lessors were able to retain security deposits and maintenance reserves.

The Bankruptcy Law includes a claw-back provision that arises in cases of liquidation. Several types of transactions are subject to annulment after a company is placed into liquidation (eg, prepayment of obligations not yet due or gratuitous transfer of assets).

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The Cape Town Convention and accompanying Aircraft Protocol have been in effect since May 2013. The RAB was appointed by Brazil as the State's Authorised Entry Point (AEP), and AEP Codes are required to register international interests over airframes (the Convention does not require them to register international interests over engines).

To obtain an AEP Code, the applicant must be previously registered and have a valid power of attorney from at least one party in interest. Brazilian AEP Codes cannot be disclosed by the professional user entity (PUE) or transacting user entity (TUE) that obtains them. Consequently, international interests over aircraft registered with the RAB are almost always made by PUEs based in Brazil. The RAB needs, on average, between one and four business days to issue an AEP Code, depending on the backlog of requests.

2.10.2 Declarations Made Concerning Conventions

The following declarations have been made by Brazil under the Cape Town Convention:

- Article 39 (1)(a) – priority of non-consensual rights and interests under local laws preserved;
- Article 39 (1)(b) – detention rights preserved;
- Article 39 (4) – priority of non-consensual rights in Article 39 (1)(a) as of the accession date;
- Article 53 – jurisdiction of Brazilian courts; and

- Article 54 (2) – self-help remedies (other than IDERAs) are not allowed.

The following declarations have been made by Brazil under the Aircraft Protocol:

- Article XXX(1) – Brazil will apply the “choice of law” provision in Article VIII;
- Article XXX(2) – Brazil will fully apply Article X (interim relief) provisions, with the following time-frames declared:
 - (a) ten calendar days for remedies in Article 13 (1) (a), (b) and (c); and
 - (b) 30 calendar days for remedies in Article 13 (1) (d) and (e);
- Article XXX(3) – Brazil adopted Alternative A of Article XI (remedies on insolvency) with a waiting period of 30 calendar days;
- Article XXX(1) – Brazil will apply Article XII (insolvency assistance);
- Article XXX(1) – Brazil will apply Article XIII (IDERA); and
- Article XIX(1) – the RAB is the AEP in Brazil.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

According to Brazil’s Declarations under the Cape Town Convention, the RAB will recognise and honour a request for deregistration based on an IDERA without the need for a court order (see 2.6.1 Restrictions on Lessors’ Abilities).

See 2.3.8 Requirements for Documents Concerning Registration and 2.8.1 Deregistering Aircraft in This Jurisdiction regarding IDERAs’ requirements, and 2.8.4 Duration of Deregistration Process for the timing of the process. The authorised party in an IDERA should ensure it is registered with the RAB at the onset of the lease term or financing term.

The RAB does not countersign or stamp its acknowledgement of submitted IDERAs but will, on request, issue a certificate confirming registration. Thereafter, the original IDERA need not be retained.

2.10.4 Enforcement of Conventions

After the Cape Town Convention came into effect, there were a few repossession cases where the plain-

tiffs pleaded application of the Convention and the courts issued repossession orders within Convention periods. In those early cases, however, the courts rarely cited the Convention as a basis for repossession orders.

In November 2018, civil courts in Brazil issued repossession orders against Oceanair within two days after requests were filed. Thus, these pre-insolvency cases complied with the Convention’s “speedy relief” provisions despite the lack of reference to the Convention in the repossession orders. The Oceanair case was the first test in Brazil of the insolvency provisions of the Cape Town Convention; see 2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership.

In February 2020, a civil court from the State of Paraná expressly cited the Cape Town Convention as the legal basis for a preliminary injunction ordering the repossession of two aircraft in favour of a lessor.

In January 2025, civil courts in Brazil issued repossession orders against Passaredo Transportes Aéreos S.A. (“Passaredo”), a small regional airline, within a few days after requests were filed. In February 2025, Passaredo filed for mediation proceedings with precautionary relief under Brazil’s Bankruptcy Law in preparation for judicial reorganisation, seeking to restructure its debts and obtain a suspension of enforcement actions. Lessors were prevented from filing for repossession or continuing existing lawsuits until March 2025, when an Appeals Court Judge, citing the Cape Town Convention, reversed the decision and assured lessors the right to immediately exercise the contractual and legal measures suitable for preserving their rights, including repossession rights.

2.10.5 Other Conventions

Brazil is a party to the 1948 Geneva Convention and the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft; however, implementation of the Cape Town Convention expressly states its prevalence over both previous conventions to the extent there is any overlap.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

There are no particular restrictions on foreign lenders financing an aircraft. However, financing aircraft and engines through loans is rare in Brazil for various reasons, including repossession precedent and tax efficiency.

3.1.2 Effect of Exchange Controls or Government Consents

The exchange controls and registration requirements applicable to finance leases also apply to loans; see **2.1.4 Exchange Controls**.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Downstream, upstream and cross-stream guarantees are permitted in favour of lenders. Guarantees should be carefully drafted to ensure certain statutory benefits provided to guarantors are waived; see **2.3.8 Requirements for Documents Concerning Registration**. Guarantees tend to be registered in an RTD rather than the RAB.

3.1.5 Lenders' Share in Security Over Domestic SPVs

Special purpose vehicles are rare in Brazil. Pledges over share agreements are recognised in Brazil; see **2.3.8 Requirements for Documents Concerning Registration**. In addition, the pledge should be listed in the company's share register. If shares are publicly traded, the pledge may be subject to additional registration and disclosure requirements.

3.1.6 Negative Pledges

Negative pledges are valid in Brazil.

3.1.7 Intercreditor Arrangements

If an intercreditor arrangement includes any Brazilian party (a rarity), the requirements listed in **2.3.8 Requirements for Documents Concerning Registration**

apply. Intercreditor agreements would usually be registered with an RTD.

3.1.8 Syndicated Loans

Facility agents and security trustees are readily accepted as parties in interest in loan and lease transactions. The RAB frequently registers interests in aircraft in the name of such agents or trustees (rarely Brazilian).

3.1.9 Debt Subordination

Subordination is achieved through written agreements and consents. Most debt subordination relating to aircraft and engine financing is achieved outside Brazil. Lease Subordination Agreements should be registered with the RAB (see **2.3.8 Requirements for Documents Concerning Registration**).

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

Assuming the debtor is Brazilian, the transfer or assignment of all or part of an outstanding debt under an English or New York law-governed loan is permissible and recognised in Brazil. If an ROF is required (see **2.1.4 Exchange Controls**), it should be amended if the payee changes.

3.1.11 Usury/Interest Limitation Laws

Usury rates are applicable in Brazil at twice the Central Bank of Brazil's interbank rate, which is called the SELIC rate and at the time of writing is in the region of 14.25% per annum. Charging a premium for holdover rent is not prohibited, but it is uncommon. In 2024, a new federal law came into effect in Brazil, stating that the Brazilian Usury Law does not apply to certain obligations, including those contracted between legal entities and by leasing companies. This settles the long-standing debate regarding whether the limits imposed by the Usury Law would apply to aircraft leasing operations. The SELIC rate does not apply to cross-border leases.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

A combination of security deposits, maintenance reserves, security assignments of rights under leases, guarantees, letters of credit, promissory notes, mortgages and account pledges are typical in avia-

tion finance transactions involving Brazilian-registered aircraft.

3.2.2 Types of Security Not Available

There are no specific restrictions on the forms of security that could be taken by a creditor over a Brazilian-registered aircraft.

3.2.3 Trust/Trustee Concepts

See 2.2.5 Recognition of the Concepts of Trust/Trustee.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

Pursuant to a mortgage, a borrower may assign its rights to an aircraft or under an aircraft lease (including insurance) to a security trustee; see 2.7 Lease Assignment/Novation.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

Brazil allows for the assignment of rights and benefits without a lessor's attendant obligations. For example, a foreign lessor of a Brazilian-registered aircraft on lease to a Brazilian lessee is allowed to assign its rights and benefits under the lease, including its rights and benefits under relevant insurance, by way of security, to a foreign security trustee located in the US (who may hold such security on trust for a changing pool of beneficiaries), without assigning the attendant obligations of the lessor under an aircraft lease.

3.2.6 Choice of Foreign Law

See 2.2.1 Mandatory Terms for Leases Governed by English or New York Law, 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards and 3.1.10 Transfer/Assignment of Debts Under Foreign Laws.

The Brazilian Aeronautical Code establishes that, when registered with the RAB, a mortgage creates a lien over a Brazilian-registered aircraft. Brazil is a contracting state under the Cape Town Convention, and qualifying mortgages should be registered in the International Registry. The Aeronautical Code further provides that rights in rem over Brazilian aircraft are to be governed by Brazilian laws.

Since the Cape Town Convention came into force in Brazil, it is arguable that parties are free to choose the governing law of a mortgage; however, the validity of foreign law mortgages in Brazil has not yet been tested. Nonetheless, lenders are increasingly relying solely on Cape Town Security Agreements as security, especially in ABS and warehouse transactions. If agreements do not take the form of Brazilian law mortgages, they are not registered at the RAB and do not establish liens under the Brazilian Aeronautical Code.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

Aircraft lease security assignments usually have no Brazilian parties and are rarely governed by Brazilian laws; therefore, the question of the creation and validity of the contractual provisions must be addressed by counsel in the relevant jurisdiction.

To be enforceable in Brazil, a security assignment should be registered with the RAB or an RTD, with a notice of assignment to, and acknowledgement from, the Brazilian lessee; see 2.3.8 Requirements for Documents Concerning Registration.

3.2.8 Domestic Law Security Instruments

A security assignment of rights under a lease and an acknowledgement of the security assignment from the Brazilian operator (describing, inter alia, the assignee's right to exercise the lessor's remedies thereunder, such as repossession) should be obtained and registered with the RAB.

Parties should also consider the need to take out a Brazilian law mortgage (see 3.2.6 Choice of Foreign Law).

Domestic law security instruments and/or local law filings are not mandatory to enable Cape Town filings, which follow the requirements provided for in the Convention and Protocol to determine whether a security instrument creates a registerable international interest.

The average costs of executing a domestic law security instrument and completing local law filings vary, and include:

- notarisation costs, which are nominal and rise according to the number of signatures (not applicable for digitally signed documents);
- costs related to apostille/consular legalisation if any party signed the instrument abroad;
- costs related to sworn translations into Portuguese (see 2.3.8 Requirements for Documents Concerning Registration); and
- RAB and RTD fees (see 2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register and 2.3.6 Taxes/Duties Payable for Registering a Lease).

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

A security assignment governed by English or New York law may be registered with the RAB; see 3.2.6 Choice of Foreign Law and 3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of contractual rights is recognised if the provisions detailed in 2.3.8 Requirements for Documents Concerning Registration are met. As mentioned in 3.2.6 Choice of Foreign Law, Brazilian law mortgages are required to establish a lien under Brazilian laws. A transfer of security interest of a Brazilian law mortgage would require a written instrument filed with the RAB.

3.2.11 Effect of Changes in the Identity of Secured Parties

If the identity of a security trustee under a security assignment changes, the new security trustee and the lessor should serve a new notice to the Brazilian lessee, and obtain an acknowledgement from them. To be enforceable, each of these documents must be registered at the RAB; see 2.3.8 Requirements for Documents Concerning Registration.

3.2.12 "Parallel Debt" Structures

As noted in 2.2.5 Recognition of the Concepts of Trust/Trustee, trusts are not recognised in Brazil per se. A parallel debt structure established in a common law jurisdiction would be effective in Brazil since the trustee/agent would hold the security under the

secured debt. Parties would not be able to create a trust under Brazilian law.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A security trustee will not be deemed resident or domiciled in Brazil as a result of being a party to or enforcement of a security assignment over Brazilian-registered aircraft; see 2.1.4 Exchange Controls and 2.4.2 Effects of Leasing on the Residence of a Foreign Lessor.

3.2.14 Perfection of Domestic Law Mortgages

A domestic law mortgage is perfected through its registration with the RAB; see 2.3.8 Requirements for Documents Concerning Registration.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

Aircraft mortgages registered with the RAB establish and perfect security interests over the aircraft (including its engines). The effect of registering a spare engine mortgage is less certain since engines themselves are not registered objects (see 2.3.3 Aircraft/Engine-Specific Registers).

International interests arising from security agreements over aircraft engines should be registered with the International Registry, according to the Cape Town Convention (see 2.10 Cape Town Convention and Others).

3.2.16 Form and Perfection of Security Over Bank Accounts

Receivables can be deposited in escrow accounts in Brazil. Parties can enter into receivables pledge agreements where a party would pledge its rights over receivables in favour of a creditor. In addition, parties can execute account management agreements, pursuant to which a bank receives instructions on how to release the account funds.

Since revenue coming into a Brazilian bank account will be in Brazilian currency, and most leases require payments in US dollars, account management agreements tend to be complex and include provisions for the bank to convert and remit funds to the foreign

creditor and to subsequently credit the balance to the Brazilian operator.

A pledge over receivables and related security instruments must be registered with an RTD for security perfection purposes. Escrow arrangements of this nature are uncommon with commercial airlines but relatively common with helicopter operators and air taxi companies.

See also **2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register**.

3.3 Liens

3.3.1 Third-Party Liens

As covered in **2.4.5 Attachment by Creditors** and **2.4.6 Priority of Third Parties' Rights**, airport and navigational authorities have not sought to exercise liens over aircraft but have occasionally sought to block the export of both commercial and business aircraft for unpaid airport navigation and parking fees (akin to a detention order). Lessor experience on this issue has been inconsistent. In most commercial aircraft repossession cases, lessors have not had the export of aircraft blocked by third parties.

There have been a few scattered cases where the SRF sought to confiscate private/corporate aircraft due to violations by lessees of customs and import regulations, with the expectation that Brazilian lessees would indemnify the owners.

Although not entirely settled, repairers generally do not have mechanic's liens over aircraft, but there are a few cases of mechanic's liens being exercised against leased aircraft. As far as is known, a crew has never asserted a claim against an aircraft for unpaid wages.

See also **3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens**.

3.3.2 Timeframe to Discharge a Lien or Mortgage

Liens are considered discharged on the date a release is filed with the RAB.

3.3.3 Register of Mortgages and Charges

Similar to leases, there is no separate mortgage or other security register; see **2.3.3 Aircraft/Engine-Specific Registers**.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

Brazil made a Declaration under Article 39 of the Cape Town Convention, preserving the supremacy of non-consensual claims under national law. No particular categories of non-consensual interests were mentioned in Brazil's Declarations.

In Brazil, fleet liens have not been asserted in the past.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

Certificates from the RAB and the International Registry enable a potential purchaser to verify that an aircraft is free of registered encumbrances.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

There are relevant differences in enforcing a security assignment as opposed to a loan or guarantee.

Security assignments are typically accompanied by notices of assignment and by acknowledgements/consents from the lessee, given to a security trustee or the ultimate creditor, agreeing to redirect payments to a security trustee and recognising the exercise of lease remedies by the assignee.

The executed instrument must be registered with the RAB in order to produce effects. If there is a default under the lease or security assignment, the security trustee (assuming the rights of the lessor under the lease) is able to bring proceedings against the lessee.

Remedies available to enforce a loan or guarantee are different.

Under Brazilian law, lenders or creditors (whether secured or not) cannot generally apply for repossession of an asset pertaining to the borrower. The usual remedy is, therefore, to seek a money judgment; this would involve a court auction regarding the encum-

bered asset, the proceeds of which would be used to pay the secured party's claim. For a variety of reasons, this remedy is ineffective with aircraft in Brazil.

3.4.2 Security Trustees' Enforcement of Their Rights

Provided the security assignment, notice and acknowledgement of assignment have been registered with the RAB, the security trustee is able to exercise its rights thereunder.

3.4.3 Application of Foreign Laws

See 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

See 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards and 2.6.12 Enforcement of Foreign Arbitral Decisions.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

See 2.6.1 Restrictions on Lessors' Abilities and 3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

See 2.6.3 Specific Courts for Aviation Disputes.

3.4.7 Summary Judgments or Other Relief

See 2.6.4 Summary Judgment or Other Relief and 2.6.12 Enforcement of Foreign Arbitral Decisions.

3.4.8 Judgments in Foreign Currencies

See 2.6.7 Judgments in Foreign Currencies.

3.4.9 Taxes/Fees Payable

See 2.6.9 Lessor's Requirement to Pay Taxes/Fees.

3.4.10 Other Relevant Issues

There are no other significant issues regarding the enforcement of lender rights.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are no relevant material issues or court judgments.

4.2 Current Legislative Proposals

There is a bill pending in the Brazilian Congress that, if ratified, would impose a new tax on aircraft due to their harmful impact on the environment. The tax would commence in 2027 and the rate is not yet known. As this is a draft bill pending in the Congress, its terms could change or the entire project could be cancelled before becoming law.

Also see 2.6.5 Domestic Courts' Approach to Foreign Courts and Judgments regarding the recent amendments to the Brazilian Code of Civil Procedure, which might limit parties' ability to freely choose courts to govern disputes.

Trends and Developments

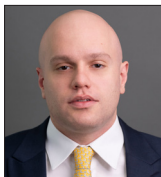
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Nantes Mello Advogados is one of the leading aviation law firms in Brazil, delivering tailored legal advice with hands-on partner involvement and a practical, business-driven approach. The firm provides comprehensive support across all aspects of aviation in Brazil, offering a wide range of services to meet the needs of airlines, air operators, and other industry participants. The firm's work spans corporate and commercial advising, regulatory matters, finance and leasing, commercial dispute resolution, debt restructuring, and passenger claims. The aviation practice

advises airlines, lessors, banks, and other key players in complex transactions, including operating and leveraged leases, sale and leasebacks, securitisations, and structured loans. With deep expertise in international structured finance, the team delivers effective solutions for cross-border transactions in any structure. The team also brings specialised knowledge in tax and accounting issues and credit-related matters, including bankruptcy and workouts, ensuring efficient structuring and risk management in both stable and distressed scenarios.

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Background: A Turning Point for Brazil's Aviation Sector

Brazil's aviation sector is entering a new phase of maturity and recalibration in 2025. After years of turbulence caused by the COVID-19 pandemic and its prolonged economic ripple effects, Brazil's major carriers and aviation stakeholders are now signalling recovery – and in many respects, transformation.

Despite filing for Chapter 11 in the United States in May 2025 to resolve historical obligations accumulated during the crisis years, in 2024, Azul Linhas Aéreas (Azul) reported record financial results, with over BRL6 billion in EBITDA and a meaningful reduction in net leverage, emphasising the company's strong cash generation abilities and positioning it among the top-performing airlines in Latin America (Azul S.A.). Gol Linhas Aéreas (Gol), despite a difficult year marked by its January 2024 Chapter 11 filing in the United States, has made notable strides toward financial restructuring, underscoring the role of in-court restructuring processes as mechanisms for long-term recovery in the airline industry.

Beyond the balance sheets, however, lies a more dynamic picture: Brazil continues to be Latin America's largest and most sophisticated aviation market, with a large domestic customer base, complex and versatile fleets, Embraer as a global Original Equipment Manufacturer (OEM) leader, and a growing appetite among international lessors and financiers to participate in structured aircraft transactions.

With the legal framework increasingly aligned with international standards – particularly due to Brazil's adoption of the Cape Town Convention and the pro-

gressive modernisation efforts led by local aviation authority *Agência Nacional de Aviação Civil* (ANAC) – the jurisdiction is proving both resilient and adaptable. Brazil in 2025 stands at a pivotal moment: a mix of macroeconomic uncertainty, regulatory innovation, and operational resilience is shaping the next generation of aviation finance and leasing in the region.

Macroeconomic and Policy Backdrop

Inflation and currency volatility: financing in a fragile landscape

In 2024, Brazil's inflation rate reached 4.87% (Brazil, BCB), reflecting a continued struggle by the Central Bank of Brazil to rein in consumer prices amidst persistent structural pressures. While more stable than in previous years, this level still complicates long-term aircraft finance planning, especially for airlines with heavy exposure to floating-rate debt or United States dollar-denominated lease obligations.

More critically, the Brazilian real (BRL) depreciated up to 21% against the United States dollar (USD) in 2024 (Langoni and Lowe), significantly impacting operator cash flows going into 2025. Because most aircraft leases and pre-delivery payments (PDPs) financings are denominated in USD whilst revenues are mostly denominated in BRL, BRL volatility remains a core structuring challenge. Lessors have responded by demanding stronger covenants, enhanced security packages, and in some cases, partial prepayment mechanisms to hedge against FX-related distress.

Financing costs and Central Bank policy

The Central Bank of Brazil began cautiously lowering its benchmark interest rate, the Selic, in late 2023, but inflation concerns have led to hesitancy in further cuts.

As of the second quarter of 2025, the Selic is peaking at 15% (Brazil, BCB, Focus). Higher domestic interest rates make local financing more expensive and reduce the competitiveness of Brazil-based banks in offering structured debt solutions for aviation clients. This, in turn, reinforces the need for cross-border financings involving international institutions, export credit agencies (ECA), and lessor-led structures – all of which must contend with Brazil's layered tax and regulatory complexities.

While financing backed by the state development bank, *Banco Nacional de Desenvolvimento Econômico e Social* (BNDES), does not match the volume of pre-pandemic levels, its strategic targeting – including lower interest rates for green or regional projects – makes it a useful instrument in the broader policy toolkit aimed at strengthening Brazil's domestic aviation footprint.

BNDES and government-backed support for fleet renewal

BNDES has maintained its role as a strategic financier of the Brazilian aviation sector, particularly in supporting regional connectivity and domestic fleet development. In 2024, BNDES continued to underwrite lines of credit and guarantee programmes for the acquisition and modernisation of aircraft, with a focus on Brazilian-made Embraer models and regional routes underserved by larger carriers which is expected to carry on into 2025 (*Agência BNDES de Notícias*).

While BNDES-backed financing does not match the volume of pre-pandemic levels, its strategic targeting – including lower interest rates for green or regional projects – makes it a useful instrument in the broader policy toolkit aimed at strengthening Brazil's domestic aviation footprint.

Regulatory landscape: ANAC and international alignment

ANAC modernisation and E-signature reforms

ANAC has significantly advanced its digital transformation strategy, streamlining regulatory processes and enhancing efficiency for stakeholders in the aviation and leasing sectors. Since January 2023, registration in the *Sistema Eletrônico de Informações* (SEI) has been mandatory for submitting requests via the

agency's civil aviation portal. In 2024, ANAC deepened this modernisation through key reforms, including mandatory authentication through a governmental platform, further legal recognition of electronic signatures, and the launch of a comprehensive Super App developed with Serpro. Initially focused on private pilots, the app will gradually expand to other civil aviation professionals in modular phases.

These reforms have enabled the digital submission and authentication of critical documents – such as lease agreements, aircraft bills of sale, and powers of attorney – without the need for notarisation or physical handling, streamlining operations for international lessors and airlines. Reinforcing this strategy, ANAC signed a technical co-operation agreement in 2025 to launch the start-up Gov.Br ANAC Segura, aimed at strengthening cybersecurity and accelerating the agency's privacy and information security programme, ensuring that its expanding digital ecosystem remains resilient and secure (Brazil, ANAC).

Improving local law enforcement and repossession protocols

Brazil's aircraft registry has become more user-friendly and transparent, largely due to ANAC's embrace of digital tools. While repossession enforcement in Brazil remains procedurally complex, especially in the context of in-court recovery (*recuperação judicial*) proceedings, recent court decisions (*Vallair Solutions SARL v Connect Linhas Aéreas*) have demonstrated that Cape Town Convention mechanisms can be effectively invoked when paired with careful structuring and pre-litigation planning. Together with ANAC now recognising requests for deregistration based solely on valid IDERA submissions in accordance with Brazil's declaration under the Cape Town Convention, this demonstrates a growing willingness to respect IDERA appointments and lessor claims, particularly where documentation is thorough and aligned with international best practices.

Deregulation and digital systems

In addition to digitisation, ANAC has eliminated several regulatory bottlenecks in 2024 and early 2025 (ANAC, Portaria 13.938). For instance, it has suspended the need for notarised translations for certain routine filings, while simultaneously implementing

new application programming interfaces (APIs) that enable seamless communication between registries, operators, and lessors (ANAC, Portaria 14.167). This simplification enhances transaction speed and legal certainty.

MoU with EASA and focus on SAF

In February 2025, ANAC signed a Memorandum of Understanding with the European Union Aviation Safety Agency (EASA), aimed at enhancing regulatory co-operation and safety alignment. A key pillar of the agreement includes co-ordination on Sustainable Aviation Fuel (SAF) regulation, certification processes for green aircraft, and harmonised safety assessments – steps that directly impact financing strategies for ESG-compliant assets.

Aircraft Financing Structures: Shifting Preferences and Regional Growth

Robust demand for sale-and-leasebacks and leases

Brazil's aircraft financing has evolved significantly since mid-2024, driven by a strong rebound in domestic air travel and heightened balance sheet optimisation among carriers. Sale-and-leaseback transactions remain the structural backbone of new deliveries. Financing for aircraft deliveries in Latin America is being primarily met by lessors, especially through sale-and-leasebacks – underscoring their central role in fleet modernisation.

Nationally, carriers have leveraged sale-and-leaseback deals coupled with structured operating and leveraged lease arrangements to preserve capital and improve liquidity. This approach aligns with global trends yet caters specifically to Brazil's USD-denominated finance environment and multi-layered capital structures.

Regulatory framework: wet, dry, finance leases under ANAC

Brazil's regulatory regime, governed by its Aeronautical Code and ANAC oversight, permits all major lease types – wet, dry, and finance leases. ANAC's digital modernisation now enables faster clearance of "wet lease" arrangements involving crews and maintenance, expanding financing flexibility for operators in need of short-term fleet solutions. Certain Aircraft,

Crew, Maintenance, Insurance (ACMI) transactions closed in Brazil recently underline this trend, offering insurers and financiers alternative recovery strategies where repossessed aircraft can be deployed through third-party partners – enhancing asset utilisation in distressed scenarios.

Regional fleet strategy and emerging players to watch

Embraer E2 and ATR fleet expansion backed by BNDES

Regional aircraft modernisation has accelerated thanks to strong Embraer E2 and ATR order momentum, supported by government-backed financing. In January 2025, Azorra secured a USD190 million BNDES facility to finance up to eight Embraer E2 jets – bringing the total BNDES financing to USD640 million for 23 E2s across airlines including Azul and Scoot, affirming state-backed financing as a key mechanism for fleet renewal.

Gol has similarly engaged in financing agreements that blend BNDES support with ECA coverage, reinforcing the track record for structured approaches that support regional fleet acquisition.

Rising regional operators and leasing activities

Regional operators are increasingly active participants in both asset operation and leasing. Azul Conecta, formerly TwoFlex, now flies to approximately 60 destinations as of April 2025, using its regional aircraft fleet to feed Azul's broader network. As domestic infrastructure investments and connectivity goals advance, demand for regional leasing – both operating and finance leases – continues to grow.

Sideral, a Brazilian cargo and charter operator, has similarly expanded, leveraging leasing structures to grow its fleet under tax-efficient platforms. The trend reflects broader diversification, where regional carriers seek flexible financing to respond to market demands and logistical opportunities in underserved routes.

New entrants: CDB-financed Chinese jets

Brazil's leasing landscape is witnessing diversification as new entrants hedge growth with non-traditional aircraft. Total Linhas Aéreas is reportedly exploring financing options for Chinese-built jets through bank

facilities, potentially backed by Chinese development financiers like the China Development Bank (CDB) (AirInsights). Though still in exploratory stages, these deals could challenge Western OEM dominance and introduce layered structuring challenges related to registration, certification, and financing risk.

Restructuring and Workouts: Lessons from High-Profile Cases

Azul's Chapter 11: A structured reset

On 28 May 2025, Azul initiated voluntary Chapter 11 proceedings in the USA with pre-arranged support from stakeholders, securing approximately USD1.6 billion in debtor-in-possession (DIP) financing comprised of USD670 million in new liquidity and up to USD 950 million in equity commitments from strategic backers such as AerCap, United Airlines, and American Airlines (Azul S.A., Form 6-K). Azul aims to eliminate over USD2 billion in debt and halve its debt-to-EBITDA ratio. The court granted access to USD250 million of the DIP facility on the first day, safeguarding operational continuity. Highlighting operational resilience, Azul continued flights throughout, with its board appointing a special committee to oversee restructuring efforts.

Gol's exit financing: restructuring concluded

Following its early-2024 Chapter 11 filing, Gol secured a USD1.9 billion exit financing package in May 2025. It includes USD1.25 billion from anchor investors, USD50 million from an ad hoc group, and USD570 million from other investors, with interest rates trimmed to 14.38% (Hardee). The US Bankruptcy Court approved Gol's restructuring plan on 20 May 2025, paving the way for an exit and imminent fleet expansion. Taxi, maintenance concessions, and receivables factoring supported a cost-efficient emergence. Gol officially exited Chapter 11 in June 2025, revealing cash reserves of USD900 million, new Boeing 737 MAX deliveries, expansion into regional routes, and openness to Embraer aircraft acquisitions.

Implications for market practice

These high-profile reorganisations offer key lessons: (i) pre-arranged creditor support smooths restructuring processes; (ii) multistage recovery plans, blending DIP financing, equity backstopping, and exit notes, can secure operational and financial viability; and (iii)

Chapter 11 is the main vehicle for fleet rationalisation and right-sizing.

ESG and sustainable aviation financing

In October 2024, Brazil advanced its environmental agenda with the enactment of the "Fuels of the Future" law (Brazil, Lei No. 14.400/2024). The legislation introduced a national SAF mandate, marking a critical step toward decarbonising aviation by requiring a minimum percentage of SAF in jet fuel blends. The mandate aims to cut greenhouse gas emissions and align Brazil with global climate goals while reinforcing its leadership in sustainable aviation.

To support SAF adoption and market participation, Brazil implemented mechanisms such as Low Carbon Aviation Fuel (LCAF) credits and the broader RenovaBio biofuel programme. Launched in 2020, RenovaBio sets carbon intensity reduction targets for producers and distributors, awarding tradable decarbonisation credits for verified reductions. LCAF credits extend this model specifically to aviation fuels, creating financial incentives for increased SAF use (Brazil, EPE).

These mechanisms promote environmental responsibility while making ESG-focused financing and leasing more attractive and viable. Airlines committing to SAF and carbon reduction can access preferential terms and sustainability-linked loans. For financiers and lessors, the frameworks offer quantifiable metrics and compliance pathways that reduce risk and support investments in green aircraft and technologies.

Together, Brazil's renewable energy profile, SAF mandate, and incentive programmes are fostering a growing ecosystem where sustainable aviation practices are economically incentivised, supporting the country's broader climate commitments and creating new opportunities within the aviation finance sector.

Foreign Investment and Tax Landscape

Influx of international capital

Global lessors are deepening their presence in Brazil in multiple ways. Avolon, the world's second-largest aircraft leasing company, is partnering with Gol and working with ANAC to support the development of eVTOL (electric vertical take-off and landing) operations in Brazil, including regulatory approvals and

infrastructure planning for this emerging urban air mobility technology.

Tax and regulatory hurdles

Cross-border aircraft financing into Brazil faces several tax and regulatory complexities that require careful structuring. Over recent years, withholding tax on operating leases from Brazil has swung dramatically – from as low as 0% to as high as 25% for payments to entities in low-tax jurisdictions like Ireland. The situation was further complicated in 2021 with the reset of withholding tax to 0% in 2022–2023, then 1% in 2024, 2% in 2025, and 3% in 2026 (Brazil, MP No. 1.094/2021) – a phased schedule that demands constant attention. Meanwhile, commercial aircraft imports are exempt from federal taxes such as Import Duty (II), IPI, and PIS/COFINS-Import (Brazil, Lei No. 12.249/2010), however, unless otherwise exempted, a 4% state-level ICMS tax still generally applies.

Legal Risks and Market Challenges

Judicial frameworks and consumer claims

Brazil's strong consumer protection laws enable courts to award substantial damages for passenger complaints, often exceeding standard compensation models under international aviation norms. As of mid-2025, Brazil's aviation sector continues to grapple with a significant volume of consumer litigation, leading to substantial financial implications for airlines.

The National Justice Council (CNJ) reported a 72% increase in consumer rights-related lawsuits since 2020, with approximately 7.2 million such cases pending nationwide (ConJur). This surge has been attributed to limited alternative dispute resolution mechanisms and a judicial environment that favours consumers. In the airline industry, this judicial environment has translated into annual legal expenditures exceeding USD200 million. These costs stem from frequent passenger claims related to flight delays, cancellations, baggage issues, and overbooking, often resulting in compensation awards.

The financial strain from ongoing litigation has led to higher ticket prices and added operational complexity, which may discourage prospective entrants into the Brazilian market. To manage the surge in legal disputes, airlines are turning more frequently to alterna-

tive dispute resolution mechanisms, including mediation and arbitration.

Additionally, there is a growing emphasis on enhancing customer service channels to address and resolve passenger complaints more efficiently, aiming to reduce the volume of legal claims and associated costs. This ongoing legal landscape underscores the importance for stakeholders in the Brazilian aviation sector to remain vigilant and proactive in managing legal risks and fostering improved consumer relations.

Supply chain and OEM constraints

Global delays in aircraft deliveries from major OEMs continue to affect Brazilian carriers, with ripple effects across their fleet planning and financing strategies. These delays – driven by supply chain disruptions, labour shortages, and production bottlenecks – have extended well into 2025, forcing airlines in Brazil to adjust their renewal timelines. Compounding the challenge is the fact that aircraft costs, including PDPs, remain tied to the United States dollar, putting additional pressure on Brazilian airlines amid ongoing FX volatility.

As a result, carriers have increasingly turned to wet leases, used aircraft acquisitions, and hybrid fleet solutions to bridge capacity gaps and maintain network commitments. These interim measures offer flexibility while deferring capital-intensive investments, helping airlines manage both operational continuity and financial exposure during a period of supply-side uncertainty.

In addition to aircraft delivery delays, engine OEM supply and reliability issues are further constraining fleet planning for Brazilian airlines in 2025. Major engine manufacturers are grappling with component shortages, maintenance, repair, and overhaul (MRO) backlogs, and ongoing technical concerns, especially with newer-generation engines. These challenges have led to grounded aircraft, extended turnaround times for engine overhauls, and reduced fleet availability for carriers across Latin America, including Brazil.

Despite short-term friction, structural trends point to strong potential for Brazil's aviation sector going forward. Brazil's domestic air travel continues to recover

faster than global averages, supported by the country's continental size, lack of high-speed rail, and growing middle class.

Conclusion: Brazil as a Resilient, Forward-Thinking Jurisdiction

Brazil's aviation finance sector in 2025 is at a pivotal juncture. Historic macroeconomic instability, including volatile inflation and currency swings, is stabilising somewhat – but remains influential. The modernisation of regulation, delivered heat-of-market restructurings through Azul and Gol, and the advent of ESG and regional-fleet dynamics, are collectively renewing investor confidence.

The offering for aviation finance and leasing is complex but compelling. Brazil's legal infrastructure, in line with global conventions, coupled with resilient carriers, regional expansion, and environmental momentum, make it an attractive jurisdiction – provided stakeholders proceed with both discipline and foresight.

CAYMAN ISLANDS



Law and Practice

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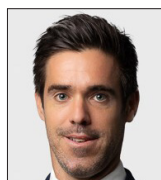
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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

The Cayman Islands currently have no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax. Stamp duty may be payable on documents executed in, or brought to, the Cayman Islands or put before the Grand Court of the Cayman Islands (the “Cayman Court”).

1.1.2 Enforceability Against Domestic Parties

There is no formal legal requirement under Cayman Islands law that a sale agreement must be translated, certified, notarised or legalised to be valid or enforceable.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Title is invariably transferred by way of bill of sale and there are no specific formalities under Cayman Islands law.

If, following the sale of the relevant ownership interest, the entity owning legal title remains the same, no sale of the physical asset would occur. It should be noted that if the aircraft is registered with the Civil Aviation Authority of the Cayman Islands (CAACI), any change in the particulars of the aircraft (including any change in beneficial or legal ownership) furnished to the CAACI at the time of first registration should be notified to the CAACI within 28 days of such a change,

in accordance with the Air Navigation (Overseas Territory) Order 2013 (as amended) (ANOTO).

1.2.2 Sales Governed by English or New York Law

There is no formal legal requirement under Cayman Islands law that a bill of sale needs to be governed by Cayman Islands law for the Cayman Court to recognise the title transfer. In the absence of public policy restrictions, the parties are free to choose the governing law of the bill of sale.

There are no known specific requirements, other than the general requirements for any contract, for the bill of sale to be substantively valid as a contract.

1.2.3 Enforceability Against Domestic Parties

There is no formal legal requirement under Cayman Islands law that a bill of sale must be translated, certified, notarised or legalised to be valid or enforceable.

1.2.4 Registration, Filing and/or Consent From Government Entities

There is no formal legal requirement under Cayman Islands law for a bill of sale to be registered, filed, or subject to any consent from any government entity, except that a copy of the bill of sale should be provided to the CAACI in respect of aircraft which are or will be registered on the Cayman Islands Aircraft Register maintained by the CAACI (the “Aircraft Register”).

For a new registration, all relevant application forms may be submitted via the CAACI’s online registration portal for approval by the Director General of Civil Aviation. The application should include a copy of the

bill of sale for the aircraft in favour of the registering owner.

If there is a change in ownership of a Cayman Islands-registered aircraft, that change must be notified to the CAACI within 28 days in accordance with the ANOTO, and a copy of the bill of sale for the aircraft may be provided as evidence of the change in ownership. The CAACI will also require certain due diligence on the new owner and for all outstanding fees in respect of the aircraft to be settled prior to updating the Aircraft Register.

No government applications or consents are a prerequisite to executing and delivering a bill of sale in relation to an aircraft or engine registered in the Cayman Islands.

Assuming the bill of sale satisfies the requirements for registration as an “international interest” under the Cape Town Convention (as defined in **2.10 Cape Town Convention and Others**), such filings can be made on the International Registry (IR).

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

See **1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement**.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

Subject to the general requirements for any contract to be substantively valid as a contract, there are no known types of leases that are not permissible or recognised under Cayman Islands law.

2.1.2 Application of Foreign Laws

In principle, the Cayman Court will recognise and enforce an aircraft lease governed by the laws of a jurisdiction other than the Cayman Islands, provided that:

- the choice of governing law was made in good faith by the parties and would be regarded as a valid and binding selection and upheld in the courts

of that foreign jurisdiction and all other relevant jurisdictions; and

- the lease has been duly executed and delivered and, as a matter of the laws of all relevant jurisdictions, constitutes the legal, valid and binding obligations of each of the parties thereto, enforceable under its terms.

Subject to the provisos above and general qualifications, one would expect the Cayman Court to give effect to an English law or New York law-governed lease in customary form and on customary market terms.

The term “enforceable” and its cognates, as used in this analysis, mean that the obligations assumed by any party under any document are of a type that the Cayman Court would enforce. This does not mean that those obligations will necessarily be enforced in all circumstances in accordance with their terms.

2.1.3 Restrictions Concerning Payments in US Dollars

There are currently no foreign exchange controls or foreign exchange regulations under Cayman Islands law.

2.1.4 Exchange Controls

See **2.1.3 Restrictions Concerning Payments in US Dollars**.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

See **1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement**.

2.1.6 Licensing/Qualification of Lessors

There are no formal legal requirements under Cayman Islands law for lessors to be licensed or otherwise qualified in the Cayman Islands to do business with a domestic lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

There are no mandatory terms that a lease (or ancillary documents thereto) is required to contain under Cay-

man Islands law other than the general requirements for any contract to be substantively valid.

Assuming the lease is effective to create, within the meaning of the Cape Town Convention, “international interests” vested in the lessor with respect to the airframe and engines, IR filings can be made in respect of those interests. See **2.10 Cape Town Convention and Others**.

2.2.2 Tax and Withholding Gross-Up Provisions

Tax and other withholding gross-up provisions are permissible and enforceable in the Cayman Islands, provided such provisions are permissible and enforceable pursuant to the governing law of the lease. See **2.1.2 Application of Foreign Laws** with respect to the enforceability of a lease governed by foreign law.

2.2.3 Parts Installed or Replaced After a Lease’s Execution

A lease can cover parts installed or replaced on an aircraft or engine after its execution, and any steps to be taken to capture such parts under the lease would be a matter of the governing law of the lease.

2.2.4 Risk of Title Annexation

There is no known risk of title annexation under Cayman Islands law. However, it is common market practice for relevant parties to enter into contractual “recognition of rights” agreements with other interested parties when engines are installed on different airframes.

2.2.5 Recognition of the Concepts of Trust/Trustee

Cayman Islands law recognises trusts, although the concept of a trust under the laws of the Cayman Islands may differ from that in other jurisdictions; for example, a trust constituted under the laws of the Cayman Islands does not have a legal personality.

2.3 Lease Registration

2.3.1 Notation of Owner’s/Lessor’s Interests on Aircraft Register

The Aircraft Register is primarily a private-use category register, and any aircraft registered in the Cayman Islands must not be used for commercial operations unless the operator holds an Air Operator’s Certificate. The Aircraft Register is a register of registered

owners and aircraft only, and the recording of details on the Aircraft Register does not determine priority between competing interests in the aircraft.

It is possible to register the aircraft in the name of:

- the owner of the aircraft; or
- the “charterer by demise”, provided such a party is qualified to be the registered owner pursuant to the ANOTO.

The ANOTO specifies particular categories of “qualified person”, including:

- citizens of the UK, Commonwealth, a European Economic Area state or of the Swiss Confederation; or
- bodies incorporated, or undertakings formed, in any part of the Commonwealth or in accordance with the law of a European Economic Area state or within the Swiss Confederation that have their registered office, central administration or principal place of business in such location.

Full details of the requirements and eligibility for registration of aircraft on the Aircraft Register are set out in the ANOTO.

It is also possible to note the interests of other parties (such as the lessor or a mortgagee) on the Aircraft Register.

No legislation in the Cayman Islands expressly provides that recording a “charterer by demise” as the registered owner constitutes public notice of a lessor’s interest in the relevant aircraft. However, a person examining a certificate of registration in which the lessor’s interest is noted will have actual notice of that interest. It would be reasonable to expect the Cayman Court to consider inspection of the Aircraft Register in respect of an aircraft which records that the registered owner is a “charterer by demise” to constitute actual notice to the inspecting party of third-party interest in the relevant aircraft.

2.3.2 Registration If the Owner Is Different From the Operator

See 2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register.

In order to register an aircraft on the Aircraft Register:

- an aircraft registration application must be submitted (this can be done via the CAACI's online platform) and a deposit paid;
- financial and legal due diligence satisfactory to the CAACI must be completed, following which the CAACI will issue a notice of acceptance of the applicant and a reserved Cayman Islands registration mark;
- an airworthiness survey of the aircraft must be completed by a CAACI surveyor;
- supporting documentation (including various technical forms) must be completed and submitted; and
- deregistration from any existing state of registration must be completed.

2.3.3 Aircraft/Engine-Specific Registers

There is no formal legal requirement for a lease to be registered with the CAACI in relation to an aircraft registered in the Cayman Islands. However, it is usual in the case of an aircraft registered in the name of its "charterer by demise" for the CAACI to request a copy of the aircraft lease in support of the registration application.

The CAACI does not maintain a separate engine register.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

See 2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register and 2.3.3 Aircraft/Engine-Specific Registers. Leases are not subject to consent from any government entity.

2.3.5 Requirements for a Lease to Be Valid and Registrable

See 2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register and 2.3.3 Aircraft/Engine-Specific Registers. An aircraft lease submitted to the CAACI is not required to satisfy any formalities, although the

CAACI will ask for a lease in a language other than English to be accompanied by an English translation.

2.3.6 Taxes/Duties Payable for Registering a Lease

See 2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register and 2.3.5 Requirements for a Lease to Be Valid and Registrable. Any fees payable to the CAACI are for registration of the aircraft, not the lease.

2.3.7 Registration of Aircraft in Alternative Countries

This is not applicable in the Cayman Islands.

2.3.8 Requirements for Documents Concerning Registration

The CAACI requires certain know-your-customer documents to be notarised as part of the legal and financial due diligence conducted during an application for registration of an aircraft.

See 2.3.5 Requirements for a Lease to Be Valid and Registrable.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

See 1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor that is not already resident in the Cayman Islands prior to its entry into a lease would not be deemed to be resident, domiciled or carrying on a business in the Cayman Islands by reason only of the execution, delivery, performance or enforcement of that lease.

2.4.3 Engine Maintenance and Operations

See 2.4.6 Priority of Third Parties' Rights in relation to repairers' liens and 2.4.4 Damage or Loss Caused by an Asset in relation to operational liability.

2.4.4 Damage or Loss Caused by an Asset

The owner of an aircraft registered with the CAACI could be subject to strict liability by virtue of Section 40 (2) of the Civil Aviation Act, 1949 (as extended to the Cayman Islands by the Civil Aviation Act 1949 (Overseas Territories) Order 1969, known as the "CAA

1969”) which states that, in essence, there are certain circumstances where:

- material loss or damage caused to any person or property as a result of an aircraft while in flight, taking off or landing can result in damages being recoverable without “proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect, or default of the owner of the aircraft”; and
- a legal liability can be created “in some person other than the owner to pay damages in respect of the said loss or damage, the owner shall be entitled to be indemnified by that other person against any claim in respect of the said loss or damage”.

As a result, the owner can seek indemnification from the operator of the aircraft.

A passive owner will typically rely on the exemption under Section 76 (4) of the UK Civil Aviation Act, 1982 (as extended to the Cayman Islands by the Civil Aviation Act 1982 (Overseas Territories) (No 2) Order 2001), which states that if an owner has bona fide demised, let or hired out the aircraft for more than 14 days, and no member of the crew is employed by the owner, Section 40 (2) of the CAA 1969 will take effect as if references to the owner are substituted with references to the person to whom the aircraft has been demised, let or hired out.

2.4.5 Attachment by Creditors

The lessee may have allowed certain liens to accrue against the aircraft (eg, a possessory lien arising from a third party having worked on the aircraft to improve its condition).

A lien constitutes an unassignable personal right of the lienor to detain the chattel until their claims for payment against the owner have been satisfied. Accordingly, a creditor with a lien over the aircraft may be able to detain the aircraft until the relevant outstanding debt is settled. See 2.4.6 Priority of Third Parties’ Rights.

2.4.6 Priority of Third Parties’ Rights

There are a limited number of third-party rights which would take priority over a valid security interest created in favour of a secured party.

These are:

- the right accorded to any party by statute to detain the aircraft, for example:
 - (a) the lien granted in favour of the Cayman Islands Airports Authority (CIAA) in respect of airport fees and charges pursuant to the Airports Authority Act (as amended); and
 - (b) a lien granted in favour of the CAACI in respect of the CAACI’s fees and charges pursuant to the Civil Aviation Authority Act (as amended); or
- certain rights arising by operation of common law, for example, a possessory lien in respect of work done on the aircraft (whether before or after the creation of the mortgage) on the express or implied authority of any party lawfully entitled to possession of the aircraft (examples of such liens are the seller’s lien, banker’s lien and repairer’s lien).

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

It is not mandatory that all or part of the insurance be placed with domestic insurance companies unless the aircraft is ordinarily based in the Cayman Islands, in which case, local insurance could be used. Insurance is typically placed with the international insurance markets in London and New York.

2.5.2 Mandatory Insurance Coverage Requirements

No mandatory insurance coverage requirements are imposed.

2.5.3 Placement of Insurance Outside of Jurisdiction

The question of insurance and reinsurance will depend on the requirements of the parties to the transaction, and in particular, on the jurisdiction of the lessee.

2.5.4 Enforceability of “Cut-Through” Clauses

There are no Cayman Islands statutory provisions relating to “cut-through” clauses. The Cayman Court

would look to English common-law principles (which have persuasive, if not binding, effect in the Cayman Court).

2.5.5 Assignment of Insurance/Reinsurance

Such arrangements are effective under Cayman Islands law, subject to general qualifications as to enforceability.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

The Cayman Court recognises self-help remedies and typically recognises and enforces contractual arrangements between parties. However, it should be noted that in the majority of cases, the aircraft will not be located in the Cayman Islands, and the lease is likely to be governed by English or New York law. The effectiveness of these actions will, therefore, be determined by general principles of enforceability under the governing law of the lease and in the jurisdiction in which the aircraft is located.

Any sale of the aircraft would be subject to there being no third-party liens in place. See **2.4.6 Priority of Third Parties' Rights** in connection with such third-party liens.

2.6.2 Lessor Taking Possession of the Aircraft

Enforcement will be determined by the provisions of the relevant lease agreement. If enforcement is contested, court proceedings may be required to resolve the dispute.

Taking physical possession of the aircraft is permitted under Cayman Islands law, and self-help remedies are permitted without the need to obtain a court order. However, it is open to the relevant enforcing party to seek a court order if it considers it necessary, and in such circumstances, the Cayman Court would recognise the self-help remedies.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts in the Cayman Islands that deal exclusively with aviation disputes, and no judicial decisions of the Cayman Court have been reported in relation to the seizure of aircraft.

2.6.4 Summary Judgment or Other Relief

Summary judgment is available. Relief is not conditional upon the lease being in a particular form, but stamp duty would need to have been paid in respect of the lease to present it in proceedings before the Cayman Court.

It is not possible to confirm what conditions the Cayman Court might impose. It is possible, however, that the courts may require security for costs or an undertaking to pay another party's damages in connection with the grant of interlocutory relief, which may likely be obtained prior to the hearing of the dispute, which is the subject of the proceedings.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

See **2.1.2 Application of Foreign Laws** and **2.6.11 Lessees' Entitlement to Claim Immunity**.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

A judgment obtained in a foreign court (other than certain judgments of a Superior Court of any state of the Commonwealth of Australia) will be recognised and enforced in the Cayman Court without any re-examination of the merits at common law by an action commenced on the foreign judgment in the Cayman Court where the judgment:

- is final and conclusive;
- is one in respect of which the foreign court had jurisdiction over the defendant according to Cayman Islands conflict of law rules;
- is either for a liquidated sum, not in respect of penalties or taxes, or a fine or similar fiscal or revenue obligations or, in certain circumstances, for in personam non-money relief (following *Bandone Sdn Bhd v Sol Properties Inc* (2008) CILR 301); and
- was neither obtained in a manner, nor is of a kind, that is contrary to natural justice or the public policy of the Cayman Islands if enforced.

2.6.7 Judgments in Foreign Currencies

The Cayman Court has jurisdiction to give judgment in the currency of the relevant obligation.

See 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards regarding foreign judgments.

2.6.8 Limitations on Lessors' Actions Following Termination

Penal rates of interest may be unenforceable under English common-law principles (those common-law principles having persuasive, if not binding, effect in the Cayman Court).

2.6.9 Lessor's Requirement to Pay Taxes/Fees

See 1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement with respect to taxes.

If an aircraft registered on the Aircraft Register is to be deregistered, the aircraft account with the CAACI will need to be settled, and there may also be unpaid charges payable to the CIAA. These charges would depend on the specific facts and circumstances at the time.

With respect to fees, it is not possible to estimate the cost of proceedings in the Cayman Court to enforce a lease for a hypothetical case where the relevant facts are not known.

2.6.10 Mandatory Notice Periods

The procedure for the termination of a lease is a matter to be determined by the terms agreed between the parties to that lease.

2.6.11 Lessees' Entitlement to Claim Immunity

Whether the lessee is entitled to claim any immunity from suit, execution, attachment or other legal process will depend on its actual identity. If the lessee is a sovereign body or other government organ (whether autonomous or quasi-autonomous), the lessee may be able to claim sovereign immunity.

2.6.12 Enforcement of Foreign Arbitral Decisions

The Cayman Court will recognise and enforce an arbitral decision. The Arbitration Act (as amended) provides the regime for enforcement of domestic awards, non-convention* awards and interim measures.

* See the Foreign Arbitral Awards Enforcement Act (1997) in respect of the enforcement of "New York Convention" awards.

2.6.13 Other Relevant Issues

There are no other relevant issues in the Cayman Islands of which a lessor should be aware in relation to the enforcement of its rights.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Cayman Islands law recognises the concepts of novation and contractual assignment.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

The consent of the continuing party (whether that is the lessee or otherwise) would typically be required.

The courts of the Cayman Islands will recognise and enforce an agreement in accordance with its terms, on the assumption that:

- the assignment and assumption or novation agreement is in a customary form and on customary market terms for an assignment and assumption or novation of an aircraft lease governed by English or New York law and is itself governed by the same law; and
- the agreement has been duly executed and delivered and, as a matter of the laws of all relevant jurisdictions, constitutes the legal, valid and binding obligations of each of the parties thereto, enforceable in accordance with its terms and effective to achieve the intended novation.

2.7.3 Enforceability of Lease Assignments/Novations

There is no formal legal requirement under Cayman Islands law that a lease assignment and assumption/novation agreement must be translated, certified, notarised or legalised to be valid and enforceable.

2.7.4 Filing/Registration of Lease Assignments/Novations

The original lease should have been submitted to the CAACI at the time of registration of the aircraft if the registered owner is a "charterer by demise", and any assignment and assumption or novation of the lease that results in a change to this information must be

conveyed to the CAACI within 28 days of the change, in accordance with the ANOTO.

There are no specific formalities except that the CAACI will ask for a document in a language other than English to be accompanied by an English translation.

No government applications or consents are prerequisite to the execution and delivery of an aircraft and/or engine lease assignment and assumption/novation in relation to an aircraft registered domestically.

2.7.5 Taxes/Duties Payable on Assignment/Novation

See 1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement.

2.7.6 Recognition of Transfer of Ownership Interests

It is assumed that if legal title to the aircraft remained with the same entity, there would be no intention to novate/assign the lease even if the beneficial ownership of the aircraft were transferred to another party. It should be noted, however, that any change in ownership particulars previously notified to the CAACI for Cayman Islands-registered aircraft should be notified to the CAACI within 28 days of any such change (see also 1.2.1 Transferring Title and 2.7.4 Filing/Registration of Lease Assignments/Novations).

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

When an irrevocable deregistration and export request authorisation (“IDERA”) is recorded with the CAACI in respect of an aircraft registered on the Aircraft Register, Article 18 (5) of the ANOTO provides that the CAACI must cancel the registration of the aircraft as soon as reasonably practicable if satisfied that a person wishes and is entitled under the laws of the Cayman Islands to procure deregistration of the aircraft in accordance with Article IX of the Protocol of the Cape Town Convention (the “Protocol”).

When no IDERA is recorded with the CAACI in respect of an aircraft registered on the Aircraft Register, the CAACI is expected to follow its customary approach prior to 1 November 2015; namely, that any application to deregister an aircraft should be made by the

registered owner of that aircraft. It should be noted that an application to deregister the aircraft can be made in the name of the owner by a person appointed as its attorney-in-fact, pursuant to a deregistration power of attorney given by the owner. All persons who have registered vested interests in the aircraft should provide written consent to any such deregistration to the CAACI.

These registered interests include, without limitation, those of:

- the beneficial owner of that aircraft (if other than the registered owner);
- any lessor of that aircraft (if other than the beneficial or registered owner); and
- any mortgagee if there is an entry with respect to the aircraft on the mortgage register maintained by the CAACI (the “Mortgage Register”).

The CAACI does not require the consent of the operator of an aircraft (in its capacity as operator) for the deregistration of an aircraft.

2.8.2 Lessee’s/Operator’s Consent

See 2.8.1 Deregistering Aircraft in This Jurisdiction.

2.8.3 Required Documentation

In order to deregister an aircraft, the CAACI must receive:

- written instructions from the registered aircraft owner or their agent (whose authority is evidenced by a notarised power of attorney);
- evidence of settlement of the aircraft account with the CAACI, including payment of the deregistration fee;
- the Certificate of Registration with Section III signed by the owner of the aircraft, together with evidence of the signing authority of the relevant person signing (Section III should not be dated until the proposed day of deregistration, and the CAACI will not deregister the aircraft until the final instruction is received from the owner or authorised person);
- instructions from the lessor of a “charterer by demise” registered aircraft or holder of an IDERA over the aircraft on the termination of the current

- lease and authorisation that the aircraft can be deregistered, accompanied by certified copies of all relevant legal documents;
- when an aircraft has a registered mortgage on the Mortgage Register, either:
 - (a) a mortgage discharge application form; or
 - (b) a letter of authorisation from the mortgagee indicating how the mortgage should be dealt with, specifying:
 - (i) a description of the mortgage, including the reference number;
 - (ii) the proposed date of deregistration of the aircraft and new state of registry;
 - (iii) confirmation that the mortgage is not being discharged, nor will it be deregistered from the Mortgage Register prior to the aircraft being deregistered;
 - (iv) authority for the aircraft to be deregistered and have the mortgage referenced on the deregistration certificate, along with any filed IDERAs; and
 - (v) an indication of when the mortgage will be deregistered from the Mortgage Register (notarised proof of authority of the mortgagee's signatory will also be required); and
 - when a Certificate of Airworthiness for Export is required, proof of a completed inspection of the aircraft by a CAACI surveyor.

2.8.4 Duration of Deregistration Process

From the CAACI's perspective, where all parties are co-operating, deregistration can typically be effected in one day once all the documentation is in place.

The period for deregistration where there is no co-operation from the parties cannot be estimated.

2.8.5 Aviation Authority's Assurances

See 2.8.4 Duration of Deregistration Process.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

Deregistration fees are nominal (currently KYD500/USD609.76). The fee payable is prescribed by statute, and there is no known precedent for the fee being waived.

In addition, the aircraft account must be settled with the CAACI before the aircraft can be deregistered. This amount may or may not be significant, depending on how the accounts have been managed prior to deregistration.

2.8.7 Deregistration Power of Attorney

There is no formal legal requirement under Cayman Islands law that, for a deregistration power of attorney to be enforced against a domestic party, it needs to be translated, certified, notarised, legalised or lodged in advance. It should be noted, however, that since the Cape Town Convention came into force in the Cayman Islands on 1 November 2015, pursuant to the CTC Act (as defined in 2.10 Cape Town Convention and Others), the CAACI typically accepts IDERAs rather than deregistration powers of attorney.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

See 2.8.1 Deregistering Aircraft in this Jurisdiction and 2.8.3 Required Documentation.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A deregistration power of attorney does not have to be governed by the laws of the Cayman Islands.

2.8.10 Revocation of a Deregistration Power of Attorney

Under Cayman Islands law, a deregistration power of attorney granted to secure an obligation owed, typically to the finance parties, will be irrevocable until that obligation is discharged.

2.8.11 Owner's/Lessor's Consent

Aircraft registered on the Aircraft Register are usually located and operated outside of the Cayman Islands. See also 2.8.1 Deregistering Aircraft in This Jurisdiction, noting that the lessee's consent is not required for deregistration.

2.8.12 Aircraft Export Permits/Licences

See 2.8.1 Deregistering Aircraft in This Jurisdiction and 2.8.3 Required Documentation. The issuance of an export permit/licence will also depend on the requirements of the jurisdiction to which the aircraft is being exported.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

See 2.8.6 Costs, Fees and Taxes Relating to Deregistration. In addition, the fees payable to the CAACI for an export certificate of airworthiness are calculated at KYD100 per 500 kg of the maximum take-off weight of the aircraft to be exported.

2.8.14 Practical Issues Related to Deregistration of Aircraft

Other than the points discussed here, there are no other known significant practical issues.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

Part V of the Companies Act (as amended) (the “Companies Act”), supplemented by the Companies Winding-Up Rules (2023 Revision) (“the CWR”), governs insolvency proceedings in the Cayman Islands.

The relevant insolvency provisions apply to the winding-up of companies – including certain foreign companies – as well as to the winding-up of exempted limited partnerships in the Cayman Islands by virtue of Section 36 of the Exempted Limited Partnership Act (as amended).

Whilst a Cayman Islands scheme of arrangement is not a formal insolvency process, the restructuring and reorganisation of Cayman Islands companies is often achieved by implementing a scheme of arrangement pursuant to Sections 86 and/or 87 of the Companies Act (see also the descriptions on the appointment of provisional liquidators and/or restructuring officers in 2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership).

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Voluntary Liquidation

Voluntary liquidation can be utilised to wind up a company incorporated or registered in the Cayman Islands. In order to be voluntarily liquidated, the company must cease its business activities, except where

necessary, to complete the winding-up, and each of the directors of the company must make a declaration of solvency within 28 days of the commencement of the voluntary liquidation stating that the company will be able to pay its debts in full in a period not exceeding twelve months. If a solvency declaration is not provided, the voluntary liquidator(s) must apply to the Cayman Court for an order that the voluntary liquidation continue under the Cayman Court’s supervision.

The company’s directors are usually replaced by a voluntary liquidator on the commencement of a voluntary liquidation, except where the company or the voluntary liquidator sanctions the continuance of the directors’ powers. There are no qualification requirements for the role of voluntary liquidator, so any individual, including the company’s directors, may be appointed as voluntary liquidators.

Importantly, a voluntary liquidator does not require the Cayman Court’s authorisation to exercise their powers. Once the company’s affairs are wound up, its creditors are paid in full, and any remaining assets are distributed to shareholders.

Official Liquidation

Official liquidation is a court-supervised insolvency process where the aim is to collect, realise and distribute the assets of the company to the company’s creditors and, where there are surplus assets, to its shareholders. As officers of the court, official liquidators must be qualified insolvency practitioners and are required to report to the Cayman Court and the company’s stakeholders on the affairs of the company and the steps taken to wind it up.

A winding-up petition may be presented to the Cayman Court at any time by the company, any of its creditors (including any contingent or prospective creditor or creditors) and any contributory. The right of creditors to present a winding-up petition is, however, subject to any contractually binding non-petition clauses, and a petitioning contributory’s shares must be either:

- fully paid; or

- originally allotted to them, held by them for at least six months prior to the presentation of the petition, or inherited from the original shareholder.

The grounds for winding up a Cayman company are when:

- the company has passed a special resolution requiring the company to be wound up by the Cayman Court;
- the company has not commenced its business within a year from its incorporation or has suspended its business for a whole year;
- the period fixed for the duration of the company by the articles of association is expiring, or an event occurs, upon the occurrence of which it is provided by the articles of association that the company is to be wound up;
- the company is unable to pay its debts as they fall due;
- the court is of the opinion that it is just and equitable that the company should be wound up; or
- the Cayman Islands Monetary Authority (CIMA) may present a winding up petition in respect of any company which is carrying on business within the Cayman Islands upon the grounds that it is not duly licensed or registered to do so under applicable regulatory or other laws.

Provisional Liquidation

Provided there is a prima facie case for making a winding-up order, an application for provisional liquidation may be made by creditors or shareholders of the company (and, where the company is a regulated entity, the Cayman Islands Monetary Authority (“CIMA”)) for the appointment of provisional liquidators to preserve and protect the company’s assets until the hearing of a winding-up petition in circumstances where there are concerns about:

- the misuse or dissipation of the company’s assets;
- the oppression of minority shareholders; or
- mismanagement or misconduct on the part of the company’s directors.

Provisional liquidation may also be used as a restructuring tool where the directors of a company consider that the company is liable to be wound up under the

Companies Act. The directors may cause the company to petition for its own winding-up and apply for the appointment of provisional liquidators in order to present a compromise or arrangement to creditors with the protection of an automatic moratorium against proceedings being brought or continued against the company.

Provisional liquidators are appointed and supervised by the Cayman Court.

Restructuring Officer Regime

A Cayman Islands incorporated company may present a petition to the Cayman Court for the appointment of a restructuring officer on the grounds that (i) the company is, or is likely to become, unable to pay its debts; and (ii) the company intends to present a compromise or arrangement to its creditors (or classes thereof), pursuant to the Companies Act, foreign law or by way of a consensual restructuring.

Unlike provisional liquidation, the petition seeking the appointment of a restructuring officer may be presented by the directors of a company: (i) without a shareholder resolution and/or an express power to present a petition in its articles of association; and (ii) without the need to file a winding-up petition as a prerequisite.

Upon filing the petition seeking the appointment of restructuring officers, an automatic and standalone restructuring moratorium will immediately arise which will have extraterritorial effect within which a restructuring may be proposed and implemented, including by way of a Cayman Islands scheme of arrangement (see below). A company may also apply for the appointment of a restructuring officer on an interim basis pending the hearing of the petition.

Scheme of Arrangement

A scheme of arrangement is a court-approved compromise or arrangement between a company and its creditors (or any class of them) or its shareholders (or any class of them). There is no statutory definition of the terms “compromise” or “arrangement”, but it is well-established that a “compromise” or “arrangement” requires an element of “give and take” between the company and the scheme’s creditors or share-

holders, and the Cayman Court will construe these terms broadly.

There is no statutory restriction on a company carrying on business after it has entered into a scheme of arrangement (although the scheme may contain such restrictions).

Receivership

Receivers may be appointed over Cayman Islands companies, either by the Cayman Court or by a secured creditor, pursuant to the terms of the relevant security document.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

By virtue of Section 241 of the Companies Act, the Cayman Court has jurisdiction over the application by a trustee, liquidator, or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding to make orders ancillary to a foreign bankruptcy proceeding for:

- recognising the foreign representative's right to act in the Cayman Islands on behalf, or in the name, of the foreign debtor;
- enjoining the commencement or staying the continuation of legal proceedings against a debtor;
- staying enforcement of any judgment against a debtor;
- requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and/or
- ordering that any property belonging to a debtor be turned over to the foreign representative.

CWR Order 21 governs the implementation of international protocols in relation to companies which are the subject of liquidation proceedings in the Cayman Islands as well as parallel foreign bankruptcy proceedings. CWR Order 21 also deals with cases where a Cayman Islands company in liquidation has assets located in a foreign country, and those assets are the subject of a foreign bankruptcy proceeding or receivership.

Official liquidators appointed by the Cayman Court are required by CWR Order 21 to evaluate the appropriateness of entering into an international protocol with a foreign office-holder and to seek approval, from both the Cayman Court and the relevant foreign court, in respect of any such protocol.

The Cayman Islands adopted the use of the Judicial Insolvency Network (JIN) Guidelines on 30 July 2018, by operation of Practice Direction No 1 of 2018. This practice direction indicates that office-holders appointed by the Cayman Court, companies subject to restructuring proceedings supervised by the Cayman Court, and other interested parties involved in cross-border insolvency cases should consider, at the earliest opportunity, whether to incorporate some or all of the guidelines (with suitable modifications) either into:

- an international protocol to be approved by the Cayman Court; or
- an order of the Cayman Court adopting the guidelines.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

This will depend on the laws of the lessee's jurisdiction and other relevant laws, such as the laws that govern the power of attorney.

If the lessee is incorporated in the Cayman Islands and the power of attorney is governed by Cayman Islands law, an irrevocable deregistration power of attorney (when granted to secure an obligation owed, typically to the finance parties) will not be revoked by the winding-up or dissolution of the lessee. In practice, however, deregistration powers of attorney are not usually governed by Cayman Islands law but rather by the same governing law as the other transaction documents.

2.9.5 Other Effects of a Lessee's Insolvency

There is no process of administration (or equivalent) under Cayman Islands law.

In the majority of cases, the lessee is not incorporated under the laws of the Cayman Islands, and therefore, it is unlikely the lessee would be subject to insolvency

proceedings in the Cayman Islands. The local law in the lessee's jurisdiction of incorporation will govern any such proceedings.

If the lessee is incorporated under the laws of the Cayman Islands and enters into provisional liquidation or official liquidation proceedings in the Cayman Islands:

- there is no power to disclaim (or set aside) the lease as an onerous contract;
- the Cayman courts will typically recognise and enforce contractual arrangements such as lease-termination provisions (including those created under foreign laws) and self-help remedies by which the lessor may take possession of the aircraft, subject to enforceability considerations under the governing law, the *lex situs* and other relevant laws (although it should be noted that the CTC Act permits taking possession of the aircraft without leave of the court);
- as a matter of Cayman Islands law, leases do not operate to transfer legal ownership from the lessor to the lessee; however, in an insolvency scenario, the lease may be treated as an asset (provided that the lease does not contain an automatic termination for insolvency provisions); and
- in a Cayman insolvency process, there may be creditors who rank in priority to the lessor – eg, a registered mortgage will have statutory priority over subsequently registered and unregistered mortgages and will rank in preference to any right, claim or interest of other creditors (certain other rights and interests will take priority under Cayman law – eg, Cayman government liens for unpaid taxes, charges and repairers' liens, and liquidation expenses, as well as a prior-registered "international interest" registered on the IR pursuant to the Cape Town Convention).

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The main risk is that a lender will not be repaid in full. The lender may also incur certain costs in connection with enforcement, and there will be an inevitable delay in recovering funds (in whole or in part).

If the enforcement of security is not sufficient or the guarantor is unable to repay the liabilities owed to

the lender in full, the lender would then need to claim the remaining portion as an unsecured creditor in the insolvency proceedings of the borrower and/or the guarantor.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

In certain circumstances, a moratorium (or similar stay) may be imposed in connection with insolvency proceedings. While no claim may be started or continued against a company in compulsory liquidation in the Cayman Islands without leave of the court, under the Companies Act, a secured party may enforce its security without leave of the court or reference to the liquidator.

2.9.8 Liquidation of Domestic Lessees

Assuming that the lessee will not enter into voluntary liquidation (see 2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership), a creditor, contributory or the company itself may petition the Cayman Court to wind up the company on the ground that the lessee is unable to pay its debts. This is determined on a cash-flow basis (ie, the lessee is unable to pay its liabilities as they become due) and by proof of an unpaid debt (commonly evidenced by a statutory demand which has not been satisfied for 21 days).

Receivership is a contractual self-help remedy only available to secured creditors on the terms set out in the relevant security document. There are no specific statutory provisions under Cayman Islands law determining how a receiver should be appointed, and the appointment of a receiver must be made in accordance with the terms of the security document to be valid.

2.9.9 Ipso Facto Defaults

It is not possible to disclaim onerous contracts in Cayman Islands insolvency proceedings. Generally, Cayman courts would be expected to give effect to the terms of the relevant lease regarding the repossession of an aircraft.

2.9.10 Impact of Domestic Lessees' Winding-Up

If the lessee is incorporated under the laws of the Cayman Islands and enters into provisional liquidation or

official liquidation proceedings in the Cayman Islands, it is generally the case that the terms of the lease (which cannot be disclaimed) would provide for the procedure for repossession of the aircraft, remedies for loss of rent and provisions in respect of forfeit by the lessee of the security deposit and any maintenance reserves.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The Convention and the Protocol (together, the “Cape Town Convention”) have been in force in the Cayman Islands as of 1 November 2015, pursuant to the International Interests in Mobile Equipment (Cape Town Convention) Act, 2015 (the “CTC Act”). The Cayman Islands are not designated as an “entry point” under Article XIX of the Protocol.

2.10.2 Declarations Made Concerning Conventions

Declarations made under the Convention are in Articles 39 (1), 39 (4), 53 and 54 (2).

Declarations made under the Protocol are in Articles XXX(1), XXX(2), XXX(3).

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Where a debtor has issued an IDERA, substantially in the form annexed to the Protocol, it may be submitted to the CAACI for recordation.

2.10.4 Enforcement of Conventions

There is no known recent case law in the Cayman Islands enforcing the Convention or the Protocol.

Secured creditors have recently been assisted with the deregistration and export from the Cayman Islands of three aircraft, pursuant to IDERAs granted in respect of them. This appears to be the only example of IDERA deregistration/export post-implementation of the Cape Town Convention in the Cayman Islands.

The priority and effectiveness of a right or interest created by any document capable of registration within the meaning of, and to the extent provided by, the Cape Town Convention will, if Cayman Islands law applies, be determined in accordance with the Cape Town Convention.

2.10.5 Other Conventions

The Cayman Islands is not a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft, nor to the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

The Cayman Islands is also not a signatory to the 1999 Montreal Convention nor the 1944 Chicago Convention on International Civil Aviation.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

There are no restrictions on foreign lenders financing an aircraft locally or on borrowers using the loan proceeds.

3.1.2 Effect of Exchange Controls or Government Consents

There are currently no foreign exchange controls or foreign exchange regulations under Cayman Islands law.

3.1.3 Granting of Security to Foreign Lenders

Typically, a Cayman Islands borrower would be an exempted company, and there would be no restrictions on granting security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Such guarantees are permissible under Cayman Islands law, provided that the company granting those guarantees is permitted to do so under its memorandum and articles of association. It is important to note that the directors of Cayman Islands companies have a fiduciary duty to act in the best interests of the company. It is considered good practice to obtain the consent of the shareholders where there is any question as to the corporate benefit of such guarantees.

3.1.5 Lenders' Share in Security Over Domestic SPVs

It is advisable for a lender to take share security over a domestic special-purpose vehicle which owns the financed aircraft; such security typically takes the form

of a Cayman Islands law-governed equitable share mortgage or charge (as legal title to the shares remains with the shareholder). Share pledges are recognised but not typically used in aircraft finance transactions involving Cayman Islands companies.

3.1.6 Negative Pledges

Negative pledge provisions are typically included in the share security documents.

3.1.7 Intercreditor Arrangements

No material restrictions or requirements are imposed on intercreditor agreements under Cayman Islands law. Typically, intercreditor agreements are governed by English or New York law, following the governing law of the other transaction documents.

3.1.8 Syndicated Loans

Agency is a recognised concept under Cayman Islands law.

3.1.9 Debt Subordination

Subject to general qualifications as to enforceability, any method of subordination permitted by a transaction governed by English or New York law would be permissible and recognised under Cayman Islands law.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

Subject to general qualifications as to enforceability, the courts of the Cayman Islands will recognise a New York law-governed or an English law-governed assignment that is effective under that law.

3.1.11 Usury/Interest Limitation Laws

See 2.6.8 Limitations on Lessors' Actions Following Termination.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

Aviation finance transactions are typically governed by English or New York law and tend to have a security package including an aircraft mortgage, security assignments in respect of the lease, warranties and insurance proceeds, security over the shares in the aircraft-owning entity and an IDERA. If the aircraft-owning entity is a Cayman Islands exempted com-

pany, recourse would be limited to the assets of the special-purpose vehicle, with no recourse to the directors or shareholders.

A mortgage granted over an aircraft registered on the Aircraft Register should be filed with the CAACI for entry on the Mortgage Register. There is no statutory format of aircraft mortgage.

3.2.2 Types of Security Not Available

There are no known restrictions under Cayman Islands law. See 3.2.1 Typical Forms of Security and Recourse.

3.2.3 Trust/Trustee Concepts

See 2.2.5 Recognition of the Concepts of Trust/Trustee.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

Cayman Islands law does not restrict or prohibit any such assignment or mortgage.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

A party may assign its rights and benefits under an agreement by way of security without entering into any arrangements to transfer its obligations under that agreement.

3.2.6 Choice of Foreign Law

A security assignment or guarantee does not have to be governed by the laws of the Cayman Islands to be valid and enforceable in the Cayman Islands. Subject to general qualifications as to enforceability (see 3.4.10 Other Relevant Issues), the courts of the Cayman Islands would recognise as effective a New York law-governed or an English law-governed security assignment or guarantee that is effective under that law.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

For foreign law assignments, the rules of priority and perfection in that jurisdiction will apply.

Under Cayman Islands law, it would be advisable to give notice of an equitable assignment to the lessee

(as the obligor in respect of the assigned rights) to fix the priority of the interest of the lessor as assignee in accordance with the principles set out in the judgment in *Dearle v Hall* (1828) 3 RUSS 1.

- There is no requirement that written notice of an equitable assignment should be given to the obligor, but there are certain advantages in doing so, including:
- a later encumbrancer taking without notice of the earlier assignment and giving notice first would obtain priority;
- without written notice to the obligor, the obligor can still obtain a good discharge in respect of any payment made to the assignor before the obligor receives notice of the assignment;
- notice prevents the obligor from setting up further equities or set-offs; and
- notice will also prevent the obligor and assignor from varying the assigned agreement in a manner prejudicial to the assignee.

With respect to an absolute assignment, Section 5 (1) of the Property (Miscellaneous Provisions) Act (as amended) (the “P(MP)” Act”) will apply to any legal assignment of a debt or a chose in action. The basic requirements for a legal assignment to be effectual are:

- the assignment must be absolute (ie, unconditional) and may not purport to be by way of a charge only;
- it must be in respect of the whole debt or chose in action;
- it must be in writing and signed by hand by the assignor; and
- express notice in writing of the assignment must be given to the person from whom the assignor would have been entitled to claim such a debt or thing in action.

There is no formal legal requirement under Cayman Islands law that a security assignment must be translated, certified, notarised or legalised to be valid or enforceable.

3.2.8 Domestic Law Security Instruments

No additional domestic law security instruments are needed. With respect to IR filings, where the security

assignment creates a registrable “international interest” under the Convention, that international interest in respect of the aircraft may be recorded on the IR. No additional registrations or filings are required to be made in relation to a security instrument in the Cayman Islands, except as mentioned in **3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws**.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

There is no requirement to file the security assignment on any register in the Cayman Islands, except if a Cayman Islands company is a party to a security assignment as assignor, in which case, such company should record details of the security interest created thereunder on the company’s register of mortgages and charges (“ROMC”), to comply with Section 54 of the Companies Act.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

See **3.2.11 Effect of Changes in the Identity of Secured Parties**.

3.2.11 Effect of Changes in the Identity of Secured Parties

This is a question to be determined as a matter of the governing law of the security assignment. As a matter of Cayman Islands law, if the security interest is granted to a security trustee and the identity of that security trustee does not change, the security interest should not be discharged because of a change to the other secured parties.

3.2.12 “Parallel Debt” Structures

See **2.2.5 Recognition of the Concepts of Trust/Trustee**.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A security trustee or other secured creditor that is not already resident in the Cayman Islands prior to its entry into a security assignment would not be deemed resident, domiciled or carrying on business in the Cayman Islands by reason only of the execution, delivery, performance or enforcement of such a security assignment.

3.2.14 Perfection of Domestic Law Mortgages

Typically, mortgages over aircraft are governed by English or New York law. If such a mortgage is over an aircraft registered with the CAACI, the mortgage will need to be registered with the CAACI in accordance with the Mortgaging of Aircraft Regulations, 2015. Once the mortgage is registered on the CAACI Mortgage Register, all persons will at all times be taken to have express notice of all the facts appearing on the register; however, the registration of a mortgage is not evidence of its validity. It is also possible to file a priority notice with the CAACI prior to entry into the mortgage.

Assuming that the mortgage satisfies the requirements for classification as an “international interest” pursuant to the Cape Town Convention, IR filings can be made in respect of that mortgage.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

There is no difference between the form of security (or perfection) taken over an aircraft and that taken over spare engines. There is also no separate engine register maintained by the CAACI in the Cayman Islands.

3.2.16 Form and Perfection of Security Over Bank Accounts

An account charge would typically be taken over a bank account located outside the Cayman Islands. Security over an account held in the Cayman Islands would typically be achieved by way of an account charge. Pursuant to the P(MP) Act, to perfect such security, notice must be given to the account bank. Acknowledgement of that notice by the account bank should be obtained as a matter of best practice, but failure to do so would not affect the perfection of the security. If the account charge is granted by a Cayman Islands company, details of the security interest created by the account charge should be recorded in the company’s ROMC to comply with Section 54 of the Companies Act.

3.3 Liens

3.3.1 Third-Party Liens

Cayman Islands law provides for liens in favour of the CAACI and CIAA for fees and charges owed. However, the law does not specify whether such a lien is only

in respect of the aircraft that incurred such fees and charges, or if it extends to any aircraft operated by the person owing such fees and charges.

The CIAA may enter, take control of and arrest and sell by public auction or private arrangement, in compliance with any rules or regulations to that effect, any aircraft over which it has a lien.

The CAACI may enter, take control of and arrest any aircraft over which it has a lien.

The possibility that a court in the Cayman Islands would order the sale of an aircraft in connection with proceedings that consider the rights of a lien-holder with respect to that aircraft (being the holder of a contractual, possessory, statutory or other lien) will turn on the particular circumstances and facts and, if applicable, the terms of any relevant contracts.

3.3.2 Timeframe to Discharge a Lien or Mortgage

The effective time for the discharge of a lien or mortgage over an aircraft will depend on the terms of the discharge document.

The cancellation of the registration of the mortgage on the Mortgage Register will be effective from the time the CAACI confirms that the entry in respect of the mortgage has been removed from the Mortgage Register.

3.3.3 Register of Mortgages and Charges

The CAACI maintains the Mortgage Register. A registered mortgage is given statutory priority over subsequently registered mortgages and unregistered mortgages.

The ROMC of a Cayman Islands company is not publicly available but companies creating security interests must record them on the company’s ROMC in order to comply with Section 54 of the Companies Act.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

See 3.3.1 Third-Party Liens.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

In order to verify that an aircraft is free of encumbrances, a potential purchaser of an aircraft can search the Mortgage Register. See also **3.4 Enforcement**.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

Enforcement of a security assignment, as opposed to a loan or guarantee, will depend on the terms of each of these instruments.

3.4.2 Security Trustees' Enforcement of Their Rights

Subject to certain limited qualifications, the courts of the Cayman Islands should recognise as effective a foreign law-governed security assignment that is effective under that law to create an assignment by way of security of the relevant rights and benefits under a lease agreement.

3.4.3 Application of Foreign Laws

See **2.1.2 Application of Foreign Laws**.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

See **2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards** with respect to foreign judgments.

See **2.6.12 Enforcement of Foreign Arbitral Decisions** with respect to arbitral awards.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

Enforcement will be determined by the provisions of the relevant security agreement. As per **2.6.2 Lessor Taking Possession of the Aircraft**, the Cayman Court will recognise self-help remedies for enforcement of security interests over the aircraft and/or enforcement of security interests over the shares in a Cayman Islands company claiming title to the aircraft. The CAACI will also typically deal directly with the beneficiary of an IDERA to effect deregistration. See also **2.6.3 Specific Courts for Aviation Disputes**.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

See **2.6.3 Specific Courts for Aviation Disputes**.

3.4.7 Summary Judgments or Other Relief

See **2.6.4 Summary Judgment or Other Relief**.

3.4.8 Judgments in Foreign Currencies

See **2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards** and **2.6.7 Judgments in Foreign Currencies**.

3.4.9 Taxes/Fees Payable

See **1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement** and **2.6.9 Lessor's Requirement to Pay Taxes/Fees**.

3.4.10 Other Relevant Issues

Any document that purports to create a security interest (a "Security Document") is subject to general principles of enforceability, including (without limitation):

- The Cayman Court may treat a purported fixed charge over assets as a floating charge if the chargor has sufficient authority to deal with its assets in the course of its business and/or the holder of security does not exercise sufficient control over the relevant assets.
- Any charge in the nature of a floating charge will not take priority in ranking over any subsequent fixed mortgage or charge or lien which is created prior to the crystallisation of the floating charge and will be subject to such preferential payments as are set out in Section 141 (1) and Schedule 2 of the Companies Act.
- In the case of a winding-up of a Cayman Islands company in a jurisdiction other than the Cayman Islands, the priority of any security granted by or over the assets of that Cayman Islands company may be affected by any provision of the laws of that jurisdiction as to the priority of claims in a winding-up.
- To the extent that any collateral that is the subject of any security interest ("Relevant Collateral") is held in the Cayman Islands or has its *lex situs* in the Cayman Islands or is otherwise governed by or constituted according to the laws of the Cayman Islands ("Cayman Relevant Collateral"), failure to

comply with any restrictions or provisions applicable to the granting of security over any such Cayman Relevant Collateral or the transfer thereof, whether arising under Cayman Islands law generally or pursuant to specific documentation relating to that Cayman Relevant Collateral, may invalidate any purported security interest intended to be granted under the Security Document, invalidate any purported transfer of the Cayman Relevant Collateral intended to be effected pursuant to the Security Document or impede any future transfer of these upon enforcement of any security interest effectively or purportedly granted under the Security Document.

- Entry of particulars of a mortgage or charge on the ROMC of a Cayman Islands company may not of itself give that mortgage or charge priority in ranking over any mortgage, charge or lien existing prior to its creation.
- As a matter of Cayman Islands law as to the priority of competing claims in respect of security interests, the interests of the beneficiary of any security interest created pursuant to any Security Document will, subject to certain exceptions:
 - (a) whether legal or equitable, rank after any prior legal or perfected equitable interest in the Relevant Collateral; and
 - (b) if merely equitable, rank after any prior equitable interest and after any later legal interest in the Relevant Collateral created in favour of a bona fide purchaser for value, each such person having no notice of the security interests created pursuant to the Security Documents.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

The Air Navigation (Overseas Territories) (Amendment) Order 2024 (UKSI 2024 No 384) (the “2024 Amendment Order”) – which amends the Air Navigation (Overseas Territories) Order 2013 (as amended) (the “2013 Order”) – and the Air Navigation (Overseas Territories) (Environmental Standards) Order 2024 (UKSI 2024 No 378) (the “2024 Environmental Order”, together with the 2024 Amendment Order, the “New Orders”) – which revokes and replaces the Air Navigation (Overseas Territories) (Environmental Standards) Order 2014 (as amended) – came into force on 10 April 2024. Both of the New Orders apply to various overseas territories, including the Cayman Islands. It is not expected that the amendments will have a material impact on the matters set out in this chapter.

There are no other material issues and/or court judgments relevant to issues discussed here.

4.2 Current Legislative Proposals

No current proposals before the legislature would alter the issues discussed here.

CHAD

Law and Practice

Contributed by:

Claudy Monja and Felana Ranaivoson

John W Fooks & Co



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John W Ffooks & Co is a full-service corporate, commercial law firm with offices in Madagascar, Mauritius and Senegal, providing support to business and industry across French-speaking Africa. The firm's multilingual legal team, comprising six resident partners and 20 associates, is the only legal practice in the region with a combination of Napoleonic and English law expertise – making the firm the obvious choice when it comes to international transactions in francophone Africa. Its particular strengths are in assisting

inward investors in the region and in reconciling their common law understanding of business with the realities of working under legal systems derived from the Napoleonic Code. The firm's expertise in advising local and international clients has earned the trust of listed and unlisted domestic, as well as international, corporations, banks and financial institutions, light and heavy industrial firms, state-owned enterprises and government departments.

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

The transfer of title to an aircraft may be subject to the payment of fees of up to XAF1 million (approximately USD1,786).

The transfer of title to an aircraft while the aircraft is located in Chad is subject to the payment of a tax of XAF5,000 (approximately USD9).

1.1.2 Enforceability Against Domestic Parties

While this is not mandatory, it is advisable for a sale agreement written in a foreign language to be accompanied by a French translation made by a Chadian sworn translator.

1.2 Transfer of Ownership

1.2.1 Transferring Title

A sales agreement and a bill of sale may constitute a “transfer of ownership” of an aircraft or engine.

The letter of the law does not specify whether they extend to the inclusion of all installed parts.

Under the Chadian Civil Aviation Code, the transfer should be recorded in a written document (ie, sale agreement) and the transfer of ownership must be registered on the Aircraft Register to be enforceable against third parties.

It is worth noting that the following documents can be considered as proof of ownership of an aircraft.

- An original sale agreement between the purchaser (the applicant) and the seller of the aircraft, showing that the transfer of ownership has been completed.
- A fully paid commercial invoice (which must be made out on the seller’s letterhead or stamped with the seller’s contact number and date, as well as the seller’s name, address and company registration number). Eventually, a bill of sale issued by the civil aviation authorities of the state where the aircraft comes from is required as proof of ownership.

- Title of ownership recognised by Chadian civil law (eg, a judgment).
- In the case of an aircraft built by an amateur constructor, a certificate drawn up on plain paper by the applicant, establishing that they are the constructor and owner of the aircraft.

1.2.2 Sales Governed by English or New York Law

The parties are free to choose the law governing their contract. Therefore, it is possible for a bill of sale to be governed by a foreign law (including English or New York law). Such agreement should be recognised in Chad.

1.2.3 Enforceability Against Domestic Parties

Although the law is silent on this matter, it is recommended that a bill of sale written in a foreign language should be accompanied by a French translation made by a Chadian sworn translator, in order to be enforceable against a domestic party.

1.2.4 Registration, Filing and/or Consent From Government Entities

Bills of sale should be registered with the Chadian Civil Aviation Authority (*l’Autorité de l’Aviation Civile*, or ADAC).

The following are mandatory for the registration of aircraft in Chad:

- the initial certificate of registration of the aircraft;
- the deregistration certificate or certificate of non-registration;
- airworthiness documents;
- tax or customs certificates (in the case of new registrations);
- the sale agreement duly signed by the parties or their legal representatives; and
- the original proof of ownership (eg, bills of sale) of the aircraft.

The period for completion of registration is estimated to be five working days but this is subject to administrative delay.

There are no government applications or consents required as a prerequisite to the execution and deliv-

ery of a bill of sale in relation to an aircraft or engine registered in Chad.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

The transfer of title to an aircraft while the aircraft is located in Chad is subject to the payment of fees of XAF5,000 (approximately USD9).

The authors are not aware of any taxes payable for executing and/or delivering a bill of sale or consummating the sale of the ownership interest in an entity that owns an aircraft or engine, including where title to such aircraft or engine is transferred while it is (i) over international waters; or (ii) in transit to/from Chad.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

The authors are not aware of any types of operating/wet/finance leases or leases concerning only engines or parts that are not permissible nor recognised.

2.1.2 Application of Foreign Laws

It is permitted for a lease involving a domestic party or an asset in Chad to be governed by a foreign law.

2.1.3 Restrictions Concerning Payments in US Dollars

As long as it is established in the lease agreement, there are no material restrictions imposed on domestic lessees making rent payments to foreign lessors in US dollars.

2.1.4 Exchange Controls

The Ministry of Finance is in charge of foreign exchange control approval in Chad. All Chadian banks must report all the foreign exchange operations of their clients (including the lessee) to the Ministry of Finance. In practice, a bank will require from its client all information the bank deems relevant for a specific foreign exchange operation. Upon receipt of this information from its client, the bank will liaise with the Ministry of Finance to request an authorisation (if necessary) or to file a declaration. However, the payment of rents is normally considered as current operations (*opéra-*

tions courantes) as opposed to capital transactions (*transactions en capital*), and therefore no approval should be required.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

The leasing of an aircraft to an entity in Chad is subject to the payment of a registration tax of 3% of the annual value of the lease.

The administrative fees of registration of the aircraft lease with the ADAC should lead to the payment of a fee amounting to XAF50,000 (approximately USD89).

2.1.6 Licensing/Qualification of Lessors

A lessor does not need to be licensed or otherwise qualified in Chad to do business with a domestic lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

There is no requirement for mandatory terms to be in a lease governed by English or New York law. That said, any lease registered with the ADAC should at least contain the following information:

- identification of the lessor and the lessee;
- the signature of the lessor and the lessee or their legal representatives;
- identification of the aircraft (ie, brand and model, registration number and serial number); and
- effective date and term of the lease.

2.2.2 Tax and Withholding Gross-Up Provisions

Any payment under the lease is subject to an 18% withholding tax.

Tax “gross-up” is a common practice when it comes to the lease of an aircraft and the authors do not foresee any reason why a tax gross-up clause would not be effective.

2.2.3 Parts Installed or Replaced After a Lease's Execution

The parties can agree in their contract that the lease may cover parts that are installed or replaced on an aircraft or engine after its execution. For the sake of

accuracy, it is advisable to appendix the list of installed parts of the aircraft covered by the lease. If there is any modification to the list, an amendment of the list of parts should be made.

2.2.4 Risk of Title Annexation

If it is legally proven that the engine is the property of a third party, there is no risk of annexation. For the avoidance of doubt, the use of nameplates is recommended to clearly identify the actual owner of the aircraft engines installed on an airframe.

2.2.5 Recognition of the Concepts of Trust/Trustee

The concept of trust is not expressly set forth in any legal provision. However, Chadian law gives free rein to the parties to establish the terms and conditions of their contract. This includes the rights to appoint an entity or an individual to represent and act on behalf of several parties driven by the same interest.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The authors do not foresee any issue regarding the notation of such interests on the Aircraft Register and believe that this is possible.

This constitutes evidence of the existence of the lease over the aircraft as well as a public notice warning third parties of the existence of the rights of the lessor or the owner.

2.3.2 Registration If the Owner Is Different From the Operator

An aircraft may be registered on the Aircraft Register in the name of the aircraft operator if that party is not the owner but has lawful ownership of the aircraft (eg, a lease agreement). However, at the time of registration of the lease agreement, the actual owner's title must also be filed on the Aircraft Register.

2.3.3 Aircraft/Engine-Specific Registers

Any leases concerning aircraft should be registered with the ADAC. However, to date, there is no specific register for engine leases.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

Any leases concerning aircraft should be registered on the ADAC's register. This is not a mandatory requirement and is not subject to any consent from government authorities. However, it is always in the interest of a lessor that the ADAC or third parties be aware of the existence of a lease over an aircraft operated in Chad.

The following documents are required for the registration of leases:

- a form should be completed by the owner of an aircraft when leasing the aircraft;
- an original lease agreement;
- an original certificate of registration; and
- documents identifying the lessee(s) (eg, extract from the Register of Companies or tax identification number for Chadian companies) and an identity document (individual or company manager).

2.3.5 Requirements for a Lease to Be Valid and Registrable

There is no requirement for a lease to be in a specific form or translated, served, certified, notarised or legalised under Chadian law. That said, any lease registered with the ADAC should at least contain the following information:

- identification of the lessor and the lessee;
- signature of the lessor and the lessee or their legal representatives;
- identification of the aircraft (ie, brand and model, registration number and serial number); and
- the effective date and term of the lease.

2.3.6 Taxes/Duties Payable for Registering a Lease

The leasing of an aircraft to an entity in Chad is subject to the payment of a registration tax of 3% of the annual value of the lease.

The registration of the lease with the ADAC should lead to the payment of a fee amounting to XAF50,000 (approximately USD89).

2.3.7 Registration of Aircraft in Alternative Countries

This is not applicable in Chad. There are no other alternative countries for the registration of aircraft under Chadian law.

2.3.8 Requirements for Documents Concerning Registration

The applicant should provide the original of the lease agreement and the original certificate of registration of the aircraft. However, power of attorney should be notarised. Apart from this, the authors are not aware of any other requirement.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A foreign lessor will not be required to pay any income or capital gains or other taxes upon leasing an aircraft or engine to a domestic lessee. However, any payment of rent made by the lessee to the lessor will be subject to a withholding income tax of 18%. This will be withheld by the paying entity (ie, the lessee). This is the reason why there are tax gross-up clauses in lease agreements.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

No foreign lessor to any lease will be deemed to be resident, domiciled or carrying on business in Chad, or subject to any taxes in Chad, as a result of its being a party to, or its enforcement of, the lease.

2.4.3 Engine Maintenance and Operations

No liabilities in respect of aircraft or engine maintenance and operations should be imposed on a foreign lessor under a lease as a result of its being a party to such lease.

2.4.4 Damage or Loss Caused by an Asset

Only the lessee (as operator of the aircraft) is liable with respect to the use and operation of the aircraft for the duration of the lease. It is advisable to insert in the lease a statement specifying that the aircraft is under the care and custody of the lessee for the duration of the lease.

2.4.5 Attachment by Creditors

The retaining right is the right of a creditor to retain in its possession a debtor's asset in the event of default and until full payment of the debts. This is applicable to movable assets and properties. Note that the retaining right is not subject to any agreement or registration formalities in order to be enforceable. The creditor's security is materialised by its right to retain in its possession the asset that is the object of the dispute. For example, an aircraft maintenance service company is entitled to retain the aircraft in its possession if the aircraft operator fails to pay the maintenance fees.

2.4.6 Priority of Third Parties' Rights

In terms of ranking, employees' salaries, court fees, legal fees (eg, bailiff's fees), taxes and other state fees, suppliers' debts secured by rights of detention (*droit de rétention*), mortgages and pledges (possessory and non-possessory pledges) take priority over a lessor's rights under an aircraft or engine lease.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

If an aircraft is registered in Chad, the aircraft is required to be placed with domestic insurance companies. Reinsurance can be subscribed with foreign insurance companies.

2.5.2 Mandatory Insurance Coverage Requirements

Aircraft operators must have insurance to cover their liability for damage to third parties, persons, baggage and goods.

2.5.3 Placement of Insurance Outside of Jurisdiction

Foreign reinsurance subscription is allowed.

2.5.4 Enforceability of "Cut-Through" Clauses

There is no such concept under local law. The enforcement of such clause would be left to the discretion of the judge.

2.5.5 Assignment of Insurance/Reinsurance

The assignment of insurances/reinsurances is permitted. However, this is subject to the consent of the insured party.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

There are no restrictions on a lessor's ability to:

- terminate an aircraft lease;
- re-export the aircraft; and/or
- sell the aircraft following such termination.

The letter of the law does not specify whether the aircraft needs to be physically located in Chad at the time of any such action.

2.6.2 Lessor Taking Possession of the Aircraft

On the basis of a deregistration power of attorney/irrevocable power of attorney granted by the lessee to the lessor, neither the consent of the former nor a court order would be required in order for a lessor to take physical possession of the aircraft.

2.6.3 Specific Courts for Aviation Disputes

A claim should be lodged by the lessor at the commercial court (first-instance level). Each party has to provide evidence to support its position and several hearings will be scheduled by the judge.

2.6.4 Summary Judgment or Other Relief

A summary judgment can be obtained in relation to the lease. However, this is only available if there is urgency and there is no possibility for the counterparty to challenge the request of the lessor (eg, any unpaid sums in relation to the execution of the lease).

The estimated period to obtain such a court order could be immediate or up to 30 days, depending on the specific injunctive relief requested to the court.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

The parties are free to choose the governing law of the lease. In addition, they are entitled to choose to submit their disputes to a foreign court. Therefore, Chadian courts would uphold a foreign law as the governing law of an aircraft lease, as well as the submission to foreign jurisdictions if the parties agree to choose this.

A waiver of immunity is also recognised.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Any foreign judgment (ie, final judgment of a foreign court or an arbitral award) can be enforced in Chad after an exequatur order by a Chadian court. An exequatur order is a decision of a Chadian court to enforce a foreign judgment in Chad after a final verification that such foreign judgment is not in breach of public order and good moral standards (ie, any decision that may constitute a threat to national defence cannot be enforced in Chad). The case will not be re-examined on its merits.

2.6.7 Judgments in Foreign Currencies

It is possible for a lessor under an aircraft lease to obtain a judgment in a foreign currency if the lease agreement sets forth this possibility.

2.6.8 Limitations on Lessors' Actions Following Termination

Following an event of default, it would be possible for a lessor to recover default interest. However, following termination of the lease after an event of default – in particular, if the lessee fails to return the aircraft – it would be difficult, if not impossible, to charge additional rent.

That said, the repossession of the aircraft would be possible and the lessor could claim compensation for damage suffered on the basis of the failure of the lessee to return the aircraft.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

Any non-resident party (ie, the lessor) might be asked by the court to deposit a guarantee or caution (*cautio judicatum solvi*) at the request of the resident party. The caution is an amount of money to be deposited in escrow with the aim to cover any potential damages in the event of refusal of the claimant's claim. The amount is fixed under the discretionary power of the court and there is no maximum threshold. The court will return the caution to the non-resident party if the latter wins the dispute.

2.6.10 Mandatory Notice Periods

It is understood that the lessor will be required to comply with the mandatory notice period for termination

of the aircraft lease if this is established in the lease agreement.

2.6.11 Lessees' Entitlement to Claim Immunity

The lessee is not entitled to claim sovereign or other immunity from suit. In all cases, immunities can be waived.

Immunity of Execution

If the lessee is a private legal entity, neither the lessee nor any of its assets is entitled to immunity of execution on the grounds of sovereign immunity of execution.

The provision under the 2023 Organisation for the Harmonisation of Business Law in Africa (*l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires*, or OHADA) Uniform Act on the organisation of simplified recovery procedures and measures of execution (the "Uniform Act on Measures of Execution") only relates to immunities of execution of public legal entities. It seems to recognise that they are entitled to immunity of execution. Said provision adds that their debts can be offset against monies that third parties owe them. However, the Uniform Act on Measures of Execution does not shed any light on whether public legal entities are allowed to waive their immunity of execution (eg, via a provision to that end inserted into the lease agreement). The Uniform Act on Measures of Execution also does not expressly forbid the waiver of said immunity of execution.

Immunity of Jurisdiction

Although the authors are not aware of any piece of legislation in Chad that relates to immunity of jurisdiction of the lessee, it is understood that, in practice, the waiver of this immunity of jurisdiction (if any) by the lessee is considered as being possible and enforceable in Chad.

2.6.12 Enforcement of Foreign Arbitral Decisions

Chad has not adopted the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). However, any foreign judgment (including an arbitral award) can be enforced in Chad after an exequatur order by a Chadian court.

2.6.13 Other Relevant Issues

There are no other relevant issues.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

The concepts of contractual assignment and novation are recognised under Chadian law.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

To the extent that the assignment is limited to the assignment of the lessor's rights and benefits under the lease, there are no specific formalities to follow in respect of the assignment. However, it is advisable to file a copy of the notice and acknowledgement of assignment (and the assignment subject to any confidential arrangement between the parties) in the ADAC document record book for information purposes. It is understood that the notice and acknowledgement of assignment (and the assignment subject to any confidential arrangement between the parties) are not subject to consent from a government authority.

The requirement pertaining to the lessee's consent is generally subject to the provision of the lease.

2.7.3 Enforceability of Lease Assignments/Novations

In principle, there is no need to translate, certify, notarise or legalise an aircraft and/or engine lease assignment and assumption/novation. However, it is advisable for these assignments and assumptions/novations to be notarised/authenticated to be enforceable against a domestic party. In addition, should such enforcement be carried out via the Chadian judicial courts, a certified translation thereof into French by a Chadian sworn translator is required.

2.7.4 Filing/Registration of Lease Assignments/Novations

The lessor should file the lease assignment/novation with the ADAC. There are no specific formalities for the purpose of this filing, nor is the assignment subject to any government consent.

2.7.5 Taxes/Duties Payable on Assignment/Novation

The authors are not aware of any taxes/duties payable in respect of an assignment/novation agreement.

2.7.6 Recognition of Transfer of Ownership Interests

Any transfer of the ownership interest of the entity (or the beneficial interest in the trust) would not be considered per se as a transfer of ownership of the aircraft.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

The lessor, the owner or the mortgagee can deregister an aircraft. In this respect, a deregistration power of attorney from the lessee is required to facilitate the deregistration of an aircraft when this is required.

2.8.2 Lessee's/Operator's Consent

The lessee's or the operator's consent is required for the deregistration of the aircraft. A deregistration power of attorney should be delivered for this purpose. Note that if the aircraft is under a lease agreement, the deregistration of the aircraft is subject to the deregistration of the lease.

2.8.3 Required Documentation

As explained in 2.8.1 Deregistering Aircraft in This Jurisdiction and 2.8.2 Lessee's/Operator's Consent, a deregistration power of attorney should be provided by the lessee to the lessor, mortgagee or owner to deregister the aircraft. In addition, a deregistration application should be filed with the original registration certificate, and if the applicant is not the last registered owner in Chad, the original bill of sale between the last registered owner and the applicant is also required.

2.8.4 Duration of Deregistration Process

As administrative delays are very common in Chad, it is difficult to ascertain the process duration. An estimate would be between 15 and 20 working days.

2.8.5 Aviation Authority's Assurances

The ADAC does not provide advance assurances to an aircraft owner, mortgagee or lessor as to the prompt deregistration of the aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

The deregistration of a lease should not be subject to any deregistration fees. In all cases, any potential administrative fees should not be significant.

2.8.7 Deregistration Power of Attorney

A deregistration power of attorney provided by the lessee to the lessor, mortgagee or owner should be recognised in Chad.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

Apart from the notarisation, the authors are not aware of any other documents required.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A deregistration power of attorney can be governed by foreign law.

2.8.10 Revocation of a Deregistration Power of Attorney

The revocation of an irrevocable power of attorney should not be possible. Generally, the beneficiary of the power of attorney should give its consent. In this case, the written consent of the beneficiary is required for revocation purposes.

2.8.11 Owner's/Lessor's Consent

The lessee's consent is required to export the aircraft. An irrevocable deregistration and export request authorisation duly executed by the lessee and the lessor, and approved and signed by the ADAC, is required.

2.8.12 Aircraft Export Permits/Licences

It is understood that an export certificate of airworthiness is required to export an aircraft. The applicant should file an application with the ADAC. An export certificate of airworthiness is issued by the ADAC following an application made by the applicant (eg, the lessor) subject to a technical airworthiness assessment made by the ADAC (ie, the aircraft meets the airworthiness requirements of Chad, as well as the special requirements and conditions of the importing country, etc). The certificate can be issued in advance.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

The fees are known at the time of filing with the relevant authorities.

2.8.14 Practical Issues Related to Deregistration of Aircraft

The deregistration of an aircraft is subject to the release of the rights registered on that aircraft. If the aircraft is leased, the owner(s) must apply for deregistration of the lease.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

Insolvency is regulated by the OHADA Uniform Act on insolvency proceedings (the “Uniform Act on Insolvency”). The Uniform Act on Insolvency regulates all matters relating to insolvency law in all OHADA member states. Its purpose is:

- to organise pre-insolvency procedures of conciliation, preventative settlement and rehabilitative proceedings of reorganisation and assets liquidation so as to preserve the economic activities and employment of debtor companies, quickly rehabilitate healthy companies and liquidate distressed ones in such a way that the debtors’ assets will be maximised for the purpose of increasing receivables to be recovered by creditors and establish a specific order of payment to secured or unsecured collateral securities;
- to define rules applicable to judicial administrators; and
- to set proprietary and professional sanctions as well as criminal proceedings related to the default of the debtor, applicable to the debtor company’s top executives and individuals involved in managing the insolvency proceedings.

To summarise, insolvency proceedings are under the control of the judge (*juge commissaire*) and the assets of the company are placed under the supervision of a judicial trustee (*syndic*), whose main responsibility is to act in the overall interests of the creditors as a whole (*masse des créanciers*).

A judgment from the commercial court confirms the starting of insolvency proceedings (*jugement d’ouverture*). Such judgment is published in the Companies Registry or *Registre du commerce et du crédit mobilier* (RCCM) and in the newspapers. A second publication should be made 15 days after the first publication. The two publications must contain a warning to creditors to produce their claims to the *syndic*. Creditors’ claims against the company must be declared to the *syndic* within two months following the second publication of the insolvency judgment. This period is extended to three months for creditors residing outside the national territory.

In principle, the declaration must contain the amount of the claim, its due date and the amount due. The declaration must also specify the type of security attached to the claim (if any). Creditors should also provide the *syndic* (to the extent possible) with any evidence of the existence of their claims. The *syndic* will provide the creditors with a receipt confirming that their declarations have been duly received by the *syndic*.

Note that insolvency proceedings suspend and prohibit any individual claim initiated by a creditor. Two situations may occur, as set out below.

- The *juge commissaire* may decide that the activities of the company must be continued (legal redress, or *redressement judiciaire*). In a legal redress, the directors/managers of a company are assisted by the *syndic* in the administration of the company. Any commitment or operation made by the directors/managers without the assistance of the *syndic* is not enforceable towards third parties.
- The *juge commissaire* may decide that the activities must be terminated (liquidation). In the event of a liquidation, the directors/managers of a company are removed from their duties. Only the *syndic* is allowed to represent the company during the liquidation.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

The lessee can lodge a declaration of cessation of payment with the commercial court and request the

initiation of insolvency proceedings. The cessation of payment and the insolvency proceedings (ie, a judicial restructuring or a winding-up) can also be requested by the creditors or the court itself. In theory, three scenarios are possible:

- self-declaration; or
- request by the creditors; or
- request by the court.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings Co-Operation on Overseas Proceedings

In the event of an international insolvency proceeding, the competent court may co-operate as far as possible with foreign courts or foreign representatives, either directly or through the *syndic*.

In addition, the competent court will be entitled to (i) communicate directly with foreign courts or representatives; or (ii) request information or assistance directly from them.

In all cases, the local courts must comply with the provisions of the Uniform Act on Insolvency.

There is no specific provision under local law for adopting co-ordination principles (most notably, the American Law Institute and International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases 2001, and the INSOL International (International Association of Restructuring, Insolvency and Bankruptcy Professionals) Global Principles for Multi-Creditor Workouts 2000).

Recognition of Proceedings Opened Within the OHADA Area

The Uniform Act on Insolvency is applicable for the recognition of foreign proceedings.

It is understood that judgments opening and closing insolvency proceedings, as well as those that settle disputes arising from such proceedings in a member state (eg, Chad), are recognised and enforceable in the territory of the other member states.

Recognition of Decisions Pronounced Outside the OHADA Area

A foreign representative can file an application with the court of a member state (eg, a Chadian court) for the recognition of foreign proceedings. The application must include the following documents:

- a certified copy of the decision opening the foreign proceedings and appointing the foreign representative;
- a certificate from the foreign court attesting to the opening of the foreign proceedings and the appointment of the foreign representative; or
- in the absence of the documents referred to in the first two bullet points, any other evidence of the opening of the foreign collective procedure and of the appointment of the foreign representative that may be accepted by the competent court.

All supporting documents provided for recognition of a decision must be written in, or translated into, the official language(s) of the relevant member state.

The competent court must verify the various conditions listed in the Uniform Act on Insolvency for the recognition of foreign insolvency proceedings.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

In the event that the lessee is declared insolvent by a Chadian court, the judgment pronouncing the insolvency proceedings suspends and prohibits all individual claims that order the lessee to pay an amount of money or terminate an agreement following an event of default. The repossession of the aircraft will be affected by the insolvency proceedings. The lessors could be allowed to use the deregistration power of attorney or an irrevocable deregistration and export request authorisation (IDERA) if it complies with the procedure of declaration mentioned in **2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations**.

For this purpose, the lessor must specify in its declaration that it intends to exercise its *droit de revendication*, or reclamation right.

2.9.5 Other Effects of a Lessee's Insolvency

A lease is not automatically terminated upon the issuance of an insolvency judgment. The following scenarios may apply:

- the *syndic* may decide to continue the lease subject to the payment of the rent; or
- the *syndic* may decide to terminate the lease, in which case, the lease is terminated by simple notice given by an extrajudicial act.

The lessor is required to comply with the procedure of declaration mentioned in 2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations. In addition, the lessor must specify in its declaration that it intends to exercise its reclamation right.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The unsecured lender may run the risk of not being paid in full. Indeed, when the debtor's assets are not sufficient to ensure the payment of the insolvent creditors, including the lender, the latter will be considered as any other ordinary creditor to be paid in equal parts with the existing assets of the debtor.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

In the case of legal redress, the debtor must propose an arrangement with its creditors. This arrangement can usually impose moratoria. In all cases, the lease will not automatically be terminated when the insolvency judgment is pronounced.

The *syndic* may decide to continue the lease subject to payment of the rent, or to terminate the lease. In the latter case, the lease is terminated by a simple notice given by an extrajudicial act.

2.9.8 Liquidation of Domestic Lessees

The lessee can lodge a declaration of cessation of payment with the commercial court and request the initiation of insolvency proceedings. The cessation of payment and the insolvency proceedings (ie, either a judicial restructuring or a winding-up) can also be requested by the creditors or the court itself. In theory, three scenarios are possible:

- self-declaration; or
- request by the creditors; or
- request by the court.

2.9.9 Ipso Facto Defaults

See 2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations.

2.9.10 Impact of Domestic Lessees' Winding-Up

See 2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations and 2.9.5 Other Effects of a Lessee's Insolvency.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

Chad is not a member state of the Convention on International Interests in Mobile Equipment (the "Convention") and the related Protocol on Matters Specific to Aircraft Equipment (the "Protocol"). However, the Chadian Civil Aviation Code provides that the Convention and Protocol are applicable and enforceable in Chad.

2.10.2 Declarations Made Concerning Conventions

No declarations under the Convention or the Protocol have been made, to the best of the authors' knowledge.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

The letter of the law is silent on how an IDERA should be submitted to or recorded in the ADAC's register, but it is recommended that the IDERA be filed with the ADAC.

2.10.4 Enforcement of Conventions

The authors are not aware of any experience on the part of local courts in the enforcement of the Convention or the Protocol.

2.10.5 Other Conventions

Chad is a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft. Chad is not a party to the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

A loan between a non-resident entity and a resident borrower is permitted under Regulation No 02/18/CEMAC/UMAC/CM relating to foreign exchanges in the Economic and Monetary Community of Central Africa (*Communauté économique et monétaire de l'Afrique centrale*, or CEMAC), which is applicable in Chad.

The loan is subject to a declaration to the Bank of Central African States (*Banque des États de l'Afrique Centrale*, or BEAC) and the minister of finance 30 days prior to any payment/first drawdown under the loan. The declaration may take the form of a simple letter.

3.1.2 Effect of Exchange Controls or Government Consents

See 3.1.1 Restrictions on Lending and Borrowing.

In practice, after filing the declaration (a simple letter), the borrower should receive a letter from the minister of finance authorising the borrower to move forward with the transaction. Without this authorisation letter, the borrower's local bank will refuse to process any transfer of funds from the non-resident bank. In the event that the first drawdown occurs before the minister's authorisation is obtained, the funds will be kept by the borrower's local bank for eight days and will be transferred back to the non-resident bank at the expiry of the said period if the borrower is unable to provide the authorisation letter from the minister.

3.1.3 Granting of Security to Foreign Lenders

Local borrowers are permitted to grant security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

The concept of downstream, upstream and cross-stream guarantees is not expressly set forth in any legal provision. However, the closest concept under Chadian law is that of *cautionnement*.

Cautionnement is a contract by which a guarantor (*caution*) undertakes to perform an obligation (current

or future) on behalf of a debtor, if the latter fails to meet its contracted obligation to the creditor.

This commitment may be entered into without any instructions from the debtor.

3.1.5 Lenders' Share in Security Over Domestic SPVs

Pledges over shares are recognised under the OHADA Uniform Act organising securities (the "Uniform Act on Securities").

3.1.6 Negative Pledges

There is no specific provision under Chadian law on negative pledges.

3.1.7 Intercreditor Arrangements

If the parties proceed with the registration at the tax office, the facility agreement could be subject to a registration fee of 1% of the facility amount.

3.1.8 Syndicated Loans

While the concept of agency and the role of an agent (such as a facility agent) under a syndicated loan does not exist per se in Chad, from a practical perspective, this concept is recognised. In addition, the parties are free to establish the terms and conditions of their contract. This includes the right to appoint an entity or an individual as agent.

3.1.9 Debt Subordination

There is no specific provision for debt subordination under local law.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of all or part of an outstanding debt under an English or New York law-governed loan may be permissible and recognised in Chad.

3.1.11 Usury/Interest Limitation Laws

Usury is prohibited in Chad. However, the law does not set out a maximum threshold beyond which an interest rate is considered usurious. In Chad, each category of loan has its own effective global rate beyond which an interest rate is considered usurious. In practice, the effective global rate is agreed

between the lender and the borrower. In light of the above, usury is unlikely to occur, but any interested party can always contest the effective global rate that has been agreed if it can provide evidence that the rate is actually usurious.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

The typical forms of security and recourse that would be granted in an aviation finance transaction domestically are mortgages.

3.2.2 Types of Security Not Available

The authors understand that only the securities provided in the Chadian Civil Aviation Code can be taken over an aircraft or related collateral such as engines.

3.2.3 Trust/Trustee Concepts

The concept of a trust is not expressly set forth in any legal provision in Chad. However, the Chadian Civil Code gives free rein to the parties to establish the terms and conditions of their contract. This includes the right to appoint an entity or an individual to represent and act on behalf of several parties driven by the same interest.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

The borrower can assign its rights to an aircraft or under an aircraft lease to a security trustee pursuant to a security assignment or a mortgage.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

The assignment of rights and benefits under a contract (eg, an aircraft lease), without also assigning the attendant obligations of the lessor, is possible.

3.2.6 Choice of Foreign Law

As the parties are free to choose the law governing their contract, it is permitted and enforceable for security assignments or guarantees to be governed by English or New York law.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

The security assignment must be executed by the lessor (as assignor) and the security trustee (as assignee).

A separate notice and acknowledgement of the assignment will need to be executed by the assignor, the assignee and the assigned party (ie, the lessee).

In addition, the Chadian Civil Aviation Code provides that any security (including a security assignment) must be notified to the ADAC for registration on the Aircraft Register.

3.2.8 Domestic Law Security Instruments

If an English or New York law-governed security assignment were to be taken in respect of an aircraft registered in Chad, no specific domestic security instrument would need to be taken in addition by a financier.

It is recommended, however, that the foreign law-governed security assignment be registered with the ADAC.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

It is possible for an English or New York law-governed security assignment or domestic law security instrument to be registered with the ADAC. This would result in the payment of a fee amounting to XAF50,000 (approximately USD89).

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests over an aircraft can be recognised.

3.2.11 Effect of Changes in the Identity of Secured Parties

If the identity of the secured parties under a security assignment were changed after its execution, the authors are of the view that the security interests would not be jeopardised.

3.2.12 “Parallel Debt” Structures

There is no specific provision on parallel debt structures under Chadian law.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment would not be deemed to be resident or domiciled in Chad

and is not subject to any taxes as a result of its being a party to, or its enforcement of, a security assignment.

3.2.14 Perfection of Domestic Law Mortgages

A mortgage over an aircraft or engine would be perfected when it complies with the provisions of the Chadian Civil Aviation Code and is registered with the ADAC.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

Securities over aircraft are expressly provided under Chadian law (eg, by a mortgage). They should be registered with the ADAC.

Securities can also be taken over spare engines. The Chadian Aviation Code includes spare engines (and other parts) as eligible for aircraft mortgages, provided they are individually identified and listed in an inventory annexed to the registered document.

The mortgage must also be registered with the ADAC, and appropriate on-site public notice must be given.

Therefore, while the security is similar in form (a mortgage), the process includes additional requirements specific to spare parts.

3.2.16 Form and Perfection of Security Over Bank Accounts

Security over a bank account in Chad is typically created in the form of a pledge of monetary claims (*nantissement de créance*), in accordance with the Uniform Act on Securities.

The pledge must be in writing and is perfected by registration with the tax authorities and the RCCM.

Note that in practice, the bank maintaining the account may also need to be notified of the pledge.

3.3 Liens

3.3.1 Third-Party Liens

The Uniform Act on Securities does not set forth any specific provisions on liens. However, the closest concepts under Chadian law are the retaining right and the possessory pledge.

The retaining right is the right of a creditor to retain in its possession a debtor's asset in an event of default and until full payment of the debt. This is applicable to movable assets and properties. Note that the retaining right is not subject to any agreement or registration formalities in order to be enforceable. The creditor's security is materialised by its right to retain in its possession the asset that is the object of the dispute. For example, an aircraft maintenance service company is entitled to retain the aircraft in its possession if the aircraft operator fails to pay the maintenance fees.

3.3.2 Timeframe to Discharge a Lien or Mortgage

There is no specific timeframe to carry out the discharge of a lien or mortgage over an aircraft. As administrative delays are common in Chad, the average timeframe may be up to six months.

3.3.3 Register of Mortgages and Charges

The mortgage should be registered on the ADAC's register. The interests of an aircraft mortgagee or security trustee may be noted on the Aircraft Register. This constitutes evidence of the existence of the right over the aircraft as well as a public notice warning third parties of the existence of the rights of the aircraft mortgagee or security trustee.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

See 3.3.1 Third-Party Liens for information about the retaining right.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser of an aircraft should verify with the Aircraft Register that the aircraft is free of encumbrances.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

There is no specific provision on this under local law.

3.4.2 Security Trustees' Enforcement of Their Rights

There is no specific provision on this under local law.

3.4.3 Application of Foreign Laws

The parties are free to choose the governing law of the lease. In addition, they are entitled to choose to submit their disputes to a foreign court. Therefore, Chadian courts would uphold a foreign law as the governing law of a finance or security document, as well as the submission to foreign jurisdictions if the parties choose this.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Any foreign judgment (ie, a final judgment of a foreign court or an arbitral award) can be enforced in Chad after an exequatur order by a Chadian court. An exequatur order is a decision of a Chadian court to enforce a foreign judgment in Chad after a final verification that such foreign judgment is not in breach of public order and good moral standards (ie, any decision that may constitute a threat to national defence cannot be enforced in Chad). The case will not be re-examined on its merits.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

A secured party can take possession of the aircraft to enforce a security agreement/aircraft mortgage without the consent of the lessee or the operator. In principle, the repossession of the aircraft should be made pursuant to judicial proceedings, particularly when the provision of the lease is not clear.

On another note, the secured party can also use the deregistration powers of attorney as an instrument for repossession purposes.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

A claim should be lodged by the secured creditor at the commercial court (first-instance level). Each party has to provide evidence to support its position, and several hearings will be scheduled by the judge.

Regarding recourse, there are three levels of jurisdiction in Chad: first-instance court, court of appeal and court of cassation.

3.4.7 Summary Judgments or Other Relief

A summary judgment can be obtained in relation to the lease. However, this is only available if there is an urgent need and there is no possibility that the counterparty will challenge the request of the creditor (ie, there are no unpaid sums in relation to the execution of the finance or security document).

3.4.8 Judgments in Foreign Currencies

It is possible for a secured party under a security agreement/aircraft mortgage to obtain a judgment in a foreign currency.

3.4.9 Taxes/Fees Payable

Any non-resident party (ie, the secured party) might be asked by the court to deposit a guarantee (cautio judicatum solvi, or caution) at the request of the resident party. The caution is an amount of money to be deposited in escrow with the aim of covering any potential damages in the event of refusal of the claimant's claim. The amount is fixed under the discretionary power of the court and there is no maximum threshold. The court will return the caution to the non-resident party if the latter wins the dispute.

3.4.10 Other Relevant Issues

Note that administrative delays of court proceedings are common in Chad.

4. Other Issues of Note

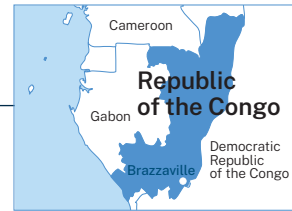
4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are no other issues or court judgments that are relevant to these matters.

4.2 Current Legislative Proposals

The authors are not aware of any relevant legislative proposals at the time of writing (July 2025).

CONGO BRAZZAVILLE



Law and Practice

Contributed by:

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John W Fooks & Co is a full-service corporate, commercial law firm with offices in Madagascar, Mauritius and Senegal, providing support to business and industry across French-speaking Africa. The firm's multilingual legal team, comprising six resident partners and 20 associates, is the only legal practice in the region with a combination of Napoleonic and English law expertise – making the firm the obvious choice when it comes to international transactions in francophone Africa. Its particular strengths are in assisting

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

The execution of an aircraft or engine sale agreement by a domestic party or where the asset is located in the Republic of Congo could be subject to registration at the local tax authority. The registration of the sale agreement could be subject to a registration fee and stamp duty.

1.1.2 Enforceability Against Domestic Parties

The official language in the Republic of Congo is French. Therefore, it is advisable for a sale agreement to be in the official language to be enforceable against a domestic party. That said, where the sale agreement is in a foreign language, it should be accompanied by a French translation made by a Congolese sworn translator.

The Civil Aviation Code of the Economic and Monetary Community of Central Africa (*Communauté économique et monétaire de l'Afrique centrale*, or CEMAC), which is applicable in the Republic of Congo, is silent on the requirement to notarise the sale agreement. However, in practice, some entities do notarise the sale agreement.

1.2 Transfer of Ownership

1.2.1 Transferring Title

A sale agreement duly executed by the parties could constitute a transfer of ownership.

Pursuant to the Civil Aviation Code, the transfer must be recorded in writing. It is enforceable against third parties only after the registration of the transfer with the Aircraft Register (*registre d'immatriculation*) held by the Civil Aviation Authority of the Republic of Congo (*l'Autorité Nationale de l'Aviation Civile*, or ANAC).

It is understood that the transfer does not automatically extend to include installed parts, such as an auxiliary power unit (APU). It is also understood that parties must expressly provide that the transfer is extended to include all installed parts.

Court judgments transferring an aircraft/engine in favour of an entity or an individual may also be considered as proof of ownership of an aircraft.

1.2.2 Sales Governed by English or New York Law

The bill of sale may be governed by a foreign law (eg, English or New York law).

The bill of sale must be dated, executed by the parties (it may be notarised) and should provide the following information:

- the identities and addresses of the parties; and
- information regarding the aircraft/engine, ie, type, series, serial number and home registration/aerodrome.

1.2.3 Enforceability Against Domestic Parties

By virtue of the will of the parties to a contract, a contract is duly binding and enforceable among those parties once duly executed by them. In other words, a bill of sale is enforceable against a domestic party once duly executed by it. There is no legal requirement to notarise a bill of sale. In practice, parties are free to notarise it.

1.2.4 Registration, Filing and/or Consent From Government Entities

The authors are not aware of any requirement for consent from any government entity regarding a bill of sale. However, the bill of sale is subject to registration at (i) the tax authority; and (ii) the ANAC.

The registration at the tax authority and the ANAC must be made within three months from the execution of the bill of sale.

Regarding the registration at the ANAC, the applicant must submit the bill of sale and the initial registration certificate of the aircraft/engine, along with an application request, stating the following:

- the identities and addresses of the parties; and
- information regarding the aircraft/engine, ie, type, series, serial number and home registration/aerodrome.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

A registration fee could be payable regarding the registration of the bill of sale at the tax office and the ANAC.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

The authors are not aware of any laws that would prevent entering into an agreement relating to the operating/wet/finance leases or leases concerning only engines or parts.

2.1.2 Application of Foreign Laws

The authors are not aware of any law that restricts the conclusion of a lease involving a domestic party or an asset to be governed by a foreign law.

2.1.3 Restrictions Concerning Payments in US Dollars

The authors are not aware of any material restrictions imposed on domestic lessees making rental payments to foreign lessors in US dollars. In general, as long as (i) it is duly agreed by the parties in the lease agreement; and (ii) the requirements under the exchange regulations are respected, no material restrictions are imposed on domestic lessees making rental payments to foreign lessors in US dollars.

2.1.4 Exchange Controls

The authors understand that transfers and/or receipt of funds outside CEMAC member states can only be carried out through the central bank, an approved intermediary or a manual exchange licensed agent. This should not cause any issue, provided that rental payments are carried out by approved banks.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

The leasing of an aircraft could be subject to a registration fee of 5% to 10% of the total value of the lease.

2.1.6 Licensing/Qualification of Lessors

A licence or other qualification of the lessor is not required to do business with a domestic lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

No mandatory terms are required to be in a lease or ancillary documents thereto governed by English or New York law that would not typically already be included.

Pursuant to the Civil Aviation Code, the lease needs to be written. If the lease is concluded for a period of more than 30 days, the agreement must be registered on the Aircraft Register of the ANAC.

Furthermore, in practice, the lease should provide, among other things, the following information:

- the identities of the parties;
- the amount of the rent;
- the duration of the lease; and
- information on the aircraft/engine.

2.2.2 Tax and Withholding Gross-Up Provisions

Tax and other withholding gross-up provisions are recognised under Congolese law.

2.2.3 Parts Installed or Replaced After a Lease's Execution

The authors are not aware of any laws that would prevent a lease from covering parts that are installed or replaced on an aircraft or engine after its execution, as long as the lessor is the owner of the parts. No specific steps need be taken, but the initial lease may be amended to cover the parts.

2.2.4 Risk of Title Annexation

There is only a risk of title annexation if the aircraft engines are not indicated/considered as separate assets from the aircraft itself.

2.2.5 Recognition of the Concepts of Trust/Trustee

The Republic of Congo is a member state of the regional Organisation for the Harmonisation of Business Law in Africa (*l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires*, or OHADA). Under the OHADA Uniform Act organising securities (the "Uniform Act on Securities"), there is the concept of fiduciary transfer of money, or *transfert fiduciaire de somme d'argent*, which is an agreement under which

a settlor assigns funds as security for the execution of an obligation. The funds must be deposited into a blocked account opened in the name of the creditor in the books of an approved finance company.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The interests of the owner (legal or beneficial) or a lessor of an aircraft may be noted on the Aircraft Register. The main effect of such notation would be making the interests public, which could reduce their effectiveness against third parties.

2.3.2 Registration If the Owner Is Different From the Operator

An aircraft will be registered domestically only if it is at least 51% owned by (i) a natural person who is a national of the Republic of Congo; or (ii) a legal person incorporated under Congolese law.

However, exemptions may be granted in exceptional cases by the ANAC.

2.3.3 Aircraft/Engine-Specific Registers

Leases concerning aircraft or engines must be registered on the Aircraft Register.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

A lease should be registered on the domestic Aircraft Register when the duration of the lease is more than 30 days.

The Civil Aviation Code is silent on the consequences of failing to do so.

There does not appear to be any requirement for consent from any government entity.

For the registration of the lease, the applicant must submit the lease and an application request containing the following information to the ANAC:

- the name(s) and address(es) of the lessee(s);
- the date of the agreement and validity period; and

- information on the engine/aircraft, ie, trade mark, type, series, serial number, home registration and aerodrome of the leased aircraft.

In addition, any change to the type or design of an aircraft must be notified to the ANAC within three months.

2.3.5 Requirements for a Lease to Be Valid and Registrable

The official language in the Republic of Congo is French. Therefore, it would be advisable for a lease to be in the official language or to have it translated into French by a Congolese sworn translator.

2.3.6 Taxes/Duties Payable for Registering a Lease

The registration of the lease agreement at the tax authority could be subject to a registration fee of 3% to 10% of the total value of the rent during the lease. A stamp duty of XAF1,000 (approximately USD1.78) per page of the lease agreement could also be payable.

2.3.7 Registration of Aircraft in Alternative Countries

The Civil Aviation Code refers to the CEMAC member states. The Republic of Congo is a member state of CEMAC. As such, it seems that the aircraft could potentially be registered in another member country of the CEMAC region.

2.3.8 Requirements for Documents Concerning Registration

The official language in the Republic of Congo is French. Therefore, it would be advisable that a lease be in the official language or translated into French by a Congolese sworn translator.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

Assuming that the lessor is located/incorporated/domiciled in the Republic of Congo, it may be subject to the payment of income tax for any profits from businesses operated in the Republic of Congo.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor would not be deemed to be a resident as a result of its being a party to, or its enforcement of, the lease.

2.4.3 Engine Maintenance and Operations

Under Congolese law, aircraft and engine maintenance must be carried out by maintenance organisations approved by the ANAC.

While such organisations are responsible for maintenance in accordance with regulatory standards, the operator of the aircraft, typically the lessee, is liable for ensuring that the aircraft is maintained in an airworthy condition.

Where the lessor retains operational control, it will bear liability. In the case of a foreign lessor that retains technical control of an aircraft and direction of the crew, the lessor will also be considered as the operator of the aircraft and should be insured for this liability in a manner satisfactory to the ANAC in relation to the category of aircraft operated.

2.4.4 Damage or Loss Caused by an Asset

Whichever party retains technical control of an aircraft and direction of its crew is considered to be the operator of the aircraft and is held responsible for the operation of the aircraft. As such, this party is liable for damages (eg, damages caused to persons and the property of third parties by the movement of the aircraft or by persons or objects falling from it).

2.4.5 Attachment by Creditors

Seizure in private interest can only be carried out for the benefit of a creditor of the owner or the holder of an interest in the aircraft.

2.4.6 Priority of Third Parties' Rights

Creditors and beneficiaries of mortgages over aircraft may take priority over a lessor's rights under an aircraft or engine lease in accordance with the rank of registration of the mortgage on the Aircraft Register.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

Any aircraft that carries out services within, or flies over, the territory of the Republic of Congo is required to take out an insurance policy against damages that could be caused to third parties, passengers, luggage and cargo, regardless of whether the aircraft is registered in the Republic of Congo or abroad.

The Civil Aviation Code further provides that insurance must be taken out from an approved insurance company located in the Republic of Congo when the aircraft is registered in the Republic of Congo. However, when the aircraft is registered outside the Republic of Congo, the insurance can be taken with a foreign insurance company duly approved in its country of origin.

Based on the above, either all or part of the insurance should be placed with domestic insurance companies when the aircraft is registered in the Republic of Congo.

2.5.2 Mandatory Insurance Coverage Requirements

Under Congolese legislation, an aircraft must be insured with respect to the operator's liability for damages caused to third parties, passengers, luggage and cargo.

The insurance covering liability of the operator must not be less than the operator's limits of liability provided under the Civil Aviation Code.

2.5.3 Placement of Insurance Outside of Jurisdiction

The law is silent on whether reinsurances can be placed outside the Republic of Congo for up to 100% coverage.

2.5.4 Enforceability of "Cut-Through" Clauses

The law is silent on the enforceability of "cut-through" clauses; however, it is understood that they are allowed in practice.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurances/reinsurances are permitted.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

The authors are not aware of any restrictions on a lessor's liability to:

- terminate an aircraft lease;
- re-export the aircraft; or
- sell the aircraft following such termination.

2.6.2 Lessor Taking Possession of the Aircraft

The authors understand that the consent of the lessee or a court order would be required to take physical possession of the aircraft.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts for aviation disputes in the Republic of Congo. The general courts are competent to decide aviation disputes.

The authors are not aware of historic examples of cases where specific courts have adjudicated on aviation disputes.

2.6.4 Summary Judgment or Other Relief

A lessor may obtain a summary judgment or equitable or other injunctive relief pending final resolution of judicial proceedings to enforce an aircraft lease. The estimated period to obtain such a court order could be immediate or up to 30 days, depending on the specific injunctive relief requested to the court. The court order may be subject to appeal within 15 days from the date of issuance.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

The domestic courts can uphold:

- a foreign law as the governing law of an aircraft lease;
- submission to a foreign jurisdiction; and
- a waiver of immunity by the parties of such lease.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

In order for a foreign judgment (either a foreign court judgment or an arbitral award) to be enforceable in the Republic of Congo, an exequatur order will need to be issued by the domestic court. The domestic court will not reassess the merit of the case; that is, there is no re-examination of the matter.

2.6.7 Judgments in Foreign Currencies

The law is silent on whether a lessor under an aircraft lease can obtain a judgment in a foreign currency. Generally, Congolese courts pronounce judgment in local currency. However, a judgment is left at the discretion of the judge and the authors understand that the equivalent amount in foreign currency may be granted in local currency.

2.6.8 Limitations on Lessors' Actions Following Termination

The Civil Aviation Code is silent on whether there are limitations on a lessor's ability to recover default interest or to charge additional rent following termination of the lease for default.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

There are no legal requirements regarding the payment of taxes or fees in a significant (ie, non-nominal) amount by a lessor under an aircraft lease in connection with the enforcement of such lease.

2.6.10 Mandatory Notice Periods

Aside from the notice period indicated in the lease agreement, the lessor is not required to comply with any other mandatory notice periods for the termination of an aircraft lease.

2.6.11 Lessees' Entitlement to Claim Immunity

A lessee is not entitled to claim sovereign or other immunity from suit. In all cases, immunities can be waived.

2.6.12 Enforcement of Foreign Arbitral Decisions

The Republic of Congo has not adopted the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

2.6.13 Other Relevant Issues

There are no additional issues that a lessor should be aware of in relation to the enforcement of its rights.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

The Republic of Congo recognises the concept of contractual assignment and novation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

From a practical perspective, it is understood that an assignment/novation of an aircraft and/or an engine lease agreement under foreign laws would be held valid by a domestic court. The requirement of the lessee's consent would depend on the governing law of the lease agreement. Under Congolese law, consent is required in such circumstances. The authors are not aware of any mandatory terms under Congolese law to be included in such agreement/deed.

2.7.3 Enforceability of Lease Assignments/Novations

It would be advisable for an aircraft and/or engine lease assignment and assumption/novation to be translated into French and notarised or legalised in order to be enforceable against a domestic party.

2.7.4 Filing/Registration of Lease Assignments/Novations

See 2.3.4 Registration of Leases With the Domestic Aircraft Registry.

2.7.5 Taxes/Duties Payable on Assignment/Novation

Such assignment and assumption/novation agreement could potentially be subject to registration at the tax authority.

2.7.6 Recognition of Transfer of Ownership Interests

The law is silent on the recognition of transfer of ownership.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

An aircraft may be deregistered by its owner or the ANAC. The deregistration is achieved before the ANAC and consists of filing an application form at the ANAC.

2.8.2 Lessee's/Operator's Consent

The consent of the lessee or the operator would be required for the deregistration of the aircraft.

2.8.3 Required Documentation

The registration certificate as well as the identity plate/card of the aircraft are required for deregistration. The following documents may also be required:

- a certificate of airworthiness;
- a deed of release in the case of a mortgage; and
- a statement of non-opposition duly executed by the lessee.

2.8.4 Duration of Deregistration Process

The law is silent on how long the deregistration process would typically take. Note that administrative delays are not uncommon in the Republic of Congo.

2.8.5 Aviation Authority's Assurances

The authors are not aware of any advance assurances to an aircraft owner, mortgagee or lessor as to the prompt deregistration of the aircraft provided by the Civil Aviation Authority.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

The deregistration of an aircraft may be subject to payment of the following fees:

- XAF340,000 (approximately USD609); and
- XAF85,000 (approximately USD152) to obtain a certificate of deregistration.

2.8.7 Deregistration Power of Attorney

A deregistration power of attorney should be recognised in the Republic of Congo. It would be advisable to have such power translated and notarised or legalised, to be enforceable against a domestic party.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

No additional documents are required to enforce deregistration of a power of attorney.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

It is understood that a deregistration power of attorney should be governed by Congolese law.

2.8.10 Revocation of a Deregistration Power of Attorney

If a deregistration power of attorney is said to be irrevocable, it could be difficult to revoke it.

2.8.11 Owner's/Lessor's Consent

Before exporting an aircraft, it would be advisable to get the lessee's consent, particularly where they are the registered operator, as the ANAC typically expects the deregistration or export request to come from or be supported by the operator. The consent of the owner or lessor is not expressly required under Congolese law unless they hold a registered interest in the aircraft. However, in accordance with the CEMAC Aviation Code, if the aircraft is subject to a registered security interest (eg, a mortgage), deregistration cannot proceed without either a formal release (*mainlevée*) of those rights or the consent of the rights holders. The letter of the law does not set forth whether the asset needs to be located in the Republic of Congo at the time of deregistration and/or export.

2.8.12 Aircraft Export Permits/Licences

An aircraft export certificate can be issued by the ANAC. Generally, this is subject to the filing of an application form at the ANAC along with information regarding the aircraft. It cannot be issued in advance.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

The law is silent on the costs, fees and taxes in respect of the export of an aircraft. However, a fee may be payable.

2.8.14 Practical Issues Related to Deregistration of Aircraft

There are no significant practical issues that an aircraft owner, mortgagee or lessor should be aware of

in respect of the deregistration of an aircraft in the Republic of Congo.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

The OHADA Uniform Act dated 10 September 2015 (the "Uniform Act on Insolvency") governs insolvency and restructuring in the Republic of Congo. The Uniform Act on Insolvency regulates all matters relating to insolvency law in all OHADA member states. Its purpose is:

- to organise pre-insolvency procedures of conciliation, preventative settlement and rehabilitative proceedings of reorganisation and asset liquidation so as to preserve the economic activities and employment of debtor companies, quickly rehabilitate healthy companies and liquidate distressed ones in such a way that the debtors' assets will be maximised for the purpose of increasing receivables to be recovered by creditors and establish a specific order of payment to secured or unsecured collateral securities;
- to define rules applicable to judicial administrators; and
- to set proprietary and professional sanctions, as well as criminal proceedings related to the default of the debtor, applicable to the debtor company's top executives and individuals involved in the insolvency proceedings management.

To summarise, insolvency proceedings are under the control of the judge (*juge commissaire*) and the assets of the company are placed under the supervision of a judicial trustee (*syndic*), whose main responsibility is to act in the overall interests of the creditors as a whole (*masse des créanciers*).

A judgment from the commercial court confirms the start of insolvency proceedings (*jugement d'ouverture*). Such judgment is published in the Companies Registry (*Registre du commerce et du crédit mobilier*, or RCCM) and in the newspapers. A second publication should be made 15 days after the first publication. The two publications must contain a warning to creditors to produce their claims to the *syndic*. Creditors' claims

against the company must be declared to the *syndic* within two months following the second publication of the insolvency judgment. This period is extended to three months for creditors residing outside the national territory.

In principle, the declaration must contain the amount of the claim and its due date. The declaration must also specify the type of security attached to the claim (if any). Creditors should also provide the *syndic* (to the extent possible) with any evidence of the existence of their claims. The *syndic* will provide a receipt to the creditors confirming that their declarations have been duly received.

Note that insolvency proceedings suspend and prohibit any individual claim initiated by a creditor. Two situations may occur, as set out below.

- The *juge commissaire* may decide that the activities of the company must be continued (legal redress, or *redressement judiciaire*). In a legal redress, the directors/managers of a company are assisted by the *syndic* in the administration of the company. Any commitment or operation made by the directors/managers without the assistance of the *syndic* is not enforceable towards third parties.
- The *juge commissaire* may decide that the activities must be terminated (liquidation). In the event of a liquidation, the directors/managers of a company are removed from their duties. Only the *syndic* is allowed to represent the company during the liquidation.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

See 2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

The Uniform Act on Insolvency is applicable in principle when the local tenant is in financial difficulty. Nevertheless, if the international leasing agreement so provides or the liquidator deems it relevant, all the good practices applicable in this matter may be

applied, in particular, the adoption of co-ordination principles such as the American Law Institute and International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases 2001, the INSOL International (International Association of Restructuring, Insolvency and Bankruptcy Professionals) Global Principles for Multi-Creditor Workouts 2000, the UNCITRAL Model Law on Cross-Border Insolvency, or any other relevant international principles or rules.

The Recognition of Proceedings Opened Within the OHADA Area

The Uniform Act on Insolvency is applicable for the recognition of foreign proceedings.

It is understood that judgments opening and closing insolvency proceedings, as well as those that settle disputes arising from such proceedings in an OHADA member state (eg, the Republic of Congo), are recognised and enforceable in the territory of the other member states.

The Recognition of Decisions Pronounced Outside the OHADA Area

Under the Uniform Act on Insolvency, a foreign representative may apply to the competent domestic court to recognise and oversee proceedings for which they have been appointed as a representative. As such, an application for recognition will be submitted with the following documents:

- a certified copy of the decision to open the foreign collective proceeding and to appoint the foreign representative; and
- a certificate from the foreign court attesting to the opening of the foreign collective proceeding and the appointment of the foreign representative.

The application for recognition will also be accompanied by a statement identifying all foreign collective proceedings concerning the debtor that are known by the foreign representative.

All documents provided in support of an application for recognition will have to be drafted or translated into French.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

Irrevocable powers of attorney regarding the assets that make up the estate of the insolvent party will not survive its insolvency. However, and taking into account that the aircraft is not owned by the lessee/insolvent, the aircraft is not part of the insolvency estate, for which reason the deregistration power of attorney will survive. If the amounts regarding the lease are not paid, the lessor may invoke an event of default to terminate the agreement, requesting the repossession and deregistration of the aircraft through a deregistration power of attorney.

2.9.5 Other Effects of a Lessee's Insolvency

The opening of insolvency proceedings against a lessee (ie, legal redress or liquidation of assets) neither suspends nor terminates a lease agreement. However, as the Republic of Congo has adhered to the Cape Town Convention and the Protocol (see 2.10 Cape Town Convention and Others), the following options may be considered as per Article XI of the Convention.

If the lessee is declared insolvent, the receiver(s) must give back the aircraft within a maximum waiting period of 60 calendar days unless the lessee executes the outstanding obligations and commits to execute all its future contractual obligations. The aircraft must be immediately returned to the lessor upon the occurrence of a new event of default and the lessee cannot claim any further delay.

Any attempt to delay or prevent the repossession of the aircraft by the lessor after the expiry of the waiting period of 60 days is prohibited.

Subject to the above, which is fully recognised and applicable in the Republic of Congo, the Cape Town Protocol does not prevent the lessor from using any remedy available in the local legislation.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The main risks for a lender if a borrower providing security becomes insolvent would be the lack of sufficient assets to provide for payments due to the lender, which, if it does not have a guarantee of its own, will be deemed as any other common creditor that should

be equally paid in accordance with the debtor's existing assets.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

In the case of legal redress, the debtor must propose an arrangement with the creditors. This arrangement can usually impose moratoria. A two-year moratorium on the payment of rents may be granted to the lessee in accordance with the provisions of Articles 9 and 75 et seq of the Uniform Act on Insolvency.

2.9.8 Liquidation of Domestic Lessees

The methods by which a domestic lessee can be liquidated or placed in administration or receivership are conciliation, preventative settlement, legal redress and liquidation of property, as defined under the Uniform Act on Insolvency.

The lessee can lodge a declaration of cessation of payment with the commercial court and request the initiation of insolvency proceedings. The cessation of payment and the insolvency proceedings (ie, either a judicial restructuring or a winding-up) can also be requested by the creditors or the court itself. In theory, three scenarios are possible:

- self-declaration; or
- request by the creditors; or
- request by the court.

2.9.9 Ipso Facto Defaults

Performance defaults are required to repossess an aircraft during a lessee insolvency proceeding.

2.9.10 Impact of Domestic Lessees' Winding-Up

See 2.9.5 Other Effects of a Lessee's Insolvency.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The Convention on International Interests in Mobile Equipment (the "Convention") and the related Protocol on Matters Specific to Aircraft Equipment (the "Protocol") are in force in the Republic of Congo. They have been applicable in the Republic of Congo since 1 May 2013. The "authorised entry point" codes are not required for registering international interests.

2.10.2 Declarations Made Concerning Conventions

At the time of the Republic of Congo's adherence to the Convention, the country made declarations in respect of Articles 39 (1) (a), 39 (1) (b), 40, 52, 53 and 54 (2).

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Article XIII of the Protocol is applicable in the Republic of Congo. There is no specific procedure for the submission and recording of an irrevocable deregistration and export request authorisation (IDERA) with the Aircraft Register. The most important point is that the IDERA is filed with the ANAC.

2.10.4 Enforcement of Conventions

The authors are not aware of any case law regarding the enforcement of the Convention and Protocol.

2.10.5 Other Conventions

The Republic of Congo is party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft, but not to the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

The authors are not aware of any particular restrictions on foreign lenders financing an aircraft locally or on borrowers using the loan proceeds.

3.1.2 Effect of Exchange Controls or Government Consents

The authors are not aware of any exchange controls or government consents that would be material to any financing or repatriation of realisation proceeds under a loan, guarantee or security document. Payment or debt repayment operations abroad are freely carried out and are subject to certain restrictions set out in the foreign exchange regulations.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Downstream, upstream and/or cross-stream guarantees are permitted under the Uniform Act on Securities. The registration is generally made at the Companies Registry.

3.1.5 Lenders' Share in Security Over Domestic SPVs

It would not be advisable for a lender to take share security over a domestic special-purpose vehicle (SPV) that owns the financed aircraft. A pledge of shares is recognised.

3.1.6 Negative Pledges

A negative pledge is not recognised in the Republic of Congo. However, parties are free to organise this under the lease agreement.

3.1.7 Intercreditor Arrangements

The authors are not aware of any material restriction or requirement imposed on intercreditor arrangements.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent are recognised in the Republic of Congo.

3.1.9 Debt Subordination

There is no specific method of debt subordination under Congolese law. However, in practice, subordination agreements are permissible and recognised.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

It is permissible to transfer or assign all or part of an outstanding debt under an English or New York law-governed loan.

3.1.11 Usury/Interest Limitation Laws

It is understood that usury or interest limitation is regulated in the Republic of Congo.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

Mortgages and guarantees made in accordance with the Uniform Act on Securities are the typical forms of security and recourse that would be granted in an aviation finance transaction.

3.2.2 Types of Security Not Available

It is understood that pledges cannot be taken over an aircraft or related collateral such as engines, warranties or insurances.

3.2.3 Trust/Trustee Concepts

The concept of a trust and the role of a security trustee are recognised under the Uniform Act on Securities.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

The law is unclear on the assignment of rights to an aircraft by a borrower to a security trustee. However, the authors believe that a borrower may assign to a third party, including a security trustee (*agent de sûreté*, under the Uniform Act on Securities), its rights to the aircraft or under an aircraft lease, pursuant to a security assignment or a mortgage.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It is understood that it is possible to assign rights and benefits only, without also assigning the attendant obligations of the lessor. However, the lessor is required to notify the lessee of such agreement. The transferee is therefore required to comply with the lessor's obligation under the lease agreement.

3.2.6 Choice of Foreign Law

A security assignment or a guarantee can be governed by English or New York law. Parties are free to choose the governing law of their contract.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

It would be advisable to have a security assignment translated (if not already in French) and certified, notarised or legalised to be enforceable against a domestic party.

3.2.8 Domestic Law Security Instruments

It is a requirement to have a written contract duly signed by the authorised signatories of the parties to such contract. The assignment deed must provide information that allows individualisation and identification. The registration of the assignment deed is also advisable in order to be enforceable. While not mandatory, it is advisable for a security assignment written

in a foreign language to be accompanied by a French translation made by a Congolese sworn translator.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

Assignments of security interests governed by English or New York law over an aircraft registered in the Republic of Congo are permitted.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The law is silent regarding the transfer of security interests over an aircraft and/or engines. However, the authors believe that there should be no issue if the parties have so agreed.

3.2.11 Effect of Changes in the Identity of Secured Parties

The security interests should not be jeopardised if the identity of the secured parties under a security assignment changes after its execution.

3.2.12 "Parallel Debt" Structures

The authors have not yet come across this type of structure in the Republic of Congo.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment would not be deemed to be resident, domiciled or carrying on business in the Republic of Congo, or subject to taxes as a result of its being a party to, or its enforcement of, such security assignment.

3.2.14 Perfection of Domestic Law Mortgages

A domestic law mortgage over an aircraft or engine should be registered at the tax authority and the ANAC in order to be perfected/produce legal effect.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

There is no difference between the form of security (or perfection) taken over an aircraft and that taken over spare engines.

3.2.16 Form and Perfection of Security Over Bank Accounts

Security over a bank account usually takes the form of a pledge over the account. A pledge over a bank account needs to be registered with the tax authority and the Companies Registry in the Republic of Congo.

3.3 Liens

3.3.1 Third-Party Liens

A third party may take or register a lien over an aircraft or engine.

Liens may be registered under the Civil Aviation Code for:

- the legal costs incurred in order to achieve the sale of the aircraft and the distribution of its price;
- the remuneration due for the salvage of the aircraft; and
- the indispensable expenses incurred for its preservation.

The aforementioned liens are on the aircraft or on the insurance indemnity in the case of loss or damage. The liens follow the aircraft even when it passes into other hands.

3.3.2 Timeframe to Discharge a Lien or Mortgage

The liens expire three months after the event that gave rise to them, unless the creditor has previously entered their claim in the registers, having had the amount acknowledged amicably or, failing that, having brought legal proceedings in respect of it.

The liens may also expire further to judicial sale of the aircraft or two months from the registration of the voluntary transfer of the liens on the Aircraft Register.

3.3.3 Register of Mortgages and Charges

The Aircraft Register is the register for mortgages and charges. The interests of an aircraft mortgagee or security interest can be noted on the Aircraft Register. The registration is a mandatory requirement to ensure the enforceability in respect of third parties.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

Statutory rights of detention would prevail over consensual liens.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser may check the Aircraft Register before the ANAC to verify that an aircraft is free of encumbrances.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

There are no relevant differences between enforcing a security assignment and enforcing a loan or guarantee.

3.4.2 Security Trustees' Enforcement of Their Rights

It is permitted for a third party (eg, a security trustee) to enforce its rights under a security assignment, by which a security is granted to it by a lessor in respect of its rights under an aircraft lease, pursuant to a notice and acknowledgement executed by the lessor and the lessee respectively in connection with that security assignment.

3.4.3 Application of Foreign Laws

Courts in the Republic of Congo may uphold a foreign law as the governing law of a finance or security document and the submission to a foreign jurisdiction.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Congolese courts will recognise and enforce a final judgment of a foreign court or an arbitral award without re-examination of the matter, subject to an exequatur issued by said court.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

It is possible for a secured party to take physical possession of an aircraft to enforce a security agreement/ aircraft mortgage without the lessee's or operator's consent.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

Congolese courts are generally competent to decide enforcement actions under a security agreement or aircraft mortgage when these (ie, the security agreement or aircraft mortgage) are registered in the Republic of Congo.

3.4.7 Summary Judgments or Other Relief

It is possible for a lessor to obtain a summary judgment or equitable or other injunctive relief pending final resolution of judicial proceedings, to enforce a security agreement/aircraft mortgage, generally in the case of an emergency.

3.4.8 Judgments in Foreign Currencies

The law is silent on whether a secured party under a security agreement/aircraft mortgage can obtain a judgment in a foreign currency. Generally, a Congolese court decision is in local currency. In other words, a secured party under a security agreement/aircraft mortgage may obtain a judgment in a foreign currency but its equivalence in Central African francs (XAF) shall be indicated. Such judgment is generally at the discretion of the judge.

3.4.9 Taxes/Fees Payable

A secured party would not be required to pay taxes. However, it is liable to pay court fees, which are nominal.

3.4.10 Other Relevant Issues

There are no other relevant issues that a lender should be aware of in relation to the enforcement of its rights.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are no other relevant issues in the Republic of the Congo.

4.2 Current Legislative Proposals

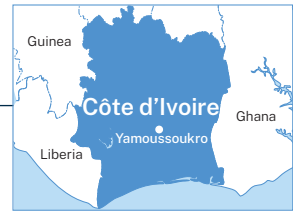
There are no current proposals before the Congolese legislature that are worth mentioning in respect of the foregoing items.

CÔTE D'IVOIRE

Law and Practice

Contributed by:

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John W Fooks & Co



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John W Fooks & Co is a full-service corporate, commercial law firm with offices in Madagascar, Mauritius and Senegal, providing support to business and industry across French-speaking Africa. The firm's multilingual legal team, comprising six resident partners and 20 associates, is the only legal practice in the region with a combination of Napoleonic and English law expertise – making the firm the obvious choice when it comes to international transactions in francophone Africa. Its particular strengths are in assisting

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

The transfer of an aircraft or engine is subject to the payment of registration fees in Côte d'Ivoire.

1.1.2 Enforceability Against Domestic Parties

For registration purposes, it is advisable that a sale agreement be translated into French by a sworn translator.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Pursuant to the Civil Aviation Code, the sale agreement or the bill of sale and the registration of the sale with the Civil Aviation Registry constitute ownership title. The law is silent when it comes to ascertaining whether it includes all installed parts, such as an auxiliary power unit (APU). However, the authors believe that in order to be included, the parts must be mentioned in the sale agreement.

Based on a strict reading of the Civil Aviation Code, the sale of the ownership interest in an entity that owns an aircraft or engine is not recognised as a sale of such aircraft or engine itself.

1.2.2 Sales Governed by English or New York Law

The bill of sale may be governed by a foreign law (eg, English or New York law). It is advisable that the bill of sale be translated into French by a sworn translator.

1.2.3 Enforceability Against Domestic Parties

For registration purposes in Côte d'Ivoire, it is advisable that a sale agreement be translated into French by a sworn translator.

1.2.4 Registration, Filing and/or Consent From Government Entities

Bills of sale should be registered with the Ivorian Civil Aviation Authority (*l'Autorité Nationale de l'Aviation Civile*, or ANAC).

No government applications or consents are prerequisite to the execution and delivery of a bill of sale in relation to an aircraft or engine registered in Côte d'Ivoire.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

The bill of sale is subject to the payment of a registration fee at the tax office.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

The authors are not aware of any laws that would prohibit or permit any types of operating/wet/finance leases or leases concerning only engines or parts.

2.1.2 Application of Foreign Laws

The courts in Côte d'Ivoire accept the right of the parties to a lease to choose a foreign law and submit to the jurisdiction of foreign courts, provided the applicable provisions of the English or New York law, as the case may be, would not be contrary to public order pursuant to any applicable law in Côte d'Ivoire.

2.1.3 Restrictions Concerning Payments in US Dollars

No material restrictions are imposed on domestic lessees making rent payments to foreign lessors in US dollars, subject to compliance with the exchange control requirements.

2.1.4 Exchange Controls

There are no specific exchange control provisions that could prevent rent payments under a lease or any repatriation of realisation proceeds.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

A lease is subject to the payment of a registration fee to the ANAC.

2.1.6 Licensing/Qualification of Lessors

A lessor needs to be licensed or qualified in Côte d'Ivoire to do business with a domestic lessee.

The lease of a foreign-registered aircraft by an Ivorian-based entity is subject to the prior approval of the ANAC.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

Any lease governed by English or New York law must contain the following information:

- the type, model and serial number of the aircraft;
- the name and address of the registered owner;
- the type of lease (dry lease, wet lease, damp lease);
- the name of the country of registration, nationality and trade mark registration;
- an airworthiness certificate and declaration by the aviation authority of the country of registration stating that the aircraft is in compliance with the rules of airworthiness of the country of registration;
- details of the lessee;
- the duration of the lease;
- a statement specifying the party liable for the control and airworthiness of the aircraft;
- places of use of the aircraft; and
- information on the airworthiness status of the aircraft during the last five years of use (including any accidents).

The Civil Aviation Code provides that when the duration of the lease is more than six months, the agreement must be registered with the ANAC. Based on this mandatory requirement, the parties may consider inserting a provision under which the aircraft will be registered under such conditions.

2.2.2 Tax and Withholding Gross-Up Provisions

Such provisions are accepted under Ivorian law.

2.2.3 Parts Installed or Replaced After a Lease's Execution

The law is silent on whether a lease can cover parts that are installed or replaced on an aircraft or engine after a lease's execution.

2.2.4 Risk of Title Annexation

The law is silent on the risk of title annexation in respect of aircraft engines installed on an airframe.

2.2.5 Recognition of the Concepts of Trust/Trustee
Ivorian law does not expressly discuss such concepts.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The law is not entirely clear on this point. However, based on the authors' interpretation of the law, the interests of the owner or a lessor of an aircraft may be noted on the Aircraft Register.

2.3.2 Registration If the Owner Is Different From the Operator

Based on the Civil Aviation Code, aircraft may only be registered in the name of the owner. In all cases, if the owner is different from the operator, the certificate of registration of the aircraft will clearly identify which is the owner and which is the operator of the aircraft.

2.3.3 Aircraft/Engine-Specific Registers

There is no specific register for leases concerning aircraft or engines. Leases are registered with the ANAC.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

Pursuant to the Civil Aviation Code, any lease of an aircraft for a period of three months or more must be registered with the ANAC. The use of the leased aircraft is subject to the prior approval of the ANAC.

Briefly, the lessee must file an application for approval within the 60 days prior to the use of the aircraft. The application letter needs to be filed with:

- a copy of the executed lease agreement;
- information on the registered owner, the lessor and the lessee;
- a description of the aircraft;
- the duration of the lease;
- the country of registration, nationality and trade mark registration; and
- information on airworthiness.

There is no specific timeframe for completion. In the event of failing to register the lease, the minister in charge of civil aviation may pronounce the suspension or withdrawal of the licences of the lessee. The ANAC may also impose administrative fines.

2.3.5 Requirements for a Lease to Be Valid and Registrable

The lease should be drafted in or translated into French for the purpose of registration at the ANAC.

2.3.6 Taxes/Duties Payable for Registering a Lease

The registration of the lease is subject to the payment of registration fees.

2.3.7 Registration of Aircraft in Alternative Countries

In Côte d'Ivoire, an aircraft can only be registered with the ANAC. An aircraft registered abroad may operate in Côte d'Ivoire for up to six months. If its use by an Ivorian operator extends beyond that period, it must be re-registered with the ANAC in Côte d'Ivoire, and once registered there, it cannot remain registered in another country.

2.3.8 Requirements for Documents Concerning Registration

See 2.3.5 Requirements for a Lease to Be Valid and Registrable.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

If the lessor is incorporated in Côte d'Ivoire, the payment of income taxes will be required. However, if the lessor is not incorporated in Côte d'Ivoire, withholding tax may be due.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor would not be deemed to be resident or domiciled in Côte d'Ivoire as a result of its being party to, or enforcing, a lease there. However, as a party to the lease, it would be subject to taxes.

2.4.3 Engine Maintenance and Operations

In the case of a dry lease, the lessee is liable for the control of the operation of the aircraft and the responsibilities resulting from such operation.

In the case of a wet lease, the lessor carries out the control of the operation of the aircraft. The lessor is also liable for the supervision of the security of the aircraft.

2.4.4 Damage or Loss Caused by an Asset

See 2.4.3 Engine Maintenance and Operations.

2.4.5 Attachment by Creditors

The creditors of a domestic lessee are not permitted to attach an aircraft leased to it but owned by a different entity.

2.4.6 Priority of Third Parties' Rights

The following creditors take priority over the lessor:

- court fees in connection with the sale of the aircraft;
- remuneration in relation to the rescue of the aircraft;
- costs in relation to the conservation of the aircraft;
- debts resulting from the contract of employment of the members of the crew and other persons employed in the on-board service;
- royalties for the use of devices and aids to navigation; and
- landing as well as parking fees.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

There is no provision under the law which requires that all or part of the insurances be placed with domestic insurance companies.

2.5.2 Mandatory Insurance Coverage Requirements

Organisations responsible for the operation and management of air navigation services in Côte d'Ivoire are required to subscribe to an "air navigation" insurance policy. All aircraft operators are required to take out a policy covering their civil liability in the event of an accident, in particular with regard to flight personnel, passengers, luggage, cargo, mail and third parties.

2.5.3 Placement of Insurance Outside of Jurisdiction

Insurances can be placed outside Côte d'Ivoire for up to 100% coverage.

2.5.4 Enforceability of "Cut-Through" Clauses

The law is silent on the issue of "cut-through" clauses.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurances/reinsurances are permitted.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

There are no restrictions on the lessor's ability to terminate an aircraft lease, re-export the aircraft and sell the aircraft following that termination, except if any limitations were established in the lease agreement. The law is silent on whether the aircraft needs to be physically located in Côte d'Ivoire at the time of any such action(s).

2.6.2 Lessor Taking Possession of the Aircraft

While the authors are not aware of any court resolution in Côte d'Ivoire dealing with taking possession of an aircraft, from a purely legal perspective, the lessee should be notified of the possession action.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts that are competent to decide aviation disputes. Such disputes are brought before the commercial courts of Côte d'Ivoire.

2.6.4 Summary Judgment or Other Relief

Summary judgment or injunctive relief requires the existence of urgency. The lawsuit is brought before the president of the courts, who issues a decision within approximately four to ten days (depending on the urgency of the matter).

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

The domestic courts could uphold:

- a foreign law as the governing law of an aircraft lease;
- the submission to a foreign jurisdiction; and
- a waiver of immunity by the parties to such lease.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

The enforcement of foreign judgments (either a foreign court judgment or an arbitral award) in Côte d'Ivoire is subject to obtaining an exequatur duly issued by the courts of Côte d'Ivoire. An Ivorian court will not reas-

sess the merit of the case but will mainly ascertain that the following conditions have been satisfied:

- the judgment was rendered by a competent judicial authority according to the laws of the country where it was given;
- the judgment has become *res judicata* according to the same laws and is enforceable in the country where it was rendered;
- the convicted party was duly summoned to appear before the court that rendered the judgment and was given the opportunity to defend itself;
- the dispute on which the foreign court ruled is not, according to Ivorian law, within the exclusive jurisdiction of Ivorian courts;
- there is no conflict between the foreign judgment and another judgment already rendered by an Ivorian court, on the same cause of action, the same subject matter and between the same parties, and that has become *res judicata*; and
- the decision contains nothing contrary to Ivorian public policy.

2.6.7 Judgments in Foreign Currencies

While the authors are not aware of any court resolution in Côte d'Ivoire dealing with this point, in general, damages are set in the local currency.

2.6.8 Limitations on Lessors' Actions Following Termination

It should be possible to recover default interest on the termination of a lease. However, following termination of a lease for default, including if the lessee fails to return the aircraft, it would not be possible to charge additional rent, but it would be possible to repossess the aircraft and claim compensation for the damages incurred by the lessor, given the lessee's failure to return the aircraft.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

A lessor under an aircraft lease is not required to pay taxes or fees in a significant (ie, non-nominal) amount in connection with the enforcement of such lease in Côte d'Ivoire.

2.6.10 Mandatory Notice Periods

The terms of termination of the aircraft lease are fixed by the parties in the lease.

2.6.11 Lessees' Entitlement to Claim Immunity

A lessee is not entitled to claim sovereign or other immunity from suit, unless the lessee is the Ivorian state.

2.6.12 Enforcement of Foreign Arbitral Decisions

Côte d'Ivoire has adopted the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and the national courts recognise and enforce arbitral decisions.

2.6.13 Other Relevant Issues

There are no other relevant issues of which a lessor should be aware in relation to the enforcement of its rights.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

There is no prohibition under the relevant law pertaining to the concepts of contractual assignment and novation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

A domestic court would uphold the agreement should a lessor transferring its rights under an aircraft lease assign or novate its rights under such lease to a new lessor pursuant to a New York or English law-governed assignment and assumption agreement or novation agreement. The requirement of the lessee's consent would depend on the governing law of the lease agreement and the assignment/novation agreement. The authors are not aware of any mandatory terms under Ivorian law to be included in such agreement/deed.

2.7.3 Enforceability of Lease Assignments/Novations

It is advisable for an aircraft and/or engine lease assignment and assumption/novation to be translated into French (if in another language) and certified, notarised or legalised to be enforceable against a domestic party.

2.7.4 Filing/Registration of Lease Assignments/Novations

The law is silent on the requirement to file or register lease assignments. However, if the initial lease was subject to registration with the ANAC, assignments/novations of such lease should also be registered with the ANAC.

No government applications or consents are prerequisite to the execution and delivery of an aircraft and/or engine lease assignment and assumption/novation in relation to an aircraft registered domestically.

2.7.5 Taxes/Duties Payable on Assignment/Novation

Such assignment and assumption/novation agreement may be subject to the payment of registration fees.

2.7.6 Recognition of Transfer of Ownership Interests

If the ownership interest of an entity (or the beneficial interest in a trust) owning an aircraft is transferred (with the legal title to the asset remaining with that entity), such transfer would not be considered per se as a transfer of ownership of the aircraft.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

An aircraft can be deregistered by the aircraft's registered owner or the owner's authorised representative. The registered owner must notify the ANAC in writing of the reasons for deregistration and fill in a form that must be signed by the owner or its representative.

Deregistration of a lease can also be done at the request of the lessee if the latter brings evidence of the expiry or termination of the lease.

2.8.2 Lessee's/Operator's Consent

The aircraft owner or the lessor can apply for the deregistration of the aircraft without the lessee's or operator's consent.

2.8.3 Required Documentation

The following documents must be provided to deregister an aircraft:

- a deregistration application letter;
- a request in duplicate, signed by the owner or its mandated representative;
- revenue stamps (XAF100,000 (approximately USD179) for aircraft more than 5,700 kg and XAF20,000 (approximately USD36) for aircraft less than 5,700 kg);
- an original of the certificate of registration;
- an original of a certificate of airworthiness;
- an original of a noise certificate;
- an original of an operating certificate of any on-board radio-electric installation;
- an original of an aircraft radio licence;
- if the applicant is not the last owner registered in the Ivorian register, an original or certified deed of sale between the last registered owner and the applicant;
- proof that the applicant, if different from the owner, has been appointed by the latter; and
- proof of payment of fees of XAF200,000 (approximately USD357).

2.8.4 Duration of Deregistration Process

There is no specific duration for a deregistration process under the law.

2.8.5 Aviation Authority's Assurances

Advance assurances are not provided to an aircraft owner, mortgagee or lessor as to the prompt deregistration of an aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

Deregistration is subject to the payment of fees of XAF200,000 (approximately USD357).

2.8.7 Deregistration Power of Attorney

A deregistration power of attorney will be recognised. However, it is advisable for a deregistration power of attorney to be translated into French (if in another language) and certified, notarised or legalised to be enforceable against a domestic party.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

Apart from the required documents noted in 2.8.3 Required Documentation, no additional documents are required.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A deregistration power of attorney can be governed by a foreign law.

2.8.10 Revocation of a Deregistration Power of Attorney

From a practical perspective, if a deregistration power of attorney is expressed to be irrevocable, attempting to revoke it in practice could be difficult.

2.8.11 Owner's/Lessor's Consent

The law is silent on the possibility of exporting an aircraft without the lessee's consent. However, as a matter of practice, any formality in connection with a transaction involving a local lessee (and especially if such lessee is the national airline) is subject to the approval of the latter. For deregistration/export purposes, an aircraft should be in Côte d'Ivoire for inspection purposes in order to be issued an export certificate.

2.8.12 Aircraft Export Permits/Licences

It is possible to obtain an export licence in Côte d'Ivoire, called a certificate of airworthiness for export purposes. The requirements for a certificate of airworthiness for export purposes are:

- an indication as to whether the product is new, newly revised or used;
- conformity with the type certificate;
- a weighing sheet less than 12 months old after any repair or major modification of the product;
- proof of compliance with the applicable airworthiness directives and, if applicable, a notification acceptable to the ANAC of non-compliance with certain airworthiness directives;
- product history, such as aircraft and engine logs, and repair and modification records;
- a general description of all temporary installations on the aircraft for ferrying purposes and a commitment to dismantle and restore the aircraft to approved conditions after the ferry flight;
- a certificate or promise of acceptance of the product by the foreign buyer; and
- any special conditions of the country importing the product.

The law is silent on how long it will take to obtain a certificate of airworthiness for export purposes and on whether this can be issued in advance.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

The relevant law does not provide for costs/fees/taxes that are charged in respect of the export of an aircraft.

2.8.14 Practical Issues Related to Deregistration of Aircraft

While the law requires the removal of registration marks from an aircraft, the law does not require that the ANAC be provided with evidence of such removal.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

The Organisation for the Harmonisation of Business Law in Africa (*l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires*, or OHADA) Uniform Act dated 10 September 2015 (the “Uniform Act on Insolvency”) governs insolvency and restructuring in Côte d'Ivoire. The Uniform Act on Insolvency regulates all matters relating to insolvency law in all OHADA member states. Its purpose is:

- to organise pre-insolvency procedures of conciliation, preventative settlement and rehabilitative proceedings of reorganisation and asset liquidation so as to preserve the economic activities and employment of debtor companies, quickly rehabilitate healthy companies and liquidate distressed ones in such a way that the debtors' assets will be maximised for the purpose of increasing receivables to be recovered by creditors and establish a specific order of payment to secured or unsecured collateral securities;
- to define rules applicable to judicial administrators; and
- to set proprietary and professional sanctions as well as criminal proceedings related to the default of the debtor, applicable to the debtor company's top executives and individuals involved in the insolvency proceedings management.

To summarise, insolvency proceedings are under the control of the judge (*juge commissaire*) and the assets of the company are placed under the supervision of a judicial trustee (*syndic*), whose main responsibility is to act in the interests of the creditors as a whole (*masse des créanciers*).

A judgment from the commercial court confirms the start of insolvency proceedings (*jugement d'ouverture*). Such judgment is published in the Companies Registry, or *Registre du commerce et du crédit mobilier* (RCCM), and in the newspapers. A second publication should be made 15 days after the first publication. The two publications must contain a warning to creditors to produce their claims to the *syndic*. Creditors' claims against the company must be declared to the *syndic* within two months following the second publication of the insolvency judgment. This period is extended to three months for creditors residing outside the national territory.

In principle, the declaration must contain the amount of the claim and its due date. The declaration must also specify the type of security attached to the claim (if any). Creditors should also provide the *syndic* (to the extent possible) with any evidence of the existence of their claims. The *syndic* will provide a receipt to the creditors confirming that their declarations have been duly received.

Note that insolvency proceedings suspend and prohibit any individual claim initiated by a creditor. Two situations may occur, as set out below.

- The *juge commissaire* may decide that the activities of the company must be continued (legal redress, or *redressement judiciaire*). In a legal redress, the directors/managers of a company are assisted by the *syndic* in the administration of the company. Any commitment or operation made by the directors/managers without the assistance of the *syndic* is not enforceable towards third parties.
- The *juge commissaire* decides that the activities must be terminated (liquidation). In the event of a liquidation, the directors/managers of a company are removed from their duties. Only the *syndic* is allowed to represent the company during the liquidation.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

See 2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings The Recognition of Proceedings Opened Within the OHADA Area

The Uniform Act on Insolvency is applicable for the recognition of foreign proceedings.

It is understood that judgments opening and closing insolvency proceedings, as well as those that settle disputes arising from such proceedings in a member state (eg, Côte d'Ivoire), are recognised and enforceable in the territory of the other member states.

The Recognition of Decisions Pronounced Outside the OHADA Area

Under the Uniform Act on Insolvency, a foreign representative may apply to the competent domestic court to recognise and oversee proceedings for which they have been appointed as a representative. As such, an application for recognition must be submitted with the following documents:

- a certified copy of the decision to open the foreign collective proceeding and to appoint the foreign representative; and
- a certificate from the foreign court attesting to the opening of the foreign collective proceeding and the appointment of the foreign representative.

The application for recognition will also be accompanied by a statement identifying all foreign collective proceedings concerning the debtor that are known by the foreign representative.

All documents provided in support of an application for recognition will have to be drafted in or translated into French.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

The power of attorney remains valid until full completion of the deregistration formalities. It is advisable that the power of attorney includes a provision in this regard.

2.9.5 Other Effects of a Lessee's Insolvency

In Côte d'Ivoire, the opening of insolvency proceedings against a lessee (ie, legal redress or liquidation of an asset) neither suspends nor terminates a lease agreement. However, the insolvency administrator or the *syndic* may always terminate it. The aircraft would not be deemed part of the lessee's property as it is not owned by the lessee/insolvent.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The main risks for a lender if a borrower providing security becomes insolvent would be the lack of sufficient assets to provide for the payments due to the lender, which, if the lender does not have a guarantee of its own, will be deemed a common creditor to be paid equally in accordance with the debtor's existing assets.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

A moratorium (or similar stay) is not imposed in connection with insolvency proceedings. However, in the case of legal redress, the debtor must propose an arrangement with creditors. This arrangement usually imposes moratoria.

2.9.8 Liquidation of Domestic Lessees

The procedure for legal redress or liquidation of an asset may be open to any debtor (ie, a domestic lessee) in the case of cessation of payment.

Cessation of payments happens when the debtor is unable to meet its due obligations with its available assets (excluding situations where the credit reserves or payment periods enjoyed by the debtor from its creditors enable it to meet its due obligations).

A debtor that is in cessation of payments will make a declaration at the relevant domestic court for the purpose of obtaining the opening of legal redress or

liquidation proceedings, regardless of the nature of the debts.

The cessation of payments and the insolvency proceedings (ie, either a judicial restructuring or a winding-up) can also be requested by the creditors or the court itself. In theory, three scenarios are possible:

- self-declaration; or
- request by the creditors; or
- request by the court.

2.9.9 *Ipsso Facto* Defaults

See 2.9.5 Other Effects of a Lessee's Insolvency.

2.9.10 Impact of Domestic Lessees' Winding-Up

See 2.9.5 Other Effects of a Lessee's Insolvency.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

Côte d'Ivoire adheres to the Convention on International Interests in Mobile Equipment (the "Convention") and the related Protocol on Matters Specific to Aircraft Equipment (the "Protocol"). The authors are not aware, to date, of any requirement to obtain "authorised entry point" codes for registering international interests or how long this might take.

2.10.2 Declarations Made Concerning Conventions

Pursuant to the International Civil Aviation Organization (ICAO), Côte d'Ivoire has made the following declarations:

- a declaration under Article 54 (2) of the Convention; and
- declarations under Articles 39 (1) (a), 40, 52, 53 and 54 (2) of the Convention.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

The authors are not aware of any declaration under Article XIII of the Protocol made by Côte d'Ivoire.

2.10.4 Enforcement of Conventions

The authors are not aware of any experience that the courts in Côte d'Ivoire have had in relation to parties enforcing the Convention or the Protocol.

2.10.5 Other Conventions

Côte d'Ivoire is a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft and the 1933 Rome Convention for the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

The authors are not aware of any restrictions on foreign lenders financing an aircraft locally, or on borrowers using the loan proceeds.

3.1.2 Effect of Exchange Controls or Government Consents

Borrowing is subject to a declaration with the Central Bank of West African States (*La Banque Centrale des Etats de l'Afrique de l'Ouest* or BCEAO) and the Ministry of Finance.

Repatriation of realisation proceeds is not subject to any specific restrictions but should be made via a local bank.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

The issuance of guarantees by an Ivorian entity is permitted but is subject to the prior approval of the Ministry of Finance.

Ivorian laws do not contain a definition/explanation of the legal concept of corporate benefit.

3.1.5 Lenders' Share in Security Over Domestic SPVs

Taking share security over a domestic special-purpose vehicle (SPV) that owns the financed aircraft is possible, but the authors have not come across this kind of situation. Pledges over shares are permitted under the local laws.

3.1.6 Negative Pledges

Parties can agree to include provisions on negative pledges. However, such provisions are not mentioned in the registry of the competent authority when registering the pledge.

3.1.7 Intercreditor Arrangements

The relevant local laws do not provide for restrictions on intercreditor arrangements.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent under a syndicated loan agreement are recognised.

3.1.9 Debt Subordination

The authors are not aware of any debt subordination concept under Ivorian law.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of all or part of an outstanding debt under an English or New York-governed loan is permissible and recognised.

3.1.11 Usury/Interest Limitation Laws

Usury laws in Côte d'Ivoire are governed by Law No 2014-810 and regional UEMOA regulations, such as Decision No CM/UMOA/011/06/2013, which cap effective interest rates on loans. The usury ceiling is 15% per annum for banks and 24% for non-banking financial institutions. The effective interest rates include all loan-related costs (fees, commissions and intermediary charges), excluding taxes.

These limits apply to any loan governed by Ivorian law or enforced locally, including aviation finance transactions involving borrowers or security interests.

For cross-border aircraft financing, foreign law structures may reduce risk, but local enforcement (eg, repossession or registration) could still bring usury limits into consideration.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

The typical form of security and recourse that would be granted in an aviation finance transaction domestically is a mortgage.

3.2.2 Types of Security Not Available

A mortgage in the name of the owner of the aircraft covers the airframe, the engines, the propellers, the on-board equipment and all parts intended to be used on a continuous basis for the service of the aircraft, whether they are part of the aircraft or temporarily separated from it.

3.2.3 Trust/Trustee Concepts

The concept of a security agent is recognised in Côte d'Ivoire.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

There are no legal provisions that would prevent a borrower from assigning its rights to an aircraft or under an aircraft lease (including in relation to insurances) to a security trustee, pursuant to a security assignment or a mortgage.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It is possible to assign the rights and benefits only, without also assigning the attendant obligations of the lessor, under an aircraft lease.

3.2.6 Choice of Foreign Law

The OHADA Uniform Act organising securities (the "Uniform Act on Securities") provides a list of securities that can be taken as a guarantee of loans. The security set forth therein must be governed by the act.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

A security assignment needs to be registered with the RCCM in order to be enforceable against third parties. Security assignments should also be drafted and executed in French.

3.2.8 Domestic Law Security Instruments

See 3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

A security assignment needs to be registered with the RCCM in order to be enforceable against third parties.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests over an aircraft and/or engines should be permitted.

3.2.11 Effect of Changes in the Identity of Secured Parties

Should the identity of the secured parties under a security assignment change, this should not jeopardise the security interests.

3.2.12 “Parallel Debt” Structures

The authors are not aware of any parallel debt structures that are used domestically so that the security trustee has an independent right to the secured debt.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment would not be deemed to be resident, domiciled, carrying on business or subject to any taxes in Côte d'Ivoire as a result of its being a party to, or its enforcement of, the security assignment.

3.2.14 Perfection of Domestic Law Mortgages

Pursuant to the Civil Aviation Code, any mortgage is only enforceable against third parties from the date of its registration on the Aircraft Register.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

It is understood that there is no difference between the form of security (or perfection) taken over an aircraft and that taken over spare engines. Regarding the mortgage, the Civil Aviation Code states that the basis of the mortgage concerns the airframe, the engines, the propellers, the on-board equipment and all parts intended continuously for the service of the aircraft (as long as these belong to the owner of the aircraft), whether they are part of the aircraft or temporarily separated from it.

3.2.16 Form and Perfection of Security Over Bank Accounts

Security over a bank account usually takes the form of a pledge over a bank account. A pledge over a bank account should be registered with the tax authority and the RCCM to be enforceable against third parties.

3.3 Liens

3.3.1 Third-Party Liens

The Civil Aviation Code provides the following list of preferred receivables (privileges) that are paid prior to the mortgagee:

- court fees in connection with the sale of the aircraft;
- remuneration in relation to the rescue of the aircraft;
- costs in relation to the conservation of the aircraft;
- debts resulting from the contract of employment of the members of the crew and other persons employed in the on-board service;
- royalties for the use of devices and aids to navigation; and
- landing as well as parking fees.

The third-party creditor needs to register its receivables with the Aircraft Register to benefit from the privileges; otherwise, the privileges will lapse three months after the event that gave rise to the existence of the privileges.

3.3.2 Timeframe to Discharge a Lien or Mortgage

There is no specific timeframe to discharge a lien or mortgage over an aircraft.

3.3.3 Register of Mortgages and Charges

Mortgages and charges are registered with the Aircraft Register, which is publicly available. The interests of an aircraft mortgagee or security trustee can be noted on the Aircraft Register and the effect of such notation is enforceability against third parties.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

Ivorian law provides a concept of the right of retention. This security allows a creditor that holds a movable asset of its debtor to retain said movable asset until the debtor pays the creditor. However, the law is silent on whether the right of retention arises over an aircraft and/or on a “fleet-wide” basis.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

To verify that an aircraft is free of encumbrances, the potential purchaser should carry out searches on the Aircraft Register of the ANAC.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

There are no relevant differences in enforcing a security assignment as opposed to a loan or a guarantee.

3.4.2 Security Trustees' Enforcement of Their Rights

Pursuant to the Uniform Act on Securities, the instrument appointing the security agent must provide the following information:

- a description of the secured obligation(s), or, if they are in the future, elements enabling their individualisation, such as the identification of the debtors, the place of payment, debt amount and maturity date;
- identification of the secured creditors as of the date of appointment of the security agent;
- identification of the security agent and its registered office;
- the duration of the security agent's mandate and a description of the scope of the security agent's management and disposal powers; and
- the conditions under which the security agent reports its activities to the secured creditors.

Failure to provide the information above will result in the security instrument being null and void.

The Uniform Act on Securities also provides that during the security agent's mandate, when they act for the benefit of the secured creditors, it shall expressly state so, and any registration of a security made during their mandate must state their name and role as a security agent.

In this regard, a notice and an acknowledgement are not sufficient from a purely legal perspective.

3.4.3 Application of Foreign Laws

The domestic courts should uphold:

- a foreign law as the governing law of a finance document; and
- the submission to a foreign jurisdiction.

However, the security document must be governed by Ivorian law and submitted to the Ivorian courts.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

The enforcement of foreign judgments (either a foreign court judgment or an arbitral award) in Côte d'Ivoire is subject to obtaining an exequatur duly issued by the courts of Côte d'Ivoire.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

The Civil Aviation Code is silent on whether a secured party can take physical possession of the aircraft to enforce a security agreement/aircraft mortgage without the lessee's or operator's consent.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

Commercial courts are generally competent to decide enforcement actions under a security agreement/aircraft mortgage.

3.4.7 Summary Judgments or Other Relief

See 2.6.4 Summary Judgment or Other Relief.

3.4.8 Judgments in Foreign Currencies

The law is silent on whether a secured party under a security agreement/aircraft mortgage can obtain a judgment in a foreign currency.

3.4.9 Taxes/Fees Payable

A secured party would not be required to pay taxes or fees in a non-nominal amount in connection with the enforcement of a security agreement/aircraft mortgage.

3.4.10 Other Relevant Issues

There are no other relevant issues that a lender should be aware of in relation to the enforcement of its rights.

4.2 Current Legislative Proposals

The authors are not aware of any current legislative proposals relevant to aviation finance and leasing in Côte d'Ivoire.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are no other material issues and/or any material court judgments that are relevant to the purchase, sale, lease or debt finance of an aircraft registered domestically and/or involving a domestic party in Côte d'Ivoire.

EGYPT

Law and Practice

Contributed by:

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Matouk Bassiouny & Hennawy was founded in 2005 and is a leading full-service business law firm in Egypt and the MENA region, with offices in Algeria, Sudan, and the UAE, and a New York satellite office

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

The mere execution of an aircraft/sale agreement in Egypt does not entail the payment of taxes.

1.1.2 Enforceability Against Domestic Parties

Whether a sale agreement needs to be certified, notarised or legalised to be enforceable depends on the asset subject to sale. Such an agreement is also subject to the governing law and dispute resolution mechanism. Under an aircraft sale agreement regarding an Egyptian registered aircraft, the bill of sale is required to be:

- filed with the Egyptian Civil Aviation Authority (ECAA); or
- deposited with the ECAA after having been notarised and legalised up to the level of the Egyptian Embassy/Consulate in the country of issuance, to reflect the new owner.

As to engines, such requirement does not exist unless the agreement will be presented to an Egyptian court. It is advisable, however, for the bill of sale pertaining to an engine that is installed on an Egyptian registered aircraft/aircraft maintained or operated in Egypt to be notarised and legalised up to the level of the Egyptian Embassy/Consulate in the country of issuance and kept on file (i) until the Cape Town Convention is fully implemented to allow for engine registration and (ii) in the event there is a dispute adjudicated in Egypt that involves said engine. Moreover, if the agreement is subject to a foreign law and adjudicated outside of Egypt then it is not required to be translated. Please see **1.2.1 Transferring Title** and **2.1.1 Non-Permissible Leases**.

Egyptian law allows documents in the English language to be filed as is, without translation into Arabic. This aviation industry-specific law is considered unique. In courts, English documents will need to be translated.

1.2 Transfer of Ownership

1.2.1 Transferring Title

The transfer of title to an aircraft registered in Egypt must be done through (i) the filing of the sale agreement or the bill of sale with the ECAA, or (ii) depositing the sale agreement or the bill of sale with the ECAA after having it notarised and legalised up to the level of the Egyptian Embassy/Consulate in the country of issuance.

As to an engine, in the absence of a regime specifically governing engines as opposed to aircraft, the transfer of title of an engine would follow the conventional procedures prescribed under Egyptian law. There are no perfection procedures prescribed for the sale of an engine. Please see **2.1.1 Non-Permissible Leases**. The same applies to auxiliary power units and other installed parts.

The sale of the ownership interest in an entity owning an aircraft or engine does not have an impact on that aircraft or engine. However, if the owner of an aircraft is changed, that transfer of title must be reflected in the ECAA relevant registries. As to engines, please see **2.1.1 Non-Permissible Leases**.

1.2.2 Sales Governed by English or New York Law

The transfer of title to an aircraft or engine physically delivered in Egypt would be recognised if the bill of sale is governed by English or New York law assuming it is valid under the governing law so long as the foreign legal provision being relied upon does not contravene Egyptian public order or public morality.

Minimum substantive requirements for a sale to take place in Egypt include the transfer of title to the buyer for a consideration and that the description of the sold item is clearly identified.

The above applies to aircraft bills of sale that are registered in Egypt in addition to either the said bill of sale needing to be filed for a filing fee or a notarised and legalised certified true copy needing to be deposited with the ECAA.

1.2.3 Enforceability Against Domestic Parties

Please see response to section **1.2.2 Sales Governed by English or New York Law**, **2.3.4 Registration of**

Leases With the Domestic Aircraft Registry and 2.3.5 Requirements for a Lease to Be Valid and Registrable.

1.2.4 Registration, Filing and/or Consent From Government Entities

A flat fee of EGP35,000 shall be due on filing of any document, including the bill of sale. The bill of sale shall be either filed against the aforementioned filing fee or a notarised and legalised certified true copy should be deposited with the ECAA, which does not require the payment of any fees to the ECAA.

An application should be submitted to the ECAA. The document will be reviewed by the ECAA prior to filing. There is no specific timeframe for this and the process differs depending on whether the aircraft is new or used. Generally, there are no government consents required. However, please see section 2.6.13 **Other Relevant Issues**.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

If the seller does not have a permanent establishment and the sale is not considered as part of its commercial activities, then no taxes should arise as a result of the sale. Otherwise, if the seller is based in Egypt, there could be tax implications.

The ECAA filing fees are EGP35,000.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

There are no specific restrictions on types of operating/wet/finance leases or leases concerning only engines or parts. To date, any transactions related to engines or spare parts that are treated separately from an aircraft and are not filed with the ECAA. The Egyptian Registry held by the ECAA is aircraft based and the ECAA acts as the competent notarial office for all transactions related to aircraft.

2.1.2 Application of Foreign Laws

A lease involving either a domestic party or an asset situated in Egypt may be governed by a foreign law

provided that such law does not contravene or violate Egyptian public order.

2.1.3 Restrictions Concerning Payments in US Dollars

There are no material restrictions that are imposed on domestic lessees making rent payments in US dollars.

In practice and due to a shortage of foreign currency, payment in foreign currency or the transfer thereof by domestic lessees may prove to be somewhat difficult and time consuming.

2.1.4 Exchange Controls

There are no exchange controls that could prevent rent payments under a lease or repatriation of proceeds. However, Egyptian banks require evidence for such payment, such as a contractual arrangement or an invoice.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

To file a lease, there is governmental registration flat fee of EGP35,000 although certain government operators are exempt from these fees. Physical presence is required through valid powers of attorney to file the lease before the ECAA.

Since 2016, the ECAA has only required the amount of EGP35,000 for the entire package of documentation (excluding mortgages and bills of sale) if the registration of such documents is made on the same day.

2.1.6 Licensing/Qualification of Lessors

A lessor does not have to be licensed or qualified to do business in Egypt with a domestic lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

There are certain mandatory terms that are required to be in a lease such as the term of the lease, rental value, aircraft registration marks and manufacturer's serial number, the type of aircraft, the number of engines and their manufacturer's serial number, the date of manufacture and the name and address of the manufacturer, together with subleasing, insurance, applicable law and jurisdiction clauses.

There are also certain mandatory provisions that are not commonly seen in English or New York law leases, such as that the subleasing provisions must include the name of the sublessee and the duration of such sublease.

2.2.2 Tax and Withholding Gross-Up Provisions

Tax and other withholding gross-up provisions are permissible and enforceable. Grossed-up payments may be considered, however, as taxable income by the Egyptian Tax Authority.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease can cover parts that are installed or replaced on an aircraft or engine after its execution.

For an aircraft lease that is filed with the ECAA, any significant changes must be reflected in an addendum/amendment/annex that is to be filed with the ECAA for perfection purposes.

For an engine, please see **2.1.1 Non-Permissible Leases**.

2.2.4 Risk of Title Annexation

There is a risk of title annexation of aircraft engines installed on an airframe since the Egyptian Register is aircraft based.

To mitigate such risk, an agreement could be entered into between the relevant parties recognising the right, title, and interest of the owner/lessor of an engine. Accordingly, such agreement may grant some protection by confirming that the engine is not part of the aircraft. Such an agreement could also include a bill of sale evidencing engine title both of which shall be notarised and legalised as original/certified true copies of same up to the level of the Egyptian Embassy/Consulate at the country of issuance.

2.2.5 Recognition of the Concepts of Trust/Trustee

The concept of trust is not recognised in Egypt. Accordingly, an owner trustee is treated as prima facie owner pursuant to the bill of sale.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The interests of the owner or a lessor of an aircraft are noted in the Aircraft Register held by the ECAA.

All documents related to aircraft are registered with the ECAA.

It is necessary and desirable to ensure the priority, validity and enforceability of the obligations of the Egyptian lessee under a relevant document – such as a lease, a conventional deregistration power of attorney (DPOA), a security assignment and an irrevocable de-registration and export request authorisation (IDERA) – for that document to be notarised, filed, registered and recorded with the ECAA.

2.3.2 Registration If the Owner Is Different From the Operator

The certificate of registration of an aircraft specifies the name of the aircraft owner as an owner and the Egyptian lessee/operator as the holder/possessor of the aircraft.

2.3.3 Aircraft/Engine-Specific Registers

There is a specific register for leases concerning aircraft only, please see section **2.3.4 Registration of Leases With the Domestic Aircraft Registry**. There is no engine register. To date, any transactions related to engines or spare parts, which are treated separately from an aircraft, have not been filed with the ECAA due to legislative restrictions.

It is envisaged that the relevant Egyptian laws may be amended to accommodate transactions, such as sale, lease or mortgages over engines to be filed with the ECAA.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

Aircraft lease agreements must be registered with the ECAA. The ECAA reviews the leases in question before filing to provide its verbal sign-off. Also, the respective aircraft is inspected by the ECAA for compliance with applicable Egyptian laws and regulations. Moreover, the filing process involves the physical presence of the relevant ECAA officers to validate the lease filing pro-

cess, along with the representatives of the signatory parties acting under notarised and legalised powers of attorney.

Registration Formalities

In general, any document that will be submitted to an Egyptian authority or court of law for purposes of filing, registering, or enforcing same, must be translated into Arabic. Such translation may be done by the translation department of the Ministry of Justice or by the translation department in the Ministry of Foreign Affairs. In particular, any documents that will be submitted for notarisation, filing, registration or enforcement before the ECAA must be either in English or Arabic, but if they are in any other language, then they must be translated into English or Arabic.

A lease agreement need not be in a specific form. However, in a sub-leasing structure, the head lease must expressly permit for the sub-leasing and must have a term not less than the sub-lease agreement.

In general, where documents are required to be notarised for use, if notarised by a notary outside of Egypt, the document then needs to be legalised up to the level of the Egyptian Consulate/Embassy in the relevant country, which shall be followed by the authentication thereof by an Egyptian Foreign Ministry office in Cairo. This does not apply to leases since they must be filed with the ECAA.

Egypt has not ratified the Hague Convention of 1961 Abolishing the Requirement of Legalisation for Public Documents.

Egyptian law and regulations further provide an alternative to the above. Parties to a certain transaction could, by virtue of powers of attorney, appoint attorneys to represent them before the ECAA. Said powers of attorney will require notarisation and legalisation up to the level of the Egyptian Consulate in the country of issuance to be followed by authentication by an Egyptian Foreign Ministry office in Cairo.

Prerequisites to Execution/Delivery of a Lease

As a matter of practice, the operator/lessee submits the following:

- an application reserving the registration marks of an aircraft for a fee of EGP10,000; and
- an application for the registration of the aircraft in the Aircraft Register for a fee of EGP25,000.

The lessee or the owner representative may submit the applications for the registration of the relevant lease and any accompanying documents. Government fees depend on what the requirements are, as they may vary.

As a prerequisite to filing any aircraft lease agreement (but not an engine lease agreement), the lessee or the owner must provide a notarised and legalised certified true copy (or original) bill of sale of the aircraft up to the level of the Egyptian Consulate/Embassy in the country of issuance or have the bill of sale filed with the ECAA.

2.3.5 Requirements for a Lease to Be Valid and Registrable

See 2.3.4 Registration of Leases With the Domestic Aircraft Registry. In practice, the ECAA sometimes requests an Arabic translation, even of English documents, for guidance.

2.3.6 Taxes/Duties Payable for Registering a Lease

See 2.1.5 Taxes/Duties Payable for Physical Execution of a Lease.

2.3.7 Registration of Aircraft in Alternative Countries

Aircraft that are habitually based in Egypt are typically registered. Anything to the contrary is dealt with on a case-by-case basis and subject to the approval of the Ministry of Civil Aviation.

2.3.8 Requirements for Documents Concerning Registration

See 2.3.4 Registration of Leases With the Domestic Aircraft Registry and 2.3.5 Requirements for a Lease to Be Valid and Registrable.

The ECAA reviews any document before having it filed with the ECAA.

For any document to be admissible, it must be either (i) filed with the ECAA or (ii) deposited with the ECAA

after having been notarised and legalised up to the level of the Egyptian Embassy/Consulate in the country of issuance. However, the mere depositing of a document does not grant perfection, rights, priority, or ranking of a document. Therefore, it is recommended to file documents with the ECAA.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A foreign lessor will not be required to pay income or capital gains or other taxes upon leasing an aircraft or engine to a domestic lessee. The Egyptian lessee, however, is required by law to withhold certain amounts as a withholding tax, which shall be subject to Egyptian tax law and/or any applicable double taxation treaty.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor should not be deemed to be resident, domiciled, carrying on business or subject to any taxes as a result of its being a party to, or its enforcement of a lease.

2.4.3 Engine Maintenance and Operations

There are no liabilities in respect of aircraft or engine maintenance and operations that are imposed on a foreign lessor under a lease. However, if the Egyptian lessee does not make the necessary amounts due to the maintenance provider for example, the said maintenance provider may put and exercise a maintenance lien. In a repossession and deregistration event, the foreign lessor may be put in a situation whereby it has to make such payments to enable it to repossess and deregister the aircraft.

2.4.4 Damage or Loss Caused by an Asset

A foreign aircraft or engine owner or lessor under a lease, or a financier financing the asset on lease, shall not be liable under the doctrine of strict liability because of damage or a loss caused by the asset.

2.4.5 Attachment by Creditors

Creditors of a domestic lessee could attach an aircraft leased to that lessee but owned by a different entity. The owner in this case would need to provide evidence to court of its ownership of the aircraft. A bill of sale that is notarised and legalised up to the level

of the Egyptian Embassy/Consulate in the country of issuance would be sufficient proof to exclude such aircraft from being part of the lessee's assets.

2.4.6 Priority of Third Parties' Rights

Under Egyptian law, the rights of a lessor will rank equally with other creditors of the same ranking but will have priority in all respects over the claims of all unsecured creditors of the lessee if the lease agreement is registered with the ECAA except for certain sovereign and preferred debts. What constitutes sovereign or preferred debts includes the amounts due to the public treasury (eg, judicial expenses), which are followed by taxes, other rights (such as secured debts), maintenance liens and employees' rights for the past six months, in that order.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

It is mandatory under Egyptian law that all insurances over property be placed with domestic insurance companies.

2.5.2 Mandatory Insurance Coverage Requirements

There is no minimum requirement for insurance. However, industry norms are followed.

2.5.3 Placement of Insurance Outside of Jurisdiction

Reinsurances can be placed outside of Egypt with foreign reinsurers.

2.5.4 Enforceability of "Cut-Through" Clauses

Cut-through clauses are enforceable.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurances and reinsurances are permitted under Egyptian law. It is also advisable to perfect said assignments as per Egyptian laws and regulations for the benefit of the beneficiaries thereunder.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

There are no restrictions for a lessor to terminate an aircraft lease. Such terms are subject to the terms of

the lease itself, so if the lease restricts such termination, then such restrictions shall be complied with.

There are no restrictions on the lessor re-exporting the aircraft. However, an export certificate of airworthiness needs to be obtained from the ECAA.

There are no restrictions on the lessor selling the aircraft following termination, but it is important to note that the aircraft in this case shall be deregistered from Egyptian Register as a lease termination is considered a reason for deregistration under Egyptian law.

The aircraft does not need to be physically located in Egypt at the time of any of the above actions taking place.

2.6.2 Lessor Taking Possession of the Aircraft

Self-help remedies are not valid.

A lessor can use the filed DPOA to repossess, deregister and export an aircraft. A lessor can use a Cape Town Convention IDERA to repossess, deregister and export an aircraft.

If a DPOA or IDERA is not used or its use was unsuccessful, then a court order will be needed – especially if the lessee is contesting the repossession of the aircraft.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts that are competent to decide on aviation disputes. Nevertheless, if there is a dispute with a government authority or body, it shall be adjudicated before the State Council.

2.6.4 Summary Judgment or Other Relief

A lessor can obtain a summary judgment or other injunctive relief. However, in practice, injunctions are rarely issued and are often challenged by the other party. There are no special requirements or conditions. If such a court order is rendered, it is usually for a short period of time.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Domestic courts would uphold:

- foreign law as the governing law of an aircraft lease;
- the submission to a foreign jurisdiction; and
- a waiver of immunity by the parties of such a lease, provided that if the party issuing the waiver of immunity is a government authority or body, consent for such waiver of immunity shall be provided.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Enforcing Foreign Judgments in Egypt

To enforce a foreign judgment a party must obtain an exequatur. To apply for an exequatur the normal procedures for initiating a lawsuit must be satisfied and the following conditions must be met:

- Reciprocity – the country in which the judgment was obtained (the “foreign court”) enforces judgments obtained in the courts of Egypt. If such reciprocal treatment is not offered by the foreign court, the Egyptian courts will re-examine the merits of the case in the same manner as that adopted by the foreign court.
- Competence of the foreign court rendering the judgment – the courts of Egypt are not exclusively competent to hear the dispute which constituted the object of the foreign judgment and the foreign court is shown to have been competent to hear the dispute in accordance with the laws applicable to it.
- Due process – the parties to the dispute were duly notified and properly represented in the proceedings (ie, not in contravention of the rules of natural justice). Thus, Egyptian courts will not recognise an English default judgment and a full trial must have been conducted.
- Final judgment – the judgment of the foreign court is final, non-appealable and conclusive in accordance with the relevant law.
- Conflict – the judgment of the foreign court does not conflict with a prior Egyptian judgment on the same subject matter and is not contrary to public order.

The authors are not aware of any treaty between Egypt and the United Kingdom or the United States or of an Egyptian court decision which was enforced by the courts of the United Kingdom or the United States,

which in either such case would satisfy the criteria set forth in the first point in the list above. In practice, reciprocity is very difficult to prove and, consequently, the enforceability of a foreign judgment issued by jurisdictions that do not have treaties with Egypt, is doubtful.

The New York Convention

Egypt is a signatory to the New York Convention of 1958 On the Recognition and Enforcement of Foreign Arbitral Awards. Moreover, pursuant to the Egyptian Arbitration Law, international arbitration awards are enforceable and therefore any arbitral awards rendered would be enforced subject to paragraph 5 (d) of the Egyptian Arbitration Law. The following documents must accompany the application for enforcement:

the original award or a signed copy;

- a copy of the arbitral agreement;
- an Arabic translation of the award, authenticated by the competent authority if the award was not issued in Arabic;
- a copy of the minutes evidencing the deposit of the award with the competent court (usually the Cairo High Court of Appeals); and
- a copy of the notification of the award to the party against whom the award has been made.

However, Egyptian law provides for an annulment procedure of arbitral awards in specific exceptional cases.

2.6.7 Judgments in Foreign Currencies

Egyptian courts may, at their discretion, render judgments for a monetary amount in a currency other than Egyptian pounds if they consider that it is the currency which most fairly expresses the plaintiff's loss.

2.6.8 Limitations on Lessors' Actions Following Termination

There are no limitations on the lessor to recover default interest. However, under Egyptian law, the interest due requiring the payment of default interest cannot exceed 7%, as such transaction is considered to be a commercial one. Any agreement to the contrary may be deemed void.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

A lessor under an aircraft lease is not required to pay taxes for the enforcement of a lease. However, there are other associated fees that could be incurred such as legal fees, experts' fees or related deregistration fees. This is in addition to other minimal court charges that are assessed depending on the claim.

2.6.10 Mandatory Notice Periods

There are no mandatory notice periods; accordingly, such notice periods are subject to the lease agreement.

2.6.11 Lessees' Entitlement to Claim Immunity

Lessees are not entitled to sovereign immunity. However, adding clauses that waive immunity is common practice.

Assuming that the lessee is not a governmental authority and pursuant to the provisions of the Civil Code and the Commercial Code, the lessee would not be entitled to any right of immunity on the grounds of sovereign immunity.

2.6.12 Enforcement of Foreign Arbitral Decisions

Please see 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards.

2.6.13 Other Relevant Issues

For enforcement, arbitration is recommended as the dispute resolution mechanism. As to foreign courts, it is advisable only to use courts in jurisdictions where there is a judicial cooperation treaty with Egypt that satisfies the reciprocity requirement for enforcement of foreign judgments.

Arbitration If the Lessee Is Owned by the Egyptian Government or an Organ Thereof

Pursuant to a Prime Ministerial Decree, it is not permissible for any Egyptian administrative bodies, including ministries, public bodies, government agencies, and their affiliated bodies; or companies affiliated with the state, or to which the state contributes in any way, to take the following measures without first presenting the matter to the Commission (the High Commission for International Arbitration and Disputes):

- entering into contracts with foreign investors or signing any contracts that include a mandate to resort to international arbitration, or making any modification in these contracts, or taking any action that involves terminating those contracts; or
- taking any remedy or procedure in relation to arbitration.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Egypt recognises the concepts of both contractual assignment and novation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Both English and New York law assignments and novations would be held valid. It is recommended that perfection of such rights under Egyptian law is to be taken into consideration.

2.7.3 Enforceability of Lease Assignments/Novations

There is no need for an aircraft and/or engine lease assignment and novation to be translated unless presented to an Egyptian court. It is recommended that perfection of such rights under Egyptian law is to be taken into consideration and reflected in such documents. Please see **2.3.4 Registration of Leases With the Domestic Aircraft Registry**.

An engine lease novation or assignment cannot be filed as previously explained.

2.7.4 Filing/Registration of Lease Assignments/Novations

An aircraft lease assignment and novation shall be registered or filed with the ECAA.

The formalities for such action follow the same formalities reflected in the answers to section **2.3.4 Registration of Leases With the Domestic Aircraft Registry**.

There are no governmental consents but an application to file the same must be filed with the ECAA.

The ECAA must review said documents before filing.

Engines' related documents do not get filed with the ECAA so there is no obligation to file them anywhere.

Nevertheless, it is envisaged that the relevant Egyptian laws may be amended to accommodate transactions, such as filing of sales, leases or mortgages over engines with the ECAA upon the full implementation of the Cape Town Convention.

2.7.5 Taxes/Duties Payable on Assignment/Novation

Please see **2.1.5 Taxes/Duties Payable for Physical Execution of a Lease** and **2.3.6 Taxes/Duties Payable for Registering a Lease** as the same process applies.

2.7.6 Recognition of Transfer of Ownership Interests

There is no impact on the filing process before the ECAA if the ownership interest of an entity owning an aircraft is transferred with the legal title to the asset remaining with that entity.

If the aircraft ownership is transferred to another owner, then the ECAA will require evidence of transfer of title through a notarised and legalised bill of sale up to the level of the Egyptian Consulate/Embassy in the country of issuance or filing of the bill of sale with the ECAA. It will also be obligatory to file a lease amendment or novation to reflect such change. Accordingly, the aircraft registration certificate will need to be changed.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

A beneficiary, such as a security trustee or owner can deregister an aircraft under a DPOA or IDERA if such DPOA or IDERA is registered with the ECAA.

An application is submitted to the ECAA with a copy of the filed DPOA or is presented to the ECAA along with a copy of the notice of default and the grounding notice as evidence for lease termination. The ECAA reviews same and contacts all relevant parties prior to the issuance of a deregistration certificate.

In the event of a mutually consented termination, an early termination agreement needs to be filed with the ECAA. The same process identified in **2.1.5 Taxes/**

Duties Payable for Physical Execution of a Lease and 2.3.6 Taxes/Duties Payable for Registering a Lease must be followed.

2.8.2 Lessee's/Operator's Consent

An aircraft owner, mortgagee or lessor may apply for the deregistration of the aircraft without the lessee's consent.

In practice, the ECAA informs the lessee with the deregistration request and requests comments from the lessee or operator prior to taking any deregistration actions. Customarily, the ECAA contacts Egyptian state-owned companies and authorities in the aviation industry to verify if the lessee has any outstanding dues. If the lessee is a solvent and solid one with no outstanding debts and has various aircraft in its fleet, the process is simple and deregistration may follow promptly. If not, then the ECAA may require the payment of all outstanding dues to state-owned companies and the process may be extended without which deregistration may not be granted.

2.8.3 Required Documentation

An original copy of the filed DPOA or IDERA is presented to the ECAA along with a copy of the notice of default and the grounding notice as evidence for lease termination. Any additional documentation evidencing the lessee or operator default should be submitted as well.

In addition, the ECAA will require from the aircraft owner, mortgagee or lessor evidence of representation by lessor representative in the form of a power of attorney to be presented.

2.8.4 Duration of Deregistration Process

If the lessee does not challenge the deregistration or if the reasons for deregistration are clear and free from doubts, deregistration may be effected within three weeks. Recently, the deregistration process became lengthier. Otherwise, the ECAA may request submission of a final judgment, settlement or evidence of default (such as default notices or grounding notices) to deregister the aircraft. It should be noted that, as a practical matter, deregistration usually exceeds the three-week period and submission of settlements/judgments/evidence of default may be required.

2.8.5 Aviation Authority's Assurances

It is highly unlikely that the ECAA would provide advance assurances to an aircraft owner, mortgagee or lessor as to the prompt deregistration of the aircraft. However, such assurances have been granted on rare occasions as per the Minister of Civil Aviation's approval to certain governmentally owned operators to conclude export credit agency-backed financing.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

The government costs associated with deregistration are minimal.

2.8.7 Deregistration Power of Attorney

A DPOA must be filed with the ECAA to protect the rights of the beneficiary thereof.

The formalities are the same as reflected for leases, assignments and novations as reflected in **2.1.5 Taxes/Duties Payable for Physical Execution of a Lease and 2.3.6 Taxes/Duties Payable for Registering a Lease**.

A DPOA does not need to be translated.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

Please see **2.8.3 Required Documentation**.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A DPOA does not have to be governed by Egyptian laws.

2.8.10 Revocation of a Deregistration Power of Attorney

If the DPOA was irrevocable, it would be enforceable against the lessee. In principle, the irrevocable power of attorney is not subject to revocation solely by the lessee. However, in the case of a dispute, the lessee may seek a court judgment revoking the same but such a ruling is difficult to obtain.

2.8.11 Owner's/Lessor's Consent

An aircraft owner, mortgagee or lessor may export the aircraft without the lessee's consent through a DPOA

or IDERA that includes a proxy and authorisation to export the aircraft.

Self-remedy measures are not permissible.

There are no additional actions that can be done by the lessor, owner or mortgagor at the time of lease negotiations to ensure that the aircraft is exported promptly except for the obtaining of a DPOA and IDERA (please see **2.10 Cape Town Convention and Others**).

Enforcement of a mortgage must comply with Egyptian law, which obliges the enforcer to sell the aircraft through a public auction administered through the court.

The aircraft does not need to be located in Egypt at the time of deregistration.

2.8.12 Aircraft Export Permits/Licences

Aircraft export permits/licences are issued.

An export permit/licence request/application has a limited validity period. If the aircraft is not exported within such period, a new licence must be obtained. It is also important to note that if there are any outstanding charges against the aircraft to Egyptian state-owned companies in the aviation industry, the aircraft may not be issued an export licence.

An export permit/licence cannot be granted in advance.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

The costs with respect to the export of an aircraft are minimal. The fees of agents on the ground may need to be considered.

2.8.14 Practical Issues Related to Deregistration of Aircraft

Deregistration of aircraft is not a smooth process, especially if the lessee is not cooperative. Moreover, if the solvency status of the lessee is in question, further hurdles may be put in place since deregistration may be stopped or at least delayed for state creditors to collect their outstanding debt as a prerequisite to

deregistration. A recent hurdle experienced was that the ECAA does not allow for the grounding of an aircraft despite the ECAA honouring the filed IDERA or DPOA. So, the aircraft would continue operation up until the deregistration is imminent.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

The bankruptcy regime has been largely consistent since 1999, following the arrival of the Commercial Code. It recognises bankruptcies, insolvencies and liquidations.

In 2018, however, the bankruptcy regime introduced a new section on restructuring and reorganisation. This section provides for restructuring through putting in place a plan to reorganise a trader's financial and administrative business, the means to recover from a state of financial and administrative distress, a scheme to pay off its debts and the proposed sources of funding. This can be done in several ways, including the re-evaluation of assets, debt restructuring, including state debt, capital increase, increased internal cash flow, and reduction of external cash flow.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

The term "trader" is defined in the Commercial Code as "whoever exercises by way of profession in its name or for its account a commercial activity". Such definition also includes all companies formed under the companies' laws regardless of the purpose of their establishment.

A trader shall be considered in a state of bankruptcy, as declared through a court order, if it stops paying its commercial debts following distress in its financial condition (ie, becomes unable to pay). The law does not specify what could be deemed as instability of a company leading to financial distress. Therefore, the court reviews all the circumstances surrounding the debtor prior to issuing its judgment, taking into consideration the debtor's future resources, the debtor's responsibility in causing such distress, and the creditors' interests.

The rules of bankruptcy are that the debt must be current, undisputable, and due. Also, there should be evidence that the debtor is unable to pay such debt due to its distressed financial position.

The law further stipulates that a company is considered in a state of bankruptcy if it stops paying its debts due to its financial distress. There is a specific time-period with respect to establishing whether a company should file for bankruptcy, which shall be within 15 days from the date it stopped paying its debts as a result of disruption in its financial position.

The trader is declared bankrupt at its own request, the request of one of its creditors or that of the Public Prosecutor.

Where a company's loss reaches 50% of its issued capital, an extraordinary general assembly of the company shall convene to look into the dissolution or continuation of the company.

A lessee may be liquidated by (i) its dissolution, (ii) the lapse of its term under its by-laws, and (iii) the completion of its company objective. The liquidator is either appointed by the company's shareholders or by virtue of a court order.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

The co-ordination, recognition or relief in connection with overseas proceedings is done on a case-by-case basis.

There are certain arrangements or treaties on a bilateral, regional or international level whereby the relevant Egyptian authorities, such as the Ministry of Justice, the Public Prosecutor and the Central Bank of Egypt co-ordinate with their foreign counterparts.

As to enforcement of court judgments and arbitral awards please see **2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards**.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

In general, the courts will recognise a DPOA provided that it is duly registered and notarised.

There is a suspect period to be determined by the court, but in any event, it may not be traced back to more than two years from the date the bankruptcy judgment is issued. In that regard, the law provides that any transaction conducted during the suspect period under a bankruptcy scenario may be nullified if it is evidenced that it was conducted against the interests of the creditors and that the other party was aware of the financial status of the bankrupt entity acting in bad faith.

Under a liquidation scenario, it is presumed that the appointed liquidator should adhere to all obligations assumed before the liquidation process up until liquidation is concluded.

2.9.5 Other Effects of a Lessee's Insolvency

If the lease calls for termination of the contract in the event of bankruptcy, then such a provision would be respected by Egyptian courts and the bankruptcy trustee would be bound thereby. However, if the contract is silent on termination for bankruptcy, then pursuant to Egyptian law, the bankruptcy judgment does not require the termination of a binding contract to which the bankrupt is a party, unless such contract is based on personal considerations. The law further provides that if the bankruptcy trustee does not perform or does not continue the performance of the contract, the other party to the contract may request the termination of the contract, and that any decision taken by the bankruptcy trustee with regards to the contract must first be presented to the bankruptcy judge for their approval.

The lessor may be delayed or prevented from repossessing the aircraft.

The aircraft may be deemed part of the lessee's property. In this case the aircraft owner would be entitled by law to repossess the aircraft without the need to have a mortgage thereon if the Lessor can prove ownership thereof. Accordingly, the aircraft owner would need to provide evidence to the court and bankruptcy trustee evidencing its ownership of the aircraft. A bill of sale that is notarised and legalised up to the level of the Egyptian Embassy/Consulate in the country of issuance may be sufficient evidence for the judge to exclude it from the bankruptcy process. The les-

sor would also need to request the court/bankruptcy trustee to set aside the aircraft from any proceedings and allow its repossession. The bankruptcy law further stipulates that the bankruptcy trustee, after consulting the bankruptcy controller and obtaining a permission from the bankruptcy judge, may return the aircraft to its owner. If such repossession has been rejected, the party (owner) requesting it may bring a dispute before the court.

The bankruptcy trustee may impose the rights of any other creditors in priority to the lessor.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

If the security provided is not perfected, then the security is at risk as other secured or unsecured creditors may also be able to claim.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

There is a moratorium imposed in connection with bankruptcy proceedings, which excludes certain matters such as criminal claims. Under Egyptian law, there is no fixed moratorium period. However, said moratorium commences on the date on which the bankruptcy judgment is rendered and continues until the decision to conclude the bankruptcy is rendered.

2.9.8 Liquidation of Domestic Lessees

An Egyptian company may be voluntarily or involuntarily liquidated or made bankrupt.

2.9.9 Ipso Facto Defaults

A provision in an agreement creating a default for specific reasons – such as insolvency or reorganisation and restructuring – and thereby permitting the lessor to terminate the leasing of the asset, is permissible.

2.9.10 Impact of Domestic Lessees' Winding-Up

If the lessee is wound up by a court or administration proceeding, there is a suspect period as stipulated in 2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney. In that regard, the law provides that any transaction conducted during the suspect period under a bankruptcy scenario may be nullified if it is evidenced that it is conducted against the interests of the creditors and that the other party

was aware of the financial status of the bankrupt entity. Accordingly, for the lease rentals, the lease security deposit and maintenance reserves may be ordered by the court to the liquidator or bankruptcy control if such payments would be deemed void by the bankruptcy judge if said judge is of the view that such transactions were made to the detriment of third parties.

As to the aircraft, please see 2.9.5 Other Effects of a Lessee's Insolvency (second and third paragraphs).

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

Egypt ratified the Cape Town Convention and the Aircraft Protocol, and both came into force on 1 April 2015. However, neither instrument has yet been fully implemented by Egyptian authorities. Accordingly, the ECAA is not yet involved in the registration of international interests and this process is left to the lessor and lessee.

2.10.2 Declarations Made Concerning Conventions

Originally, Egypt made declarations only under Articles 39 (1)(a), 40 and 54 (2) of the Cape Town Convention with no declarations relevant to the Aircraft Protocol.

Recently, Egypt has made new declarations whereby Egypt has notified UNIDROIT on 7 November 2019 of subsequent declarations under Articles 39 (1)(a), 53 and 54 (2) of the Cape Town Convention and Articles XIX, XXX(1), XXX(2) and XXX(3) of the Aircraft Protocol. These subsequent declarations came into effect on 1 June 2020.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Egypt has made the relevant declaration to apply IDERA.

Historically, the ECAA began approving the registration of IDERA provided the inclusion of the following qualification:

“We acknowledge that the provisions in the Cape Town Convention and the Protocol to the Convention on International Interest in Mobile Equipment on Matters specific to Aircraft Equipment relating to recognition of Irrevocable Deregistration and Export Request

Authorisations have not yet entered into effect in the Arab Republic of Egypt. The Egyptian Civil Aviation Authority shall recognise this instrument once the relevant provisions are effective in the Arab Republic of Egypt”.

Currently, the ECAA approves filing the IDERA without the above qualification and there is precedence evidencing the deregistration, repossession and export of an aircraft using IDERA.

2.10.4 Enforcement of Conventions

There was no court precedent in relation to parties enforcing the Convention or the Protocol until 2022. It is unclear yet how Egypt will enforce them or when.

In 2022, various cases were filed before the State Council regarding repossession. While all matters were settled out of court, it was apparent that such courts have no experience or knowledge of the Cape Town Convention and Protocol.

2.10.5 Other Conventions

Egypt is a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft.

Egypt is a party to the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

There are no restrictions on foreign lenders financing an aircraft locally or on borrowers using the loan proceeds.

3.1.2 Effect of Exchange Controls or Government Consents

Please see response to section 2.1.4 Exchange Controls.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders. There may be some restrictions regarding real estate security provided to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Guarantees are acceptable forms of collateral. This includes clauses governing the explicit waiver of certain rights by the guarantors and dispute resolution mechanisms.

There is no legal regime that governs the perfection of guarantees.

3.1.5 Lenders' Share in Security Over Domestic SPVs

Special purpose vehicles are incorporated in foreign jurisdictions. It is common for lenders to have share security over such vehicles. A share pledge is recognised and can be perfected and the method of perfection depends on the type of entity in question.

3.1.6 Negative Pledges

A negative pledge is recognised.

3.1.7 Intercreditor Arrangements

There are no restrictions or requirements imposed on intercreditor arrangements.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent under a syndicated loan is recognisable.

3.1.9 Debt Subordination

Debt subordinations are permissible and recognised. However, there is no legal regime that governs same except for the priority ranking of secured assets, which also depends on the type of security and whether such security can be perfected.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of all or part of an outstanding debt under an English or New York law-governed loan is permissible and recognised. Perfection of such transfer or assignment may be required for Egyptian law purposes.

3.1.11 Usury/Interest Limitation Laws

There are certain interest limitations:

- Interest cannot exceed 7% if such transaction is considered a commercial transaction – any agreement to the contrary may be deemed void.
- Under an aircraft mortgage, the interest due on the loan secured by a mortgage cannot exceed 12% – any agreement to the contrary may be deemed void.
- Under banking transactions such as loans, the interest is calculated as per market norms.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

Mortgages, account pledges, share pledges, assignments of rights, assignments of insurances and reinsurances, guarantees, bank cheques, IDERA, DPOA, and letters of credit are the typical forms of security in an aviation finance transaction.

3.2.2 Types of Security Not Available

There are no specific types of security that cannot be taken over an aircraft so long as they do not contravene Egyptian public order.

3.2.3 Trust/Trustee Concepts

The concept of the trust is not recognised in Egypt.

The role of a security trustee acting on behalf of the lenders as a security agent in a transaction is, however, recognisable.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

A borrower can assign to a security trustee, pursuant to a security assignment/assignment of insurances or under an aircraft lease or mortgage, its rights in the aircraft.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It is possible to assign the rights and benefits only without also assigning the attendant obligations of the lessor under an aircraft lease.

3.2.6 Choice of Foreign Law

A security assignment or a guarantee can be governed by English or New York law.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

If there are any assignments of rights, the registration of such assignments must be registered for them to be valid vis-à-vis third parties. As per Egyptian law, for an assignment of rights to be effective against third parties, the assignment must have an “established date”, which can take place either before an Egyptian notary (the ECAA for aircraft-related transactions) or through service of a formal notice through a court bailiff. Failure to do so may risk losing the priority of the assignment.

3.2.8 Domestic Law Security Instruments

If an English or New York law-governed security assignment were to be taken in respect of an aircraft registered domestically, other security instruments available to a financier include mortgages, share pledges, mortgages over other assets, guarantees, DPOA, IDERA, or account pledges. For filing fees, please see 2.1.5 Taxes/Duties Payable for Physical Execution of a Lease and 2.3.6 Taxes/Duties Payable for Registering a Lease.

To date there are no Cape Town filings made through the ECAA.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

An English or New York law-governed security assignment or a domestic law security instrument may be registered domestically.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests over an aircraft and/or engines is recognised. However, a transfer of security over an engine would not be registrable with the ECAA.

3.2.11 Effect of Changes in the Identity of Secured Parties

If the identity of the secured parties under a security assignment changes after its execution, then such changes may need to be reflected in the underlying security documents.

If the security trustee or agent changes, such change shall be reflected and filed, if such security was filed.

3.2.12 “Parallel Debt” Structures

A parallel debt concept has not been tested. Accordingly, it is not possible to say how an Egyptian court or tax authorities would respond to it.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment will not be deemed to be resident, domiciled, or carrying on business as result of enforcing such assignment.

3.2.14 Perfection of Domestic Law Mortgages

A domestic law mortgage over an aircraft is perfected through filing it with the ECAA. Enforcement thereon shall follow Egyptian law.

To perfect a mortgage over an engine under Egyptian law, the engine must be either in the possession of a trustee or a creditor. Since the possession by the creditor cannot be perceived and is impractical, the engine mortgage agreement would include a trustee, having the trustee as a party thereto. Usually, the trustee is an affiliate to the lessee to simplify the possession process.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

There are various differences between the perfection process taken over an aircraft when compared to engines.

To date, the regime governing security over engines is not under the auspices of the ECAA (unlike aircraft) and so security over engines is treated differently – eg, a mortgage over an engine requires the appointment of a trustee or the engine being kept with the creditor. The charges to perfect a mortgage over an engine are minimal.

For an aircraft mortgage to be filed with the ECAA involves a charge of EGP135,000.

3.2.16 Form and Perfection of Security Over Bank Accounts

Security over bank accounts is recognisable.

For perfection, the bank account pledge over an account held locally is filed with the Egyptian Collateral Registry.

3.3 Liens

3.3.1 Third-Party Liens

A third party can register a lien over an aircraft or engine. Nevertheless, this must be done through a court order. In practice, such third party detains the aircraft or engine without a court order as leverage for payment or settlement of the outstanding dues.

A lien should cover only the work done on the asset in question.

A fleet lien may not be exercised.

3.3.2 Timeframe to Discharge a Lien or Mortgage

There is no mandatory timeframe to discharge a lien or mortgage. Nevertheless, an Egyptian registered aircraft mortgage needs to be renewed every ten years.

3.3.3 Register of Mortgages and Charges

There is no specific mortgage register. Mortgages are reflected in what is called the “Aircraft Register” and the mortgage is filed in what is called the “Documents Register”.

Registration of a mortgage gives a priority and will ensure continuous perfection. A registered mortgage affords the mortgagee preference over all subsequent registered secured debts, regardless of the dates on which such debts were created, as well as all unsecured debts.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

Statutory rights of detention or non-consensual preferential liens arise over an aircraft but not on a fleet-wide basis.

3.3.5 Verification of an Aircraft’s Freedom From Encumbrances

A potential purchaser of an aircraft will not be able to verify that an aircraft is free of encumbrances as the Aircraft Register is not publicly accessible. The only method of verification is through an application by the owner, lessor, lessee or mortgagee.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

There are certain relevant differences in enforcing a security as opposed to a loan or a guarantee.

The security assignment can be perfected through filing with the ECAA while neither loans nor guarantees are perfected with any.

The priority under a security assignment can be maintained while under a guarantee or loan there are no priorities since they are not filed anywhere unless the loan is secured with collateral over certain assets that are perfected.

If enforcement is pursued under a loan or a guarantee, it will only require the payment of certain amounts that have to be rendered after obtaining a court order or an arbitral award, while under a security assignment, the debtor should be paying the necessary amounts to the assignee (unless the assignor revokes its instructions and the debtor abides by such new instructions).

3.4.2 Security Trustees' Enforcement of Their Rights

If, under a security assignment, security is granted to a security trustee by a lessor in respect of its rights under an aircraft lease, the security trustee can enforce its rights under the security assignment pursuant only to a notice and acknowledgement, executed by that lessor and the relevant lessee respectively, provided that the assignment is perfected pursuant to the relevant Egyptian laws through having an established date.

3.4.3 Application of Foreign Laws

See 2.1.2 Application of Foreign Laws, 2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments, 2.7.2 Assignment/Novation of Leases Under Foreign Laws and 3.2.6 Choice of Foreign Law.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

See 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

See 2.6.2 Lessor Taking Possession of the Aircraft, 2.8.2 Lessee's/Operator's Consent, and 2.8.11 Owner's/Lessor's Consent.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

See 2.6.3 Specific Courts for Aviation Disputes.

3.4.7 Summary Judgments or Other Relief

See 2.6.4 Summary Judgment or Other Relief. There are no bonds, security or cash deposits that would be required.

3.4.8 Judgments in Foreign Currencies

See 2.6.7 Judgments in Foreign Currencies.

3.4.9 Taxes/Fees Payable

See 2.6.9 Lessor's Requirement to Pay Taxes/Fees.

3.4.10 Other Relevant Issues

The judicial process needs to be more dynamic to accommodate and cope with the fast changes in the industry to encourage more lenders and lessors to invest in Egypt.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are no relevant material issues or material court judgments relevant to the sale, lease or finance of aircraft or engines not already covered in this chapter.

4.2 Current Legislative Proposals

Egypt is expected to witness new developments to accommodate the Egyptian ratification of the Cape Town Convention and the Aircraft Protocol, along with their relevant declarations.

The Cape Town Convention and Aircraft Protocol are under serious tests in Egypt that may shape their future enforceability.

FRANCE

Law and Practice

Contributed by:

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HENAFF D'ESTREES



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HENAFF D'ESTREES is an independent law firm founded in 1989 in Paris by managing partner Yves Hénaff d'Estrées. The practice deals with all aspects of aviation law and aviation and aircraft finance, including related corporate, commercial, tax and bank-

ruptcy law issues, and aircraft repossession by lessors. In addition, the firm handles complex litigation and arbitration involving cross-border transactions, and has extensive experience in business, corporate, tax and criminal law.

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Hénaff d'Estrées

1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

The execution of an aircraft or engine sale agreement does not in itself create an obligation to pay a tax in France.

As a general rule, value-added tax at the rate of 20% is invoiced to the buyer and is due from the seller of an aircraft physically located in France at the time of transfer of title. In some cases, however, an exemption may apply, such as the exemption to the benefit of companies whose services to the destination of France or departing from France represent at least 80% of the services they operate.

1.1.2 Enforceability Against Domestic Parties

The aircraft sale agreement does not need to be translated, certified, notarised or legalised to be enforceable against a domestic party.

Translations are requested by the French courts.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Transfer of ownership of French-registered aircraft must be made in writing and registered with the aircraft register. The registration is proof of a valid title and includes all installed parts, such as an APU.

There is no separate register for aircraft engines.

The sale of ownership interest in an entity that owns an aircraft or engine will not effectively be recognised as a sale of such aircraft or engine itself, while the entity remains the owner.

1.2.2 Sales Governed by English or New York Law

The transfer of title to an aircraft or engine physically delivered in France will be recognised if the bill of sale is governed by either English or New York law.

The bill of sale must, however, include a complete description of the aircraft by which it can be identified, with the category, name of the manufacturer, type and

serial number, and it must clearly indicate full transfer of ownership in order to be recognised in France.

1.2.3 Enforceability Against Domestic Parties

An aircraft bill of sale does not need to be translated, certified, notarised or legalised in order to be registered and enforceable against a domestic party.

1.2.4 Registration, Filing and/or Consent From Government Entities

The bill of sale of a French-registered aircraft needs to be filed with the aircraft register, together with all the documents required to register the new aircraft owner.

The formalities for filing the transfer of ownership are fairly simple and may take only a few hours in urgent cases. The following applies:

- the new owner/natural person must have French nationality or nationality of another European Union country or of a country member of the European Economic Area; or
- the new owner/legal person must be constituted in accordance with the legislation of a member state of the European Union or of a country member of the European Economic Area, and must have its statutory office or main establishment in France or in another European Union country, or in a country member of the European Economic Area.

In addition:

- an aircraft may also be listed on the French register when it is operated by a carrier holding a French operating licence;
- special exemptions may also be obtained upon request to the ministry in charge of civil aviation;
- proof of payment of taxes, customs duties and an import licence is required when an aircraft is imported from outside the European Union; and
- aircraft already registered on a foreign register require an official certificate of deregistration.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

When title to an aircraft or engine is transferred while the aircraft or engine is located in France, even in transit, payment of a 20% French value-added tax

may be due, subject to several exemptions, including an exemption for companies where at least 80% of their flights are outside French territory. A list of French exempted companies is published each year by the tax administration. The sale of an ownership interest between foreign persons in a foreign entity that owns an aircraft or engine, including where title to such aircraft or engine is transferred while it is located in France, or in transit, does not in itself create any French tax obligation regarding the aircraft or the engine owned by the entity.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

All types of operating/wet/finance leases or leases concerning only engines or parts are generally permissible and recognised.

2.1.2 Application of Foreign Laws

Foreign law may apply to an asset situated in France where there is a lease between a foreign party and a domestic party.

2.1.3 Restrictions Concerning Payments in US Dollars

There are no material restrictions imposed on domestic lessees making rent payments to foreign lessors in US dollars.

2.1.4 Exchange Controls

There are no specific exchange controls that could prevent rent payments under a lease, or any repatriation of realisation proceeds, if such lease is enforced by a foreign lessor.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

There are no taxes/duties payable for physically executing a lease in France with regard to a domestic party, or as a consequence of an original or copy of a lease being brought to France either physically or electronically, if the aircraft is not located in France at the time when the lease is executed.

2.1.6 Licensing/Qualification of Lessors

A lessor does not need to be licensed or otherwise qualified in France to do business with a domestic lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

No mandatory terms are required in a lease (or ancillary documents thereto), governed by either English or New York law, that would not typically already be included.

2.2.2 Tax and Withholding Gross-Up Provisions

Tax and other withholding gross-up provisions are permissible and enforceable.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease can cover parts that are installed or replaced on an aircraft or engine after execution of the lease, if this is clearly provided for in the lease agreement.

2.2.4 Risk of Title Annexation

The lease should be carefully drafted in order to minimise the risk of title annexation in respect of aircraft engines installed on an airframe, and it is highly advisable to affix fireproof plates on the engine mentioning the name of the engine's owner and the name of the lessee.

2.2.5 Recognition of the Concepts of Trust/Trustee

In France, the concept of a trust and the role of an owner-trustee are recognised under a lease.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The French aircraft register is an owner's register. The legal owner, not the beneficial owner, is registered as the aircraft owner on the register. Only dry leases may be registered.

When a lease is registered, the aircraft's registered owner will no longer be jointly liable with the lessee for damages caused by the leased aircraft. The lessee alone will be liable, unless it can be proved that the owner has been negligent.

2.3.2 Registration If the Owner Is Different From the Operator

An aircraft may not be registered in France in the name of the aircraft operator if the operator is not also the owner, but it can be registered in the name of the owner if the owner is not also the operator.

2.3.3 Aircraft/Engine-Specific Registers

Leases concerning aircraft are registered in the aircraft register. Engines may not be registered.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

To protect a lessor's interests it is advisable, but not mandatory, to register a lease with the aircraft register in order to avoid the risk of joint liability with the lessee in the case of damage caused by the aircraft.

The formalities are fairly simple and the owner must file, *inter alia*:

- an original executed copy of the lease or of the novation and the certificate of acceptance; and
- corporate documents such as its articles of association, a certificate of incorporation, and a list of the authorised representatives, with sample signatures.

There are generally no government applications or consents required as a prerequisite to the execution and delivery of an aircraft and/or engine lease for an aircraft registered in France.

2.3.5 Requirements for a Lease to Be Valid and Registrable

A lease does not need to be in a specific form or translated, served, certified, notarised or legalised to be valid and registrable in the French aircraft register.

2.3.6 Taxes/Duties Payable for Registering a Lease

The fees payable to the aircraft registration bureau for registering a lease are nominal.

2.3.7 Registration of Aircraft in Alternative Countries

It sometimes happens that aircraft habitually based in France and operated by foreign companies are registered in other countries, such as Ireland (eg, Ryanair).

2.3.8 Requirements for Documents Concerning Registration

The French aircraft register requires that the bill of sale and the lease be filed in an original executed copy before it will accept and process the registration of an aircraft.

Normally, translations from English are not required by the French register.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A foreign lessor will not be required to pay any income tax or capital gains upon leasing an aircraft or engine to a French lessee, but a foreign lessor established outside the European Union may be held jointly liable with the lessee for the payment of value-added tax. The lease agreement may provide that the lessee is under obligation to pay a lease rental net of any French taxes, including any withholding tax. Gross-up provisions are recognised.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor cannot be deemed to be resident or domiciled in France as a result of its being a party to, or its enforcement of, said lease.

2.4.3 Engine Maintenance and Operations

Liabilities in respect of aircraft or engine maintenance and operations may not generally be imposed on a foreign lessor under a lease as a result of its being a party to such lease.

2.4.4 Damage or Loss Caused by an Asset

A foreign aircraft lessor may be held jointly and strictly liable with the lessee under a lease as a result of damage or loss caused by the aircraft, unless the lease has been registered with the French aircraft register.

2.4.5 Attachment by Creditors

Creditors of a domestic lessee are not generally authorised to attach an aircraft leased to it but owned by a different entity. Eurocontrol may however be authorised by the French courts to attach a leased aircraft for unpaid route charges for debts of the operator.

2.4.6 Priority of Third Parties' Rights

Some third parties' rights may take priority over a lessor's rights under an aircraft lease whether or not such lease/lessor is registered in the national aircraft register. For example, creditors may take advantage of retention rights for repair and maintenance costs, warehousing and depository costs, preservation costs and judicial costs.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

It is not a mandatory requirement that either all or part of the insurance be placed in France.

2.5.2 Mandatory Insurance Coverage Requirements

Commercial air carriers must be insured for damages caused to passengers, luggage, freight and third parties, with a mandatory minimum. The mandatory insurance coverage requirements imposed by European regulations for damages caused to passengers are 250,000 SDR (about USD350,000 at the current rate of 1 SDR to USD1.40), and 300 million SDR (about USD420 million) for aircraft weighing between 50,000 and 200,000 kgs, in respect of liability for third parties.

2.5.3 Placement of Insurance Outside of Jurisdiction

Reinsurances of up to 100% coverage may be placed outside of France with foreign insurance companies based in a member country of the European Economic Area. Outside the European Union, in 2015, the European Commission granted ten-year equivalent conditions for reinsurance companies based in Australia, Bermuda, Brazil, Canada, Mexico and the United States.

Switzerland has been granted a limited equivalence.

A "covered agreement" between the European Union and the United States was signed on 22 September 2017, detailing the financial and prudential obligations imposed on insurance and reinsurance companies.

2.5.4 Enforceability of "Cut-Through" Clauses

"Cut-through" clauses in insurance/reinsurance documents are valid and enforceable.

2.5.5 Assignment of Insurance/Reinsurance

Assignment of insurance/reinsurance is permitted.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

There are no substantial restrictions on a lessor's ability to:

- terminate an aircraft lease;
- re-export the aircraft; and/or
- sell the aircraft following such termination.

The aircraft need not be physically located in France at the time of any such action(s).

2.6.2 Lessor Taking Possession of the Aircraft

A lessor cannot take physical possession of an aircraft without a court order in a case where the lessee is opposing the lessor's possession. A court order is necessary in this case.

2.6.3 Specific Courts for Aviation Disputes

In France, there are no specific courts to decide aviation disputes, but commercial courts have competent subject matter jurisdiction to adjudicate disputes between commercial undertakings, whether French or foreign.

2.6.4 Summary Judgment or Other Relief

A lessor may obtain a summary judgment, equitable or other injunctive relief pending final resolution of judicial proceedings to enforce an aircraft lease. A French court would issue a summary judgment on the condition that the obligation of the debtor is not seriously questionable, or in the case of urgent matters.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

French courts will generally uphold:

- a foreign law as the governing law of an aircraft lease between a French and a foreign party;
- the submission to a foreign jurisdiction;
- a contractual waiver of jurisdiction immunity by the parties of such lease; and
- a contractual waiver of immunity of execution which expressly describes the assets subject to the waiver of such immunity.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

French courts will recognise and enforce a final judgment of a foreign court or an arbitral award without re-examining the merits of the case, once they have verified that due process has been followed, and that no fraud is involved.

2.6.7 Judgments in Foreign Currencies

A lessor under an aircraft lease may obtain a judgment in a foreign currency.

2.6.8 Limitations on Lessors' Actions Following Termination

French courts may in certain cases qualify default interest or additional rent as a penalty clause following termination of a lease for default, including where the lessee fails to return the aircraft. French courts may reduce penalty clauses that are considered manifestly excessive, in consideration of the contractual obligations of the parties and the facts of the case.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

A lessor under an aircraft lease is not required to pay taxes or fees in a significant (ie, non-nominal) amount in connection with the recognition and enforcement of such lease in France.

2.6.10 Mandatory Notice Periods

French courts may in certain commercial cases declare a contractual clause void where this provides a too-short notice period for terminating an aircraft lease (regardless of its terms), and where this relates to an aircraft operated domestically or leased to a domestic operator.

2.6.11 Lessees' Entitlement to Claim Immunity

A lessee (for example, a government entity) may contractually waive its sovereign immunity from suit (immunity of jurisdiction). The lessee's waiver of its immunity must be expressed and must describe those of its assets which may be seized in execution of a judicial or arbitral decision.

2.6.12 Enforcement of Foreign Arbitral Decisions

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") has been ratified and is in force in France.

French courts will recognise and enforce a foreign arbitral decision, in the absence of fraud and providing the principles of due process have been observed.

2.6.13 Other Relevant Issues

In a case where a lessee defaults, it is advisable for the lessor to terminate the lease as soon as contractually possible and also notify the airport where the aircraft is parked of the termination of the lease, in order to limit the risk of being compelled to pay certain of the lessee's debts, such as French airport charges.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

The concepts of contractual assignment and novation are recognised by French jurisdictions.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Assuming that a lessor transferring its rights under an aircraft lease is assigning or novating its rights under such lease to a new lessor, pursuant to a New York or English law-governed assignment and assumption agreement or novation agreement or deed, the agreement or deed will be regarded as valid by a domestic court if the lessee is notified thereof, and the lessee's consent will not be required. When a lessor is assigning or novating its obligations under the lease, the lessee's consent is required, unless the lease provides otherwise. There are no mandatory terms that a French jurisdiction requires to be included in such agreement/deed.

2.7.3 Enforceability of Lease Assignments/Novations

It is not necessary for an aircraft and/or engine lease assignment and assumption/novation to be translated, certified, notarised or legalised to be enforceable against a domestic party. Translations of such agreements or deeds are generally required only when litigating before French courts.

2.7.4 Filing/Registration of Lease Assignments/Novations Formalities

When title to an aircraft has been transferred and after the new aircraft owner/lessor has been duly registered

in the French aircraft register, an aircraft lease assignment and assumption/novation, executed with the lessee's consent, must be registered and filed by the new owner/lessor in the French aircraft register. The consequences for failing to do so are that the new owner/lessor may be held jointly liable with the operating lessee for any damages caused by the leased aircraft.

Requirements

The new registered owner/lessor must file an original executed copy of the relevant agreements, together with copies of all other required documents, with the French aircraft register. The registration process may take between a few hours and a few days.

No consent from any government entity is required, and no government applications or consents are generally needed, as a prerequisite to the execution and delivery of an aircraft lease assignment and assumption/novation in relation to an aircraft registered domestically.

2.7.5 Taxes/Duties Payable on Assignment/Novation

As a general rule, French value-added tax is due any time aircraft ownership is transferred while an aircraft is located on French territory, subject to specific exemptions. Subject to this, no taxes/duties are payable in respect of the execution of an aircraft lease assignment and assumption/novation agreement, or as a consequence of an original or copy thereof being brought into France, either physically or electronically.

2.7.6 Recognition of Transfer of Ownership Interests

When the ownership interest of an entity, or the beneficial interest in a trust, owning an aircraft is transferred (with the legal title, to the asset remaining with that entity), no filing with the French aircraft register is required, because the entity will remain the registered legal owner of the aircraft.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

Only the owner of a registered aircraft may deregister an aircraft in France.

2.8.2 Lessee's/Operator's Consent

The aircraft owner may apply for the deregistration of the aircraft without the lessee's consent once the registered lease has been terminated and once any registered mortgage has been released.

2.8.3 Required Documentation

The following documents and information must be filed by the owner in order to deregister an aircraft:

- a signed request on a standard form;
- the original copy of the aircraft registration certificate;
- requests for deregistration of the registered mortgages, registered rights and leases, if any, together with the relevant documentation;
- the original copy of the bill of sale executed by the registered owner in favour of the new owner, if the request is made by a new aircraft owner who is not registered;
- an indication of the reason for the deregistration request – if the aircraft is to be registered in another country, the name of that country must be supplied so that the French aircraft register may notify the other country of the aircraft's deregistration;
- evidence of authentication of the signatures of the representatives of the owner and evidence of their corporate powers; and
- an original copy of the power of attorney when the request is signed by the owner's counsel.

2.8.4 Duration of Deregistration Process

The aircraft owner may apply for the deregistration of the aircraft without the lessee's consent once the registered lease has been terminated and once any registered mortgage has been released.

2.8.5 Aviation Authority's Assurances

The French aircraft register will not provide advance written assurances to an aircraft owner, mortgagee or lessor as to the prompt deregistration of the aircraft until all the required documentation is filed with the executed request.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

The fees charged by the aircraft register in respect of the deregistration of an aircraft are nominal.

2.8.7 Deregistration Power of Attorney

The Irrevocable Deregistration Authorisation of the Cape Town Convention is not recognised in France because France is not a party to the Convention.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

This is not applicable in France.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

This is not applicable in France.

2.8.10 Revocation of a Deregistration Power of Attorney

This is not applicable in France.

2.8.11 Owner's/Lessor's Consent

Once the lease is terminated and the aircraft has been repossessed, the aircraft owner may export the aircraft without the lessee's consent. The lease generally provides that the lessee will assist the lessor, if and when needed, to facilitate the deregistration and export of the aircraft. The aircraft does not need to be located in France at the time of deregistration.

It is not possible for a mortgagee to deregister and export a registered aircraft. Deregistration of an aircraft from the French aircraft register may be made only by the aircraft owner after any registered mortgage will have been released by the mortgagee.

2.8.12 Aircraft Export Permits/Licences

Export Certificates of Airworthiness for used aircraft are issued in France upon written request to the civil aviation authority in accordance with the applicable European safety regulations. In practice, the process may take from a few days to several weeks.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

No significant costs/fees/taxes are charged in respect of the export of an aircraft.

2.8.14 Practical Issues Related to Deregistration of Aircraft

Proof of removal of registration marks from an aircraft need not be provided for deregistration to be granted.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

Insolvency and other “bankruptcy” proceedings are governed by the French Commercial Code, Book VI, Articles L.610-1 to L.696-1.

The main relevant statutes codified in the Commercial Code are:

- Law No 85-98 of 25 January 1985 (as modified) and its implementing regulations, which created the new French procedures of judicial reorganisation and judicial liquidation; and
- Law No 2005-845 of 26 July 2005 (as modified) and its implementing regulations, which created the procedures of conciliation and safeguard.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

A lessee which is facing financial difficulties has the mandatory obligation to “file for bankruptcy” (*déposer le bilan*) before the commercial court of its registered office when it is no longer able to pay its creditors for a period of 45 days.

The lessee may file:

- for judicial reorganisation (*redressement judiciaire*) in case there is some hope of finding financial and economic solutions with the assistance of the court to continue its activity; or
- for judicial liquidation (*liquidation judiciaire*) in case the economic situation of the lessee's company is so catastrophic that there is no hope of recovery.

The judicial reorganisation or liquidation procedures may also be initiated upon the request of any unpaid creditor or by the public prosecutor.

In France, the commercial courts may also help a debtor to solve its financial difficulties by organising, upon the debtor's request, a procedure of conciliation (conciliation) for trying to reach an out-of-court amicable agreement with the creditors, or a procedure of safeguard (*sauvegarde*) for the purpose of set-

ting up a safeguard plan of a maximum of ten years which provides for financial and economic conditions and obligations (for example, rescheduling of debts, transfer of assets) for the continuation of the business activity of the debtor.

In the procedures of judicial reorganisation, judicial liquidation and safeguard, the court judgment opening the procedure has several main effects such as, in particular, prohibition of any payment for pre-judgment debts and suspension of individual proceedings.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

European Regulation No 2015/848 of 20 May 2015 relating to insolvency proceedings provides for uniform rules of competent jurisdiction, organisation, judicial co-operation for administering the insolvency proceedings, and recognition of insolvency judgments among the European member states.

Insolvency and bankruptcy judgments by foreign courts located in states not members of the European Union may be enforced in France in accordance with the ordinary procedure of *exequatur*.

The French court will check the indirect competent jurisdiction of the foreign court, the conformity of the foreign procedure with the international public order (essentially compliance with due process), and the absence of fraud.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

Irrevocable deregistration and export request authorisation (IDERA) is not recognised in France because France is not a party to the Cape Town Convention.

2.9.5 Other Effects of a Lessee's Insolvency

When the lessee of an aircraft, who is in possession of that aircraft, is put into liquidation or administration or a similar process, the following generally applies:

- the bankruptcy trustee may elect not to continue the performance of the lease;
- the lessor may be prevented or delayed from repossessing the aircraft on termination of the

lease if the lease was not terminated before the date of the bankruptcy judgment;

- the aircraft will not be deemed to be part of the lessee's property; and
- the liquidator/administrator may not impose the rights of any other creditors in priority to those of the lessor, if the return of the aircraft has been duly requested by the lessor.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The main risk for a lender if a borrower, guarantor or entity providing security becomes insolvent is that the debts which were outstanding before the bankruptcy judgment will be left unpaid. However, any new loan made to a borrower in bankruptcy that is deemed necessary for the continuation of its activities after the date of the bankruptcy judgment will benefit from preferential rights of payment.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

An observation period may be ordered by the bankruptcy court for six months, renewable for another six-month period, during which no payment or judicial action for payment, or for termination for default of payment, may be made for debts due before the bankruptcy judgment or those due after the judgment, which are not necessary to continue the debtor's activity. All procedures of execution on the debtor's assets are also either suspended or prohibited.

2.9.8 Liquidation of Domestic Lessees

In France, an insolvent lessee can be liquidated or placed in administration or receivership either at its own request or at the request of a creditor or the public prosecutor.

2.9.9 Ipso Facto Defaults

In repossessing a French registered aircraft after the bankruptcy judgment of a lessee, the following applies:

- if the lease was registered by the lessor with the register of security rights in movables (*registre des sûretés mobilières*) before the judgment, the lessor is informed by the trustee that it has to declare its claim, and the lessor may request that the trustee

return the aircraft. The trustee may elect to continue the lease without paying the lease rentals due before the judgment; or

- if the lease has not been registered by the lessor, the lessor of a French registered aircraft does not have to first revendicate (*revendiquer*) its rights, ie, request the court to recognise its ownership rights on the French registered aircraft (French Supreme court decision of 27 March 2024).

2.9.10 Impact of Domestic Lessees' Winding-Up

If a domestic lessee is liquidated by a French court judgment, the following generally occurs:

- the aircraft may be repossessed if the liquidator trustee elects not to continue the performance of the lease, or if the lease is terminated for default of payment of rentals due after the judgment;
- the lessor must declare its debt to the liquidator for rentals that become due after the judgment and will be paid if there are sufficient funds after paying the other preferential debts;
- the lease security deposit must be returned to the lessor when the lease is terminated; and
- the maintenance reserves paid to the lessor (whether classified as reserves or supplemental rent) will remain with the lessor in accordance with the terms of the lease.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The Convention on International Interests in Mobile Equipment (the "Convention") and the related Protocol on Matters Specific to Aircraft Equipment (the "Protocol") are not in force in France.

2.10.2 Declarations Made Concerning Conventions

This is not applicable in France.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

This is not applicable in France.

2.10.4 Enforcement of Conventions

This is not applicable in France.

2.10.5 Other Conventions

The 1948 Geneva Convention on the International Recognition of Rights in Aircraft is applicable in France. The 1933 Rome Convention for the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft is not applicable in France.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

Regular lending activities in France are limited by the banking monopoly rule to credit institutions that are licensed to do business in France as credit institutions, or to credit institutions duly established and authorised in the European Union or in the European Economic Area. However, the issuance of bonds stays outside the banking monopoly.

There are no usury rate prohibitions for loans made to French corporations. The borrowers may use the loan proceeds in accordance with their own corporate purpose and benefit. A withholding tax of 75% will not generally be due, except in certain circumstances where a borrower makes reimbursement payments to an entity based in a state or territory which is considered as non-cooperative regarding transparency and exchange of information in fiscal matters.

3.1.2 Effect of Exchange Controls or Government Consents

Except where French public order or strategic sectors are concerned, no exchange controls or government consents are material to any financing or repatriation of realisation proceeds under a loan, guarantee or security document.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders when this is not contrary to the corporate interests and benefit of the borrower, and if made in accordance with French corporate and monetary law.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Downstream, upstream and/or cross-stream guarantees are permitted in favour of lenders when they are

made in accordance with the corporate interest and benefit of the guarantors, and in accordance with corporate and monetary law. There are no registration requirements.

3.1.5 Lenders' Share in Security Over Domestic SPVs

It may be advisable for a lender to take share security over a domestic special purpose vehicle that owns the financed aircraft. Pledges of shares are possible under French law.

3.1.6 Negative Pledges

Negative pledges are recognised by the French courts when made in accordance with the corporate interest and benefit of the pledgor.

3.1.7 Intercreditor Arrangements

There are no specific or substantial material restrictions or requirements imposed on intercreditor arrangements.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent (such as a liability agent) under a syndicated loan is recognised in France.

3.1.9 Debt Subordination

All valid methods of debt subordination are permissible and recognised.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment by a creditor of all or part of an outstanding debt under an English or New York law-governed loan is permissible and recognised once the debtor has been notified of this.

3.1.11 Usury/Interest Limitation Laws

There are no limitation laws on interest regarding loans to business legal persons, except for overdraft debts.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

The typical form of security over an aircraft in France is the aircraft mortgage (*hypothèque*) which is governed by French law and, once it has been registered with the aircraft register, permits the creditor to seize and

proceed to a judicial sale of the aircraft in the case of default of payment.

3.2.2 Types of Security Not Available

No pledge (gage) may be made or registered for a French-registered aircraft.

3.2.3 Trust/Trustee Concepts

Foreign trusts and the role of a security trustee are recognised by the French courts, and the Supreme Court has declared that parallel debt structures are not contrary to French international public order.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

A borrower may assign its rights to an aircraft or under an aircraft lease (including in relation to insurance) to a foreign security trustee, pursuant to a security assignment or mortgage.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It is possible to assign the rights and benefits only, without also assigning the attendant obligations of the lessor, under an aircraft lease.

3.2.6 Choice of Foreign Law

A security assignment or guarantee can generally be governed by English or New York law, as long as it does not contradict French public order rules, in order to be fully enforceable in France.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

Subject to the terms of the agreement, the transfer of a French aircraft mortgage by a mortgagee must be notified to the mortgagor, and the transfer of an engine pledge must be notified to the former pledgor. The new mortgagee must be formally registered in the aircraft register in order to perfect the transfer of the mortgage and bind third parties. In all cases, a translation of a mortgage assignment will need to be produced in court.

The transfer of an engine pledge is perfected by registering the transfer with the national register of pledges, after notice has been given to the previous pledgor.

The transfer of a registered aircraft mortgage is perfected when the mortgagor is notified and the new mortgage document is filed with the French aircraft bureau.

3.2.8 Domestic Law Security Instruments

If an English or New York law-governed security assignment is taken in respect of an aircraft registered domestically, it may be advisable for the financier to take out and register a mortgage on the aircraft in addition to this.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

An English or New York law-governed security assignment may not be registered in France on the aircraft register.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests over an aircraft and/or engines is generally recognised under French law.

3.2.11 Effect of Changes in the Identity of Secured Parties

If the identity of the secured parties under a security assignment changes after its execution, the security interests may be jeopardised when the required statutory notices, filings and registrations are not duly made.

3.2.12 “Parallel Debt” Structures

The jurisprudence of the Supreme Court permits parallel debt structures to be used in France so that the security trustee has an independent right to the secured debt.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment will generally not be deemed to be resident, domiciled or carrying on business in France. In certain cases, it may however be subject to French taxes as a result of its being a party to, or its enforcement of, such security assignment, for example, when the secured party becomes the legal owner of the aircraft.

3.2.14 Perfection of Domestic Law Mortgages

A domestic law mortgage over an aircraft is perfected by its registration with the aircraft register.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

Pledges over spare engines may be taken and registered with the national register of securities on movables (*Registre national des sûretés mobilières*) and are perfected once registered.

3.2.16 Form and Perfection of Security Over Bank Accounts

A pledge is typically used to take security over a bank account (such as a lease receivables account) and is simply perfected by notifying the bank holding the debtor's account about the pledge.

3.3 Liens

3.3.1 Third-Party Liens

Third-party liens for debts such as unpaid airport fees, navigation charges and repairers' costs are not registrable.

Repairers' Costs

In the case of repairers' costs and similar liens, a statutory right of retention permits the repairer to retain physical possession of an aircraft or an aircraft engine as long as the contractual debt to the repairer is not paid in full. The right to retention may not be used to cover the value of work done on other assets which are no longer in the physical possession of the repairer. No court order is necessary for the right to retention.

Airport Fees

Where airport charges are due, the airport authority may ask the court to be authorised to attach any of the aircraft operated or owned by the debtor.

Navigation Charges

In the case of default of payment of route charges, the civil aviation ministry may ask the court to be authorised to attach any of the aircraft operated or owned by the debtor. The civil aviation ministry may also ground the entire fleet operated by the debtor until full payment has been made. This administrative decision can be taken without a court order.

3.3.2 Timeframe to Discharge a Lien or Mortgage

The discharge of a lien or mortgage over an aircraft may be made in less than a day.

3.3.3 Register of Mortgages and Charges

Mortgages are registered for ten years in the aircraft register. There is no registry for airport or navigation charges. The mortgage registration gives the mortgagee a preferential right of payment out of a judicial sale of the debtor's aircraft.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

There are no statutory rights or non-consensual preferential liens on a fleet-wide basis.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser of an aircraft should search the aircraft register to verify that an aircraft is free of mortgages.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

There are no significant differences in enforcing a security assignment as opposed to a loan or guarantee. In all cases, any difficulty encountered in enforcing the agreement should be referred to the court of competent jurisdiction.

3.4.2 Security Trustees' Enforcement of Their Rights

If under a security assignment, security is granted to a security trustee by a lessor in respect of its rights under an aircraft lease, that security trustee may enforce its rights under the security assignment pursuant only to a notice and acknowledgement executed by that lessor and the relevant lessee, respectively, in connection with such security assignment.

3.4.3 Application of Foreign Laws

Generally, the French courts will uphold a foreign law as the governing law of a finance or security document, and submission to a foreign jurisdiction.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

French courts will recognise and enforce the final judgment of a foreign court or an arbitral award, without re-examining the merits of the case.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

A secured party cannot take physical possession of an aircraft to enforce a security agreement/aircraft mortgage without the lessee's or operator's consent.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

No French courts have special competent jurisdiction to decide enforcement actions under a security agreement/aircraft mortgage. In commercial aviation matters, the cases are always adjudicated by commercial courts.

3.4.7 Summary Judgments or Other Relief

A secured party may obtain a summary judgment, equitable or other injunctive relief pending final resolution of judicial proceedings to enforce a security agreement. It is not generally necessary to give a guarantee or post a bond in connection with such summary judgment.

3.4.8 Judgments in Foreign Currencies

It is possible for a secured party under a security agreement to obtain a judgment in a foreign currency.

3.4.9 Taxes/Fees Payable

A secured party will generally not be required to pay taxes or fees in a non-nominal amount in connection with the enforcement of a security agreement.

3.4.10 Other Relevant Issues

In order to assess its risk, it is important for a lender to have a clear view of the economic and financial health of a debtor. If the debtor is a French company, a complete search of the corporate and financial data of that company must be made by the lender's local counsel on the French register of commerce and companies.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

It should be noted that the highest administrative court, the State Council (*Conseil d'Etat*), passed judgment in July 2003 that a retention by the Paris airports authority of several aircraft operated by a lessee had been made in violation of the right of property of the aircraft owner/lessor. The leases had been terminated for default of payment. According to the State Council's judgment, Article 1 of the European Convention on Human Rights guarantees the respect of any person's right of property, which is considered a "fundamental freedom", and the airport was ordered to pay damages to the company.

4.2 Current Legislative Proposals

There are no current legislative proposals in relation to the matters covered by this chapter.

GERMANY



Law and Practice

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FRESHFIELDS

1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

The execution of an aircraft or engine sale agreement itself (including the sale of an ownership interest in an entity owning an aircraft or engine) does not generally result in taxation, irrespective of the location of the aircraft or engine and the seller's domicile. Generally, the transfer of ownership upon completion of the sale agreement is relevant for income tax and VAT purposes.

1.1.2 Enforceability Against Domestic Parties

It is not necessary for an aircraft sale agreement to be translated, certified, notarised or apostilled/legalised to be enforceable against a domestic party. However, if legal proceedings are instigated before a German court, upon its request, foreign language documents must be translated into German to be admissible in evidence in such proceedings. More recently, certain German courts have introduced individual tribunals where proceedings can be held in English.

1.2 Transfer of Ownership

1.2.1 Transferring Title

To transfer title, the owner must (i) declare that it transfers its title to the aircraft or engine and (ii) surrender possession thereof; the acquirer must declare that it accepts such title and must establish possession over the aircraft or engine. Transfer of title to an aircraft pursuant to German property law:

- includes any essential part (*wesentlicher Bestandteil*) – ie, any part that cannot be removed without the destruction of either the aircraft or the relevant part;
- extends to any non-essential component (*nicht wesentlicher Bestandteil*) which, in the parties' understanding, forms part of the aircraft; and
- comprises by way of rebuttable presumption any accessory (*Zubehör*).

Non-essential components and accessories include engines, auxiliary power units or removable parts. There is no conclusive view on whether an engine constitutes a non-essential component or an accessory.

Under German law, the sale of the ownership interest in an entity that owns an aircraft or engine is not recognised as a sale of such aircraft or engine itself.

1.2.2 Sales Governed by English or New York Law

Under German conflict of law rules, the transfer of title to an aircraft registered in a national aircraft register of a member state of the International Civil Aviation Organization (ICAO) will generally be governed by the law of the jurisdiction of the registration of such aircraft (Article 45, paragraph 1 of the German Introductory Code to the Civil Code (EGBGB)), unless there is – in exceptional cases – a substantially closer nexus to the laws of another jurisdiction, or if the laws of the jurisdiction of registration, in turn, refer to the laws of Germany (*renvoi*). The recognition of obligatory provisions in a bill of sale (eg, a title warranty) which are not related to the title transfer must be assessed independently. If the bill of sale is expressed to be governed by a law not applicable pursuant to the above, Ger-

man law can vet whether such title transfer de facto abides by mandatory German law. If the aircraft is not registered in a contracting state of the ICAO, and in the case of separate engines, the transfer of title is governed by the lex situs (Article 43 of the EGBGB).

If German law does not govern the transfer of title, German conflict of law rules will look at the laws applicable to the title transfer to determine if the bill of sale is sufficient. German law does not express minimum substantive requirements applicable to bills of sale. However, a bill of sale should:

- sufficiently determine the aircraft, the engines, and any other part as well as the aircraft documentation; and
- contain suitable wording regarding the transfer of title in accordance with the applicable domestic law.

The German Civil Aviation Authority (*Luftfahrt-Bundesamt* or LBA) requires proof of ownership to register the aircraft or a change in ownership in the German aircraft register (*Luftfahrzeugrolle*), which can be established by a bill of sale.

1.2.3 Enforceability Against Domestic Parties

It is not necessary for a bill of sale to be translated, certified, notarised or apostilled/legalised to be enforceable against a domestic party. However, upon request of the competent German court, foreign language documents must be translated into German to be admissible in evidence in proceedings before such court.

1.2.4 Registration, Filing and/or Consent From Government Entities

A bill of sale cannot be registered or filed and is not subject to any consent from any government entity. However, the change in ownership of an aircraft registered in the German aircraft register has to be registered in the German aircraft register for regulatory reasons but such registration is not a condition to the effectiveness of the title transfer. The application for registration of an owner in the German aircraft register requires, amongst other things, the submission of proof of ownership, which in practice can be estab-

lished by a bill of sale (with back-to-birth traceability, if applicable).

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

In general, the disposal of an aircraft or engine by a party that is tax resident in Germany triggers income taxation of any capital gain from the sale – so-called unlimited income tax liability. Also, the disposal of an aircraft registered in the German aircraft register by a non-German tax resident results in a capital gains taxation in Germany, irrespective of where the asset is located – so-called limited income tax liability, but subject to double taxation treaties.

VAT should not be payable if the aircraft is designated to be used by airlines predominantly providing international commercial air transport. The taxation of the sale of an ownership interest in an entity that owns an aircraft or engine depends particularly on the type of entity sold (eg, partnership or corporation) and the individual structure of the sale.

No stamp duties or transfer taxes are triggered by the disposal of an aircraft or an ownership interest in an entity that owns an aircraft in Germany.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

Operating leases, wet/damp leases, finance leases and leases concerning engines or parts are permissible and generally recognised in Germany.

2.1.2 Application of Foreign Laws

A lease involving either a domestic party or an asset situated in Germany can generally be governed by foreign law, provided that a German court may give effect to German public policy and overriding mandatory provisions of either German law or of the laws of any other country pursuant to Regulation (EC) No 593/2008 (the Rome I Regulation), and must give effect to foreign exchange regulations pursuant to Article VIII 2 (b) of the Articles of Agreement of the International Monetary Fund.

2.1.3 Restrictions Concerning Payments in US Dollars

Except for reporting requirements relating to inbound or outbound payments in excess of EUR12,500 (or the equivalent in any foreign currency) from or to a foreign lessor pursuant to the German Foreign Trade Ordinance (*Außenwirtschaftsverordnung*), there are no restrictions imposed on domestic lessees making rent payments to foreign lessors in US dollars.

2.1.4 Exchange Controls

In the EU, exchange controls between member states and between member states and third countries are prohibited. However, for statistical purposes, all inbound or outbound cross-border payments in excess of EUR12,500 (or the equivalent in any foreign currency) have to be reported by German residents (*Inländer*) to the German Federal Bank (*Deutsche Bundesbank*) within a period of seven calendar days of such inbound or outbound payment pursuant to the German Foreign Trade Ordinance (*Außenwirtschaftsverordnung*). German law will give effect to foreign exchange regulations pursuant to Article VIII 2 (b) of the Articles of Agreement of the International Monetary Fund.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

The mere physical execution of a lease agreement in Germany or the transportation of an executed lease agreement into Germany does not result in any taxation. However, income resulting from a lease is subject to taxation in the case of a German tax resident lessor or, otherwise, if the aircraft is registered in the German aircraft register (*Luftfahrzeugrolle*) – subject to double taxation treaties – irrespective of an original or copy of a lease agreement being brought into Germany either physically or electronically. Leasing of an aircraft designated to be used by airlines predominantly providing international commercial air transport is usually exempt from VAT.

2.1.6 Licensing/Qualification of Lessors

Generally, operating leasing by a German lessor does not require any regulatory approval or licence from German authorities. The provision of financing leasing (*Finanzierungsleasing*) within the meaning of the German Banking Act (*Kreditwesengesetz* or KWG)

within or into Germany can be subject to regulation under the KWG. Such financing leasing of an aircraft under a financing lease will require a permit under the KWG subject to certain exemptions. The features of a German financing leasing (*Finanzierungsleasing*) differ from those of finance leases pursuant to International Financial Reporting Standards (IFRS) and may deviate from comparable tax rules. For other roles in aircraft financing (eg, the lender), further regulatory approvals may be required (eg, a banking licence).

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

We are not aware of any aspects of German law requiring the inclusion of specific provisions in a foreign law-governed lease agreement not typically already included, except for certain restrictions to sanctions provisions predicated on the anti-boycott rules in the German Foreign Trade Ordinance (*Außenwirtschaftsverordnung*) and Regulation (EC) No 2271/96 (the EU Blocking Regulation), which should be included if a German and/or European resident is a party to the lease agreement. Also, lease agreements between a European party and a non-European party would, from the European party's perspective, need to conform with the requirements of Article 12g of Regulation (EU) 833/2014 on so-called No Russia clauses and Article 8g of Regulation (EU) 765/2006 on so-called No Belarus clauses.

2.2.2 Tax and Withholding Gross-Up Provisions

Gross-up provisions with regard to any withholding tax levied on payments by a party to a lease agreement are not prohibited by German (tax) law. Aircraft lease agreements usually allocate such risks to the lessee and contain a gross-up provision to that effect.

2.2.3 Parts Installed or Replaced After a Lease's Execution

Aircraft or engine leases typically contain provisions relating to the replacement of parts (during maintenance or otherwise), the alteration and modification of, and additions to, the aircraft, as well as to the corresponding title transfers. Under German conflict of law rules, the choice of law is excluded for in rem rights. As regards ownership and its transfer, German law provides for mandatory provisions.

2.2.4 Risk of Title Annexation

Title to an engine does not vest in the person holding title to an airframe merely by installing the engine on the airframe. However, if the same person holds title to the airframe and the engine, and the engine is on-wing or temporarily off-wing, the German aircraft mortgage (*Registerpfandrecht*) granted over the airframe may extend to that engine. The regime applicable to aircraft parts upon their installation depends on whether the specific part is classified as a part (*Bestandteil*), an essential part (*wesentlicher Bestandteil*) or an accessory (*Zubehör*). Automatic title transfer upon installation is only conceivable with respect to essential parts and only if additional requirements are fulfilled. As regards parts and accessories, an anticipated agreement to transfer title upon installation in the respective transaction document is conceivable.

2.2.5 Recognition of the Concepts of Trust/Trustee

The concepts of a common law trust and an owner trustee of a common law trust are not recognised under German property law because the separation of legal title from equitable title is not compatible with the German legal concept of title. Germany has not ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition. However, a statutory trust with its own legal personality and an owner trustee of such trust are recognised in such capacities. The German Civil Aviation Authority (*Luftfahrt-Bundesamt* or LBA) is likely to disregard a common law trust arrangement and has occasionally registered the trustee as an unrestricted owner in the past.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The purpose of the German aircraft register is to implement the rules of Part 1 – Chapter III of the Convention on International Aviation (the “Chicago Convention”), which is devised to maintain the safety of navigation of civil aircraft, but not to constitute or allocate in rem rights in aircraft. The aircraft register records the ownership interest of the holder of legal title to the aircraft as notified to the LBA but does not prove ownership, and the registration of a person as owner in the aircraft register does not establish any ownership interests or perfect transfer of title. The interest of a lessor of an aircraft is not recorded in the aircraft register.

2.3.2 Registration If the Owner Is Different From the Operator

An aircraft cannot be registered in the name of the aircraft operator if the operator is not the owner of the aircraft. An aircraft must be registered in the name of the owner.

2.3.3 Aircraft/Engine-Specific Registers

Engines (whether installed on an airframe or not) are not registered or even mentioned in the German aircraft register.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

Neither a lease nor a lessor's interest in or under an aircraft lease can be registered or recorded in the German aircraft register. However, an aircraft lease to which a German operator is a party requires approval by the LBA prior to the commencement of the services and needs to be submitted to the LBA for that purpose. In a multi-tier lease structure, this rule applies to the entire chain of leases.

2.3.5 Requirements for a Lease to Be Valid and Registrable

It is not necessary for a lease to be translated, certified, notarised or apostilled/legalised to be enforceable against a domestic party. As a matter of practice, the LBA accepts leases in German or English. If the lease is in any other language, the LBA may require that the lease, or excerpts, be translated and such translations certified by a registered translator.

2.3.6 Taxes/Duties Payable for Registering a Lease

As an aircraft or engine lease cannot be registered, there are no taxes/duties triggered by the aircraft registration.

2.3.7 Registration of Aircraft in Alternative Countries

Generally, an aircraft is registered in the state in which its operator is domiciled, unless international treaties on the basis of Article 83bis of the Chicago Convention permit otherwise. As a practical observation, private and corporate jets operated in Germany are often registered in the USA. Commercial aircraft operated by German airlines and habitually based in Germany are typically registered in Germany.

2.3.8 Requirements for Documents Concerning Registration

Generally, any document submitted to the LBA needs to be an original or a notarised (and, if and as applicable, apostilled or legalised) copy of such document, and certain documents in a foreign language need to be accompanied by a certified translation into German. As a matter of practice, the LBA accepts documents in German or English.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

Generally, a non-German tax resident lessor is subject to limited income taxation in Germany if the leased aircraft is registered in the German aircraft register irrespective of whether the lessee is domestic or not (subject to, and often reversed by, double taxation treaties).

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor being a party to a lease agreement or its enforcement does not generally result in limited income taxation in Germany. The mere leasing of an aircraft or engine does not result in a foreign lessor being deemed to be a tax resident, domiciled or carrying on a business in Germany. Rather, a foreign lessor's income from a lease is subject to income taxation in Germany if the aircraft is registered in the German aircraft register (subject to, and often reversed by, double taxation treaties).

2.4.3 Engine Maintenance and Operations

German law does not impose a general liability for the maintenance or operation of an aircraft or aircraft engine on the owner (unless it is also the operator) or lessor (if different from the owner). This can be different if the owner or lessor assumes control over the aircraft or engine (eg, in the case of a repossession) or, for example, in the case of emission rights if the operator is unknown (which appears unlikely in the case of commercial aircraft). The owner can be obliged to provide information about the aircraft and its use – eg, in connection with the registration status or emission trading obligations.

2.4.4 Damage or Loss Caused by an Asset

German law does not impose strict liability on the owner of an aircraft that is not the operator, or on the lessor (if different from the owner). In exceptional circumstances, an owner can be held responsible for any hazard or danger caused by the aircraft under general rules of prevention of harm and damages.

2.4.5 Attachment by Creditors

German law generally respects the owner's title to the aircraft and does not permit enforcement into the aircraft to discharge the liabilities of any person other than the owner – eg, the lessee. There is potential liability of an aircraft for air traffic control charges or of the aircraft owner for emission charges if the operator is unknown.

2.4.6 Priority of Third Parties' Rights

If the aircraft is registered in the German aircraft register, it cannot be encumbered with statutory liens such as a workman's lien. The owner of an aircraft can potentially be held liable for Air Traffic Control charges if the operator is unknown. Different rules may apply to engines that are off-wing.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

German law does not require that all or a certain fraction of the insurance coverage taken out with respect to an aircraft be underwritten by domestic insurers. However, the insurer must be permitted to do business in Germany. Owners and lessors customarily require that internationally renowned insurers underwrite the insurance.

2.5.2 Mandatory Insurance Coverage Requirements

An aircraft operator is obliged to maintain liability insurance that covers death and injury of passengers and third parties, delayed transportation of passengers, damage to, and destruction and loss of, transported goods and the property of third parties. The minimum insurance amounts depend on the maximum take-off weight of the aircraft and are provided for by European and German laws. The LBA will only issue an operating permit for an aircraft upon, inter alia, proof of sufficient liability insurance coverage for

it. No such minimum insurance requirements exist for property insurance with respect to an aircraft (or any part thereof).

2.5.3 Placement of Insurance Outside of Jurisdiction

German law does not restrict the portion of reinsurance coverage that can be taken out abroad. German operators usually do not take out reinsurance but rather place the primary insurance with established insurers permitted to conduct business in Germany.

2.5.4 Enforceability of “Cut-Through” Clauses

Regarding cut-through clauses in insurance contracts, no known regulatory or judicial restrictions exist. However, the enforceability of such clauses in German law-governed contracts remains untested in court. In particular, it is uncertain whether customary cut-through clauses would be upheld and honoured following the insolvency of the insurer.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurances and reinsurances are generally permitted under German law. However, payment claims under liability insurance contracts cannot be assigned by the insured party, as it is the purpose of liability insurance to cover the affected person’s damage and, therefore, the affected person is the creditor of the claim against the insurer.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors’ Abilities

The lessor (as owner) retains legal title to the aircraft. Pursuant to the lease agreement, the lessee has the right of use and quiet enjoyment of the aircraft, provided there is no default under the lease. During the lease term, the lessor’s repossession claim would be unjustified. If the lease is governed by German law, the lessor has a statutory right to terminate without a notice period for good cause (*wichtiger Grund*), such as payment delays or a material breach of contract, and otherwise a contractual right to terminate according to the terms of the lease.

Pursuant to German insolvency law, the lessor may not terminate a lease after a petition for insolvency against the lessee has been filed with the insolvency court on the grounds of a payment default or a general

deterioration of the commercial situation and credit-worthiness of the lessee prior to the insolvency filing, and any such termination rights of the lessor in a lease would be unenforceable.

The aircraft does not have to be located in Germany at the time of the lease termination.

In general, there are no restrictions on a lessor’s ability to export an aircraft from Germany, except for exports to prohibited countries. However, for certain aircraft containing parts and specific technical components which could be used for military purposes (so-called dual-use goods), an export approval will be required pursuant to the German Foreign Trade Act (*Außenwirtschaftsgesetz*) in connection with the German Foreign Trade Ordinance (*Außenwirtschaftsverordnung* or AWW). Export requirements are tighter for export to countries outside the EU and especially restricted for certain countries listed in the AWW.

The lessor will usually obtain an export certificate of airworthiness to simplify the aircraft registration in the new jurisdiction. That certificate is obtained from the LBA and requires inspection of the aircraft. Additional consents, approvals or licences may be required from the LBA, and the LBA will have to approve the ferry flight out of Germany.

The termination of the lease is not a prerequisite for the sale of an aircraft. The aircraft is not required to be in Germany in case or at the time of its sale.

2.6.2 Lessor Taking Possession of the Aircraft

The lessor has no right to self-help under German law should the lessee not surrender possession of the aircraft following the termination of the leasing of the aircraft. So long as the aircraft is located in Germany, non-consensual repossession must be accomplished by filing a suit in a court and the subsequent enforcement of the court ruling through a bailiff (*Gerichtsvollzieher*). No further permissions beyond an enforceable copy of the ruling of a German court are needed to repossess the aircraft in Germany, while all customary requirements will apply for operating the aircraft. Any party with a legitimate in rem or security interest in the aircraft may intervene in the repossession proceed-

ings. The lessor may utilise faster provisional judicial measures.

However, the enforcement is restricted if the aircraft is used for specific purposes such as state or postal services, public transportation on scheduled routes, or if the aircraft is ready for take-off to a flight constituting commercial transportation of people or goods. Approval by the LBA is required to fly the aircraft out of Germany. If the aircraft is located outside Germany, the applicable rules of the *lex fori* apply to any repossession.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts in Germany that are competent to decide disputes regarding sales or leases of aviation assets. The competent court is determined in accordance with general rules. In case of enforcement of a German registered aircraft mortgage (*Registerpfandrecht*), the local court (*Amtsgericht*) of Braunschweig is exclusively competent to hear the case.

2.6.4 Summary Judgment or Other Relief

In Germany, summary proceedings (*summarische Verfahren*) are generally available for the enforcement of pecuniary claims – the simplified document proceeding (*Urkundenprozess*) – but not for the enforcement of any other right. In the case of a simplified document proceeding (*Urkundenprozess*) in respect of payment obligations, the court decides based on the document(s) in question and the statements of the claimant (if uncontested). A simplified judgment can be challenged by the defendant if the defendant prefers to rely on other evidence than the documents introduced during the simplified procedure.

By way of interim relief, the competent German court may order an injunctive relief (*einstweilige Verfügung*) against the respondent pending final judgment if, in the absence of such injunction, the right of the petitioner would be frustrated or the realisation of such right would be substantially aggravated. This remedy is not restricted to pecuniary claims. However, the competent German court would not grant ultimate relief before the case is decided on its merits. Exceptions may apply for ancillary items such as aircraft documents or where compliance with public law obligations is to be preserved.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

German courts would generally uphold a foreign law as the governing law of an aircraft lease, provided that a German court may give effect to German public policy and overriding mandatory provisions of either German law or of the laws of any other country pursuant to the Rome I Regulation, and must give effect to foreign exchange regulations pursuant to Article VIII 2 (b) of the Articles of Agreement of the International Monetary Fund.

A submission to a foreign jurisdiction is generally accepted on the basis of, and subject to, Regulation (EU) No 1215/2012 (the “Brussels Recast Regulation”), the 2005 Hague Choice of Court Convention, and/or the German Civil Procedure Code (*Zivilprozessordnung*).

A party to a lease is entitled to waive sovereign immunity either explicitly in the lease or implicitly by engaging in the legal proceedings before the competent German court without objection (*rügeloses Einlassen*). A blanket waiver of sovereign immunity does not necessarily include a waiver of consular immunity. A waiver of immunity by a German public entity may not necessarily be enforceable.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

German courts will recognise and enforce:

- a final judgment:
 - (a) of a court within the EU (excluding Denmark) without retrial or re-examination pursuant to the Brussels Recast Regulation; and
 - (b) of a court outside the EU or in Denmark if the requirements of an applicable bilateral or multi-lateral treaty are met (eg, and most importantly, the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the 2019 Hague Convention) and the Convention of 30 October 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Lugano Convention); and
 - (c) otherwise, if the prerequisites of the German Civil Procedure Code (*Zivilprozessordnung*,

- ZPO) are fulfilled; and
- an arbitral award pursuant to the ZPO, which refers to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the New York Convention) (see **2.6.12. Enforcement of Foreign Arbitral Decisions** for further details).

2.6.7 Judgments in Foreign Currencies

A judgment can be obtained in any currency. A judgment for payment of money expressed in a foreign currency may be satisfied in euros at the exchange rate prevailing at the time of payment unless the enforcement court decides that specific performance of the obligation to effect payment in the judgment currency has been agreed.

2.6.8 Limitations on Lessors' Actions Following Termination

General limitations under German law with respect to punitive damages, compound interest, contravention of good morals (*Sittenwidrigkeit*), general principles of equity (*Treu and Glauben*) or German public policy (*ordre public*) have to be observed, and provisions of a lease agreement in violation thereof may be unenforceable and actual remedial actions taken by a creditor in violation thereof may be held to be illegal.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

A lessor under an aircraft lease has to pay regular income taxes on its income in Germany in connection with the performance or enforcement of such lease agreement if the lessor is subject to either unlimited (German tax residents) or limited income taxation (foreign lessors such as those having a permanent establishment in Germany or if the aircraft is registered in the German aircraft register, subject to double taxation agreements).

2.6.10 Mandatory Notice Periods

Unless the relevant aircraft lease contains specific provisions, a lessor must comply with statutory notice periods under the laws governing the lease if it terminates an aircraft lease.

2.6.11 Lessees' Entitlement to Claim Immunity

Commercial lessees would usually not be entitled to any immunity from suit, execution or attachment,

subject to restrictions on the attachment of aircraft in scheduled service operated by a lessee.

2.6.12 Enforcement of Foreign Arbitral Decisions

Germany ratified the New York Convention, and German courts will recognise and enforce an arbitral decision if and to the extent it contains a final and binding decision which conclusively resolves the matter.

2.6.13 Other Relevant Issues

In an enforcement scenario, safeguarding the legitimate interests of either party requires the examination of the underlying facts as well as the entire range of legal areas affected, such as contract law, statutory law, insolvency law, aircraft regulations, etc. In an imminent enforcement scenario, a creditor is well advised to retain legal experts with in-depth knowledge of domestic and international aviation laws.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

German law recognises legal concepts of assignment and novation. An assignment (*Abtretung*) is the transfer of the relevant rights, claims or receivables. In a novation (*Novation*), an existing right or claim is replaced by a new right or claim with the replacement right or claim having equal content as the replaced right or claim, except that the right or claim is established anew and any counterclaims, objections and the like arising from the relationship between the debtor and the (original) creditor would generally not be available against the replacing right or claim.

If the rights and claims under a lease agreement that is to be transferred have been assigned for security purposes, an assignment or novation will likely require the consent or co-operation of the secured party and – depending on the terms of the security assignment – a new security assignment may have to be entered into upon completion of the transfer.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

German law will apply German and European conflict of law rules to any finance or security document. Subject to limitations in certain circumstances and compliance with *ordre public*, there is general freedom

of choice of applicable law under contracts between commercial parties, including lease assignments and novations. In respect of security, the law governing the collateral (eg, a claim or tangible item) will typically determine the law applicable to any security interest over such asset. The submission to the jurisdiction of a foreign court or arbitration tribunal is generally permissible between commercial parties.

As regards in rem rights over aircraft (such as legal title or a mortgage), German conflict of law rules do not allow for a choice of law and German law would generally apply to in rem rights over an aircraft registered in Germany. Therefore, the transfer of title to an aircraft registered in Germany to the new owner is governed by German law regardless of the chosen law in the documents.

2.7.3 Enforceability of Lease Assignments/Novations

It is not necessary for an aircraft or engine lease assignment or novation agreement to be translated, certified, notarised or apostilled/legalised to be enforceable against a domestic party. The operator will have to submit a copy of the lease assignment or novation agreement to the LBA, but this is not a condition to its effectiveness. As a matter of practice, the LBA accepts the submission of leases in German or English. If the lease is not in German or English, the LBA may require that the lease or excerpts thereof be translated, and such translations certified by a registered translator. Upon request of the competent German court, foreign language documents have to be translated into German to be admissible in evidence in legal proceedings.

2.7.4 Filing/Registration of Lease Assignments/Novations

An aircraft or engine lease assignment and assumption/novation does not require registration in the German aircraft register. The operator must submit a copy of the lease assignment or novation agreement to the LBA, but this is not a condition to its effectiveness.

2.7.5 Taxes/Duties Payable on Assignment/Novation

Depending on the specific circumstances, an assignment and assumption/novation agreement may result

in income taxation if the lessor is tax resident in Germany or subject to limited income tax (subject to double taxation treaties).

VAT is triggered if the assignment constitutes a VAT-able supply or service and if no exemption applies.

Usually, subject to the specific circumstances at hand, a customary novation of an aircraft or engine lease upon the sale and transfer of the relevant aircraft or engine can be structured to the effect that the novation itself does not trigger any German transfer or income tax.

2.7.6 Recognition of Transfer of Ownership Interests

In Germany, the transfer of a legal entity does not require or involve a transfer of the legal title to the assets held by such legal entity.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

The German aircraft register is an owner register. The owner is entitled to apply for the deregistration of the aircraft. A form must be completed, signed and submitted to the LBA, which maintains the aircraft register, together with certain ancillary documents.

2.8.2 Lessee's/Operator's Consent

The aircraft owner's application for the deregistration of the aircraft does not require the lessee's consent. It is untested, however, if a lessee could take preventive action to hinder deregistration in the case that that deregistration would constitute a breach of the owner's obligations (eg, the quiet enjoyment undertaking in favour of the lessee under a lease). A lessee, operator or mortgagee on its own is not entitled to deregister the aircraft.

2.8.3 Required Documentation

For the deregistration, the owner or the owner's legal counsel (if acting under a power of attorney) will have to submit the completed deregistration application form, the original certificate of registration (*Eintragungsschein*), the certificate of airworthiness and the noise certificate (*Lärmzeugnis*). The *Eintragungsschein* is to be kept on board the aircraft. Therefore, taking possession of the aircraft or at least of the certificate

of registration may be required for deregistration. If an aircraft mortgage is registered against the aircraft in Germany, the mortgagee's written consent to the deregistration of the aircraft is required (Article IX of the Geneva Convention (1948)).

2.8.4 Duration of Deregistration Process

If the documents presented to the LBA are complete and in the appropriate form, registration should usually occur within four weeks. If the lease forming the basis for the use of the aircraft is terminated, and the authority is informed thereof, it may take action to prevent further operation of the aircraft.

2.8.5 Aviation Authority's Assurances

The LBA will not assure in advance the prompt deregistration of an aircraft to the owner applying for its deregistration.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

There are only minor fees chargeable in respect of the deregistration of an aircraft.

2.8.7 Deregistration Power of Attorney

A deregistration power of attorney by the owner can generally be recognised. The power of attorney should be notarially certified, apostilled/legalised and translated (in certified form) into English or German. If substantive German insolvency law applies to the owner, the power of attorney lapses upon the owner's insolvency.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

The authority of the person acting for the owner when granting the deregistration power of attorney and the corporate existence of the owner (in case it is not a natural person) have to be demonstrated by acceptable documentation (including incumbency certificate, commercial register excerpt or other adequate proof).

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A deregistration power of attorney to deregister an aircraft from the German aircraft register does not necessarily have to be governed by German law.

2.8.10 Revocation of a Deregistration Power of Attorney

Under German law, a power of attorney expressed to be irrevocable is generally irrevocable except where there is no appropriate reason for the irrevocable nature or there is good cause (*wichtiger Grund*) that justifies the revocation. Therefore, while irrevocability limits the right of revocation, it does not exclude it entirely.

2.8.11 Owner's/Lessor's Consent

In principle, the export of an aircraft by the owner does not require the lessee's consent. However, if the aircraft is to be deregistered at the same time and the aircraft is encumbered with a German aircraft mortgage, a mortgagee will have to consent to the deregistration. As between the owner/lessor and the lessee, deregistration and subsequent export may not be permissible as long as the lessee's right of quiet enjoyment under the lease subsists. A mortgagee is not entitled to appropriate or export the aircraft but may only cause the sequestration and a court-supervised auction sale.

2.8.12 Aircraft Export Permits/Licences

The certificate of airworthiness for export is issued by the LBA. The documents required for the application depend on the target country as well as the status of the aircraft. Since a certificate of airworthiness for export is only required in extraordinary instances, the time necessary to obtain an export licence may vary. Such certificate cannot be obtained in advance (eg, at the inception of the lease or registration).

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

There are no significant costs/fees/taxes chargeable in Germany in connection with the export of an aircraft.

2.8.14 Practical Issues Related to Deregistration of Aircraft

For deregistration, the owner must provide the original certificate of registration kept on board the aircraft. Access to and control over the aircraft may therefore be a prerequisite if the operator is not co-operative.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

If a lease agreement is restructured consensually, the amendment is usually agreed upon under the law governing the relevant lease.

Restructurings under court supervision and insolvencies are governed by the German Insolvency Code (*Insolvenzordnung*), encompassing the insolvency plan and other rescue proceedings as well as outright bankruptcy, or by the Stabilisation and Restructuring Act (*Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen*), which came into force on 1 January 2021.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

If the lessor's centre of main interest is in Germany, the lessor can be subject to the proceedings set out in the German Insolvency Code (*Insolvenzordnung*). This can either be a restructuring plan aimed at rehabilitation of the debtor or an outright bankruptcy proceeding with or without the rescue of the business.

In case of the lessor's imminent inability to pay its debts (*drohende Zahlungsunfähigkeit*), the lessor's management is at liberty to commence insolvency proceedings. The management is obliged to initiate insolvency proceedings in case of actual inability to pay the debts (*Zahlungsunfähigkeit*) or over-indebtedness (*Überschuldung*), each as defined in the Germany Insolvency Code (*Insolvenzordnung*). In these cases, the proceedings can also be commenced by any creditor, whereas the restructuring plan proceeding is only available in a voluntary insolvency commenced by the lessor's management.

The Stabilisation and Restructuring Act (*Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen*) provides a specific voluntary pre-insolvency restructuring procedure which is available to debtors who do not belong to the financial sector.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

Within the EU (excluding Denmark), the recognition of foreign insolvency proceedings is governed by Regulation (EU) 2015/848 (the Recast Insolvency Regulation), which provides for broad recognition of insolvency proceedings (as listed in Annex A of the Recast Insolvency Regulation) opened by the courts of another EU member state. The Recast Insolvency Regulation is generally based on the principle of universality, which means that (in the absence of any domestic secondary proceeding) the insolvency law of the country where a proceeding first commences shall (subject to certain exemptions) apply to all matters and assets of the debtor (whether located in its home jurisdiction or abroad).

The Recast Insolvency Regulation does also not apply to certain enterprises from the financial and insurance industries. German conflict of law rules apply to these and to cross-border cases beyond the EU (excluding Denmark). These rules are similar to the corresponding provisions of the Recast Insolvency Regulation; they do not strictly follow or enact the UNCITRAL Model Law on Cross-Border Insolvency.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

Irrespective of the operator's insolvency, the LBA would not honour an IDERA in favour of the owner or financier of an aircraft as Germany has not ratified the Cape Town Convention.

As the German aircraft register is an owner register and the operator's consent is legally not necessary for aircraft deregistration, no deregistration power of attorney by the operator is necessary for the owner to deregister the aircraft from the aircraft register upon the operator's insolvency.

A valid deregistration power of attorney from the owner to the operator or a financier would generally be honoured by the aircraft registry provided that it is submitted as an original or as a notarially certified copy (*notariell beglaubigte Abschrift*); it does not survive the insolvency of the German owner though.

2.9.5 Other Effects of a Lessee's Insolvency

Lease agreements concerning registered aircraft generally survive the opening of preliminary German insolvency proceedings and the formal opening of insolvency proceedings concerning the lessee. Once insolvency proceedings are formally opened, the insolvency administrator of the lessee has an extraordinary statutory termination right. The lessor is barred from terminating the lease agreement on the grounds of payment defaults or general deterioration of the lessee's creditworthiness prior to the insolvency filing.

Upon termination of the lease agreement, the insolvency administrator has to surrender possession of the aircraft to the lessor. Factual circumstances such as engine replacements, or a lack of the necessary licences, insurance coverage or trained personnel may prevent or delay such redelivery.

During preliminary insolvency proceedings and provided that the insolvent lessee's operations continue, the insolvency court can order – at the request of the preliminary insolvency administrator – that the aircraft shall temporarily remain with the lessee irrespective of the termination of the lease agreement if the aircraft is material for the lessee's operations.

As a practical observation, insolvency administrators of German airlines were generally co-operative in past cases, given the risk-adjacent nature of an aircraft and its operation.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The effects of the insolvency of the borrower under an aircraft financing depend on the collateral granted. While the right to realise an aircraft mortgage remains with the secured party, the realisation of any other collateral in possession of the administrator vests in the insolvency administrator, who deducts a percentage fee and VAT (if applicable) from the realisation proceeds before remitting them to the secured party. Access to the aircraft, the aircraft documentation and the (off-wing) engines may de facto be impeded in insolvency.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

German law does not provide for a moratorium in connection with the insolvency of an entity that is not a financial institution or insurer. However, any enforcement measures taken against an insolvent borrower would cease automatically upon the opening of insolvency proceedings against the borrower, as the right to realise collateral would generally vest in the insolvency administrator, who would then have to turn over the net realisation proceeds (minus a percentage fee and VAT, if any) to the secured creditor. The enforcement of in rem security over registered aircraft is exempt from this rule (as is the enforcement into real estate) and may continue unless the insolvency administrator applies for its discontinuation.

2.9.8 Liquidation of Domestic Lessees

Airlines can be subject to German insolvency proceedings if their centre of main interest is in Germany. Each third-party creditor can apply for insolvency proceedings upon the debtor's illiquidity (*Zahlungsunfähigkeit*) or over-indebtedness (*Überschuldung*) (ie, balance sheet insolvency together with a negative continuation prognosis for the operations). The directors of a company generally have to apply for insolvency in these circumstances as well (subject to a relatively short grace period) and may choose to file for insolvency upon the company's imminent illiquidity (*drohende Zahlungsunfähigkeit*).

Solvent liquidation of a company outside insolvency requires a shareholder resolution.

Subject to certain requirements, secondary insolvency proceedings can be opened over branches or assets of foreign airlines in Germany.

2.9.9 Ipso Facto Defaults

In the insolvency of a lessee of an aircraft, the lessor may repossess the aircraft upon the termination of the underlying lease agreement. Also, during preliminary insolvency proceedings and following the opening of insolvency proceedings, the aircraft lease agreement can generally be terminated by the lessor in accordance with its terms and the aircraft can be repossessed as a consequence of such termination, provided that:

- during preliminary insolvency proceedings and irrespective of the termination of the lease agreement, the competent insolvency court can order, upon the insolvency administrator's application, that the aircraft shall remain with the insolvency estate against compensation in case it is material for the continuation of the insolvent lessee's operations; and
- the lessor is barred from terminating the lease agreement on the grounds of payment defaults or general deterioration of the lessee's creditworthiness prior to the insolvency filing or on the grounds of the insolvency itself.

2.9.10 Impact of Domestic Lessees' Winding-Up

In the insolvency of an aircraft lessee, and despite the continuation of the aircraft lease agreement (see 2.9.5 **Other Effects of a Lessee's Insolvency**), the insolvent lessee often lacks the liquidity necessary to fund the contractually agreed maintenance of the aircraft.

During preliminary insolvency proceedings, lease rentals might not necessarily be paid (in full). If the lease agreement continues beyond the formal opening of insolvency proceeding, claims for lease rentals incurred following the formal opening of insolvency proceedings constitute preferred claims against the insolvency estate. Any remaining lease security deposit (if any) would be available to the lessor to cover outstanding claims, but the insolvent lessee will very likely not replenish the security deposit (despite the lessee's contractual obligation to do so).

Maintenance reserves would usually remain with the lessor. The treatment of the maintenance reserves will very much depend on the underlying contractual arrangements.

The exercise of set-off and retention rights against the insolvent party is widely restricted as a matter of statutory German insolvency law.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

Germany has not ratified the Convention on International Interests in Mobile Equipment or the related Protocol on Matters Specific to Aircraft Equipment.

2.10.2 Declarations Made Concerning Conventions
See 2.10.1 Conventions in Force.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment
See 2.10.1 Conventions in Force.

2.10.4 Enforcement of Conventions
See 2.10.1 Conventions in Force.

2.10.5 Other Conventions
See 2.10.1 Conventions in Force.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

Lenders who offer loans in Germany are subject to German banking supervision by the German Banking Regulator (*Bundesanstalt für Finanzdienstleistungsaufsicht*) and to the German Banking Act (*Kreditwesengesetz*).

There are no particular statutory restrictions on borrowers in conjunction with the use of the loan proceeds. However, borrowers have to abide by rules that generally apply to the use of monies (eg, compliance with sanctions) and with the applicable contractual use of proceeds provisions.

3.1.2 Effect of Exchange Controls or Government Consents

Exchange controls between member states and between member states and third countries are prohibited in the EU. For statistical purposes, all inbound and outbound cross-border payments in excess of EUR12,500 (or the equivalent in any foreign currency) have to be reported by German residents (*Inländer*) to the German Federal Bank (*Deutsche Bundesbank*) within a period of seven calendar days of such inbound or outbound payment pursuant to the German Foreign Trade Ordinance (*Außenwirtschaftsverordnung*). Also, a German court must give effect to foreign exchange regulations pursuant to Article VIII 2 (b) of the Articles of Agreement of the International Monetary Fund.

3.1.3 Granting of Security to Foreign Lenders

Borrowers may grant security to foreign lenders. Depending on the legal form of the corporate borrower, certain statutory restrictions exist if the lender is a direct or indirect affiliate or if security is granted for the liabilities of an affiliated person (upstream or side-stream collateral). The details depend on the specific corporate set-up.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

In the case of a German limited liability company (*Gesellschaft mit beschränkter Haftung*, GmbH) an upstream and/or cross-stream guarantee can expose its directors to personal civil liability unless it is ensured that the assets required for maintaining the registered capital are not distributed to or for the benefit of the GmbH's direct or indirect shareholders or any of their respective subsidiaries. The same test applies to the general partner of a limited liability partnership (GmbH & Co. KG). Even stricter restrictions exist for German stock corporations (*Aktiengesellschaften*) and Societates Europaea (established under German law).

3.1.5 Lenders' Share in Security Over Domestic SPVs

It would be usual in aviation finance transactions for a lender to take share security over a domestic special purpose vehicle which owns the aircraft. German law generally recognises share pledge agreements. Share pledges over German limited liability companies require notarisation with relatively high notarial fees.

3.1.6 Negative Pledges

A negative pledge obliging the pledgor not to grant security to a third party is generally recognised as an obligatory arrangement but would not restrict the grantor's ability to dispose of its assets.

3.1.7 Intercreditor Arrangements

There is no material restriction or requirement imposed on intercreditor arrangements. Creditors can be considered to form a civil law partnership with regard to any collateral held jointly in Germany or if the intercreditor arrangements are governed by German law.

3.1.8 Syndicated Loans

Syndication is generally permissible under German law. The role of an agent (such as the facility agent) under a syndicated loan is generally recognised in Germany and well established in the German lending market, including the aviation finance market.

3.1.9 Debt Subordination

Generally, debt can be or become subordinated by means of a contractual subordination or a structural subordination as well as by operation of law (eg, in the case of a shareholder loan).

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The concept of transfer and assumption of contracts (including the debt) is generally recognised in Germany. Certain implications of the Rome I Regulation may require specific attention.

3.1.11 Usury/Interest Limitation Laws

Pursuant to the German Civil Code (*Bürgerliches Gesetzbuch*), usury is prohibited, and any agreement providing usurious consideration is void ab initio. Compound interest cannot be validly agreed upon in advance under German law.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

Typical forms of security and recourse granted in a domestic aviation finance transaction would be an aircraft mortgage, a security assignment (regarding rent payments, other lessor rights under a lease agreement, insurance proceeds, requisition and total loss proceeds), a share pledge, an account pledge, a parent company guarantee, cross-collateralisation arrangements, airframe and engine warranties arrangements, a security deposit and a deregistration power of attorney. The selection and details of the security instruments employed depend on the specific transaction structure and the parties involved.

3.2.2 Types of Security Not Available

If the aircraft is registered in the German aircraft register (*Luftfahrzeugrolle*), no private law in rem security can be taken over the aircraft other than a German aircraft mortgage and a security transfer of title (*Sicherungsübereignung*).

As Germany has not ratified the Cape Town Convention or the related Protocol on Matters Specific to Aircraft Equipment, no international interests can be validly created over aircraft registered in the German aircraft register.

3.2.3 Trust/Trustee Concepts

The concept of a security trustee (*Sicherheiten-treuhänder*) is generally recognised and frequently employed in Germany. With respect to accessory security instruments such as mortgages and pledges, it is customarily combined with a parallel debt arrangement in favour of the security trustee (eg, on the basis of an abstract acknowledgement of debt).

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

A borrower can assign to a security trustee its rights under a lease agreement pursuant to a security assignment, and it may mortgage the aircraft to the benefit of the security trustee. A security transfer of title (*Sicherungsübereignung*) in an aircraft would require additional legal consideration.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It would be usual for a borrower/lessor to assign to the security trustee the rights and benefits only – ie, without also transferring the related obligations of the lessor under an aircraft lease. Step-in arrangements, which are sometimes used in connection with other asset classes, are not customary in aviation finance in Germany.

3.2.6 Choice of Foreign Law

A security assignment or guarantee can generally be governed by English or New York law. However, according to Article 14 paragraph 1 of the Rome I Regulation, the law governing the assigned claims will determine its assignability, the relationship between the assignee, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged. Further, upon their enforcement, a German court may give effect to German public policy and overriding mandatory provisions of either German law or the laws of any other country pursuant to the Rome I Regulation. Finally, it must give effect to foreign exchange

regulations pursuant to Article VIII 2 (b) of the Articles of Agreement of the International Monetary Fund. It is generally recommendable that a security assignment be governed by the law governing the right that is assigned.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

In connection with any German law security assignment, a notification of the third-party debtor is necessary to prevent the third-party debtor from discharging its obligations by making payments to the assignor instead of the assignee. It is not necessary for a security assignment to be translated, certified, notarised or apostilled/legalised to be enforceable against a domestic party. However, if legal proceedings are instigated before a German court, upon request of the court, foreign language documents have to be translated into German to be admissible in evidence in such proceedings.

3.2.8 Domestic Law Security Instruments

An aircraft registered in the German aircraft register should be encumbered with a German aircraft mortgage; other security over the aircraft would generally not be enforced by German courts. Such mortgage needs to be notarised and registered with the German aircraft mortgage register (*Register für Pfandrechte an Luftfahrzeugen*), which is different from the German aircraft register. The costs for the notarisation and filing depend on the amount of the secured obligations. As Germany has not ratified the Cape Town Convention, no international interest can be registered against the aircraft on the basis of an aircraft mortgage.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

A security assignment of claims or rights cannot be registered in Germany.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

A security interest over an aircraft pursuant to a German aircraft mortgage (*Registerpfandrecht*) can generally be transferred. Due to its accessory nature, it can only be transferred together with the secured obligations and to the same person and requires reg-

istration with the German aircraft mortgage register (*Register für Pfandrechte an Luftfahrzeugen*).

3.2.11 Effect of Changes in the Identity of Secured Parties

The effects of any change in the identity of a secured party under a German law security assignment depend on the specific arrangements made with respect to such security interest – eg, whether a security trustee concept has been introduced or not. The transfer of a mortgagee's position under a German aircraft mortgage is possible if transferred together with the secured obligation, and it requires registration with the German aircraft mortgage register.

3.2.12 “Parallel Debt” Structures

The concept of “parallel debt” on the basis of abstract acknowledgements of debt is generally an established concept in Germany.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment is generally not deemed to be resident, domiciled, carrying on business or subject to any taxes in Germany solely because it is a party to, or the enforcement of, such security assignment.

3.2.14 Perfection of Domestic Law Mortgages

A German aircraft mortgage takes effect upon its registration in the German aircraft mortgage register. Such mortgage encompasses engines that are on-wing and owned by the same legal entity or natural person owning the airframe at the time of the creation of the aircraft mortgage.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

An engine installed on an airframe owned by the same person can become subject to an aircraft mortgage pertaining to such airframe. For a spare engine that is off-wing or owned by a person other than the owner of that airframe, other security interests – such as a pledge or security transfer of title – may be available.

3.2.16 Form and Perfection of Security Over Bank Accounts

Typically, an account pledge would be used to take security over a bank account (such as a lease receivables account), and it requires, among other things, a notification to the account bank.

3.3 Liens

3.3.1 Third-Party Liens

In the case of:

- undischarged European Union Emission Trading Scheme payments;
- unpaid VAT and/or customs in case of an import of an aircraft;
- due and outstanding Eurocontrol charges; and
- non-payment of certain official charges as well as fines as a result of a breach of obligations under the German Air Traffic Act (*Luftverkehrsgesetz*).

the relevant authority can – with the help of a bailiff (*Gerichtsvollzieher*) – register a non-consensual lien over an aircraft registered in Germany if the debtor is the aircraft owner (and in case of air traffic control charges if the operator is unknown).

Repairer's charges, otherwise generally permitted under German civil law, cannot be created in respect of German-registered aircraft. However, in the case of salvage, the Act on the Rights in Aircraft (*Gesetz über Rechte an Luftfahrzeugen*) provides for a first-priority lien if certain conditions are met.

A German aircraft mortgage can be granted over more than one German-registered aircraft.

3.3.2 Timeframe to Discharge a Lien or Mortgage

One has to distinguish between the discharge of the mortgage itself and the deregistration of the mortgage from the register. In general, the mortgage as a legal right ends automatically if the claim secured by the mortgage ceases to exist. To record the release of the mortgage its deregistration from the German aircraft mortgage register should be sought. Vis-à-vis third parties acting in good faith, the register is generally deemed correct.

Once the required documents have been submitted to the mortgage register, it usually takes at least one to two weeks until written confirmation of deregistration is received by the mortgagee and mortgagor.

3.3.3 Register of Mortgages and Charges

German aircraft mortgages must be registered in the German aircraft mortgage register to be effective. The mortgage registration avails in rem effects and generally entitles the secured party to enforce the aircraft mortgage and obliges the owner to tolerate the foreclosure of the aircraft.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

In the case of:

- a default in the payment of Eurocontrol charges by an aircraft operator and, if the operator is unknown, non-payment of such charges by the owner;
- unpaid VAT and/or customs in case of an import of an aircraft; and
- non-payment of charges for official acts, especially for examinations and inspections, according to the German Air Traffic Act (*Luftverkehrsgesetz*) and the Act on the German Civil Aviation Authority (*Gesetz über das Luftfahrt-Bundesamt*),

a bailiff (*Gerichtsvollzieher*) can be retained by the relevant authority to detain and encumber the aircraft – to the extent that the defaulting debtor is also the owner of the aircraft, whereupon an aircraft which is registered in the German aircraft register may be encumbered with a German aircraft mortgage and an aircraft registered abroad may be encumbered by way of attachment.

In principle, the non-consensual lien would arise over one aircraft, whereas the Act on the Rights in Aircraft generally provides for the entitlement of the bailiff to encumber more than one aircraft registered in the German aircraft register with a German aircraft mortgage.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser of an aircraft may request a search of the German aircraft mortgage register to verify that an aircraft is free from encumbrances;

furthermore, a check should be run for Eurocontrol charges and, if the aircraft was previously registered in any other country, a check in that jurisdiction and in the International Register is recommended.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

A security assignment over rights and claims, constituting an in rem interest over the respective collateral, is typically enforced by the secured party collecting any claims and, in the case of other rights, by realising them by private sale or auction. A loan or guarantee, constituting claims in personam are enforced by filing a lawsuit against the respective debtor and seeking court title for payment or performance, as the case may be.

3.4.2 Security Trustees' Enforcement of Their Rights

Under German law, notice and acknowledgement of a security assignment over German law-governed rights or claims are not necessary to establish a valid security assignment or allow for enforcement. The third-party debtor may, however, continue to discharge its obligations to the assignor and will be otherwise protected – eg, by a continuing right to set-off – unless notice of assignment or other appropriate proof of assignment is given to the third-party debtor by the relevant assignor.

3.4.3 Application of Foreign Laws

German law applies German and European conflict of law rules to any finance or security document. Subject to limitations in certain circumstances and compliance with *ordre public*, there is general freedom of choice of applicable law under contracts between commercial parties. Regarding security, the law governing the collateral (eg, a claim or tangible item) should typically determine the law applicable to any security interest over such asset.

The submission to the jurisdiction of a foreign venue is generally permissible between commercial parties.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

A final judgment by a court in any member state of the EEA on commercial matters will typically be recognised in Germany pursuant to the Brussels Recast Regulation and the Lugano Convention (as applicable). In the absence of specific treaties, a judgment obtained in any other jurisdiction will have to comply with certain standards of due process, and certain prerequisites of the German Civil Procedure Code (*Zivilprozessordnung*) and reciprocity will have to be ensured. An arbitral award will be recognised and enforced by German courts subject to certain restrictions according to the New York Convention.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

The remedy of self-help is not available in Germany. In case the relevant security grantor is not co-operative, a court order may have to be sought to access the aircraft, the engines or the aircraft documents (with the help of a bailiff (*Gerichtsvollzieher*)).

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

For questions of enforcement (outside insolvency proceedings), the competent court will have to be determined pursuant to general rules (eg, linking the place of venue to the debtor's seat, the place of performance or the location of the asset). By way of exemption thereto, the local court of Braunschweig has exclusive jurisdiction for the enforcement of German aircraft mortgages.

3.4.7 Summary Judgments or Other Relief

Injunctive relief (*einstweilige Verfügung*) can generally be sought to prevent a continuing or threatening violation of the lessor's rights. Injunctive relief will typically not fast track the objective of the main proceedings – eg, an aircraft may be sequestered and be kept under the custody of a bailiff but will not be handed over to the lessor claiming repossession. There may be exemptions in extraordinary circumstances for ancillary claims (eg, relating to aircraft documents) or where compliance with public law obligations is to be preserved.

3.4.8 Judgments in Foreign Currencies

A judgment can be obtained in any currency. A judgment for payment of money expressed in a foreign currency may be satisfied in euros at the exchange rate prevailing at the time of payment unless the enforcement court decides that specific performance of the obligation to effect payment in the judgment currency has been agreed.

3.4.9 Taxes/Fees Payable

A secured party is not required to pay taxes in a non-nominal amount in connection with the enforcement of a security agreement/aircraft mortgage per se.

3.4.10 Other Relevant Issues

Enforcement of a German aircraft mortgage can be accelerated by a related submission to immediate enforcement in the form of a notarial deed, thereby saving the need to first obtain a judgment. In practice, enforcement requires close co-ordination with the local court of Braunschweig as additional measures may be necessary to ground the aircraft and facilitate sequestration. Maintenance and storage of the aircraft while it is in the custody of the bailiff should be supported by the creditor.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

The factual, tax and legal background of each transaction needs to be assessed on a case-by-case basis to be able to render conclusive advice on the specific legal issues that may arise in connection with a purchase, sale, lease or debt financing of an aircraft registered in Germany or involving a German party.

4.2 Current Legislative Proposals

As of 1 June 2024, the authors are not aware of any proposed new German legislation specifically addressing transactions concerning a purchase, sale, lease or debt financing of an aircraft registered in Germany or involving a domestic party. Germany has ratified the Luxembourg Rail Protocol under the Cape Town Convention and it came into force in Germany on 8 March 2024. However, we do not expect

that this will foster the ratification and implementation of the Aircraft Protocol in Germany in the near future.

On the European level, the most recent piece of legislation that will likely impact the airline industry is the draft ReFuelEU Regulation (COM/2021/561 final) on which the Council and the European Parliament reached a provisional political agreement on 25 April 2023. The draft ReFuelEU Regulation forms part of the EU's "Fit for 55" programme and aims at the decarbonisation of air traffic.

Sanctions continue to change quite frequently these days and even more recently tariffs need to be observed very closely in transactions involving aircraft and their financing given the relevant regimes keep changing frequently in light of global trade tensions.

Trends and Developments

Contributed by:

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activelaw Offenhausen.Wolter PartmbB has been on the market for 60 years and is a medium-sized law firm with offices in Hanover, Düsseldorf and Berlin, Germany. Activelaw offers a boutique service for transactions involving business jets and superyachts, the financing and leasing of commercial airliners as

well as restructuring/distressed M&A. With a team of 45 lawyers, our five aviation lawyers have advised clients in aircraft transactions worth USD7 billion. The firm provides a notary service as well, enabling German mortgages to be notarised and registered hand in hand with the legal review of finance agreements.

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German Corporate Jet Market

In general, business aviation has seen a massive increase in business activity over the last couple of years. This can be illustrated by reference to the increase of flight operations generally and by the increase of deliveries of new aircraft: looking at Q1/2025, flight operations globally increased by 2.4% year on year due to further expansion of the customer base. As regards the delivery of new aircraft, experts (Cirium Aviation Analytics) predict the delivery of approximately 8,700 new corporate jets between 2025 and 2034, with an increase of 11% for 2025 (year on year) alone. Due to the dominant stake of higher-priced aircraft (Gulfstream, Bombardier and Dassault), the expected aggregate volume of purchase prices for the new 2025 deliveries is within the range of USD25 billion. Only 50% of purchases are expected to be self-financed, the remaining half having demand for lending. About two thirds of new aircraft deliveries are to be allocated to the North American market and only 13% to the European market.

But the market moves sideways as well. Many corporate business jet fleets are being downsized as a result of public reception, legal pressure to minimise carbon footprint and general economic uncertainty. This downsizing of the German business jet fleet by about 20% is mostly absorbed by membership and fractional ownership programmes, which grew by the same amount.

Sustainability in aviation has attracted major attention in the commercial aircraft market, especially the airline segment. While this topic does not attract the same degree of importance in the business jet market, European operators apparently make stronger efforts to contribute to reduction of their carbon footprint, while North American operators lag behind.

Lastly, the biggest issue of concern in the business jet market in 2025 will be uncertainty regarding the impact tariffs potentially imposed by the US government will have on the various segments and regions targeted. This concerns new business jets, pre-owned jets and also the maintenance sector. Looking at this issue from the perspective of EU member states and potential buyers that are interested in selling and purchasing pre-owned aircraft from US parties: there

will be a split in the market between business jets produced (Gulfstream, Textron) or based in the USA, and the rest of the world. Prices of US manufacturers will rise, since US buyers are able to buy only those without tariffs. MRO based in the US will have a huge disadvantage since they have to pay tariffs on parts. European MRO will probably see more US customers, which will lead to less slot availability for German customers and higher prices as well.

German Airline Market

The major part of any analysis of aviation markets is the comparison between pre-pandemic air traffic and the current status of the industry. Globally, the aviation industry has fully recovered: passenger volumes in 2024 exceeded those in 2019 by 4% (according to IATA, freight traffic is 7% above the 2019 figures). Industry experts refer to the strong recovery in the Asian markets, especially in China.

In terms of passenger numbers, the recovery rates of European air traffic were not as strong as the global trend. In particular, the German trend falls behind. Passenger numbers at German airports in 2024 were approximately 15% below pre-pandemic levels from 2019. Market observers name two important issues that have caused this trend: firstly, there has been a major decline in demand for domestic travel (although domestic flight operations in Frankfurt and Munich did roughly exceed the 2019-levels in 2024). Secondly, airlines have reduced the availability of flight capacity in German airports: several reductions of routes, or even cancellations of entire routes, were announced in 2024.

Airlines refer to increased contributions to operational costs in Germany, which inter alia relate to state-imposed fees at German airports. For example, with reference to additional state-imposed fees, in October 2024 Ryanair announced full cancellation of flights into three destinations (Dortmund, Leipzig and Dresden) and a 60% reduction of capacity at Hamburg airport. That translates into 1.8 million fewer passenger seats being available for 2025.

Data from the German Aerospace Center (DLR) shows the substantive increase of costs that airlines are exposed to when operating from German airports: a

standard medium-haul flight is 53% more expensive for airlines than it was in 2019 due to state-imposed fees. This is far above the increase in costs in other European countries. This development triggers a follow-up problem for the aviation industry in Germany: reduced capacity (fewer flights and available seats) results in less competition for the affected routes, which then translates into higher ticket prices and, in the final step, prevents people from choosing air travel as their mode of transport. The average ticket price for an economy ticket in Germany was 61% more expensive in 2024 compared to 2019.

Some commentators also point to the comparably high national requirements for blending fuel with “sustainable aviation fuel”, a fairly unique item within European countries. A further impact on the German air traffic market is the strong position (de facto quasi-monopolistic position) of Lufthansa after airlines like Air Berlin (2017) and Germania (2019) stopped operations following the opening of bankruptcy proceedings – no other German airline stepped in (actually, Lufthansa took over more than 80 aircraft and various slots from the insolvent Air Berlin group).

Legal Topics

Dispute resolution

While arbitration is a fairly established method for dispute resolution in the shipping industry (specialised arbitration tribunals for maritime matters have existed for over 70 years), aviation disputes in the wider sense (leasing contracts, sale and purchase agreements, and financing documents) predominantly contemplate conventional court proceedings. In particular, given the fact that most aircraft transactions (leasing, sale and finance) have cross-border elements, the New York Convention (Convention on the Recognition of Foreign Arbitral Awards, 1958) can be a valuable alternative. For example, it is easier to obtain the recognition of an arbitral award than a court decision in many jurisdictions, if the award complies with standard conditions contemplated by the New York Convention. This applies (to name just a few countries) to the recognition of arbitration awards in China (including Hong Kong), Saudi Arabia or the UAE.

In 2022, a specialised arbitration court for aviation disputes was established – the The Hague Court of

Arbitration for Aviation (the “Hague CAA”). The court is affiliated with the Netherlands Arbitration Institute, one of the oldest and most recognised arbitration institutes worldwide. It remains to be seen how the industry welcomes the opportunity to have disputes settled by a specialised arbitration court. The most prominent advantages offered by arbitration are:

- confidentiality (unlike court decisions, arbitration awards are not published);
- the speed of resolution (court procedures tend to last longer); and
- neutrality (the “home-court problem” does not exist as the parties to an arbitration proceeding select the arbitrators for the arbitration tribunal).

Sanctions

Since the commencement of the Russia–Ukraine war, the aviation industry has been heavily exposed to the effects of sanctions implemented by the US, the EU, its member states and the UK. One topic with severe and broad effects is the requirement to implement a “no Russia” provision into sale and lease agreements (Regulation (EU) 2023/2878 and Regulation (EU) 2023/2875) (also known as the “12th Sanction Package”). The “no Russia clause requirement” places an obligation on aircraft lessors who are either based in an EU member state or whose business activities are performed from a EU member state to contractually prohibit the re-export of certain categories of sensitive items to or for the use in Russia. Aircraft and other space items are affected by such regulation.

The regulation also imposes a notification duty on sellers and lessors to report breaches of the prohibition to “re-export” into Russia. The “no Russia clause” must be implemented in any contract entered into by an EU-based aircraft owner or lessor relating to the sale, transfer or export of aircraft (and parts) and this regime includes the operation into and out of Russia on a routinely scheduled flight. There are certain specific forms of operation that are exempt from the regulation, which must be analysed in detail to assess how to benefit from such an exemption.

Operators and owners domiciled in the EU must also consider the impact of US sanctions, as these (unlike EU sanctions) apply to a non-US person where that

person has a nexus to the US. The US sanctions are administered by the authorities OFAC (Office of Foreign Asset Control) and BIS (Bureau of Industry and Security). There are scenarios where the operation of US manufactured aircraft or aircraft with US manufactured components might cause a breach of US sanctions against Russia; and, obviously, other US sanctions targeting the aviation industry (eg, Cuba, Iran) must also be complied with. In sum, any flight operations involving a country exposed to US sanctions must also be analysed by non-US persons to assess whether such operation falls within the scope of a specific sanction.

Sustainable Aviation

Like many other industries, the aviation industry has implemented measures to reduce levels of CO₂ emissions in order to address the environmental impact of international aviation. The ICAO (International Civil Aviation Organisation) developed the so-called CORSIA regime (Carbon Offsetting and Reduction Scheme), activated in 2021. The EU released the European Trading Scheme (already in 2012), supplemented by the European Green Deal with targets for the EU territory to be climate-neutral by 2050.

Industry experts analysed utilisation data of passenger and cargo flights and used this as the basis for estimated CO₂ emissions. The data reveals that 2024 gross emissions were 1% higher than in the baseline year of 2019 (applied in the CORSIA regime) – despite the fact that the global fleet has far more modern and fuel-efficient aircraft than in 2019. Predictions for 2025 suggest that passenger traffic will grow by 7–8% over 2024, with gross emissions increasing around 6%. The availability of sustainable aviation fuel (SAF) will be too small to have a relevant impact on this increase, with IATA estimating around 0.3% SAF usage in 2024, perhaps growing to 0.5–1.0% in 2025. Thus, the divergence between actual net CO₂ emissions and the Net Zero pathways will widen further.

Experts demand that the aviation industry must inevitably adopt broader tools in order to achieve sustainability goals: regulatory shifts, SAF and carbon removal supply chains, new technologies and infrastructure needs should become central in financial terms for the airline and aircraft-lessor industry. The request is that financing terms (and maybe also leasing terms and conditions) be enhanced and extended by KPIs linked to CO₂ emission reductions and other sustainability targets – alongside traditional metrics like creditworthiness and asset quality. It is yet to be seen whether these parameters become standard figures. Multiple aircraft loan facilities were concluded that provided for a margin-concept offering lower margins as a reward for meeting certain pre-defined sustainability goals. In 2025, industry participants in Germany will need to monitor how the perceived risk of failing to meet sustainability targets (under the various regimes) may impact aircraft financing and leasing terms.

GREECE

Law and Practice

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Bahas, Gramatidis & Partners was established in 2002 and is based in Athens, Greece. Consisting of approximately 30 lawyers, the firm has a leading practice and has been involved in a significant number of aircraft lease transactions, representing major US and European aircraft leasing companies in structuring their lease agreements with domestic carriers and planning the Greek part of major securitisations. The team represents major international airlines, leasing companies, financial institutions and aviation-related

businesses in aircraft finance, leasing, acquisitions and operational matters. Bahas, Gramatidis & Partners' services include sale and leaseback of new and used equipment as well as securitisation of aircraft and airline receivables. The firm has associated law firms in more than 105 countries worldwide through its memberships of the World Law Group, Primerus, the International Bar Association, DRI, EELA, EALA, EFL, EFJ, IADC, the Lawyer Network, EDEKA, SDEE, EODID and AEDEF, among others.

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

The execution of an aircraft or engine sale agreement, including the sale of an ownership interest in an entity owning an aircraft or engine, does not in itself create an obligation to pay taxes in Greece.

The transfer of ownership upon completion of the sale agreement may be relevant for income tax and VAT purposes. This is especially pertinent if the lessee does not have VAT exemption and the asset is physically situated in Greece – in which case, VAT may be due.

For engine transactions, it is advisable to ensure that the engine is not located in Greece at the time of transfer.

1.1.2 Enforceability Against Domestic Parties

The sale agreement does not need to be translated, certified, notarised or legalised to be enforceable against a domestic party. However, if legal proceedings are instigated before a Greek court, foreign language documents must be translated into Greek to be admissible as evidence in such proceedings.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Transfer of ownership of Greek-registered aircraft must be made in writing and registered with the aircraft register. There is a separate register for aircraft engines.

The “transfer of title” to an aircraft or engine – or the bill of sale – extends to include all installed parts, such as an auxiliary power unit.

If an entity that owns an aircraft or engine sells its ownership interest while remaining the owner, this constitutes a transfer of shares rather than a sale of the aircraft or engine.

1.2.2 Sales Governed by English or New York Law

The transfer of title to an aircraft or engine physically delivered in Greece will be recognised if the bill of sale is governed by either English or New York law. For such bill of sale to be recognised in Greece, it must fully describe the aircraft – including type and serial number – and clearly indicate complete transfer of ownership. No other minimum substantive requirements are needed.

1.2.3 Enforceability Against Domestic Parties

The bill of sale needs to be notarised and apostilled if it has been executed abroad or must have the signature of the signatory authenticated by a competent Greek authority to be enforceable against a domestic party.

1.2.4 Registration, Filing and/or Consent From Government Entities

The bill of sale of a Greek-registered aircraft/engine should be filed with the relevant registry of the Hellenic Civil Aviation Authority (HCAA), together with all the documents required to register the new aircraft/engine owner.

Typically, the lessee applies for the registration of ownership change.

The bill of sale needs to be notarised and apostilled if it has been executed abroad or must have the signature of the signatory authenticated by a competent Greek authority.

The documents required for the registration of the bill of sale include:

- the bill of sale;
- the documents pertaining to the powers of attorney (notarised and apostilled) granted for the execution of the bill of sale;
- the certificate of location related to the aircraft/engine at the time of transfer; and
- a VAT exemption document of the lessee if applicable, or payment of VAT or taxes if applicable, along with the documents related to the novation and transfer of the lease agreement.

Completion of the ownership transfer and registrations can usually occur within the same day, depending on the aircraft's/engine's location.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

Usually, VAT obligations are not applicable if the aircraft is located abroad or in Greece and the lessee has VAT exemption.

If the aircraft is located in Greece at the time of the transfer of title (ie, at the time of execution of the relevant bill of sale), and the lessee is entitled to VAT exemption, the HCAA will enter the transfer of title in the register – provided a copy of the exemption certificate obtained by the lessee from the competent tax office is attached to the bill of sale.

However, if the lessee is not entitled to VAT exemption, the seller will have to secure a taxpayer registration/VAT number in Greece, and the sale must be made subject to the corresponding VAT rate. The HCAA will enter the transfer of title in the register, provided the bill of sale includes the seller's Greek taxpayer registration/VAT number, the relevant tax office, the tax representative (if any) and the corresponding VAT. The HCAA must immediately give notice of the transfer of title to the tax office that issued the foreign seller's Greek taxpayer registration/VAT number.

If the aircraft is located outside Greece at the time of the transfer of title, such transfer of title will not be subject to tax in Greece, and the contracting parties will need to examine any VAT-related obligations in the country where the aircraft is located. In order for the transfer of the title to the aircraft to be entered in the Greek Registry, a document (eg, issued by the airport where the aircraft is parked or any other authority) certifying the location of the aircraft at the time of transfer of title must be produced. The HCAA must give notice of the transfer of title to the lessee's tax office, providing information about the identities of the seller and the buyer and the place where the aircraft was located at the time of title transfer. Under the framework of Council Regulation 904/2010, the relevant tax office will relay this information to the tax authorities of the EU member state where the aircraft was located at

the time of title transfer, clarifying whether the lessee qualifies for exemption.

This process also applies when one or both of the contract parties are tax-liable entities based in Greece.

The sale of an ownership interest between foreign persons in a foreign entity that owns an aircraft or engine – including where title to such aircraft or engine is transferred while it is located in Greece or in transit – does not in itself create any Greek tax obligation regarding the aircraft or the engine owned by the entity.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

All types of operating/wet/finance leases or leases concerning only engines or parts are generally permissible and recognised.

2.1.2 Application of Foreign Laws

Foreign law may apply to a lease involving either a domestic party or an asset situated in Greece.

2.1.3 Restrictions Concerning Payments in US Dollars

No material restrictions are imposed on domestic lessees making rent payments to foreign lessors in US dollars.

2.1.4 Exchange Controls

There are no exchange controls that could prevent rent payments. Greece's foreign exchange market conforms to EU rules on the free movement of capital. Controls only exist to facilitate the enforcement of AML/CFT laws. Since 1 January 2001, Greece has been part of the Eurozone, and all transactions have been conducted in euros since 1 March 2002.

There are no restrictions or difficulties when converting, repatriating or transferring funds associated with proceeds. Although capital controls were imposed in late June 2015, these have since been lifted.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

There are no taxes/duties payable for physically executing a lease in Greece with regard to a domestic party or as a consequence of an original or copy of a lease being brought to Greece either physically or electronically.

However, income resulting from a lease is subject to taxation in the case of a Greek tax-resident lessor and matters of deductions of taxes are subject to double taxation treaties.

Leasing of an aircraft designated to be used by airlines predominantly for international commercial air transport and/or that is subject to VAT exemptions is usually exempt from VAT.

2.1.6 Licensing/Qualification of Lessors

A lessor does not need to be licensed or otherwise qualified in Greece to do business with a domestic lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

No mandatory terms are required in a lease (or ancillary documents thereto), governed by either English or New York law, that would not typically already be included.

2.2.2 Tax and Withholding Gross-Up Provisions

Tax and other withholding gross-up provisions are permissible and enforceable.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease can cover parts that are installed or replaced on an aircraft or engine after its execution, especially if this is provided in the lease agreement.

2.2.4 Risk of Title Annexation

There are legal and practical risks associated with aircraft engines becoming attached to other aircraft. These risks are reduced in the case of registered spare engines.

The lease should be carefully drafted in order to minimise the risk of title annexation in respect of aircraft engines installed on an airframe.

Accordingly, the lease may provide for a separate recognition-of-rights agreement to be entered into in favour of the lessor/owner/security trustee.

2.2.5 Recognition of the Concepts of Trust/Trustee

The concept of a trust and the role of an owner trustee is governed by the law applicable to the trust or the lease. The concepts of a common-law trust and an owner trustee of a common-law trust are not recognised under Greek in rem law.

Greece has not ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition. However, a statutory trust with its own legal personality and an owner trustee of such trust are recognised in such capacities (owner trustee as owner), but leases with owner trustees are avoided because they cause complexity.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The certificate of registration mentions both owner and operator. The aircraft registry records the legal owner as well as the lessor and lessee. The registration of the ownership and recording of the lease in the aircraft registry is necessary for the completion of the registration of the aircraft.

2.3.2 Registration If the Owner Is Different From the Operator

If the operator does not own the aircraft, the aircraft cannot be registered in Greece in the operator's name. However, it can be registered in the owner's name, even if the owner is not the operator.

2.3.3 Aircraft/Engine-Specific Registers

There are no separate registers for leases concerning aircraft and engines. However, there are separate registers for aircraft and engines.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

A lease (and a lessor's interest therein) must be filed in the domestic aircraft registry – otherwise, registration of the aircraft is not completed.

For the registration of an aircraft, the lease must be submitted by the operator for filing with the HCAA along with certain other documents, including:

- deregistration from the previous registry;
- proof of paid nominal duties;
- an original or certified copy of the executed lease with signature authentication, or notarised and apostilled if executed abroad;
- proof of signatories' authority, such as notarised and apostilled powers of attorney;
- corporate documents;
- a resolution of lease approval by the lessee;
- a Certificate of Airworthiness (CoA); and
- an insurance certificate.

Registration can be completed fairly quickly, depending on the airworthiness of the aircraft.

Generally, no government applications or consents are required prior to the execution and delivery of an aircraft and/or engine lease for an aircraft registered in Greece.

2.3.5 Requirements for a Lease to Be Valid and Registrable

For a lease to be registered in the Greek aircraft register, it does not require translation, but it must be executed with the signatures authenticated by a competent Greek authority, or notarised and apostilled if executed abroad.

2.3.6 Taxes/Duties Payable for Registering a Lease

The fees payable to the aircraft registration for registering a lease are nominal.

2.3.7 Registration of Aircraft in Alternative Countries

There are instances where aircraft habitually based in Greece are registered in other jurisdictions such as Malta, in line with the application of Article 83bis of

the Convention on International Aviation (the "Chicago Convention").

2.3.8 Requirements for Documents Concerning Registration

For an aircraft registration to be accepted and processed, the Greek aircraft register necessitates the filing of original executed documents or certified copies from a lawyer. Translations from English are not required by the Greek register.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

Upon leasing an aircraft or engine to a Greek lessee, a foreign lessor is not obligated to pay any income tax or capital gains.

Withholding tax may be due, subject to the provisions of double taxation treaties. The withholding tax should be paid (retained) by the lessee.

The lease agreement may provide that the lessee is under obligation to pay lease rental net of any Greek taxes, including any withholding tax. Gross-up provisions are recognised.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor cannot be deemed to be resident or domiciled in Greece simply as a result of its being a party to, or its enforcement of, the lease.

2.4.3 Engine Maintenance and Operations

Liabilities in respect of aircraft or engine maintenance and operations may not generally be imposed on a foreign lessor under a lease as a result of its being a party to such lease.

2.4.4 Damage or Loss Caused by an Asset

If the lessor is also the owner of the aircraft, the lessor as the owner would be fully liable for damages to third parties caused by the aircraft's use while in flight. Here, "damages" refer to those affecting the property and personal safety of any third party, such as crew members and passengers of other aircraft, and individuals on land or at sea. The owner's liability extends up to the value of the aircraft. The limits of liability

do not apply if the damages are due to intentional or gross negligence.

The lessor would have no other liability under Greek law.

2.4.5 Attachment by Creditors

Creditors of a domestic lessee could not attach an aircraft leased to it but owned by a different entity, except in the case of liens.

2.4.6 Priority of Third Parties' Rights

Whether or not a lease/lessor is registered in the aircraft register, Greek aviation law gives priority to certain preferential rights such as expenses and fees for salvage, any necessary maintenance charges and handling fees as well as other aviation and airport taxes, relating to air navigation/landing, air navigation facilities, use of airports, EUROCONTROL, etc, which are chargeable on the aircraft.

The obligations of the lessee, in terms of priority and security, rank at least equally and *pari passu* with all other unsecured and unsubordinated obligations of the lessee, save and except in a winding-up (where there are preferential creditors – ie, creditors secured by a lien over real estate or by a pledge, and employees' claims relating to their salaries).

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

It is not a mandatory requirement that either all or part of the insurance be placed in Greece.

2.5.2 Mandatory Insurance Coverage Requirements

There are mandatory insurance coverage requirements (third-party liability to cover damage to aircraft, passengers and cargo, as well as third parties on the ground).

Commercial air carriers must be insured for damage caused to passengers, luggage, freight and third parties, with mandatory minimum coverage. The mandatory insurance coverage requirements are imposed by European regulations.

2.5.3 Placement of Insurance Outside of Jurisdiction

Greek law does not restrict the portion of reinsurance coverage that can be taken out abroad.

2.5.4 Enforceability of "Cut-Through" Clauses

"Cut-through" clauses in the insurance/reinsurance documents are enforceable.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurances/reinsurances are permitted.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

There are no restrictions on a lessor's ability to terminate an aircraft lease, re-export the aircraft and/or sell the aircraft following such termination.

In certain cases (third-country origin), the aircraft may need to be physically located in Greece before exportation.

2.6.2 Lessor Taking Possession of the Aircraft

In situations where the lessee opposes the lessor's possession, the lessor is prohibited from obtaining physical possession of the aircraft without a court order. A court order is therefore necessary in this case.

In certain cases, a deregistration power of attorney (DerPoA) may be of practical use in cases of repossession.

2.6.3 Specific Courts for Aviation Disputes

Greece does not have specialised courts dedicated to aviation disputes. However, commercial courts or other competent courts - such as those for lease disputes – hold the jurisdiction to settle disagreements between commercial entities, whether they are Greek or foreign.

2.6.4 Summary Judgment or Other Relief

A lessor could obtain a summary judgment, equitable or other injunctive relief pending a final resolution of judicial proceedings to enforce an aircraft lease, particularly when there is an imminent risk concerning the aircraft, such as the necessity for maintenance or

reduction of value. The process, from the filing to the issuance of the decision, could last up to six months.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Greek courts will generally uphold:

- a foreign law as the governing law of an aircraft lease between a French and a foreign party;
- the submission to a foreign jurisdiction;
- a contractual waiver of jurisdiction immunity by the parties of such lease; and
- a contractual waiver of immunity from execution that expressly describes the assets subject to the waiver of such immunity.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Domestic courts could recognise and enforce a final judgment of a foreign court or an arbitral award without re-examination of the matter, unless it is shown that:

- the judgment contradicts any decision previously issued in Greece concerning the same case between the same parties, or if the judgment is incompatible with an earlier judgment given in another EU member state or in a third state involving the same cause of action and the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the member state addressed;
- the lawsuit has not been served on the defendant in a timely manner; and
- the judgment is contrary to good morals or public order, in each case, as dictated by Greek law.

2.6.7 Judgments in Foreign Currencies

Greek judgments are in euros. However, they can be converted from a foreign currency.

2.6.8 Limitations on Lessors' Actions Following Termination

In certain cases, Greek courts may consider additional rent as a penalty clause following termination of a lease for default (including where the lessee fails to return the aircraft), depending on the facts and the wording of the contractual undertakings.

Greek courts may reduce penalty clauses if excessive, depending on the facts of the case and the contractual undertakings.

Under Greek legal precedent, there may be restrictions with regard to punitive damages. Statutory provisions regulate default/compound interest.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

A lessor under an aircraft lease is not required to pay substantial taxes or fees (ie, non-nominal, except in cases of request for judicial payment where the duties paid are a specific percentage of the amount) in connection with the recognition and enforcement of such lease in Greece.

2.6.10 Mandatory Notice Periods

The governing law will be applicable for notice periods if the aircraft is operated domestically or leased by a domestic operator.

2.6.11 Lessees' Entitlement to Claim Immunity

Whether the lessee is entitled to claim any immunity from suit, execution, attachment or other legal process will depend on its actual identity. If the lessee is a sovereign body or other government organ, it may be able to claim sovereign immunity.

2.6.12 Enforcement of Foreign Arbitral Decisions

Greece has adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention").

Greece's domestic courts recognise and enforce arbitral decisions.

2.6.13 Other Relevant Issues

There are no other relevant issues that lessors should be aware of in relation to the enforcement of their rights.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Greece recognises the concepts of contractual assignment and novation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Assignment and assumption agreements or novation agreements (or deeds) are executed as three-party agreements and are filed with the HCAA.

Usually, the lease provides that the lessee consents to these transfer agreements or the terms for such transfer.

There are no mandatory terms that need to be included in such agreement/deed, as they are governed by applicable law.

2.7.3 Enforceability of Lease Assignments/Novations

If an aircraft and/or engine lease assignment and assumption/novation is executed abroad it will need to be notarised and apostilled. If executed in Greece, the authenticity of the signature needs to be certified by a competent Greek public authority.

2.7.4 Filing/Registration of Lease Assignments/Novations

Lease assignments/novations need to be filed with the HCAA, along with the transfer of ownership documentation (if applicable), and are not subject to any consent from any government entity.

The completion process is typically swift, and no government consents are necessary prior to executing and delivering an aircraft and/or engine lease assignment and assumption/novation concerning an aircraft registered domestically, as long as all relevant documents have been properly filed.

2.7.5 Taxes/Duties Payable on Assignment/Novation

Taxes/duties are not payable in respect of the execution of an aircraft lease assignment and assumption/novation agreement, or as a consequence of an original or copy thereof being brought into Greece, either physically or electronically. However, there may be issues related to duties that have to be reviewed ad hoc.

2.7.6 Recognition of Transfer of Ownership Interests

When the ownership interest of an entity that owns an aircraft is transferred (with the legal title to the asset remaining with that entity), no filing with the Greek aircraft register is required. This is because the entity in question remains the registered legal owner of the aircraft.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

The lessee, lessor or owner can deregister an aircraft - although the existence of a DerPoA may be required for the lessor to apply for deregistration. This applies even when lease expiry obligates the HCAA to deregister the aircraft.

An application for the deregistration of the aircraft will have to be submitted to the HCAA. Customs clearance may also need to be submitted.

In cases other than the expiry of the lease term or unilateral termination, a letter or agreement of termination of the aircraft (duly executed) must be submitted along with the DerPoA and legal documents proving the authority of the signatories. The documents must be notarised and apostilled or, if they are intended to be used in Greece, must have the signatures of the signatories authenticated.

2.8.2 Lessee's/Operator's Consent

An aircraft owner, mortgagee or lessor may apply for the deregistration of the aircraft without the consent of the lessee or operator, especially where a DerPoA has been granted, and once the mortgage has been released.

2.8.3 Required Documentation

To deregister the aircraft, the owner, mortgagee or lessor will have to submit - along with an application - the customs documents, relevant payment of nominal duties, a copy of the DerPoA and termination documentation (unilateral termination or agreement properly executed, and legal documents proving the authority of the signatories (PoAs, etc)).

2.8.4 Duration of Deregistration Process

The deregistration process typically takes a couple of days when there are no disputes. In the event of dispute, the timeframe varies depending on whether the lessee resorts to legal action.

2.8.5 Aviation Authority's Assurances

The Greek aircraft register will not provide advance written assurances to an aircraft owner, mortgagee or lessor as to the prompt deregistration of the aircraft until all the required documentation is filed with the executed request.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

The fees charged by the aircraft register in respect of the deregistration of an aircraft are nominal.

2.8.7 Deregistration Power of Attorney

The DerPoA must be written in Greek, be irrevocable and bear specific wording. It also requires notarisation.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

To enforce a DerPoA, besides paying the nominal fees, a copy of the DerPoA must be submitted to the HCAA along with customs documentation (if applicable) and termination documentation.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

Greek law is applicable to the DerPoA.

2.8.10 Revocation of a Deregistration Power of Attorney

The grantor of the DerPoA cannot revoke it without consent of the beneficiaries.

2.8.11 Owner's/Lessor's Consent

An aircraft owner, mortgagee or lessor can export the aircraft without the lessee's consent, on the basis of the DerPoA.

A mortgagee can export the aircraft without the owner or lessor's consent on the basis of the DerPoA.

To enhance the probability of exporting the aircraft without the lessee's consent, the owner, mortgagee or lessor should request a DerPoA during lease or mortgage negotiations.

While the asset does not necessarily need to be in Greece at the time of deregistration, its location may become significant in certain customs export cases.

2.8.12 Aircraft Export Permits/Licences

Typically, Greece does not issue aircraft export permits or licences, except in instances of customs export permits.

These permits cannot be issued in advance.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

The costs/fees/taxes that are charged in respect of the customs export of an aircraft are not significant.

2.8.14 Practical Issues Related to Deregistration of Aircraft

There are no other significant practical issues that an aircraft owner, mortgagee or lessor should be aware of in respect of the deregistration of aircraft in Greece.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

The main law on bankruptcy and insolvency is Law 4738/2020. This newly enacted Greek law, titled "Debt Settlement and Facilitation of a Second Chance", came into effect on 1 January 2021.

It transposes the provisions of Directive (EU) 1023/2019 on preventative restructuring into the law, replaces the majority of the previous debt settlement mechanisms and restructuring schemes, and introduces a new regime dealing with various forms of personal and corporate insolvencies.

Liquidation and administration are also governed by the laws on the relevant corporate entities and by the Civil Procedure Code.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Within the framework of pre-bankruptcy proceedings, rehabilitation/reorganisation proceedings aim at reaching a settlement/rehabilitation agreement between the debtor and its creditors rather than liquidating the assets.

The reorganisation agreement is validated by the court.

The Out-of-Court Workout is a new procedure carried out electronically via a public electronic platform. It commences once the debtor or certain types of creditors (financial institutions, the State, social security funds) file an online application via the platform to the competent authority.

A restructuring agreement is entered into, and the creditors that are legally bound by the agreement may not proceed with any enforcement proceedings against the debtor.

Bankruptcy is a process that aims to repay the debtor's debts to creditors using the debtor's assets. This can be done by liquidating the assets at a public auction or through the sale of the debtor's business.

When a debtor consistently and generally fails to pay their debts, a bankruptcy application can be filed. This application may be submitted by the debtor themselves, a creditor or the district attorney. They will submit this application to the appropriate court to declare the debtor bankrupt.

If the court accepts the application, a supervising judge and a bankruptcy trustee are subsequently appointed.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

Greek Law 3858/2010 enacted the UNCITRAL Model Law and introduces the prospect of cross-border co-operation where there are overseas proceedings. The UNCITRAL Model Law is regarded as necessary for promoting international co-operation in cases of cross-border insolvency. The law also provides for the

recognition of a foreign judicial decision of an insolvency process, following a Greek judicial decision recognising the foreign decision.

EU Regulation 2015/848 on insolvency proceedings provides for the immediate recognition of judicial decisions related to restructuring or insolvency proceedings issued by foreign EU courts. In particular, any judicial decision related to restructuring or insolvency proceedings issued by the competent courts of an EU member state has direct effect in any other EU member state.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

The lessee's insolvency does not affect a DerPoA if it is irrevocable.

2.9.5 Other Effects of a Lessee's Insolvency

When the lessee of an aircraft, who is in possession of that aircraft, is put into liquidation, administration or a similar process, the following generally applies:

- the bankruptcy trustee may elect to not continue the performance of the lease;
- the lessor may encounter delays in repossessing the aircraft on termination of the lease if the lease was not terminated before the date of the bankruptcy judgment;
- the aircraft will not be deemed to be part of the lessee's property; and
- the liquidator/administrator may not prioritise the rights of any other ordinary creditors over those of the lessor.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The main risk for a lender if a borrower, guarantor or entity providing security becomes insolvent is that the lender's claims will not be satisfied, except if security has been granted on the aircraft. If there are insufficient assets to cover the lender's payment, or in the absence of security, the lender will be treated like other unsecured creditors.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

Once bankruptcy is declared, all individual measures of the bankruptcy creditors against the debtor for the satisfaction or discharge of their bankruptcy claims will be automatically suspended. This includes:

- the commencement or continuation of enforcement;
- the exercise of counterclaims;
- the continuation of proceedings;
- the bringing or adjudication of legal remedies; and
- the issuing of administrative acts, or their enforcement on elements of the bankrupt's assets, including administrative enforcement measures by the State and social security institutions, as well as measures to secure the debt pursuant to legislation.

Enforcement may also be suspended if an application is made before filing an agreement for the debtor's reorganisation.

The initial suspension period can last up to four months, with a potential extension of up to six months.

The filing of a recovery agreement triggers an automatic stay that lasts for four months, which may be extended.

The total duration of the moratorium under the new law cannot exceed 12 months.

Enforcement may also be suspended in the event of an application for bankruptcy if the application provides for a going-concern sale. Otherwise, the application for - or declaration of - bankruptcy will not suspend enforcement by secured creditors.

2.9.8 Liquidation of Domestic Lessees

Compulsory administration is a legal process that allows creditors to manage a debtor's property to satisfy their debts. The process does not involve freezing or auctioning the property, and the conditions for compulsory administration are as follows:

- the creditor must have a monetary claim against the debtor;

- the creditor must have an enforceable title to the claim;
- the creditor must have served the debtor with an order for execution;
- a decision of a single-member court of first instance of the district where the debtor's property or place of business is located must be issued; and
- the decision that imposes the receivership must be served on the debtor.

2.9.9 Ipso Facto Defaults

During a lessee's insolvency proceedings, ipso facto defaults are acknowledged, permitting repossession of the aircraft.

2.9.10 Impact of Domestic Lessees' Winding-Up

In the case of an insolvency situation that would usually constitute an event of default under the lease agreement and/or when the domestic lessee is wound up by a court or administration proceeding, the lessor would be entitled to request the return of the aircraft.

In a liquidation of the lessee or insolvency proceedings, the aircraft may not be attached by unsecured creditors of the lessee. The lessee only has a right to possession of the aircraft pursuant to the lease agreement, and its rights are subject to the proprietary and security interests of the lessor and its secured creditors.

Any outstanding lease rental payments that were due to the lessor when the lessee was being wound up would be treated as unsecured, along with the other ordinary creditors of an insolvent lessee.

If the lease agreement continues, claims for lease rentals incurred following the formal opening of insolvency proceedings constitute preferred claims against the insolvency estate.

The lease security deposit would be available to the lessor to cover outstanding claims.

Maintenance reserves would usually remain with the lessor.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The Convention on International Interests in Mobile Equipment (the “Convention”) and the related Protocol on Matters specific to Aircraft Equipment (the “Protocol”) are not in force in Greece.

2.10.2 Declarations Made Concerning Conventions

There is no applicable information in this jurisdiction.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

There is no applicable information in this jurisdiction.

2.10.4 Enforcement of Conventions

There is no applicable information in this jurisdiction.

2.10.5 Other Conventions

Greece is party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft, and has not ratified the 1933 Rome Convention for the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

There are no restrictions on foreign lenders financing local aircraft or on borrowers’ utilisation of loan funds. However, the act of providing loans within Greece is a regulated activity. Only credit institutions that have been duly licensed or those that have obtained an EU passport can engage in this activity.

While foreign lenders do need a licence to offer lending services in Greece, as provided by the Bank of Greece or an EU passport, they do not need to obtain a licence to obtain security over an aircraft located in Greece for loans that have been provided by them in their jurisdiction.

3.1.2 Effect of Exchange Controls or Government Consents

There are no exchange controls or government consents that would be material to any financing or repa-

triation of realisation proceeds under a loan, guarantee or security document.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders, although there are certain limitations when it comes to securing real estate in Greek border areas.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Depending on the legal form of the corporate borrower, certain statutory restrictions exist if the lender is a direct or indirect affiliate or if security is granted for the liabilities of an affiliated person (upstream, downstream or sidestream collateral).

In the case of *société anonyme*, said guarantees are considered “related-party transactions” and a certain approval and publication process is required.

The guarantee may be granted either:

- after a ten-day period from the publication in the company registry, during which shareholders holding one twentieth of the company’s shares may challenge the approval; or
- following the written consent of all shareholders of the company, waiving their right to dispute the process.

3.1.5 Lenders’ Share in Security Over Domestic SPVs

It is advisable for a lender to take share security over a domestic special purpose vehicle that owns the financed aircraft.

A pledge of shares is recognised.

3.1.6 Negative Pledges

Negative pledges are recognised.

3.1.7 Intercreditor Arrangements

No material restrictions or requirements are imposed on intercreditor arrangements.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent (such as the facility agent) under a syndicated loan is recognised only by the bond loan legislation.

The Société Anonyme Company Law provides that, if a bond loan is governed by foreign law, collateral security and guarantees are granted in the name of the person who, under the law governing the bond loan, may hold securities and guarantees on his/her account on behalf of the bondholders.

3.1.9 Debt Subordination

All forms of subordination are known in Greece.

The subordination usually takes the form of an agreement between secured and unsecured creditors of a borrower entity.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of all or part of an outstanding debt under an English or New York law-governed loan is permissible and recognised on the basis of the applicable law.

3.1.11 Usury/Interest Limitation Laws

Interest rates are not subject to a legal maximum; however, they should be determined according to the Bank of Greece in the context of the open market and competition rules. Limitations apply to default interest and compounding of interest.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

Greek law allows for the creation of a first-priority aircraft mortgage that is locally provided. Once the mortgage has been registered in the aircraft register, the creditor has the right to seize and sell the aircraft in the event of default.

3.2.2 Types of Security Not Available

There are no types of security that cannot be taken over an aircraft or related collateral such as engines, warranties or insurance.

3.2.3 Trust/Trustee Concepts

With the exception of the Greek bond loan structures, the concept of a trust and the role of a security trustee are not recognised; instead, parallel debt structures should be used. The parallel debt structure allows the debtor to undertake to pay the agent/trustee, as the creditor, an amount equal to the total amount owed to the creditors.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

A borrower may assign its rights to an aircraft or under an aircraft lease (including in relation to insurances) to a foreign security trustee, pursuant to a security assignment or mortgage.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

Under an aircraft lease, it is possible to assign the rights and benefits only, without also assigning the attendant obligations of the lessor.

3.2.6 Choice of Foreign Law

A security assignment or a guarantee can be governed by English or New York law.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

In connection with any Greek law security assignment, a notification of the third-party debtor is necessary to prevent the third-party debtor from discharging its obligations by making payments to the assignor instead of the assignee.

It is not necessary for a security assignment to be translated, certified, notarised or apostilled/legalised to be enforceable against a domestic party. However, if legal proceedings are initiated before a Greek court, foreign-language documents must be translated into Greek to be admissible as evidence in such proceedings.

3.2.8 Domestic Law Security Instruments

In the case of an English or New York law-governed security assignment in respect of an aircraft registered domestically, there is no need for a financier to take any additional domestic law security instrument

(except for the registration of the Greek mortgage). Such an assignment does not need to be registered.

Cape Town filings are not provided.

A Greek law mortgage is a domestic law security instrument and is filed with the HCAA, with a nominal cost of EUR2,000.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

An English or New York law-governed security assignment or a domestic law security instrument are not registered domestically.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests over an aircraft and/or engines is recognised. If it concerns a mortgage, it has to be registered in the Greek aircraft mortgage register.

3.2.11 Effect of Changes in the Identity of Secured Parties

If the identity of the secured parties under a security assignment changes after its execution, the security interests are not jeopardised as long as the relevant filings are made in relation to the mortgage.

The effects of any change in the identity of a secured party under a security assignment governed by foreign law depend on the specific arrangements made with regard to such security interest – eg, whether a security trustee concept has been introduced or not.

The transfer of a mortgagee's position under a Greek aircraft mortgage requires registration in the Greek aircraft mortgage register.

3.2.12 “Parallel Debt” Structures

Parallel debt structures are used domestically.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment would not be deemed to be resident, domiciled, carrying on business or subject to any taxes as a result of its

being a party to – or its enforcement of – such security assignment.

3.2.14 Perfection of Domestic Law Mortgages

A domestic law mortgage over an aircraft or engine can be perfected. It would take effect upon its registration in the Greek aircraft mortgage register.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

The mortgage over an aircraft is different from the mortgage over spare engines. Spare engines are separately registered and a mortgage can be registered on them.

3.2.16 Form and Perfection of Security Over Bank Accounts

An account pledge is the granting of security over a bank account (such as a lease receivables account) and it requires, among other things, a notification to the account bank.

3.3 Liens

3.3.1 Third-Party Liens

A lien can be taken over an aircraft. The aforementioned liens are extinguished:

- on the aircraft's sale in a public auction; or
- three months after the claim arose, unless they are registered in the mortgage book following agreement or exercise of a lawsuit.

Fleet liens could be applicable for specific liens provided by Greek law, such as handler's fees and HCAA charges, and the aircraft could be grounded. The third party could detain the aircraft and enforce the lien.

3.3.2 Timeframe to Discharge a Lien or Mortgage

A mortgage can be swiftly deregistered – typically within a week, provided there are notarised and apostilled powers of attorney from both the mortgagor and mortgagee.

The lien's discharge and the associated timeline depend on whether the lien is contested. If it is unchallenged and the relevant obligation is paid to the third party (such as the handling agent), the lien can be discharged promptly – usually within a week.

3.3.3 Register of Mortgages and Charges

The mortgage is registered in the book of mortgages. The mortgage has to be registered in order to be perfected and to give priority to the mortgagee.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

Rights of detention can be applied for liens, such as obligations to handlers, the HCAA, airport authorities and EUROCONTROL.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

The aircraft registry of the HCAA is the relevant source for any aircraft search to verify that an aircraft is free of encumbrances.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

Enforcement will depend on the terms of each such instrument. Governing law shall be applicable.

3.4.2 Security Trustees' Enforcement of Their Rights

Security trustees' enforcement of their rights will be governed by applicable law.

3.4.3 Application of Foreign Laws

Domestic courts will uphold:

- a foreign law as the governing law of a finance or security document; and
- the submission to a foreign jurisdiction.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Greek courts will recognise and enforce the final judgment of a foreign court or an arbitral award without re-examining the merits of the case.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

A secured party cannot take physical possession of an aircraft to enforce a security agreement/aircraft mortgage without the consent of the lessee or operator.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

There are no special courts competent to decide enforcement actions under a security assignment or mortgage.

3.4.7 Summary Judgments or Other Relief

A secured party can obtain a summary judgment, equitable or other injunctive relief pending final resolution of judicial proceedings to enforce a security agreement/aircraft mortgage. A bond would probably need to be granted.

3.4.8 Judgments in Foreign Currencies

Greek judgments are in euros. However, they can be converted from a foreign currency.

3.4.9 Taxes/Fees Payable

The secured party needs to pay judicial expenses for the enforcement of a decision.

3.4.10 Other Relevant Issues

There are no other relevant issues that a lender should be aware of in relation to the enforcement of its rights.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are no other material issues and/or any material court judgments that are relevant to the purchase, sale, lease or debt finance of an aircraft registered domestically and/or involving a domestic party.

4.2 Current Legislative Proposals

There are no current proposals before the legislature relating to the foregoing items that alter them or that are worth noting.

HUNGARY

Law and Practice

Contributed by:

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Lakatos, Köves & Partners has twelve partners and more than 50 lawyers (including tax advisers) and was previously Clifford Chance's Budapest office before becoming independent in 2009. The firm has a somewhat unique position as an independent one-country firm focused on working for international clients and often working with international law firms. It is one of the leading practices in Hungary covering aviation, and is involved in most of the market's major deals. Lakatos, Köves & Partners helped to create and es-

tablish innovative structures on the Hungarian market and has substantial experience in the full spectrum of aviation matters, including aircraft finance, securitisation of aircraft lease receivables, aviation regulatory, financial and operating leases, sale and leaseback transactions, pooling of engines, security interests, insurance and reinsurance liability, litigation and dispute resolution with strong trial capability and repossession of aircraft, and tax issues.

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LAKATOS, KÖVES AND PARTNERS
LAW FIRM

1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

The execution of an aircraft or engine sale agreement (including for the sale of an ownership interest in an entity) or bringing such agreement into the territory of Hungary does not incur transfer tax, stamp duty or similar charges.

However, the transfer of the title of the aircraft or the engine, or the sale of an ownership interest in an entity, may give rise to tax liabilities (see **1.2.5 Taxes/Duties Payable upon Execution of a Bill of Sale**).

1.1.2 Enforceability Against Domestic Parties

In order to be used as evidence before the Hungarian courts, a sale agreement will need to be translated into Hungarian.

In practice, it is sufficient for most purposes if only the bill of sale is translated into Hungarian. To have full evidential power under Hungarian law, the bill of sale should be appropriately witnessed or notarised and, if executed outside Hungary, legalised. The Hungarian Aviation Authority, ie, the Minister of Construction and Transport, acting as the aviation authority (CAA) (*légiközlekedési hatóságként eljáró Építési és Közlekedési Miniszter*), accepts this approach as valid for registration of a change in the ownership of an aircraft.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Where an aircraft is registered in Hungary, Hungarian law applies to the proprietary (in rem) rights in relation to the aircraft.

In order to transfer title to an aircraft or engine under Hungarian law, two things are required:

- an agreement to transfer title to the aircraft and/or engine; and
- transfer of possession regarding the aircraft and/or engine.

Agreement to Transfer Title

The agreement to transfer title to the aircraft (and any bill of sale) may be drafted to include all installed parts, such as an APU.

Transfer of Possession

The transfer of possession regarding the aircraft (by virtue of which the ownership is transferred, beyond doubt, to the buyer) is a condition to the sale to be recognised, and thus an executed contract of sale in itself is not sufficient for a valid transfer.

Transfer of possession in respect of an aircraft can be performed in a “symbolic” way. Transfer of title and possession is often documented by:

- the delivery to the buyer of a bill of sale executed by the seller; and
- acceptance of the aircraft by the buyer by delivery of an acceptance certificate to the seller.

1.2.2 Sales Governed by English or New York Law

Provided that the requirements set out in 1.2.1 **Transferring Title** are met, transfer of title to an aircraft or engine physically delivered in Hungary should be recognised if the bill of sale is governed by English or New York law.

1.2.3 Enforceability Against Domestic Parties

In order to be enforceable against a Hungarian party, the bill of sale should have full evidential power under Hungarian law (ie, it should be in writing, translated into Hungarian and appropriately witnessed or notarised and, if executed outside Hungary, legalised).

1.2.4 Registration, Filing and/or Consent From Government Entities

Any change in ownership must be reported to the CAA within 15 days from the effective date of the underlying purchase bill of sale. The Hungarian Aircraft Register is a “notation” register in terms of ownership over aircraft. Registration itself does not constitute a change in ownership, but merely records any change in the ownership of any aircraft notified to the CAA.

Formalities

See 1.1.2 **Enforceability Against Domestic Parties** for the requirements for a bill of sale.

Registration

The fees payable to the CAA for registration of a title transfer in the Hungarian Aircraft Register is HUF64,000 (approximately EUR160).

No separate government consents are required for a transfer of non-military aircraft.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

The transfer of the title, due to the execution or delivery of the bill of sale or consummating the sale of the ownership in an entity that owns an aircraft or engine, can be subject to tax or duties as follows.

Transfer of the Title of an Aircraft or an Engine

Upon the transfer of the title of an aircraft or an engine, the seller may be subject to Hungarian corporate income tax (CIT), levied at a flat rate of 9% of the positive tax base (which is the pre-tax profit of the

seller adjusted by various items) if the seller is either a Hungarian tax resident entity or has a permanent establishment in Hungary.

The revenue from the sale can also be subject to local business tax (LBT) levied by the Hungarian municipalities at the maximum rate of 2% provided that the seller is regularly engaged in the sale of aircraft and engines as its business activity.

In general, the sale of an aircraft located in Hungary or in transit to Hungary is subject to VAT (the general rate is 27%). The sale of an engine is subject to Hungarian VAT if the engine is located in Hungary at the time of the sale. Where the aircraft or engine is to be transported abroad in connection with the sale, no Hungarian VAT should apply.

However, the aircraft or the engine, operated by an entity engaged in international air traffic, is exempt from VAT under the currently applicable VAT laws.

Hungary has implemented Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union by Act LXXXIV of 2023 (the “GLOBE Act”). The GLOBE Act has become effective on 31 December 2023. Under the GLOBE Act, the taxpayer entity can be subject to additional tax on the income from the transfer of the title until the effective tax rate applying to the taxpayer reaches 15%.

See 1.2.4 **Registration, Filing and/or Consent From Government Entities** on payable fees.

Sale of an Ownership Interest in an Entity

Where the ownership interest in an entity is held by a Hungarian tax resident company or a Hungarian permanent establishment of a foreign entity, the profit of the sale of the ownership interest can be subject to corporate income tax (the rate is 9%).

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

Most types of operating, wet or finance leases are permissible including separate engine leases. Providing credit is a regulated activity in Hungary and appropriate advice should be sought in relation to any finance lease.

2.1.2 Application of Foreign Laws

Hungarian law will generally recognise and enforce a lease if it is governed by a non-Hungarian law (see **3.4.3 Application of Foreign Laws**). The fact that one of the parties to the lease is a non-Hungarian resident (eg, the lessor) should in itself satisfy this requirement. Therefore, the parties to the lease may validly enter into contracts governed by and interpreted in accordance with any other (non-Hungarian) law.

As an exception, there are restrictions in relation to certain state-owned assets: if an aircraft is owned by the Hungarian state or an emanation thereof, Hungarian law may need to be applied.

2.1.3 Restrictions Concerning Payments in US Dollars

There are no material restrictions imposed on domestic lessees making rent payments to foreign lessors in US dollars.

2.1.4 Exchange Controls

There are no (central bank or other) exchange controls or prohibitions on remitting or repatriation of proceeds in force in Hungary. Therefore, no Hungarian regulatory approval or other consent is required for any (lease or other) payments to be made by the lessee under a lease, in either Hungarian forints or a foreign currency.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

No transfer tax, stamp duty or similar charges shall be payable upon the physical execution of a lease. The fact that the contract is brought into Hungary does not in itself give rise to a tax liability.

2.1.6 Licensing/Qualification of Lessors

The CAA does not currently require a licence from a lessor if the relevant lease agreement provisions in respect of the aircraft set out that the lessee is responsible for all obligations in relation to operation of the aircraft. The CAA has the discretion to alter its future requirements in this regard.

The provision of financial leases is a regulated financial service in Hungary. Providers of financial leases should seek appropriate advice on the regulatory framework for providing financial leases in Hungary.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

The lease should adequately identify the parties, the leased assets and the consideration for the lease. The lease should also contain valid governing law and jurisdiction clauses.

English and New York law-governed leases customarily used in the market typically satisfy the mandatory terms required by Hungarian law without amendment.

2.2.2 Tax and Withholding Gross-Up Provisions

No withholding tax applies to lease fees or similar payments under the currently applicable Hungarian tax laws. However, should the lessee be required at any time by law to make any deduction or withholding, provided that the laws implementing this payment obligation would not introduce a comprehensive new structure to such transactions, the gross-up provision of the lease should be recognised and enforceable in Hungary.

2.2.3 Parts Installed or Replaced After a Lease's Execution

Hungarian law distinguishes between “components” and “accessories”. As a matter of Hungarian law, components installed or replaced after the execution of the lease will become part of the aircraft or engine upon installation. Accessories will, in the absence of a contrary agreement between the parties, not automatically become the property of the lessor as a matter of Hungarian law. The parties are free to stipulate that the terms of the lease cover any replacement parts

and accessories installed or replaced after the date of the lease.

2.2.4 Risk of Title Annexation

Whether an aircraft engine qualifies as a “component” or an “accessory” of an aircraft, and thus whether ownership rights to the airframe (as principal asset) automatically extend to the engines, has not been tested before the Hungarian court.

2.2.5 Recognition of the Concepts of Trust/Trustee

Hungary is not a party to the 1986 Hague Convention on Trusts and the concept of trust is not familiar in domestic law. The trust owner should be afforded the rights as the legal owner of the aircraft under Hungarian law. It is, however, untested as to whether a trust and the specific characteristics and duties of an owner trustee would be recognised under Hungarian law.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The CAA requires all interested parties and the relevant legal relationships between them to be noted on the Hungarian Aircraft Register. The registration process is now carried out in an electronic way and all documents need to be sent to the CAA via the appropriate online platform. In particular, if the operator is not the legal owner of the aircraft, the owner and the legal grounds on which the operator operates the aircraft in Hungary should be specified.

2.3.2 Registration If the Owner Is Different From the Operator

An aircraft may be registered domestically in the name of the aircraft operator if the operator is not also the owner, or in the name of the owner if the owner is not also the operator.

2.3.3 Aircraft/Engine-Specific Registers

A specific aircraft register exists in Hungary and is operated by the CAA. The Hungarian Aircraft Register is a notation register, that is (except for mortgages perfected upon registration), it has only declarative effect regarding the rights registered therein. The recognition of such rights takes effect in accordance with the underlying transaction documents and the Hungarian Aircraft Register only officially acknowledges

the existence of such rights. No specific register for engines exists

2.3.4 Registration of Leases With the Domestic Aircraft Registry

The registration of leases is required, as the CAA needs to see all the interested parties and the legal relationships between them, and, in particular, the legal grounds on which the operator operates the aircraft in Hungary. As there is no separate register for leases, a lease will be noted in the course of the aircraft registration procedure in the case of a new aircraft.

In the event of a title transfer, the new lease agreement or transferred novated agreement (as applicable) will be registered simultaneously with the new owner.

Leases are not subject to consent from any government entity.

2.3.5 Requirements for a Lease to Be Valid and Registrable

A lease must be submitted to the CAA in Hungarian, accompanied by an official Hungarian translation. The lease agreement under which the aircraft is operated is registered in the course of the process of registering the aircraft with the Hungarian Aircraft Register.

In practice, notwithstanding the above, in order to avoid the need for obtaining a costly official translation of the lease agreement, the CAA accepts a short form, bilingual or officially translated, executed by the relevant parties and submitted to the CAA together with the copy of the lease in its original language. This document (usually called a joint declaration) must contain the relevant references to be admitted.

2.3.6 Taxes/Duties Payable for Registering a Lease

The operation of the aircraft must be registered, which may be subject to one of the following fees:

- the registration of the aircraft exceeding a take-off mass of 5,700 kg (HUF166,000, approximately EUR415); or
- the registration of the new owner (HUF64,000, approximately EUR160).

However, no separate stamp duties are payable for the registration of the lease, since it is always registered concurrently with one of the above.

2.3.7 Registration of Aircraft in Alternative Countries

This is not applicable in Hungary.

2.3.8 Requirements for Documents Concerning Registration

The CAA requires the following documents to be presented for registration:

- relevant original documents certifying the ownership of the aircraft and the legal grounds of being registered as lessee in the case of the lessee;
- an original official document that certifies the existence of the lessor and the power of representation;
- specimen signatures of relevant signatories;
- relevant powers of attorney; and
- the up-to-date certificate of insurance regarding the Aircraft.

All documents should be provided in Hungarian (or accompanied by an official Hungarian translation). Documents should be originals or notarised copies and be legalised in the country in which they were signed.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

Unless the lessor has a Hungarian permanent establishment through which the aircraft or the engine is leased, the lessor shall not be subject to taxes on income or revenue (see **1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale**). As currently there is no withholding tax on lease fees or similar payments, a lessor should not be taxed on the lease on this account.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor should not be deemed to be resident, domiciled, carrying on business or liable to pay tax in Hungary solely as a result of entering into a lease agreement.

2.4.3 Engine Maintenance and Operations

Where an operator, which is independent from the lessor, is registered separately, no specific liability is imposed on the lessor regarding the operation, maintenance and insurance of the aircraft. EU laws apply in respect of these issues. Underlying Hungarian laws also refer to the general applicability of relevant EU laws.

2.4.4 Damage or Loss Caused by an Asset

See **2.4.3 Engine Maintenance and Operations**.

2.4.5 Attachment by Creditors

Creditors of the lessee do not have any rights with respect to the aircraft under Hungarian law. Under Hungarian law, a lease is a contractual relationship which does not constitute any title of ownership for the lessee, meaning the lessee is not entitled to exercise any right of disposition or encumbrance with respect to the aircraft, other than those expressly mentioned in the lease.

2.4.6 Priority of Third Parties' Rights

The Hungarian Aircraft Register is a public and authentic register. The CAA will add rights (including other leases) to the Hungarian Aircraft Register only if they are in compliance with the terms of the previously submitted documents and in accordance with the rights that have already been registered.

Registration of the owner ensures its priority over all other rights (including other leases) granted over or in respect of the aircraft other than any security rights that the owner has granted to mortgagee(s) of the aircraft.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

There are no requirements to engage domestic insurance companies.

2.5.2 Mandatory Insurance Coverage Requirements

Mandatory EU rules apply in respect of insurances to cover liability.

2.5.3 Placement of Insurance Outside of Jurisdiction

Reinsurance can be placed outside of Hungarian jurisdiction.

2.5.4 Enforceability of “Cut-Through” Clauses

Enforceability of “cut-through” clauses should be analysed based on the governing law of such documents. Cut-through clauses are generally enforced by Hungarian courts.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurance/reinsurance is permitted.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors’ Abilities

If the lessee is subject to bankruptcy procedures, a moratorium will prevent creditors (including the lessor) from terminating their contracts as a result of non-payment. While the lessor may be entitled to terminate the lease on the basis of other termination events, there is a risk that such termination would be recharacterised by the bankruptcy trustee as termination for non-payment. The right to terminate on the grounds of non-payment is suspended for the length of the moratorium period under the bankruptcy proceedings, which can last as long as 365 days.

See 2.8.11 Owner’s/Lessor’s Consent.

2.6.2 Lessor Taking Possession of the Aircraft

The lessor can take possession of the aircraft in either a contractual or judicial way under Hungarian law, depending on the level of co-operation of the lessee.

Repossession With the Co-operation of the Lessee

If the lessee is co-operative, the most effective way to take back physical possession of the aircraft is for the relevant parties to sign a redelivery agreement and proceed with the application for deregistration from the Hungarian Aircraft Register.

Repossession If the Lessee Is Not Co-operative

If the lessee impedes the exercise of the lessor to repossess the aircraft, the lessor may request the courts to compel the lessee to redeliver the aircraft in accordance with the lease. A judgment of a foreign court having jurisdiction will be recognised and

enforced in Hungary, subject to the considerations set out in 2.6.6 Domestic Courts’ Recognition of Foreign Judgments/Awards.

Under Hungarian law, the lessor may also commence a lawsuit against the lessee and request the Hungarian courts to compel the lessee to redeliver the aircraft on the basis that it no longer has a legal right to possess it.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts for aviation disputes.

2.6.4 Summary Judgment or Other Relief

It is not possible for the Hungarian courts to issue a summary judgment and it is rare for them to grant injunctive relief.

2.6.5 Domestic Courts’ Approach to Foreign Laws and Judgments

Domestic courts uphold a foreign law as the governing law of an aircraft lease, the submission to foreign jurisdiction and waiver of immunity in accordance with Hungarian law requirements.

2.6.6 Domestic Courts’ Recognition of Foreign Judgments/Awards

A judgment taken by a foreign court in proceedings should be recognised and enforced by a Hungarian court, in so far as such a judgment:

- is not contrary to public policy in Hungary;
- complies with the requirements relating to the form and content of foreign judgments as set out in Hungarian law; and
- the jurisdiction of such a foreign court was stipulated by the parties in the manner prescribed by Hungarian conflicts law.

In the event that any party to the transaction documents seeks to enforce its rights before the courts of Hungary, all relevant documents will have to be translated into Hungarian.

See 2.6.12 Enforcement of Foreign Arbitral Decisions regarding foreign arbitral decisions.

2.6.7 Judgments in Foreign Currencies

In terms of lease agreements governed by foreign law, in respect of disputes, the jurisdiction in connection with the lease determines whether a lessor can obtain a judgment in a foreign currency under an aircraft lease.

If any arbitral award or judgment is obtained in a foreign currency, it is possible that it could only be enforced in Hungary in Hungarian forints. In the event of any proceeding being brought in a Hungarian court in respect of a monetary obligation payable in a currency other than forints, a Hungarian court may pass a judgment as an order to pay the equivalent of Hungarian forints at the time of actual payment by the debtor.

2.6.8 Limitations on Lessors' Actions Following Termination

Bankruptcy and insolvency laws may limit the lessor's ability to recover default interest (or the compounding thereof) or to charge additional rent following termination of the lease for default. See **2.9.5 Other Effects of a Lessee's Insolvency** for a more detailed description of potential limitations.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

There are no fees connected with the enforcement of the lease other than the statutory fees for court enforcement.

2.6.10 Mandatory Notice Periods

There are no specific compliance requirements regarding notice periods for the termination of an aircraft lease that relate to aircraft operated domestically or leased by a domestic operator.

2.6.11 Lessees' Entitlement to Claim Immunity

The Hungarian state and emanations of the Hungarian state are, in certain situations, entitled to claim sovereignty and immunity from suit before the civil courts. This can be waived on the terms set out in applicable Hungarian law.

Most commercial aircraft lessees in Hungary are private companies and are not entitled to claim sovereignty or other immunity from suit.

2.6.12 Enforcement of Foreign Arbitral Decisions

Hungary is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and a decision by an arbitral tribunal in another contracting state should be recognised and enforced by the domestic courts in Hungary pursuant to the New York Convention.

2.6.13 Other Relevant Issues

This is not applicable in Hungary.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Hungarian law recognises contractual assignment and novation. When the novation agreement is governed by a foreign law, care should be taken in the drafting to ensure that the assignment and novation have the intended effects under Hungarian law.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

The laws of Hungary should recognise and enforce the novation of leases governed by a non-Hungarian law (see **3.4.3 Application of Foreign Laws**).

Under Hungarian law:

- the consent of the lessee is required for a novation of a lease from a seller to the buyer;
- the lessee must be notified of an assignment and instructed to perform its obligations to the buyer; and
- the existing rights of the lessor can be transferred by assignment, but the obligations of the seller as lessor cannot be validly released and transferred to the buyer without the consent of the lessee as the beneficiary of performance of such obligations.

Any novation must identify, with sufficient precision, the needs of the parties and the leased asset(s) in question. The novation should contain valid governing law and jurisdiction clauses.

2.7.3 Enforceability of Lease Assignments/Novations

If any party to an aircraft and/or engine lease assignment and assumption/novation seeks to enforce its

rights before the courts of Hungary, or if any dispute before courts or other authorities arises, all relevant documents will have to be officially translated into Hungarian and certified versions may be required. Where documents have been executed outside Hungary, they will often need to be notarised and legalised.

2.7.4 Filing/Registration of Lease Assignments/Novations

Engine Lease Assignments and Novations

Engine lease novations do not need to be filed or registered with the CAA in Hungary.

Aircraft Lease Assignments and Novations

Aircraft lease assignments or novations should be filed for registration with the CAA in Hungary. All relevant documents will have to be officially translated into Hungarian and certified versions may be required. For practical purposes, the parties often conclude a bilingual joint declaration evidencing the information required for filing purposes.

Hungarian government consents are not currently required as a prerequisite for execution or delivery of aircraft/engine assignments and novations.

2.7.5 Taxes/Duties Payable on Assignment/Novation

In general, assignment/novation is treated under the tax laws as transfer of the sum of obligations and rights under an agreement. Depending on the actual circumstances of the transaction, such a transfer can result in taxable gain; however, provided that the party realising the gain is not a Hungarian tax resident entity or does not have permanent establishment in Hungary (see 1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale), it shall not be subject to CIT or LBT in Hungary. The fact that the contract is brought into the territory of Hungary does not result in a tax liability.

Under the GLOBE Act, the taxpayer entity can be subject to additional tax on the income from the novation until the effective tax rate applying to the taxpayer reaches 15%.

The transfer of a contractual position is generally subject to VAT (as it consists of transfer of rights and obli-

gations). However, if both parties are foreign entities which do not have fixed establishments in Hungary, the transfer would likely be outside the scope of the Hungarian VAT Act.

No stamp duty would be levied on an assignment or assumption agreement.

2.7.6 Recognition of Transfer of Ownership Interests

From a Hungarian law perspective, the transfer of beneficial or other ownership interest in a legal entity shall be governed by the law of the jurisdiction in which the relevant entity is incorporated or trust has been created. For most practical purposes, Hungarian law is unlikely to look beyond the legal ownership of the aircraft by the foreign entity or trustee.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

The owner is entitled to deregister an aircraft from the Hungarian Aircraft Register.

Steps to Achieve Deregistration

Deregistration is typically performed by local counsel on the basis of a power of attorney from the owner.

For the purpose of deregistration, an application must be filed with the CAA in bilingual form along with evidence of the aircraft being registered on the Hungarian Aircraft Register.

Estimated Time Period

The statutory time period for the CAA to complete deregistration is 55 days. It is feasible to request a priority process, in which case the applicable deadline is 10 days.

2.8.2 Lessee's/Operator's Consent

As a general rule, an aircraft may not be deregistered if there is any due and payable third-party claim in respect of the aircraft (eg, a mortgage is registered), unless the relevant third party gives consent to deregistration.

The owner of the aircraft is able to deregister the aircraft without the permission or involvement of the lessee. However, the process tends to be more straight-

forward and quicker with the active co-operation of the lessee.

2.8.3 Required Documentation

The following documents are required to deregister the aircraft:

- an application for deregistration of the aircraft;
- an application for deregistration of any mortgage over the aircraft (together with a notarised mortgage release declaration);
- evidence that the aircraft will be registered elsewhere; and
- evidence that the person making the application has the necessary capacity and authority to do so.

2.8.4 Duration of Deregistration Process

The CAA has 55 days to complete the process from the date of filing a request for deregistration. It is feasible to request a priority process in which case the applicable deadline is 10 days.

2.8.5 Aviation Authority's Assurances

The CAA does not provide advance assurances as to the prompt deregistration of the aircraft. In practice, however, it usually aims to comply with the reasonable requests of the parties.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

Costs associated with the deregistration involve the fee of HUF19,000 (approximately EUR48), payable to the CAA. The fee payable for the priority process is HUF28,500 (approximately EUR71).

2.8.7 Deregistration Power of Attorney

Deregistration powers of attorney are customarily provided, but their effectiveness on enforcement in Hungary remains untested. In particular, Hungarian law does not treat powers of attorney as being irrevocable. There is a risk that underlying transaction documents or supporting corporate documentation may be required for enforcement purposes, if the lessee is uncooperative.

It is advisable that the deregistration power of attorney be prepared in bilingual form, notarised and duly certified.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

The enforcement practice of deregistration powers of attorney is untested in Hungary, therefore, underlying transaction documents or supporting corporate documentation may be required for enforcement purposes, if the lessee is not co-operative, and enforcing rights to repossession shall require further action before the courts.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

It is advisable to stipulate English law as the governing law of the deregistration power of attorney, as this is generally the chosen governing law of the other main transaction documents. Further, a power of attorney granted under Hungarian law will be revocable notwithstanding that it is expressed to be irrevocable.

2.8.10 Revocation of a Deregistration Power of Attorney

As a matter of Hungarian law, the grantor of a power of attorney may revoke the power of attorney even where it is stated to be irrevocable. As deregistration powers of attorney are customarily governed by non-Hungarian law, the effect of such a revocation should be considered in light of the law governing the deregistration power of attorney.

2.8.11 Owner's/Lessor's Consent

No export licence is required for re-exporting (ie, transferring out of Hungary) the aircraft in general. Import restrictions may apply if the aircraft is exported to a jurisdiction outside the EU.

For the repossession and export of the aircraft by a third party (eg, the security trustee), the consent of the owner is required.

2.8.12 Aircraft Export Permits/Licences

No aircraft export permits or licences are required for export from Hungary.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

Upon the exportation of an aircraft to outside the EU, customs fees may be payable depending on the jurisdiction the aircraft is being exported to.

2.8.14 Practical Issues Related to Deregistration of Aircraft

According to the practice of the CAA, any mortgage over the aircraft should be removed before a deregistration of the aircraft can take place. Therefore, the release of the relevant mortgage over an aircraft with the involvement of the mortgagee should be arranged for prior to requesting the deregistration of the aircraft.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

The primary laws and regulations relevant to Hungarian lessees are as follows:

- Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings (the “Insolvency Act”), regulating the two main insolvency regimes, ie, bankruptcy proceedings and liquidation proceedings;
- EU Insolvency Regulation No 2015/848 (the “EU Insolvency Regulation”), addressing conflicts of law in relation to insolvency proceedings (directly applicable);
- Act XCIX of 2021 (the “State of Emergency Act”), providing an emergency and temporary pre-insolvency regime; and
- Act LXIV of 2021 on Restructuring and the Amendment of Certain Laws for the Purposes of Harmonisation (the “Restructuring Law”), implementing key sections of Directive 2019/1023 on preventive restructuring frameworks on discharge of debt, disqualifications and measures.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Relevant types of procedures under Hungarian jurisdiction are the following.

Liquidation Proceedings

Liquidation proceedings aim to satisfy creditors of a debtor company in the order determined by law by liquidating the assets of the debtor company and distributing them among the debtor company’s creditors, following which the debtor company is dissolved. All

debts of the debtor become payable and due at the start of the liquidation proceedings.

The procedure may be started by the debtor company or the creditors only on the basis of inability to pay. Courts are responsible for the appointment of the liquidator. Specific transactions listed under the Insolvency Act may be challenged by any creditors of the debtor or the liquidator within a one-year time period starting from the court order regarding commencement of the proceedings.

Bankruptcy Proceedings

The purpose of bankruptcy proceedings is to help distressed companies continue their business operations by reaching a composition agreement with creditors of the distressed company under a formalised procedure, also involving the court and a bankruptcy trustee. The bankruptcy proceedings provide a moratorium period to the debtor, during which creditors’ rights are restricted.

The procedure may be started by the company. Bankruptcy proceedings are rarely successful and the proceedings often become liquidation proceedings.

Reorganisation Proceedings

A new pre-insolvency procedure was introduced in April 2021 to mitigate debtors’ distressed positions during COVID-19. Similar to bankruptcy proceedings, its purpose is to help restructure debts of the distressed company by implementing a restructuring plan. The procedure may be started by the distressed company.

Restructuring Proceedings

Similar to bankruptcy and reorganisation proceedings, the main purpose of the restructuring proceedings is, inter alia, to allow a debtor in financial distress, but not yet insolvent, to adopt and implement a restructuring plan in co-operation with some or all of its creditors to avoid insolvency and to ensure its viability. The debtor may decide on the restructuring at its sole discretion (provided that there are no grounds for exclusion, such as pending reorganisation, bankruptcy or liquidation proceedings). The debtor may also determine, at its sole discretion, which claims and/or creditors it wishes to include in the restructur-

ing. Consequently, the general or limited nature of the moratorium depends also on whether all or just certain creditors are involved in the proceeding.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

Relevant regulations enabling international co-operation in terms of overseas proceedings are, among others:

- the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft (the “Rome Convention”);
- the 1948 Geneva Convention on the International Recognition of Rights in Aircraft (the “Geneva Convention”);
- the New York Convention;
- the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters;
- the 2005 Hague Convention on Choice of Court Agreements; and
- the 2019 Hague Judgments Convention.

Although, by implementation of EU regulations, co-operation and recognition is more comprehensively regulated on an EU level in Hungary, there is no well-developed practice or guidance regarding regulation of co-operation and recognition of cross-border overseas insolvency proceedings.

Act XXVIII of 2017 on Private International Law (the “Private International Law Act”) regulates private relationships containing a foreign law element in Hungary, determining the conditions under which overseas foreign court decisions may be recognised and also the rules of determining Hungarian jurisdiction.

Currently, the UNCITRAL Model Law on Cross-Border Insolvency has not been adopted by Hungary, but this has been encouraged by several Hungarian experts of the field.

2.9.4 Effect of Lessee’s Insolvency on a Deregistration Power of Attorney

Upon the bankruptcy or insolvency of the lessee, any power of attorney should, as a matter of Hungarian law, remain effective as the aircraft is not owned, but

only used by the lessee. Therefore, the deregistration and exportation of the aircraft will not deprive the lessee of its own assets, and thus would not be in conflict with the interest of its creditors. In practice, the insolvency officer hindering the repossession of the aircraft by declaring such power of attorney withdrawn cannot be excluded.

2.9.5 Other Effects of a Lessee’s Insolvency Effects of Liquidation Proceedings

Within a one-year period starting from publication of commencement of liquidation proceedings, any creditor of the insolvent company or the liquidator has the right to challenge transactions (which is to be made within a certain timeframe) concluded by such an insolvent company which is of a certain type.

The liquidator may seek to recover, within the time periods specified by law, any service rendered by the insolvent company within 60 days of the date preceding the date when a competent court received a petition for the initiation of liquidation proceedings or at any time thereafter, if the provision of such service resulted in a preference to any one creditor and was not made in its normal course of business.

The liquidator is also entitled to terminate the contracts previously concluded by the insolvent company with immediate effect, in which case the other contracting party has 40 days from the date of such termination to enforce its claim arising as a result of the termination by reporting the claim to the liquidator.

Effects of Bankruptcy Proceedings

During the period of a moratorium, the creditor of a bankrupt company is not entitled to rescind or terminate a contract with the bankrupt company on the basis that the bankrupt company does not pay its debts thereunder (other termination events may still be valid). Consequently, the creditors may not terminate a lease on the basis of non-payment during the period of the moratorium even if there is an event of default.

During the moratorium period in a bankruptcy proceeding, the debtor cannot, without the approval of the appointed bankruptcy trustee, make any payments based on any claims already existing at the

start of the bankruptcy proceeding and the creditor cannot enforce any claims regarding such payments.

Effects of Reorganisation Proceedings

Suppliers and service providers in a long-term relationship with a company under reorganisation may not terminate their contracts (with certain exceptions) with the company because of the reorganisation proceeding, provided that the company's director confirms to the supplier or service provider in writing that the company will be able to perform its due payment obligations.

Effects of Restructuring Proceedings

During the moratorium, the creditors to whom the moratorium applies may not suspend the performance of essential executory contracts (eg, lease agreements) stemming from the debtor's outstanding debts arising from the non-payment of debts incurred and due before the moratorium; such contract may not be terminated and may not be amended in any way or form to the debtor's disadvantage.

Potential Delays of Repossessing the Aircraft in the Case of Termination of the Lease

If an aircraft is not owned and is only used by the lessee, it should not be in conflict with the interest of its creditors, as the aircraft is not a part of the insolvency estate. In practice, it cannot be ignored that an insolvency officer may attempt to hinder the repossession of the aircraft. During bankruptcy proceedings, the feasibility of termination is limited.

Subordination of Lease Payments to Creditors' Claims

It is possible that subordination of the lease payments to other creditors' payments may be suggested under the restructuring plan in the case of bankruptcy, restructuring or reorganisation procedures.

In the case of liquidation proceedings, a statutory waterfall of creditors' claims applies. Under such a waterfall, lease payments (if unsecured) would rank among "other claims", behind, eg, secured creditors and employees.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The insolvency laws applicable to borrowers, guarantors or security providers should be considered in order to identify risks for lenders. Where Hungarian insolvency proceedings are applicable, insolvency proceedings may be started by any creditor of the debtor company or by the debtor company itself. Such proceedings are highly regulated and hardening periods apply, where certain transactions may be challenged by either the liquidator or another creditor. The liquidator also has the right to terminate contracts previously concluded with immediate effect.

Tight deadlines apply to all parties, including creditors. All proceedings may include a moratorium period, during which creditors' rights are restricted.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

Moratorium provisions apply in terms of the following.

Bankruptcy Proceedings

A moratorium is the period between the date of publication of request for the initiation of bankruptcy proceedings until a rejection or commencement of the process. A 180-day moratorium starts on the date of publication of the commencement of the bankruptcy proceedings and lasts until the end of such proceedings. Overall, this period may last up to 365 days.

Liquidation Proceedings

If a liquidation proceeding is declared "strategically important" by the Hungarian government, with regards to companies conducting certain activities, a 90-day extraordinary moratorium may also apply in the case of liquidation proceedings.

Reorganisation Proceedings

A moratorium applies from the date of receipt of the order imposing the moratorium for up to 170 days in public reorganisation, or a 90-day-long moratorium, which may be extended by further 60 days in the case of closed reorganisation procedure, while the reorganisation plan is developed and presented to the specified creditors.

Restructuring Proceedings

In restructuring proceedings, court will, at the request of the debtor, order a moratorium for the period specified in the request, but for a maximum of four months (which may be extended up to a total maximum of 12 months). The moratorium is effective from the date of receipt of the order imposing the moratorium.

2.9.8 Liquidation of Domestic Lessees

See 2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership for methods applicable in Hungary.

In addition, please note that if a Hungarian company is solvent, it may still decide on its winding-up (solvent liquidation) procedure.

Simultaneously with the decision on the commencement of the winding-up procedure, a liquidator should be nominated who shall fulfil the obligations of the executive officers. If the company cannot settle all of its debts, the winding-up procedure turns into liquidation proceedings.

2.9.9 Ipso Facto Defaults

Ipso facto defaults (specifically in the case of reorganisation) may not be recognised in certain cases under Hungarian law. See 2.9.5 Other Effects of a Lessee's Insolvency.

2.9.10 Impact of Domestic Lessees' Winding-Up

See 2.9.5 Other Effects of a Lessee's Insolvency for how domestic lessees' winding-up would impact the aircraft and lease rentals.

Applicable laws provide an exception from the stay on enforcement for financial collateral: if the early termination amount is secured by monies and/or securities subject to a Hungarian law security deposit created prior to the initiation of the insolvency proceedings, the beneficiaries may satisfy their claims directly from the deposits within three months of the commencement of the insolvency proceedings. Upon expiry of the deadline, security deposits will also be enforced by the liquidator.

Any maintenance reserves would probably be similarly classified as lease rentals under the waterfall of creditors' claims. See 2.9.5 Other Effects of a Lessee's Insolvency.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The Convention on International Interests in Mobile Equipment and the related Protocol on Matters Specific to Aircraft Equipment are not in force in Hungary.

2.10.2 Declarations Made Concerning Conventions

This is not applicable in Hungary.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

This is not applicable in Hungary.

2.10.4 Enforcement of Conventions

This is not applicable in Hungary.

2.10.5 Other Conventions

Hungary has ratified the Geneva Convention and the Rome Convention.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

Lending (which also includes the arrangement, management of loans, the collection of debt and taking security interests) is a licensable activity under Hungarian law. Accordingly, financiers need to ensure that they possess adequate permissions, ie, they:

- are licensed in Hungary;
- have a licensed branch in Hungary; or
- are seated in a member state of the EU or the OECD and possess a lending licence which could be passported into Hungary.

There are no specific restrictions on borrowers in connection with the utilisation of loan proceeds other than rules applicable to the utilisation of monies generally.

3.1.2 Effect of Exchange Controls or Government Consents

There are no exchange controls or prohibitions on remitting or repatriation of proceeds in force in Hungary. Accordingly, no Hungarian regulatory approval or other consent is required for any payments to be made under a loan, guarantee or security document, in either Hungarian forints or a foreign currency.

3.1.3 Granting of Security to Foreign Lenders

Subject to the licensing requirements referred to in 3.1.1 Restrictions on Lending and Borrowing, there are no restrictions applicable to borrowers in connection with the granting of security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Under Hungarian law, downstream, upstream and cross-stream guarantees are all permitted in most circumstances, with certain restrictions applying to, among others, some insurance companies and funds.

There is no general requirement for corporate benefit, although certain restrictions may apply, eg, if the security provider does not receive compensation for the provision of security; the secured creditors or the liquidator of the security provider may challenge the security agreement.

3.1.5 Lenders' Share in Security Over Domestic SPVs

It is advisable in aviation finance transactions for a lender to take share security over a domestic SPV that has ownership over the aircraft, and Hungarian law recognises share pledge agreements. Although notarisation is not a perfection requirement, it is market practice to incorporate share pledge agreements into a notarial deed to ensure direct enforceability.

3.1.6 Negative Pledges

Negative pledge provisions are recognised under Hungarian law towards the security provider. Negative pledge provisions will not bind a subsequent owner of the asset acquired in breach of the negative pledge.

3.1.7 Intercreditor Arrangements

No material restriction or requirement is imposed on intercreditor arrangements under Hungarian law.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent under a syndicated loan is recognised under Hungarian law.

3.1.9 Debt Subordination

The concept of debt subordination is generally permitted and recognised under Hungarian law. Debt can be subordinated by means of a contractual subordination.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of all or part of an outstanding debt under an English or New York law-governed loan is permissible and recognised in Hungary. Certain provisions of the Rome I Regulation and the Private International Law Act may need to be considered.

3.1.11 Usury/Interest Limitation Laws

According to the Hungarian Civil Code, a usurious contract is null and void. A contract stipulating excessive interest may be qualified as a contract with undue consideration which is voidable.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

In aviation finance transactions, typical forms of security and recourse are as follows:

- an aircraft mortgage;
- a security assignment (over lease rent payments, insurance proceeds, requisition and total loss proceeds);
- a share pledge;
- an account pledge;
- a floating charge;
- a parent company guarantee;
- airframe and engine warranties arrangements;
- a security deposit; and
- a deregistration power of attorney.

3.2.2 Types of Security Not Available

There is no type of security that cannot be taken over an aircraft or related collateral.

3.2.3 Trust/Trustee Concepts

Hungary is not party to the Hague Convention on Trusts 1986 and therefore trusts cannot be established under Hungarian law. Whether or not a security trust would be effective in protecting the rights of its beneficiaries is untested. It is customary for the security trust to be enhanced by a parallel debt structure or more commonly the nomination by the secured creditors of the security trustee as a security holder for the purposes of Hungarian law.

It has become market practice in Hungary in recent years to use the security holder concept (often in addition to appointing a non-Hungarian law security trustee). Pursuant to the Hungarian Civil Code, a “security holder” (*zálogjogosulti bizományos*) may be appointed by the secured creditors under the security agreement or under a separate document. The security holder would be entitled to act under Hungarian law in its own name for the benefit of the secured creditor(s) regardless of whether the status of the secured creditors as beneficiaries of the trust is recognised by Hungarian law.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

Hungarian law recognises the concept of assignment by way of security (including in relation to insurances) and there is no restriction on the form of such assignment.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

Under Hungarian law, the assignment of rights and benefits without attendant obligations is permitted and there are no specific requirements in respect of such assignment.

3.2.6 Choice of Foreign Law

A security assignment or guarantee can be governed by English or New York law. Aircraft lease agreements are generally governed by English or New York law, so it is advisable that the security assignment is governed by the same law, since, further to Rome I Regulation, the governing law of the security assignment shall govern all important enforcement-related matters in respect of agreement.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

To the extent that the security assignment is governed by Hungarian law, the assignor should:

- notify third-party debtors of the assignment; or
- provide the assignee with a document evidencing the assignment vis-à-vis third parties.

Prior to notification, third-party debtors should perform their obligations in favour of the assignor.

There are no specific formality requirements in respect of assignment agreement. However, Hungarian authorities may require the translation of foreign language documents into Hungarian to be admissible in evidence in such legal proceedings.

3.2.8 Domestic Law Security Instruments

Hungary is not party to the Cape Town Convention. Accordingly, it is advisable to create a Hungarian law mortgage over aircraft registered in Hungary, as the recognition of foreign law security interests in court enforcement proceedings is untested.

As a perfection requirement, the Hungarian law mortgage needs to be registered with the Hungarian Aircraft Register and (with respect to the engines) the Security Interest Register. Although notarisation is not a formal requirement, it is market practice to incorporate mortgage agreements into notarial deeds in order to ensure that they are directly enforceable.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

From a Hungarian law perspective, it is possible but not required to register foreign law-governed security assignments, eg, with the Hungarian Aircraft Register. However, such registration is not a perfection requirement under Hungarian law. The registration of security assignments in Hungary is rarely applied in aircraft financing transactions.

Separately, where an entity incorporated under Hungarian law (eg, the operator of the aircraft) is involved in any security assignment as assignor, the security assignment can and is recommended to be registered with the Hungarian Security Interest Register (regard-

less of its governing law). Such registration is not mandatory and is not a perfection requirement under Hungarian law; however, it ensures creditors' priority position under proceedings.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

Under Hungarian law, in most cases, security interests over aircraft or engines can be transferred together with the relevant secured obligations and to the same secured party

3.2.11 Effect of Changes in the Identity of Secured Parties

The effects of any change in the identity of the secured parties on a Hungarian law security assignment depend on the specific terms of the relevant security agreement.

3.2.12 "Parallel Debt" Structures

See 3.2.3 Trust/Trustee Concepts.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A security trustee or other secured creditor should not be deemed to be resident, domiciled, carrying on business or liable to pay tax in Hungary as a result of being party to a security assignment. The secured party does not have to pay any taxes on the basis of it being party to the contract.

If, due to the enforcement of a security assignment, the title to the aircraft or the engine would be transferred, the transfer could be subject to Hungarian VAT (27%).

Where any asset is received by a secured creditor due to the foreclosure, the gain can be subject to Hungarian corporate income tax (9%) and local business tax (the maximum rate is 2%) provided that the creditor is a Hungarian tax resident entity or has a Hungarian permanent establishment to which the security assignment is related.

Under the GLOBE Act, the taxpayer entity can be subject to additional tax on the income from the foreclosure of the title until the effective tax rate applying to the taxpayer reaches 15%.

3.2.14 Perfection of Domestic Law Mortgages

Under Hungarian law, an aircraft mortgage is perfected upon its registration with the Hungarian Aircraft Register. A mortgage over the engines should be registered with the online Security Interest Register.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

Under Hungarian law, regardless of the on-wing or spare nature of the engines, it is unclear whether the engines and replacement engines qualify as a "component" or an "accessory" of the aircraft and, as such, whether or not a mortgage covering the airframe (as principal asset) automatically extends to the engines. Accordingly, as an additional perfection requirement, the aircraft mortgage should also be registered with the Security Interest Register to ensure that it is duly perfected in respect of the engines.

3.2.16 Form and Perfection of Security Over Bank Accounts

Typically, an account pledge would be used to take security over a bank account. The account pledge would be perfected upon its registration with the Security Interest Register.

Other typical forms of account security include:

- a bank account security deposit on the basis of a tripartite security deposit agreement between the secured creditor, the security provider and the account bank; and
- a collection right on the basis of an authorisation letter granted by the owner of the account for the benefit of the secured creditor.

3.3 Liens

3.3.1 Third-Party Liens

Under Hungarian law, liens, similar possessory rights or rights of detention in favour of third parties cannot be exercised (with the theoretical exception of the rights exercised under the 1933 Rome Convention) if the person owing such taxes or dues is not the owner of the aircraft. Accordingly, no third-party creditors of the lessee or operator will be entitled to exercise any such right in respect of the aircraft.

The non-payment of Eurocontrol charges may delay or prevent taking-off since, if so requested by Eurocontrol, take-off shall be denied by the Hungarian air navigation service provider (Hungarocontrol). Although no express detention right is stipulated by domestic law, in practice, Hungarocontrol (on a contractual basis, on the basis of its terms of business/operation or on the basis of applicable international law) may require the owner to pay outstanding charges before allowing the aircraft to take off.

Under Hungarian law, it is feasible to create a mortgage over more than one aircraft.

3.3.2 Timeframe to Discharge a Lien or Mortgage

The CAA has 55 days from the date of submission to deregister the mortgage from the Hungarian Aircraft Register. It is possible to request a priority process in which case the applicable deadline is 10 days.

The deregistration of the mortgage over the engines of an aircraft from the security interest register is within the competence of a Hungarian public notary, and the process takes one to two business days.

3.3.3 Register of Mortgages and Charges

The mortgage over an aircraft and engines is required to be registered with the Hungarian Aircraft Register and the Security Interest Register. Such registration is a perfection requirement under Hungarian law. Following the registration, the interests of the mortgagee will be noted on the certificate of registration of the aircraft and recorded among the security interests encumbering the assets of the security provider in the Security Interest Register.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

The Hungarian government, other designated authorities or other governmental bodies may, in the case of extreme circumstances, effect (temporary) requisition through ordering a special regime. Such circumstances include:

- a state of emergency;
- a state of war; and
- a state of danger.

Under the special regime, the exercise of fundamental rights may be suspended or restricted and therefore, among others, the expropriation or nationalisation of the aircraft, or the application of any other measure with the same effect, becomes available to the Hungarian government. Compensation has to be paid, however, to the affected person or entity (with some exceptions).

According to the Hungarian Criminal Code, an aircraft may be forfeited if used in connection with any criminal activity. However, if the owner was not aware of the relevant offence (unless the forfeiture is prescribed by an international treaty), no forfeiture can be exercised.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

Security interests over the aircraft are indicated on the certificate of registration and in the Security Interest Register. A potential purchaser of the aircraft could obtain the certificate of registration directly from the Hungarian CAA and carry out an online search of the Security Interest Register to verify that the aircraft is free of encumbrances.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

A security assignment over rights and claims is typically enforced by the secured party collecting any claims and in the case of other rights by realising them by private sale or auction. A loan or guarantee constituting claims may be enforced by filing a lawsuit against the debtor and seeking court title for payment or performance.

3.4.2 Security Trustees' Enforcement of Their Rights

Under Hungarian law, a notice and acknowledgement of a security assignment is not necessary to establish a valid security assignment. However, the lessee may continue to discharge its obligations under the lease by payment to the lessor, unless notice of assignment or other appropriate proof of assignment is given to the lessee by the relevant assignor.

3.4.3 Application of Foreign Laws

The Hungarian Conflicts Law and the Rome I Regulation confer on the parties to an international contractual transaction almost total autonomy in choosing the law which is to govern such a contract, provided that the presence of a “foreign” (ie, non-Hungarian) element in the transaction can be proven.

The parties to the relevant finance documents may validly enter into contracts governed by a non-Hungarian law, provided that the mandatory provisions of the Hungarian Conflicts Law or other Hungarian laws (if applicable at all) do not provide otherwise. Accordingly, the choice of, eg, English or New York law for a finance or security document is generally a valid choice of law and submission to jurisdiction.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

See 2.6.6 Domestic Courts’ Recognition of Foreign Judgments/Awards and 2.6.12 Enforcement of Foreign Arbitral Decisions.

3.4.5 Secured Parties’ Right to Take Possession of Aircraft

In practice, it is not feasible under Hungarian law to take possession of the aircraft and enforce the security agreement or aircraft mortgage without the consent of the lessee or operator. Accordingly, a court order may have to be sought to obtain access to the aircraft or the engines.

However, in aircraft financing transactions, it is market practice that both the owner and the operator of the aircraft grant a deregistration power of attorney to the relevant secured creditor that contains prior consent to the repossession and deregistration of the aircraft, noting that the use of such deregistration power of attorney is untested in Hungary.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

For questions of enforcement (outside insolvency proceedings) the competent court will have to be determined pursuant to general rules, eg, linking the place of venue to the debtor’s seat, the place of performance or the location of the asset.

3.4.7 Summary Judgments or Other Relief

In Hungary, it is not possible for a court to issue a summary judgment.

3.4.8 Judgments in Foreign Currencies

A judgment can be obtained in any currency. However, if a judgment is obtained in a currency other than in forints, it is possible that it could only be enforced in Hungary in forints. In the event of any proceeding being brought in a Hungarian court in respect of a monetary obligation expressed to be payable in a currency other than Hungarian forints, a Hungarian court may give judgment as an order to pay the Hungarian forints equivalent of such currency at the time of actual payment of the debtor.

3.4.9 Taxes/Fees Payable

The stamp duty payable for the registration in the Hungarian Aircraft Register of any third-party right (eg, mortgage) is HUF69,000 (approximately EUR175).

3.4.10 Other Relevant Issues

Enforcement of a Hungarian aircraft mortgage can be accelerated by ensuring that the mortgage is incorporated into a notarial deed and, in such a case, direct enforceability of the mortgage will be available and there will be no need to obtain a court judgment first.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft Emergency Legislation

As a response to the ongoing war in Ukraine, the Hungarian government declared a state of danger again with effect from 25 May 2022, appointing the Hungarian Prime Minister as responsible for preventing/remedying the negative consequences of the state of danger caused by the ongoing war in the neighbouring country.

The government is required to terminate the state of danger when the circumstances giving rise to its declaration no longer apply. According to the Hungarian Constitution, during a state of danger, the government is entitled to suspend the application of certain laws or derogate from the provisions of certain laws

by adopting executive decrees, and may take other extraordinary measures.

FDI Rules

Hungary has enacted temporary FDI rules that restrict foreign investments in entities registered in Hungary that are engaging in certain activities specified by the government. According to the relevant Act LVIII of 2020 (the “FDI Act”) and Government Decree 561/2022 (XII 23) (the “FDI Decree”), notification requirements apply to foreign investors that intend to acquire shares in such entities incorporated in Hungary. In certain exceptional cases, purely EU-domiciled entities also fall into this category.

Transactions which result in the acquisition/encumbrance of certain assets of a Hungarian target falling under the scope of the FDI Act and the FDI Decree are subject to notification requirements and the approval of the Minister for National Economy. To the extent that such approval is denied, the transaction is considered void.

4.2 Current Legislative Proposals

The Hungarian government has mandated the drafting of a new Insolvency Bill, expected to be published in 2025. This development may have an effect on transactions concerning the purchase, sale, lease or debt financing of an aircraft registered in Hungary or involving a domestic party.

INDIA

Law and Practice

Contributed by:

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Sarin & Co is one of the oldest firms in India, having been in existence for over 90 years. Traditionally a firm of litigators, Sarin & Co branched out into the field of aviation with the joining of Mr Nitin Sarin in 2008. Since then, the aviation team has represented some of the largest banks and aircraft leasing companies, handled transactions worth billions of dollars, and carried out some of the most complex aircraft leasing and financing transactions in the country, in-

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

A sales agreement, if executed while the asset is in India, runs the risk of being levied with several taxes in India, such as goods and services tax and stamp duty. Where an original document (executed outside of India) is not stamped with the requisite stamp duty, it must be affixed with the requisite stamp duty within three months after it has been received in India. Certain states also impose stamp duty on copies of sales agreements.

1.1.2 Enforceability Against Domestic Parties

The enforceability of a sales agreement will not be affected by the language in which it is written. However, if a sales agreement needs to be submitted to a court or a government entity, it is recommended to have it translated into English and notarised. Furthermore, if a document is not properly stamped, courts in India have the power to detain the document and refuse to admit it into evidence unless and until it is properly stamped.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Under Indian law, if an offer by one party is accepted by another for consideration, such an act or series of acts shall constitute “transferring title”, and this holds for all installed parts, including an auxiliary power unit.

Under the general applicability of Indian law, the sale of an ownership interest in an entity that owns an aircraft or engine shall be recognised as a sale of that entity only.

1.2.2 Sales Governed by English or New York Law

There is no prohibition on bills of sale in relation to aircraft or engines being governed by any foreign law in India.

A bill of sale should ideally note that a valid contract has been entered into – ie, that there has been an offer by the seller and acceptance by the purchaser, and that the seller has received consideration.

1.2.3 Enforceability Against Domestic Parties

If a bill of sale is executed in any language other than English, it is recommended that a translated copy be provided for its proper enforcement. Notarisation is also recommended.

1.2.4 Registration, Filing and/or Consent From Government Entities

Generally, a bill of sale is not required to be registered, filed or subject to any consent from any government entity. At the time of registration of an aircraft, the registration authority may require a notarised copy of the bill of sale.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

Execution of a bill of sale or the consummation of the sale of the ownership interest may be taxed in India while an aircraft is located in India. Most such transactions are undertaken when the aircraft is flying over international waters or flying over or parked on the territory of another country.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

If validly executed, operating/wet/finance leases or leases concerning only engines or parts are permissible and will be recognised under the law of India. Wet and finance leases require specific approval of the regulatory authorities in advance of execution.

2.1.2 Application of Foreign Laws

It is fairly common for a foreign law-governed lease to be recognised in India. A court shall apply such law as long as the parties’ rights deriving from such a lease are not opposed to public policy and are not in breach of Indian law.

2.1.3 Restrictions Concerning Payments in US Dollars

India is an exchange-controlled country; therefore, any remittance of foreign exchange (including US dollars) requires the approval of the Reserve Bank of India (RBI) or any authority it prescribes. Most of these approvals have been delegated by the RBI to

its commercial banks (known as authorised dealer, or AD, banks), making it easier for a domestic lessee to make rent payments to foreign operating lessors in foreign exchange. Specific approval is required from the RBI in case of remittance of payments under finance leases.

2.1.4 Exchange Controls

Repatriation of foreign exchange as rent payments requires the indirect approval of the RBI. In relation to operating leases, the power to approve is delegated to AD banks, but the remittance of payments for finance leases requires the specific approval of the RBI. Similarly, in cases where a lease is enforced by a foreign lessor (operating or finance), the RBI's approval would also be required before the repatriation of any realised proceeds.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

The execution of a lease agreement physically in India would typically attract the levy of stamp duty. The stamp duty on lease agreements executed overseas must be paid within three months of such a document's entry into India. The amount of stamp duty payable varies across states, as each state has its own respective stamp duty legislation.

2.1.6 Licensing/Qualification of Lessors

A lessor does not need to be licensed or otherwise qualified in India to do business with a domestic lessee. However, a foreign lessor based in a prohibited or sanctioned country would not be permitted to do business in India.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

No mandatory terms are required to be in a lease; the lease itself must be a valid and binding contract between two parties competent to contract.

2.2.2 Tax and Withholding Gross-Up Provisions

Tax and "gross-up" clauses are permissible and may be enforced by the courts, provided they form part of the binding contract entered into between the parties.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease agreement can cover parts installed or replaced on an aircraft or engine after its execution, provided the agreement contemplates such inclusion/coverage. For parts not covered under the lease, the parties may enter a simple side letter or short lease amendment agreement.

2.2.4 Risk of Title Annexation

India will recognise the separate (and distinct) rights of both the owner(s) of the airframe and the owner(s) of each engine. As such, with India being a common law jurisdiction, title annexation does not apply.

2.2.5 Recognition of the Concepts of Trust/Trustee

Indian law recognises the concept of a trust and the role of an owner trustee.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The Directorate General of Civil Aviation (DGCA) is the authority responsible for maintaining the aircraft register in India and records the details of the owner, lessor, operator and mortgagee (if applicable). The effect of such notation on the aircraft register shall amount to notice to all third parties regarding the existence of such an interest in that aircraft.

2.3.2 Registration If the Owner Is Different From the Operator

Registration is possible even if the owner differs from the operator. Once registered, an aircraft is issued a certificate of registration by the DGCA, containing details such as the name, address and nationality of the owner, lessor, operator and mortgagee (if applicable) of the aircraft.

2.3.3 Aircraft/Engine-Specific Registers

At the time of registration of an aircraft taken on lease, the applicant is required to submit a copy of the lease agreement to the DGCA. DGCA requirements state that any lease amendments or novations must also be filed with the DGCA. There is no engine-specific register nor any requirement to submit a lease in relation to an aircraft engine to any authority in India.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

An aircraft taken on lease by an Indian operator from a foreign lessor cannot be registered in India unless the applicant has submitted a copy of the lease to the DGCA. Leases are not subject to any consent from any government entity.

A copy of the lease agreement, the electronic CA-28 aircraft registration form and other documents shall be filed for registering aircraft with the DGCA. This process may take anywhere from two to four weeks.

Before a lessee may import an aircraft into India, it must seek the consent of the DGCA. The DGCA first grants “in principle” approval for the import of the aircraft, subject to satisfaction regarding the safety of the aircraft intended to be imported, and then accords its final approval. While no consent is required as a prerequisite to the execution of a lease, the “no objection” of the DGCA is required before the import of an aircraft on lease will be permitted.

2.3.5 Requirements for a Lease to Be Valid and Registrable

There is no specific form in which a lease must be registered on the aircraft registry. If it is executed in a different language, a lease needs to be translated into English. Furthermore, a notarised copy of the lease would be valid and registrable on the aircraft registry.

2.3.6 Taxes/Duties Payable for Registering a Lease

There is a fee for the registration of an aircraft on the Indian aircraft registry based on the aircraft’s weight. No other taxes or duties are payable for registering a lease.

2.3.7 Registration of Aircraft in Alternative Countries

Aircraft habitually based in India must be registered in the country. There are very few circumstances in which a foreign-registered aircraft is permitted to operate habitually in India, with the most common being in relation to a wet lease (when a foreign-registered aircraft is permitted to operate in India). Wet leases are also only permitted in the country in exceptional circumstances.

2.3.8 Requirements for Documents Concerning Registration

Copies of the following documents must be uploaded on the DGCA’s online platform, e-GCA, along with the completed CA-28 aircraft registration form (notarisation of the documents is recommended):

- customs clearance certificate/bill of entry of the aircraft;
- certificate of deregistration from the previous registering authority;
- evidence to the effect that the aircraft has been purchased or is wholly owned by the applicant;
- an affidavit stating that the aircraft has been purchased from a previous owner, if applicable;
- a copy of the lease agreement if the aircraft is taken on a dry lease;
- a document of registration of the company and the names, addresses and nationalities of the directors if the aircraft is owned by a company or corporation;
- a copy of the import licence issued by the Directorate General of Foreign Trade or permission for the import of aircraft issued by the Ministry of Civil Aviation/DGCA;
- in cases where the aircraft has been mortgaged/hypothecated, the owner/operator shall submit their consent for this and the papers to this effect; and
- letters from the owner, lessor, operator and mortgagee (if applicable) confirming the names and nationality of their directors, and requesting or consenting to (as the case may be) the aircraft registration.

2.4 Lessor’s Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A foreign lessor may be required to pay income or other taxes upon leasing an aircraft or engine to an Indian lessee, depending on the domicile of the foreign lessor and the provisions of the specific double taxation avoidance treaty with the country of domicile of the foreign lessor and India. Ordinarily, where a lessee is required to withhold tax but does not do so, the onus would remain with the lessee; the responsibility would not shift to the foreign lessor.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor would ordinarily not be deemed to be resident, domiciled in or carrying out any business in India by virtue of being a party to a lease or because of enforcement of a lease. However, it is always prudent to have a tax expert study the relevant double tax avoidance treaty between the country of domicile of the foreign lessor and India.

2.4.3 Engine Maintenance and Operations

Unless the direct involvement and consequent negligence of the foreign lessor are proven in respect of aircraft or engine maintenance and operations, no liabilities would be imposed on the foreign lessor as a result of their being a party to such a lease.

2.4.4 Damage or Loss Caused by an Asset

A lessee under a dry lease remains primarily liable for loss or damage caused by the aircraft to third parties and for injuries to the person or property of third parties or passengers, and is responsible for any breach of environmental laws; in the event of a claim, however, both the lessor and the lessee would generally get sued. Needless to say, both the lessor and the lessee will be liable for negligence in relation to the aircraft arising as a result of their own acts and omissions.

The Indian law on vicarious liability confines the liability of the master to the torts committed by their servants and agents where these were within the scope of the servant's/agent's authority. As the relationship between the lessor and lessee is on a principal-to-principal basis, there will be no vicarious liability either. However, there are four exceptions to the above rule:

- where the lessor retains control over the lessee and interferes with and/or makes themselves a party to the tortious act;
- where the act contracted to be done is wrongful or illegal;
- where a legal or statutory duty is imposed on the lessor; and
- where the act contracted to be done is, by its nature, likely to cause danger to others – in such a case, there is a duty on the part of the lessor to take all reasonable precautions against such a risk.

2.4.5 Attachment by Creditors

Creditors of a domestic lessee may exercise a lien over the aircraft, but do not have the right to sell the leased aircraft.

2.4.6 Priority of Third Parties' Rights

The following third-party rights would take priority over a lessor's rights under an aircraft or engine lease:

- the Airports Authority of India can exercise a lien on the aircraft for any unpaid dues, such as landing and parking charges – this also includes the private airport operators exercising under the powers vested to the Airports Authority of India;
- an unpaid bailee can exercise a mechanic's lien;
- statutory dues such as taxes, workmen's wages, etc, form the first charge on the asset; and
- the government or its agencies can confiscate, detain or requisition aircraft (whether foreign-owned or otherwise) under certain circumstances, such as if the central government declares an emergency or if the aircraft is involved in criminal activity.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

Indian registered aircraft may be insured by an Indian insurer, which in turn would seek reinsurance on the international insurance market – provided, however, that there is a 4% reinsurance retention (ie, obligatory cession), which is mandatorily required to be reinsured with the General Insurance Company of India.

2.5.2 Mandatory Insurance Coverage Requirements

The operator must have insurance coverage for liability towards the hull, crew, passengers and third parties. Insurance is also mandatory for baggage, etc, as may be required under the Carriage by Air Act, 1972.

2.5.3 Placement of Insurance Outside of Jurisdiction

A 4% reinsurance retention is mandatorily required with the General Insurance Company of India.

2.5.4 Enforceability of "Cut-Through" Clauses

"Cut-through" clauses are enforceable in India.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurance and reinsurance are routinely carried out in aircraft transactions in India.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

A foreign lessor may terminate an aircraft lease if the lessee defaults on their obligations under the lease. As long as the foreign lessor is acting within the terms of the lease, there are no restrictions on their ability to terminate. A foreign lessor would be required to obtain permission from the customs authorities to re-export the aircraft from India. The sale of the aircraft following such termination is permissible.

2.6.2 Lessor Taking Possession of the Aircraft

There is no procedure for exercising self-help remedies under local laws in India. Peaceful repossession of the aircraft can, of course, be obtained without judicial intervention. Legally, the lessor may terminate the agreement and take possession or control of the aircraft. In cases where there is no co-operation, the lessor has the option to approach the court.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts that are explicitly competent to decide aviation disputes; the value, facts and circumstances of the aviation dispute would determine the forum. However, under Section 8 of the Protection of Interests in Aircraft Objects Act, 2025 (the "Aircraft Objects Act"), the High Court having the relevant territorial jurisdiction has been conferred authority as the relevant court for purposes of disputes arising from Article 53 of the Convention.

2.6.4 Summary Judgment or Other Relief

The Code of Civil Procedure, 1908 (CPC) provides for summary procedures under Order XXXVII. Summary procedures may only be effective in cases where a foreign lessor seeks to recover unpaid rent and other monies under the lease and not to enforce the lease. The courts of law are ready to intervene upon proper proceedings being filed.

Interim measures such as the grounding of the aircraft can be obtained fairly quickly, usually within a week or two of the initiation of the legal action. Where there is

an arbitration clause, the court and the arbitral tribunal have the power to pass an interim protection order.

In India, as elsewhere, the granting of an injunction under the CPC is a discretionary remedy, which may be granted unconditionally or upon the court's imposed terms. In exercising its jurisdiction, the court will not enter into a pre-trial assessment of the lessor's claim. If the court is satisfied that the lessor has a prima facie case against the lessee and that, in the absence of an injunction, "irreparable injury" or loss that cannot be compensated in the form of damages is likely to be caused to the lessor, it will grant the injunction. Before granting an injunction, the court will direct that notice of it be given to the lessee, except in cases where it appears that the object of granting the injunction would be defeated by such delay as would result from this.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

India would recognise a lease governed by foreign law and will enforce its terms and sustain claims arising under it as long as the rights are not in breach of Indian law or public policy. Submission to a foreign jurisdiction would also be recognised.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Reciprocating Territories

A foreign decree can only be executed in India directly as if it had been passed by a court in India in certain cases. Section 44A of the CPC provides, inter alia, that where a foreign judgment has been rendered by a superior court in any country or territory outside India that the government has by a notification declared to be a reciprocating territory, it may be enforced in India by proceedings in execution as if the relevant court of India had rendered the judgment.

Conditions for Enforceability of Foreign Judgments

Courts in India may refuse execution if the decree falls within any of the following exceptions specified in Section 13 of the CPC, which, inter alia, provides that a foreign judgment shall be conclusive of any matter directly adjudicated upon, except where:

- a court of competent jurisdiction has not pronounced it;
- it has not been given on the merits of the case;
- it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases where such law is applicable;
- the proceedings in which the judgment was obtained were opposed to natural justice;
- it has been obtained by fraud; or
- it sustains a claim founded on a breach of any law in force in India.

Section 44A, however, only refers to decrees or judgments under which a sum of money is payable. Essentially, it must be a money decree to fall within the purview of Section 44A.

Enforcement of Judgments from Non-Reciprocating Territories

In the absence of any reciprocal arrangement or treaty, a suit will have to be filed to enforce any such judgment or order obtained. The United Kingdom and Northern Ireland have been declared as reciprocating territories for the purpose of Section 44A. Curiously, there is no such arrangement with the USA.

In a suit on a foreign judgment, the Indian court cannot go into the merits of the original claim nor question its correctness or propriety. Through precedent, the courts have held that the word “judgment” in the expression “foreign judgment” has been assigned the same meaning as given to it in English law, whereby it refers to the decree or order of a foreign court. A foreign judgment must be final and conclusive in the court in which it is passed in order to be considered a valid cause of action.

In order to establish that a final and conclusive judgment has been pronounced, it must be shown that, in the court in which it has been pronounced, it conclusively, finally and forever established the existence of the right of which it is sought to be made conclusive evidence in India to make it *res judicata* (ie, a thing conclusively decided between parties).

2.6.7 Judgments in Foreign Currencies

Indian courts would render a judgment in a foreign currency upon request and upon the satisfaction of sufficient cause.

2.6.8 Limitations on Lessors’ Actions Following Termination

As long as the court does not form the opinion that the default interest or the penalty imposed on the lessee is excessive or uncalled for, there are no limitations on a lessor’s ability to recover default interest or charge additional rent following the termination of the lease for default. If a court concludes that the default interest or penalty on the lessee is not sustainable, it may levy a rate of interest on its own accord, which would ordinarily be the prevailing market rate of interest.

2.6.9 Lessor’s Requirement to Pay Taxes/Fees

A lessor under an aircraft lease seeking enforcement of such a lease would not be required to pay any taxes or fees. The lessor may, however, have to pay any unpaid taxes that were the lessee’s responsibility, in order to export the aircraft from the country.

2.6.10 Mandatory Notice Periods

If the lease terms provide a notice period, then such notice period must be adhered to unless specifically waived by the lessee.

2.6.11 Lessees’ Entitlement to Claim Immunity

In India, the doctrine of sovereign immunity does not apply to statutory corporations or bodies incorporated under the (Indian) Companies Act, 2013, nor to any government-owned entities. This doctrine applies only to exercising certain sovereign functions the state performs.

2.6.12 Enforcement of Foreign Arbitral Decisions

India has ratified the Geneva Convention and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Any foreign award under the New York Convention can be enforced in India in accordance with the provisions of Part II of the (Indian) Arbitration and Conciliation Act 1996. Where the court concerned in India is satisfied that such a foreign award is enforceable under the Act, the award is deemed to be a decree of that court and enforceable

as such. The courts will not revisit the issues involved in the arbitration nor sit as a court of appeal.

2.6.13 Other Relevant Issues

In general, it is prudent to factor in a significant amount of time to properly enforce one's rights in India, mainly due to the country's complex bureaucracy. In case of any contest by the lessee, enforcement may be delayed.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

India recognises the concepts of both contractual assignment and novation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

As long as the New York or English law-governed assignment and assumption agreement or novation agreement is a valid contract under Indian law, the courts in India will uphold the validity of such an agreement. The consent of the lessee will also be required for such an agreement to be valid and enforceable. As long as the agreement itself is not opposed to public policy, such an agreement does not need to contain any specific mandatory terms in order to be valid under Indian law.

2.7.3 Enforceability of Lease Assignments/Novations

The aircraft and/or engine lease assignment and assumption/novation agreement should be translated if it is not in English, and then notarised.

2.7.4 Filing/Registration of Lease Assignments/Novations

The DGCA recently mandated that all aircraft lease assignment and novation agreements must be filed with the regulator. As such, there is no requirement for an engine lease assignment and novation agreement to be filed with the DGCA, but it is recommended. Such agreements are not subject to any consent from any government entity.

The procedure for filing an aircraft or engine lease assignment and assumption/novation agreement is fairly simple: a notarised copy of the agreement may

be filed under a covering letter with a request that it be placed on the aircraft file. A change in the ownership of an aircraft needs to be recorded in the aircraft register and on the certificate of registration of the aircraft; the rules and regulations also state that it is illegal for any person to fly or assist in flying such an aircraft until the name of the new owner is endorsed on the certificate of registration. Permission must specifically be sought from the DGCA to continue flying the aircraft until such activity is carried out.

No consent is required in advance, but it is usual practice to apply to the DGCA for permission to continue flying the aircraft in case of a change of ownership.

2.7.5 Taxes/Duties Payable on Assignment/Novation

No taxes or duties are payable in respect of such an assignment and assumption/novation agreement. As is usual practice with lease agreements, the original assignment and assumption/novation agreement, if brought into India, must be "stamped" within three months of it first being received in the country. Certain states also require copies of agreements to be "stamped".

2.7.6 Recognition of Transfer of Ownership Interests

In cases where the ownership interest of an entity owning an aircraft is transferred with legal title to the asset remaining with that entity, a change on the certificate of registration of the aircraft would not be required, so the aircraft may continue flying unhindered.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

An aircraft in India may be deregistered on the application of the lessee/operator, the owner, the lessor, the holder of the Irrevocable De-Registration and Export Request Authorisation (IDERA) or its certified designee.

DGCA Suo Moto

The DGCA may also suo moto cancel the registration of an aircraft if:

- it no longer satisfies the ownership test;

- the registration has been obtained by furnishing false information;
- the aircraft could more suitably be registered in some other country;
- the lease in respect of the aircraft has been terminated in accordance with the terms of the lease agreement;
- the certificate of airworthiness in respect of the aircraft has expired for a period of five years or more;
- the aircraft has been destroyed or permanently withdrawn from use; or
- it is inexpedient in terms of the public interest that the aircraft should remain registered in India.

Lessee/Operator or Foreign Lessor/Owner

The lessee/operator or foreign lessor/owner may apply to the DGCA for the deregistration of an aircraft where the lease in respect of the aircraft has expired or has been terminated in accordance with the terms of the lease. The applicant would have to approach the DGCA with a written application requesting deregistration and the reason for such a request. The consent of all the parties named on the certificate of registration should also be enclosed.

IDERA Holder

An IDERA holder or their authorised signatory or certified designee is required to lodge an IDERA with the DGCA as per the extant guidelines.

An IDERA holder may also apply to the DGCA for the deregistration of the aircraft in light of the Cape Town Convention and Aircraft Protocol.

The IDERA holder would have to approach the DGCA with an application as prescribed under Aeronautical Information Circular (AIC) 12 of 2018 issued by the DGCA.

2.8.2 Lessee's/Operator's Consent

The consent of the lessee or operator is required in all situations, except when an IDERA holder or its certified designee applies to the DGCA for deregistration, annexing the original or notarised IDERA.

2.8.3 Required Documentation

If deregistration is sought under an IDERA, the IDERA holder or its certified designee must submit an appli-

cation form as per AIC 12 of 2018, annexing the original or notarised copy of the IDERA. The IDERA holder or its certified designee must also provide evidence that all international interests ranking in priority to that of the IDERA holder in relation to the aircraft have been discharged or, alternatively, provide the consent of the entity named as the priority interest holder in the aircraft as per the International Registry.

Alternatively, when deregistration is not sought under the IDERA route, the owner, mortgagee or lessor must apply to the DGCA annexing the original “no objection” letters from each of the entities named on the aircraft’s certificate of registration. The DGCA always has the power to request any additional documentation that it may deem necessary during the scrutiny of an application for deregistration.

2.8.4 Duration of Deregistration Process

Deregistration under the IDERA route as per AIC 12 of 2018 and Rule 30 (7) of the Aircraft Rules, 1937 shall be carried out within five working days from the date of receipt of the application from the IDERA holder or its certified designee. However, in recent experience, the DGCA has taken closer to 28 days to deregister certain aircraft. Deregistration under any other method may take anywhere from one to four weeks, assuming the DGCA does not request any additional documents, which may be sought on a case-by-case basis.

2.8.5 Aviation Authority's Assurances

There is no precedent of the DGCA providing advance assurances to an aircraft owner, mortgagee or lessor regarding the prompt deregistration of an aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

No fees or taxes are chargeable in respect of the deregistration of an aircraft. Costs are also minimal.

2.8.7 Deregistration Power of Attorney

A deregistration power of attorney should satisfy the general principles of powers of attorney – ie, it should not confer any power that the issuer itself does not possess. Furthermore, a power of attorney must be executed on Indian stamp paper and attested by a notary public. It is also recommended that it be executed in English or any language the grantor

can fluently understand. Advance recordation of the deregistration power of attorney with the DGCA is not required but is recommended.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

The person exercising powers under the deregistration power of attorney would need to demonstrate that they are duly authorised by the attorney (in the case of a corporate entity) to sign and act on behalf of such an attorney. A board resolution or officers certificate issued by the attorney would usually suffice.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

It is recommended that deregistration powers of attorney be governed by Indian law.

2.8.10 Revocation of a Deregistration Power of Attorney

Usually, if a deregistration power of attorney is stated to be irrevocable, the grantor would not be able to revoke it. However, in practice, the grantor could always dispute a power of attorney on the grounds of fraud, coercion or misrepresentation.

2.8.11 Owner's/Lessor's Consent

Under India's regulations, an IDERA holder or its certified designee can deregister and export an aircraft from India without the lessee's consent. If the mortgagee of an aircraft is the IDERA holder or the certified designee, it may also export the aircraft without the owner's or lessor's consent. The asset does not need to be located in India at the time of deregistration.

2.8.12 Aircraft Export Permits/Licences

The following permissions are required for the export of an aircraft from India:

- permission from the DGCA under AIC 12 of 2018 (after the IDERA holder pays government dues accrued against the aircraft for three months prior to the date of application for deregistration); and
- permission from the customs and tax authorities and from the Reserve Bank of India.

These permissions cannot be issued in advance, and the time required to grant each licence may range from two to three weeks.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

No taxes are payable in respect of the export of an aircraft from India; costs and fees may vary on a case-by-case basis.

2.8.14 Practical Issues Related to Deregistration of Aircraft

The DGCA usually requests proof of deactivation of the Mode S code from the aircraft. All original documentation (request letters, etc) should be notarised, and adequate proof should be included to demonstrate that the signatory of original documents submitted to the DGCA is duly authorised to do so by their company/employer. In another recent matter, the DGCA refused to deregister aircraft within five working days from the date of receipt of the application from the IDERA holder and requested various documentation instead. Adequate responses had to be filed and paperwork provided to overcome the objections raised by the DGCA.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

The current statutory regime for the reorganisation and insolvency resolution of a corporate entity is governed by the Insolvency and Bankruptcy Code, 2016 (the "Code"), some provisions of which came into force in November 2016. The Code brings the insolvency laws in India under a single umbrella with an objective to, inter alia, maximise the valuation of the corporate debtor's assets through corporate restructuring or liquidation in a time-bound manner.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

The Corporate Insolvency Resolution Process (CIRP) can be initiated upon the occurrence of default of a minimum of INR10 million by a financial or operative creditor, or at the instance of the corporate entity itself.

The corporate entity can initiate the voluntary liquidation process where no default has been committed.

Companies incorporated in India can also be wound up by order of the National Company Law Tribunal (NCLT) under the provisions of the Companies Act, 2013 on an application being filed by the company, or in the following circumstances:

- if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, etc;
- if the affairs of the company have been conducted in a fraudulent manner, etc;
- if the company has made a default in filing its financial statements or annual returns for the immediately preceding five consecutive financial years with the Registrar; or
- if the tribunal is of the opinion that it is just and equitable that the company should be wound up.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

There is no clear framework for cross-border co-operation in the instance of overseas insolvency proceedings under any statute in India. The provisions under the Code dealing with cross-border insolvency are based on the scheme of entering into separate bilateral agreements with the government of foreign countries and the issuance of letters of request (LOR) by the competent tribunal.

However, in the CIRP of Jet Airways India Limited, which commenced in India in June 2019, it was brought to the attention of the tribunal in India that a competent court in the Netherlands had already initiated insolvency proceedings against Jet Airways, wherein a Boeing 777-300ER aircraft had been seized by a creditor at Amsterdam's Schiphol airport. The tribunal ordered the resolution professional appointed in India to consider the prospect of co-ordinating with the Dutch trustee, and consequently a "cross-border insolvency protocol" was executed between both parties to promote co-operation and co-ordination among the two authorities in different jurisdictions on the matter.

There has been judicial activism and reports from the committee constituted by the government to make provisions under the Indian statute in line with the UNCITRAL Model Law on Cross-Border Insolvency.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

The Aircraft Objects Act provides for Alternative A to apply in case of a lessee's insolvency. After the "waiting period", the creditor would be able to take back possession of the aircraft. Albeit untested, it is likely that the rights under the power of attorney would be affected until then, and deregistration would not be permitted. At the time of writing, however, no regulations have been formulated under the Aircraft Objects Act which deal with the process to be followed in a lessee's insolvency.

2.9.5 Other Effects of a Lessee's Insolvency

The Aircraft Objects Act provides for Alternative A to apply in case of a lessee's insolvency. After the "waiting period", the creditor would be able to take back possession of the aircraft.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

In an operating lease, the owner of the aircraft will always be recognised as the title holder. The main risk for a lender in the insolvency of the borrower, guarantor or entity providing security is the inability to recover its debt.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

Under the Code, the tribunal may pass an order commencing a corporate insolvency resolution process – this triggers a moratorium of 180 days, extendable by a maximum further period of 90 days (or any further time the tribunal may deem fit, not exceeding 330 days in total). In the recent GoFirst insolvency, the court extended the moratorium by a further 60 days beyond the 330-day period on discretionary grounds.

2.9.8 Liquidation of Domestic Lessees

If the debt owed by a debtor is above INR100,000 (increased to INR10 million in March 2020, due to the COVID-19 crisis), the Code proposes two independent processes:

- an insolvency resolution process; or
- liquidation.

A creditor or the corporate debtor itself must apply to the NCLT to initiate the CIRP of the debtor company. Once a corporate debtor is admitted into the CIRP, its board of directors is suspended and its management is placed under an independent “interim resolution professional”. Simultaneously, a moratorium takes effect, which prohibits:

- the continuation or initiation of any legal proceedings against the corporate debtor;
- the transfer of its assets;
- the enforcement of any security interest;
- the recovery of any property from it by an owner or lessor; and
- the suspension or termination of the supply of essential goods and services to it.

However, as per the notification dated 3 October 2023, this moratorium shall not apply to transactions, arrangements or agreements under the Cape Town Convention and the Protocol relating to aircraft, aircraft engines, airframes and helicopters.

The moratorium lasts for the duration of the CIRP period – ie, 180 days extendable by another 90 days (or any further time the tribunal may deem fit, not exceeding 330 days in total). The interim resolution professional will then invite and verify claims made by the corporate debtor’s creditors, classify them, and form a committee of creditors comprised of all the financial creditors of the corporate debtor, who shall, in turn, appoint an independent professional to function as the “resolution professional”. Any resolution plan for the revival of the company needs to be approved by financial creditors holding 66% of the voting share.

If no plan is approved by the committee within the timeframe available, it may opt for liquidation. The NCLT is then required to order the liquidation of the corporate debtor. If an order of liquidation is passed, a liquidator will be appointed to sell the assets of the corporate debtor and distribute the proceeds among the creditors.

2.9.9 Ipso Facto Defaults

Ipso facto defaults are regular inclusions in lease transactions relating to aircraft in India and would be recognised to repossess an aircraft during lessee insolvency proceedings. Defaults under the Code that arose during the COVID-19 pandemic have been excluded from the period from 25 March 2020 to 24 March 2021.

2.9.10 Impact of Domestic Lessees’ Winding-Up

In cases where a domestic lessee is wound-up, an aircraft on an operating lease may be taken back by its owner, and the lease agreement would no longer subsist. All rights flowing from the lease – rent, security deposit and maintenance reserves – would also end.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The 2001 Cape Town Convention on International Interests in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment (Aircraft Protocol) are in force in India. However, several implementation issues have been dealt with over the years by the Ministry of Civil Aviation, which has been holding frequent consultations with the Aviation Working Group. Various amendments have been made to India’s subordinate legislation – ie, the Aircraft Rules, 1937, Civil Aviation Requirements (CARs) and AICs, which enshrine the tenets of the Cape Town Convention.

The Aircraft Objects Act was recently passed by the Indian Parliament and came into force in May 2025. This legislation gives legal effect to the Cape Town Convention and its Aircraft Protocol within India, thereby aligning India’s domestic laws with international standards for aircraft financing and leasing.

The key provisions of the Act include the following.

- Legal effect: the Convention and Protocol now have the force of law in India, subject to the declarations made by India.
- Registry authority: the DGCA is designated as the registry authority responsible for the registration and deregistration of aircraft.
- Remedies in case of default: creditors are entitled to exercise remedies under the Convention or Protocol upon declaring a default to the DGCA. These

remedies include repossession and deregistration of aircraft assets.

- **Overriding effect:** in case of any inconsistency between the Act and other laws, the provisions of the Act shall prevail.
- **Jurisdiction:** High Courts are designated as the relevant courts for matters under the Convention.

The enactment of this Act is expected to enhance legal certainty for aircraft financiers and lessors, reduce leasing costs for Indian carriers, and bolster India's position in the global aviation market.

2.10.2 Declarations Made Concerning Conventions The Convention

India has made extensive declarations under the Convention, as listed below.

Specific declaration under Article 39 (1)(a)

"The following categories of non-consensual right or interest have priority under its laws over an interest in an aircraft object equivalent to that of the holder of a registered international interest and shall have priority over a registered international interest, whether in or outside insolvency proceedings, namely:

- liens in favour of airline employees for unpaid wages arising since the time of a declared default by that airline under a contract to finance or lease an aircraft object;
- liens or other rights of an authority of India relating to taxes or other unpaid charges arising from or related to the use of that aircraft object and owed by the owner or operator of that aircraft object, arising since the time of default by that owner or operator under a contract to finance or lease that aircraft object; and
- liens in favour of repairers of an aircraft object in their possession to the extent of service or services performed on and value added to that aircraft object."

General declaration under Article 39 (1)(b)

"Nothing in the Convention shall affect its right or that of any entity thereof, or any intergovernmental organisation in which India is a member, or other private provider of public services in India, to arrest or detain an aircraft object under its laws for payment of amounts

owed to the Government of India, any such entity, organisation or provider directly relating to the service or services provided by it in respect of that object or another aircraft object."

Declaration under Article 40

"The following categories of non-consensual right or interest shall be registrable under the Convention as regards any category of aircraft object as if the right or interest were an international interest and shall be regulated accordingly, namely:

- liens in favour of airline employees for unpaid wages arising prior to the time of a declared default by that airline under a contract to finance or lease an aircraft object;
- liens or other rights of an authority of India relating to taxes or other unpaid charges arising from or related to the use of an aircraft object and owed by the owner or operator of that aircraft object, arising prior to the time of a declared default by that owner or operator under a contract to finance or lease that aircraft object; and
- rights of a person obtaining a court order permitting attachment of an aircraft object in partial or full satisfaction of a legal judgment."

General declaration under Article 52

"The Convention shall apply to all its territorial units."

Declaration under Article 53

"All the High Courts within their respective territorial jurisdiction are the relevant courts for the purposes of Article 1 and Chapter XII of the Convention."

Mandatory declaration under Article 54 (2)

"Any and all remedies available to the creditor under the Convention which are not expressed under the relevant provision thereof to require an application to the court may be exercised without court action and without leave of the court."

The Protocol

India has made extensive declarations under the Protocol, as follows.

Declaration under Article XXX(1) in respect of Article VIII

India will apply Article VIII.

Declaration under Article XXX(2) in respect of Article X providing for the application of the entirety of Article X

India will apply Article X of the Protocol in its entirety, and the number of working days to be used for the purposes of the time limit laid down in Article X(2) of the Protocol shall be equal to no more than:

- ten working days in respect of the remedies specified in Article 13 (1)(a), (b) and (c) of the Convention (respectively, preservation of aircraft objects and their value; possession, control or custody of aircraft objects; and immobilisation of aircraft objects); and
- 30 working days in respect of the remedies specified in Article 13 (1)(d) and (e) of the Convention (respectively, lease or management of aircraft objects and the income thereof; and sale and application of proceeds from aircraft objects).

General declaration under Article XXX(3) in respect of Article XI providing for the application of Alternative A in its entirety to all types of insolvency proceedings

India will apply Article XI, Alternative A, of the Protocol in its entirety to all types of insolvency proceedings, and the waiting period for the purposes of Article XI(3) of that Alternative shall be two calendar months.

Declaration under Article XXX(1) in respect of Articles XII and XIII

India will apply Articles XII and XIII.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Article XIII of the Protocol applies domestically. For the DGCA to record an IDERA in relation to an aircraft, an IDERA holder, their authorised signatory or a certified designee of the authorised signatory shall submit an application as per Appendix B of CAR Section 2, Airworthiness Series F Part I Issue II. Along with the application, the applicant must submit an original IDERA or two notarised copies thereof.

2.10.4 Enforcement of Conventions

Indian courts have had limited opportunities to deal with issues pertaining to the enforcement of the Convention and the Protocol. By way of recent judgments, in *ACG Aircraft Leasing Ireland Limited v Union of India and Others*, on 26 April 2024 the Delhi High Court recognised the mandatory nature of Rule 30 (7) of the Aircraft Rules, 1937 and upheld the duty cast upon the DGCA to cancel the certificate of registration. All the case law to date deals extensively with India's international obligations under the Convention/Protocol and with deregistration; however, no court has dealt directly with the issue of the physical export of an aircraft from India under the Convention and the Protocol.

2.10.5 Other Conventions

India has ratified neither the 1948 Geneva Convention on the International Recognition of Rights in Aircraft nor the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

There are very strict regulations and restrictions on loans from foreign lenders, especially in foreign exchange. The RBI is the relevant regulator, and must issue prior approval before any borrowings can be made.

3.1.2 Effect of Exchange Controls or Government Consents

India is an exchange-controlled country. The relevant enactment is the Foreign Exchange Management Act of 1999 and the rules and regulations made thereunder, which are administered by the RBI. Any financing or repatriation of the realisation of proceeds under a loan, guarantee or security document would require the approval of the RBI.

3.1.3 Granting of Security to Foreign Lenders

Guarantees, especially for foreign exchange-denominated transactions, are regulated by the RBI's Foreign Exchange Management (Guarantees) Regula-

tion, 2000 and other regulations. The borrower would require prior approval from the RBI to grant security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Prior approval of the RBI would be required for any guarantee involving the guarantee of debt owed to a foreign entity by an Indian entity.

3.1.5 Lenders' Share in Security Over Domestic SPVs

In practice, there are no cases involving a domestic special purpose vehicle that owns the financed aircraft.

3.1.6 Negative Pledges

Negative pledges are recognised.

3.1.7 Intercreditor Arrangements

The question of whether material restrictions/requirements are imposed on intercreditor arrangements is assessed on a case-by-case basis.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent under a syndicated loan are recognised in India.

3.1.9 Debt Subordination

The usual practice is the issuance of bonds as subordinated debt instruments. There are extensive RBI guidelines on what forms of subordination are permissible and restrictions on the percentage of debt that may be subordinated.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer of outstanding debt is permissible and recognised, subject to RBI approval, which may be required on a case-by-case basis.

3.1.11 Usury/Interest Limitation Laws

There are no usury or interest limitation laws. However, courts in India always have the power to fix interest rates if an opinion is formed that the applied interest is harsh or excessive.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

Typical forms of security granted in aviation finance transactions in India could include taking over the security of the immovable property by way of a mortgage or movable property/bank accounts, etc, by way of a deed of hypothecation.

3.2.2 Types of Security Not Available

If executed properly (and if it satisfies the test of being a valid contract between two parties competent to contract), a security agreement would be upheld as being valid in relation to the aircraft, engines, warranties or insurance.

3.2.3 Trust/Trustee Concepts

Indian law recognises the concept of a trust, with the relevant national legislation being the Indian Trusts Act, 1882. India is not a party to the Hague Convention on Trusts, 1986.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

Pursuant to a security assignment or mortgage, the borrower may assign their rights to the aircraft under an aircraft lease to a security trustee.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It is possible to assign the rights and benefits only without also assigning the attendant obligations of the lessor, as long as such assignment is valid under the governing law.

3.2.6 Choice of Foreign Law

A security assignment or a guarantee may be governed by English or New York law, and does not need to be governed by Indian law to be fully enforceable.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

No particular form of security assignment is required in India, nor does an assignment need to be registered in India. However, the security assignment should preferably be filed and recorded with the DGCA, which will endorse the name of the mortgagee and/or the details of the hypothecation on the certificate of registration.

The English language security assignment document will suffice and shall be accepted by the DGCA.

It is advisable to notarise the security assignments; where they are executed abroad, they should preferably be authenticated by an Indian consular or other diplomatic officer. In recent experience, it has been observed that most government departments, including the DGCA, accept notarised copies of documents, making the requirement for consularisation more or less redundant.

With the aircraft being a movable asset, there is no mandatory requirement to register any mortgages, liens, encumbrances, etc, on it in India. However, the aircraft mortgage can be registered with the Sub-Registrar of Assurances under the Indian Registration Act, 1908 within four months of its execution. This registration (of movables) constitutes persuasive value against a claim by a bona fide purchaser without notice. Registration with the Registrar of Companies is also possible; however, it is not compulsory if the mortgagor of the aircraft is not an Indian entity having its registered place of business in India.

3.2.8 Domestic Law Security Instruments

Domestic law security instruments are not required. Where the aircraft's owner is a foreign entity/citizen, local law filings are not required.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

Charges in relation to aircraft owned by Indian entities only are required to be registered with the Registrar of Companies as per the provisions of the (Indian) Companies Act, 2013, and rules made thereunder.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests over an aircraft and/or engines is recognised in India.

3.2.11 Effect of Changes in the Identity of Secured Parties

If the identity of the secured parties under a security assignment changes, the document evidencing this may be filed with the DGCA on its creation.

3.2.12 "Parallel Debt" Structures

This is not applicable under Indian law.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

Usually, a secured party under a security assignment would not be deemed to be a resident, domiciled, carrying on business nor subject to any taxes in India.

3.2.14 Perfection of Domestic Law Mortgages

A domestic law mortgage over an aircraft or engine is not required in India.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

Both aircraft and spare engines are movable objects, so there is no difference between the forms of security required.

3.2.16 Form and Perfection of Security Over Bank Accounts

A bank account can be charged by way of hypothecation. The deed of hypothecation would need to be filed with the bank maintaining the account, which must be charged in order for it to be perfected.

3.3 Liens

3.3.1 Third-Party Liens

The question of whether a third party could take or register a lien over an aircraft or engine would depend on who is trying to discharge the lien. Where the lessee seeks to discharge this lien, it would be liable to pay the total outstanding amount payable to that third-party contractor/repairer. However, if a lessor or secured party seeks to discharge a lien, in all probability it would have to bear only the value of the work actually done on that particular aircraft asset. In a case of deregistration and export by filing an IDERA under AIC 12 of 2018, the IDERA holder must bear the cost of all charges accrued three months prior to the date of submission of the IDERA, owed to the central government, any entity thereof or any intergovernmental organisation in which India is a member, or other private provider of public services in India.

A fleet lien is not recognised under the new Cape Town Convention and Aircraft Protocol regulations.

Third-party government entities have the right to arrest, detain, attach or sell an aircraft for the payment of amounts owed. However, under the new regime in India, these dues are limited to three months prior to the date of application by the IDERA holder.

3.3.2 Timeframe to Discharge a Lien or Mortgage

A lien can be discharged immediately on payment of the monies owed to the party exercising the lien.

3.3.3 Register of Mortgages and Charges

There is a register of charges maintained by the Registrar of Companies. However, only Indian owners of aircraft assets are required to register a charge against such aircraft with the Registrar. The interests of the aircraft mortgagee or security trustee shall be noted on the aircraft's certificate of registration and on the aircraft register maintained by the DGCA. Such registration shall result in notice to all third parties regarding the interest of the security trustee or mortgagee in the aircraft. Furthermore, the DGCA shall also always require the consent of the mortgagee/security trustee named on the certificate of registration/aircraft register for any amendment of the entries in relation to the aircraft.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

Fleet-wide detention of aircraft taken on an operating lease, especially after the termination of the operating lease, would not be recognised.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser of an aircraft must check the aircraft register maintained by the DGCA as well as the International Registry maintained under the Cape Town Convention and Aircraft Protocol.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

In the practical sense, there should be no difference in enforcing a security assignment as opposed to a loan or guarantee.

3.4.2 Security Trustees' Enforcement of Their Rights

A security trustee may enforce its rights under a security assignment pursuant to only a notice and acknowledgement executed by the lessor and the relevant lessee.

3.4.3 Application of Foreign Laws

Domestic courts in India will uphold foreign law as the governing law, as well as submission to a foreign jurisdiction, subject to this not being opposed to Indian public policy.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Please see 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards regarding the enforcement of foreign judgments and arbitral awards.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

There is no remedy for self-help in India. Peaceful repossession of the aircraft can be obtained without judicial intervention. In cases where there is no co-operation, the secured party has the option to apply to a court.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

The court in which an enforcement action under a security agreement/aircraft mortgage is decided would depend on the jurisdiction in India where the dispute arises and the nature and value of the claim.

3.4.7 Summary Judgments or Other Relief

Summary judgment may only be effective in cases where a secured party seeks to recover debt and other monies under the security agreement. There are no conditions that need to be complied with, apart from the fact that court fees will need to be paid on the amount claimed by the defaulting defendant.

3.4.8 Judgments in Foreign Currencies

On the request of a secured party, courts in India would pass judgment in a foreign currency.

3.4.9 Taxes/Fees Payable

There are no major taxes or fees that a secured party would be required to bear in connection with enforcing a security agreement/aircraft mortgage.

3.4.10 Other Relevant Issues

From a practical standpoint, since the courts in India are overburdened with work, lenders have preferred to have security documents governed by English law, and any enforcement takes place in England. The UK is a reciprocating territory, and money decrees passed in the UK may be enforced in India much more easily than decrees from non-reciprocating territories.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

This is not applicable under Indian law.

4.2 Current Legislative Proposals

The Aircraft Objects Act provides for subordinate legislation to be passed on a number of aspects, pertaining to notice to the DGCA prior to exercising the remedies available under the Act and Convention, the collection of information regarding dues, etc. These pieces of subordinate legislation are yet to be framed and notified by the government of India.

Additionally, the proposed Bharatiya Vayuyan Niyam, 2025 (the “Proposed Rules”) framed under the Bharatiya Vayuyan Adhiniyam, 2024, these Proposed Rules are meant to replace the existing Aircraft Rules 1937 and introduce changes to the existing rules for flight operation norms, and operational safety protocols. Public feedback has been invited until 10 August 2025 on these Proposed Rules, thereafter which, further steps will be taken to notify and enact the Proposed Rules.

Trends and Developments

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KLA Legal is a full-service law firm serving international and Indian clients from its offices in Mumbai, Gurugram and GIFT City. The team currently consists of more than ten professionals, and has worked on numerous cases, representing hundreds of leading global multinational clients as well as Indian corporates. The firm's aviation practice is headed by man-

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The Cape Town Convention Act in India: What It Means for Aviation Stakeholders

Introduction

16 April 2025 marked a watershed moment for the Indian aviation industry, as the President assented to the Protection of Interest in Aircraft Objects Bill, 2025 (“Cape Town Convention/CTC Act”), a law that enforces the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (“Cape Town Convention”, or CTC). On 1 May 2025, the CTC Act came into force as notified by the government.

The Cape Town Convention provides a comprehensive international legal framework for the creation, recognition, registration and enforcement of security interests, leases and title reservation rights in aircraft objects, including airframes, aircraft engines and helicopters. It establishes uniform rules to protect the rights of creditors, lessors and financiers by enabling them to register their interests in an international registry, enforce remedies on default (including repossession, sale and interim relief) and retain priority over competing claims.

The CTC also conceptualises an International Registry, which is a publicly accessible database that serves as a notice to third parties regarding these interests. The Aircraft Protocol supplements the Convention by tailoring its application to the aviation sector, cross-border enforcement and the recognition of rights during insolvency, and by promoting creditor confidence

through clear, predictable and enforceable rights in high-value mobile aviation assets.

The Convention, together with the Protocol, was acceded to by India in 2008, following which the state took several steps to ratify it and bring its national legislation in line with the Convention. The International Civil Aviation Organization (ICAO) is the supervisory body for the Convention, and the International Institute for the Unification of Private Law (UNIDROIT) acts as the depository thereof.

The Convention and Protocol contain a number of optional provisions that contracting states can decide whether or not to adopt. These optional provisions are set out in the form of declarations and are an integral part of the treaty system. The Cape Town Convention is applicable to Aircraft Objects, which includes airframes, aircraft engines and helicopters.

Why the need for the CTC in India

As the most populous nation in the world, India has seen an unprecedented surge in air passenger traffic. India’s aviation sector has demonstrated robust growth over the years, with domestic passenger traffic increasing by 11 % year on year; domestic passenger traffic alone is expected to reach 300 million annually by 2030. To cater to this rising demand, Indian airlines have aggressively expanded their order books.

However, amid this growth, systemic and historical issues have plagued key stakeholders and weakened lessor appetite in the country. In the past, lessors and financiers of aircraft faced serious challenges in

repossessing aircraft when an airline in India became insolvent. This affected the confidence of global aviation finance players in dealing with airlines in India. In the past few decades, India has seen the collapse or bankruptcy of some major domestic airlines, such as Kingfisher Airlines, Jet Airways and, most recently, GoFirst. Although there was a timely recovery of assets in Jet, the GoFirst case saw recovery vulnerabilities due to a moratorium, leading to significant risks for the lessors and financiers, and resulting in the Aviation Working Group (AWG) downgrading India's risk profile.

Therefore, legal and institutional changes were necessary to reassure aircraft financing entities and to provide legal safeguards for the enforcement of security interests in line with international practices and conventions, and to promote aircraft financing in India. To mitigate regulatory hurdles, insolvency moratoriums and legal complexities faced by foreign lenders and lessors, it was imperative to align India's aircraft leasing and financing ecosystem with global standards.

Leading up to the enactment of the CTC Act, India was lacking a comprehensive legal framework for the recognition and enforcement of international interests in aircraft because, under Section 31 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), aircraft are expressly excluded from the ambit of secured asset enforcement. This meant that banks and non-bank financial companies could not repossess or sell aircraft under SARFAESI mechanisms.

The Aircraft Act, 1934 regulated civil aviation, licensing and safety, but did not extend beyond Indian territorial boundaries and lacked provisions for the recognition of cross-border interests. It also did not contain specific legal mechanisms for enforcing international security or lease rights, especially when aircraft were located outside India or subject to international contracts.

Prior to the Ministry of Corporate Affairs Notification dated 3 October 2023, aircraft objects were subject to a moratorium during insolvency proceedings, preventing lessors from repossessing their aircraft, resulting in prolonged grounding and financial losses. Thus, the

aircraft leasing and financing players needed better protection in terms of enforcement of their rights and to repossess the aircraft, as leasing is the predominant mode of acquisition in India.

The CTC Act – the statutory incorporation of the Convention and Protocol

The enactment of the CTC Act gives legal effect to the Cape Town Convention and its Protocol within India, which was lacking despite India acceding to the Cape Town Convention in 2008. The Convention and Protocol now have the force of law in India, to the extent provided in the Act. This Act prevails in case of conflict with other laws. Besides giving High Courts the authority to deal with related disputes, thereby ensuring speedy relief, it also provides for notification of the registration of security interests and defaults to the Directorate General of Civil Aviation (DGCA).

Section 3 of the Act states that the Convention and Protocol shall have the force of law in India, subject to the declarations made by India. The Act provides for statutory recognition of “international interests” created by security agreements, leasing agreements and title reservation agreements. The Act mandates that an international interest must be registered under the International Registry system in order to be enforceable. Furthermore, Section 5 of the Act requires creditors to notify the DGCA of a declared default, which then becomes the trigger for enforcement.

Insolvency regime under the Act

Under the Insolvency and Bankruptcy Code, 2016 (IBC), aircraft were often stuck in legal disputes, delaying repossession. The GoFirst crisis highlighted the problem as lessors were prevented from repossessing their equipment due to the moratorium provision under Section 14 (1)(d) of the IBC, leading lessors and lenders to see India as a risky jurisdiction for aircraft leasing and financing.

One of the most significant provisions of the CTC is Article XI, which sets out remedies in case of insolvency-related events. Article XI offers two alternative regimes, Alternative A and Alternative B, from which a contracting state may select by making a declaration. If no declaration is made, the state's domestic insolvency law will govern creditor remedies.

Alternative A

Under Alternative A, upon the occurrence of an insolvency-related event, the insolvency administrator (or resolution professional) or the debtor must, by the end of the “waiting period” declared by the state (two calendar months in the case of India), either:

- give possession of the aircraft object(s) to the creditor or lessor; or
- cure all defaults (except the insolvency itself) and agree to perform all future obligations under the contract.

During this period, the aircraft must be preserved and maintained in accordance with the transaction documents. Crucially, no court approval is required for repossession at the end of the waiting period, making the remedy automatic and less susceptible to delays.

Alternative B

Under Alternative B, when an insolvency-related event occurs, the debtor or resolution professional, upon the creditor’s request, must notify the creditor within the period specified in the state’s declaration whether it will:

- perform future obligations and cure agreed defaults (excluding the insolvency event); or
- permit the creditor to take possession, subject to additional conditions or court approvals, as per applicable domestic law.

Unlike Alternative A, Alternative B does not provide a fixed timeline for repossession, leaving significant discretion to the national courts. This may lead to uncertainty and enforcement delays, especially in jurisdictions with congested or unpredictable judicial systems.

India has opted for Alternative A with a two-month waiting period, according to which the insolvency administrator or the debtor, as applicable, shall (subject to conditions stipulated under the Convention) give possession of the aircraft object to the creditor no later than either the end of the waiting period or the date on which the creditor would be entitled to possession of the aircraft object if the Act did not apply, whichever is earlier. India has implemented this

through a combination of ratification and declarations made under Article XXXIX of the Convention and Article XXX of the Protocol, and amendments to the Aircraft Rules, 1937, to give effect to these declarations administratively – particularly through the DGCA. The relevant part of the Declaration reads:

“Pursuant to Article XXX(1) of the Protocol, India declares that it will apply Article XI, Alternative A in its entirety to all types of insolvency proceedings and that the waiting period for the purposes of Article XI(3) of that Alternative shall be 60 calendar days.”

Types of transactions afforded protection under the Cape Town Convention

Alternative A gives creditors strong insolvency protection as the insolvency resolution professional must return aircraft or agree to perform the contract within a “waiting period”. If this requirement is not complied with, the creditor can repossess and export the aircraft, notwithstanding the IBC moratorium.

Other salient provisions under the Act

Under Section 7 of the Act, a creditor may apply to the DGCA for de-registration and export. The DGCA must honour the Irrevocable De-Registration and Export Request Authorisation (IDERA) when submitted. No judicial order is needed unless there is a dispute; deregistration must be processed swiftly.

Section 8 of the Act vests exclusive jurisdiction for Convention-related disputes in the High Courts. Section 9 contains an overriding clause, stating that the provisions of the Act will prevail over any other inconsistent law, ensuring the primacy of the Convention framework. However, the law also carefully balances public interest by preserving the right of the government and public authorities to detain aircraft for dues related directly to services rendered. Under Section 11, the Act permits the central government to make rules that are necessary to carry out its provisions.

What it means for stakeholders

India’s enactment of the CTC Act means that registered interests in aircraft are recognised, improving cross-border financing and asset management, and demonstrating India’s commitment to rule-based international aviation practices. With internationally

enforceable security rights, lenders will now be more willing to finance aircraft in India. By reducing the legal and financial risks for aircraft leasing companies, the Act will lead to lower leasing costs, which would have a trickle-down effect, resulting in lower fares for Indian flyers. India will now be a step closer to becoming eligible for OECD discounts. Reduced repossession risk translates into lower premiums, encouraging more favourable lease terms.

In terms of efficient repossession and enforcement, creditors and lessors can recover aircraft faster in cases of default, thanks to remedies like deregistration and export rights, especially under “Alternative A”, which India adopted. This helps to avoid the lengthy court proceedings that are common in Indian insolvency cases. Along with enhancing India’s credibility, the passage of the CTC Act also provides judicial clarity and a clearer legal roadmap for courts and tribunals handling aviation disputes.

The CTC Act, along with positive changes in Indian regulations related to easing repossession by lessors in Gujarat International Finance Tec-City (“GIFT City”), will go a long way towards increasing investor confidence in the GIFT City as well. These developments will also pave the way for Indian and foreign leasing platforms for aircraft and engines to be established on Indian soil.

Conclusion

The CTC Act marks a transformative moment for India’s aviation and legal landscape. By bringing domestic law in line with the Cape Town Convention and Aircraft Protocol, the Act provides stronger, inter-

nationally recognised protections for aircraft lessors and financiers. This not only boosts investor confidence but also makes aircraft leasing in India more attractive and cost-effective. Both the Jet Airways and GoFirst cases underlined an urgent need for the Cape Town Convention in India, and the Act is now a positive sign, considering the uncertain geopolitical climate and the fact that an environment of uncertainty invariably affects all sectors, including aviation.

By aligning with the Cape Town Convention and giving precedence to international creditor rights, the Bill addresses long-standing concerns of aircraft lessors and lenders regarding asset security and repossession in India. By adopting Alternative A under Article XI of the Aircraft Protocol and institutionalising remedies such as IDERA, India has sent a clear signal of its commitment to global best practices in aviation finance. These changes significantly enhance the creditworthiness of Indian aviation transactions, promote leasing activity through platforms like GIFT City, and position India as a jurisdiction of choice for aircraft leasing and financing.

For India, the legislation represents more than just legal reform – it is a strategic move to position itself as a global aviation hub in line with jurisdictions such as Ireland. Its passage signals India’s commitment to creating a more predictable, transparent and creditor-friendly legal environment with streamlined repossession rights, faster dispute resolution and reduced leasing risks. To fully realise its benefits, however, effective implementation and regulatory co-ordination will be critical. If executed well, the Act could significantly reshape the future of Indian aviation.

INDONESIA



Law and Practice

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Mochtar Karuwin Komar (MKK) is a leading independent Indonesian law firm, with its main office in Jakarta and a branch office in Singapore. Founded in 1971, MKK helps guide investors and businesses through the challenges of doing business in Indonesia, advising lenders and foreign investors on a broad range of project finance, asset finance and trade finance transactions, and M&A. The firm provides legal services of the highest quality – technically excellent and commercially sensible, delivered in a timely and

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

There are no stamp or similar documentary taxes payable in Indonesia in respect of the execution or delivery of the engine sale agreement, except that it is subject to a nominal stamp duty of IDR10,000 per document. This must be paid when it is first used in the Republic of Indonesia and before it will be admissible as evidence in Indonesian courts. To be admissible as evidence, the document needs to be accompanied by a sworn translation thereof into Indonesian language prepared by a sworn translator licensed in Indonesia (this requirement can be met prior to submission as evidence before the Indonesian court).

For any tax advice, please consult with an Indonesian tax consultant on this matter.

1.1.2 Enforceability Against Domestic Parties

An aircraft and engine purchase and sale agreement that does not involve an Indonesian party does not need to be translated, certified, notarised or legalised to be enforceable against an Indonesian party. However, it should be noted that, for the purpose of registration with the Indonesian Aircraft Registry, one of the prerequisite documents is evidence of aircraft ownership, which can be in the form of a bill of sale or affidavit of ownership for the aircraft (a copy of which needs to be legalised by a public notary, seller or the issuing institution).

1.2 Transfer of Ownership

1.2.1 Transferring Title

From an Indonesian law perspective, the act(s) constituting “transferring title” would depend on the governing law of such transaction, which is evidenced in the form of a bill of sale or affidavit of ownership for the aircraft. Such sales are normally conducted outside Indonesia by non-Indonesian parties.

However, there is no separate registration for engines in the Indonesian Aircraft Registry. As a matter of practice, it is also advisable to put a nameplate identifying the lessor and the owner on the aircraft, engines and certain parts.

1.2.2 Sales Governed by English or New York Law

To the extent that, under the laws governing the bill of sale (and the relevant sale agreement) and the laws where each of the parties therein is incorporated, the seller has the capacity, authority and power to dispose of the aircraft and the aircraft has been physically accepted by the buyer from the seller, Indonesia should recognise title transfer by means of a bill of sale.

1.2.3 Enforceability Against Domestic Parties

For the purpose of registration of an aircraft with the Indonesian Aircraft Registry, one of the prerequisite documents is evidence of aircraft ownership, which can be in the form of a bill of sale or affidavit of ownership for the aircraft (a copy of which needs to be legalised by an Indonesian public notary, seller or the issuing institution).

1.2.4 Registration, Filing and/or Consent From Government Entities

A bill of sale is not subject to any consent from any Indonesian government entity. For aircraft registration purposes, the Directorate General of Civil Aviation (DGCA) will need to be provided with, among others, a copy of the bill of sale (legalised by an Indonesian public notary, seller or the issuing institution) in favour of the aircraft owner. Therefore, delivery of the aircraft should already have occurred before the certificate of registration can be issued by the DGCA.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

For any tax advice, please consult with an Indonesian tax consultant on this matter.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

Provisions of the lease concerning only the engine or parts should be recognised and enforceable in Indonesia to the extent that they are also recognised and enforceable under the governing law of the lease.

2.1.2 Application of Foreign Laws

Law No 1 of 2009 regarding Aviation as amended by Law No 6 of 2023 concerning the Stipulation of Government Regulation In Lieu of Law No 2 of 2022 concerning Job Creation as Law (the “Aviation Law”), which adopts the provisions of the Cape Town Convention, provides that a security agreement, title reservation agreement, and/or leasing agreement may be entered into based on the law of choice made by the parties to the agreement.

However, in practice, courts have been known not to apply the chosen law notwithstanding the fact that the choice of the parties was valid. The court’s reasoning in such circumstances is not always specified. In at least one instance of which the authors are aware, the court held that since it is an Indonesian court and its legal competence is in Indonesian law, it will apply Indonesian law. In another instance the court ruled that it had no jurisdiction since the parties to the transaction had chosen a foreign law. A major part of

the reason is the lack of experience in adjudicating disputes governed by a substantive foreign law. The courts are also not used to relying on legal experts or legal opinions in respect of foreign law.

2.1.3 Restrictions Concerning Payments in US Dollars

Provisions of the lease relating to rent payments in US dollars should be recognised and enforceable in Indonesia to the extent that they are also recognised and enforceable under the governing law of the lease.

2.1.4 Exchange Controls

Indonesia has limited foreign exchange controls. The Indonesian rupiah (which has the acronym IDR) has been, and in general is, freely convertible within or from Indonesia. However, to maintain the stability of the rupiah and to prevent the utilisation of the rupiah for speculative purposes by non-residents, Indonesia’s Central Bank, Bank Indonesia, has introduced regulations to restrict the movement of the rupiah from banks within Indonesia to:

- offshore banks;
- an offshore branch of an Indonesian bank; or
- any investment denominated in rupiah by foreign parties and/or Indonesian parties domiciled or permanently residing outside Indonesia,

thereby limiting offshore trading of existing sources of liquidity.

Pursuant to the regulation of Bank Indonesia concerning Transactions in Foreign Exchange Markets, cross-border remittances of rupiah through the Indonesian banking system are prohibited. The Regulation is intended to achieve and maintain stability of the rupiah by restricting or limiting the ability of local banks (including branches of foreign banks) operating in Indonesia to engage in certain rupiah and foreign currency credit, investment and derivative transactions of foreign exchange against the rupiah.

In addition, Bank Indonesia has the authority to request information and data concerning the foreign exchange activities of all people and legal entities that are domiciled, or who plan to be domiciled, in Indonesia for at least one year.

Further, there are, among others, the following requirements:

- the mandatory use of rupiah as the form of currency for any transactions carried out within the territory of the Republic of Indonesia – pursuant to the Currency Law (Law No 7 of 2011, as partially revoked by Law No 1 of 2023 and amended by Law No 4 of 2023) and Regulation of Bank Indonesia concerning the Mandatory Use of Rupiah Currency;
- to provide banks with the underlying transaction documents for the purchase of any foreign currencies against rupiah through a foreign exchange bank exceeding USD100,000 or its equivalent in other foreign currencies per month per customer – pursuant to the Regulation of Bank Indonesia concerning Transactions in Foreign Exchange Markets; and
- to provide banks with underlying transaction documents for any outgoing transfer in foreign currency exceeding an amount of USD100,000 or its equivalent in other foreign currencies, or to provide banks with general information for any transfer in foreign currency up to USD10,000 or its equivalent in other foreign currencies – pursuant to the Regulation of Bank Indonesia concerning the Monitoring of Foreign Exchange Flows of Banks and their Customers.

There is no consent required for the lessee to perform its obligations under a lease agreement. However, pursuant to the Law on Foreign Exchange Flow (Law No 24 of 1999) and the relevant Bank Indonesia regulations, a report relating to offshore financial assets and/or liabilities of the lessee should be filed by the lessee with Bank Indonesia. Relating to loan documents, Bank Indonesia enacted various regulations which are intended to, among others, regulate reporting on the flow of foreign exchange activities and withdrawal of foreign exchange from offshore loans. These regulations set out the following, among others.

- Foreign exchange generated from an offshore loan must be first withdrawn by the borrower through an Indonesian foreign exchange bank (the “Forex Bank”). This provision, however, is not applicable to leasing transactions (where the Indonesian les-

see is not directly receiving loans from the offshore creditors).

- Offshore loan reporting obligations must be carried out by a borrower, covering offshore borrowing plan, initial reporting, as well as periodical reporting to Bank Indonesia and the Ministry of Finance (MOF). The reporting obligation to Bank Indonesia is carried out electronically and such reporting is also delivered to the MOF.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

For any tax advice, please consult with an Indonesian tax consultant on this matter.

2.1.6 Licensing/Qualification of Lessors

No licence is required for offshore lessors to extend a finance lease in Indonesia but, as a matter of practice, the lease is one of the prerequisite documents for registering aircraft in Indonesia, in which the name of the owner and the lessor of the aircraft will be recorded in the aircraft register.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

While there is no particular form for a lease, to enable the registration of an aircraft with the DGCA, the term of the lease should be a minimum of two consecutive years and, during such period, the aircraft may not be registered in any other aircraft registration. For aircraft registration purposes, pursuant to DGCA Regulation No KP 311 of 2018 on Technical Guidance for Civil Aviation Safety Regulation Part 47 regarding Aircraft Registration Procedure, a copy of the lease should be legalised by a public notary.

However, when reviewing the lease for aircraft registration purposes, the DGCA would normally expect to see the following provisions included:

- complete identification of the owner, the lessor and the lessee;
- complete identification of the aircraft and the engine;
- effective and expiration dates of the lease;
- allocation of responsibilities between the lessor and the lessee; and

- insurance and maintenance programmes.

In respect of language requirement (note that this is a general requirement and not related specifically to the aircraft registration), Indonesian and English language versions of a contract involving an Indonesian party should be prepared and signed simultaneously. Although the Indonesian Language Law and the implementing regulation thereof do not prescribe any sanction for failure to have a bilingual agreement, based on the past practice of the courts, there is a risk that a contract between a foreign party and an Indonesian party could be annulled by an Indonesian court on the basis of the absence of the Indonesian version of the contract by the time the English version of the contract was signed.

2.2.2 Tax and Withholding Gross-Up Provisions

For any tax advice, please consult with an Indonesian tax consultant on this matter.

2.2.3 Parts Installed or Replaced After a Lease's Execution

If the lease covers "parts that are installed or replaced on an aircraft or engine after its execution", such provisions and any amendments thereof should be recognised and enforceable in Indonesia to the extent that they are also recognised and enforceable under the governing law of the lease.

2.2.4 Risk of Title Annexation

This would depend on the governing law of the lease.

2.2.5 Recognition of the Concepts of Trust/Trustee

In general, Indonesian law does not recognise the concept of trust except in capital market matters and in the banking industry. Therefore, if there is a trust arrangement, whereby the trustee will hold the aircraft in trust in favour of a beneficiary, from the perspective of Indonesian law, it is the trustee who will be deemed as the legal owner of the aircraft. Indonesian law will not recognise the beneficiary as the legal owner of the aircraft. Consequently, only the name of the trustee can be noted in the certificate of registration of the aircraft as the registered owner of the aircraft. The authors have observed a certificate of registration naming the owner with a note that the name stated

is not acting in an individual capacity but solely as trustee of the owner.

A number of challenges have been brought by Indonesian debtors before Indonesian courts against the use of trust arrangements. However, the Supreme Court did not touch upon the issue of trust but decided the cases on the basis of other arguments presented by the Indonesian debtors.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The name of the owner and the lessor of the aircraft will be recorded in the aircraft register. However, only the name of the owner will appear in the certificate of registration of the aircraft.

Under Indonesian law, the aircraft register is not conclusive evidence of the legal owner of title of the aircraft. By registering the aircraft, such aircraft can be legally operated in Indonesia by an Indonesian operator in accordance with the Aviation Law.

2.3.2 Registration If the Owner Is Different From the Operator

Only the name of the owner will appear in the certificate of registration of the aircraft.

2.3.3 Aircraft/Engine-Specific Registers

There is no separate register of leases in Indonesia, but a copy of the lease will have to be filed with the DGCA as a prerequisite for obtaining the certificate of registration.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

There is no separate register of leases in Indonesia, but a copy of the lease will have to be filed with the DGCA as a prerequisite for obtaining the certificate of registration. For formalities of lease for aircraft registration purposes, see **2.2.1 Mandatory Terms for Leases Governed by English or New York Law**.

Leases are not subject to any consent from a government entity (including any government applications).

2.3.5 Requirements for a Lease to Be Valid and Registrable

For aircraft registration purposes, a copy of the lease documents to be filed with the DGCA should be legalised by a public notary. For requirements and formalities of lease for aircraft registration purpose, see 2.2.1 **Mandatory Terms for Leases Governed by English or New York Law**.

2.3.6 Taxes/Duties Payable for Registering a Lease

For any tax advice, please consult with an Indonesian tax consultant on this matter.

2.3.7 Registration of Aircraft in Alternative Countries

Under the Aviation Law, only an Indonesian registered aircraft can be operated in the territory of the Republic of Indonesia. Under certain circumstances and for a limited period, a foreign registered aircraft can be operated in the territory of the Republic of Indonesia after obtaining an approval from the Ministry of Transportation. A foreign registered civil aircraft can be operated by an Indonesian or foreign aircraft operator to and from overseas based on a bilateral agreement. Such foreign registered civil aircraft must comply with the airworthiness requirement stipulated by the Indonesian government. Further, one of the requirements for registration of aircraft in Indonesia is evidence of de-registration from or confirmation that the aircraft is not registered in another country.

2.3.8 Requirements for Documents Concerning Registration

For the purpose of registration of an aircraft, the prerequisite documents include evidence of aircraft ownership, which can be in the form of a bill of sale or affidavit of ownership for the aircraft, a copy of which needs to be legalised by a public notary, seller or the issuing institution. In addition, a copy of the lease should also be legalised by a public notary.

Further, a power of attorney that is signed outside Indonesia needs to be notarised by the local notary and further apostilled (if the relevant country is a member of the 1961 Hague Convention Treaty) or consularised by the nearest Indonesian Embassy or the consulate general.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

For any tax advice, please consult with an Indonesian tax consultant on this matter.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

The leasing of an aircraft engine to an Indonesian lessee will not of itself create a Permanent Establishment (PE) in Indonesia. For any tax advice, please consult with an Indonesian tax consultant on this matter.

2.4.3 Engine Maintenance and Operations

No liability in respect of aircraft or engine maintenance and operations can be imposed on a foreign lessor under a lease, as a result of being a party to the lease, to the extent that the lease is structured as a dry lease and as long as the lessor has not caused or contributed in any material way by act or omission to the circumstances giving rise to the liability arising from such use of the aircraft and/or they are not involved in the operation of the aircraft.

2.4.4 Damage or Loss Caused by an Asset

Under Article 1367 of the Indonesian Civil Code, a person is only vicariously liable for the tortious acts of those under their supervision. This article applies to cases where the tortfeasor is a party who cannot exercise their own discretion and is subject to and dependent on the supervision and direction of a principal or is an agent of a principal. This article was originally conceived for minors, servants, subordinates and agents. Arguably, where there is bargaining power to control their own affairs, a cause of action under Article 1367 can be fashioned. In the event that the monitoring activities of lessor would not constitute direct supervision and direction of the lessee's day-to-day affairs, the application of this article is unlikely.

2.4.5 Attachment by Creditors

To the extent that the aircraft is not owned by the lessee, creditors of the lessee should not be entitled to attach the aircraft.

2.4.6 Priority of Third Parties' Rights

In general, Indonesian law provides retention rights in relation to repair costs, salvage costs and craftsman costs. Further, the Indonesian government may

detain an aircraft for unpaid taxes or charges related to the use of the aircraft and airport authorities may also detain an aircraft for unpaid charges related to the use of the aircraft.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

Indonesian Insurance Law provides that any insurance object in Indonesia can only be insured and reinsured with domestic insurance and reinsurance companies, except when:

- no insurance company in Indonesia has the capability to bear the insurance risk or is willing to give insurance coverage; or
- the owner of the insured object is neither an Indonesian individual nor Indonesian legal entity.

Thus, as a matter of practice, for insurance and reinsurance to satisfy the Aviation Law requirements, an operator usually places insurance with domestic insurance companies and the reinsurance could be with a combination of Indonesian reinsurance companies (who may reinsure some of the risks with offshore reinsurance companies) and non-Indonesian reinsurance companies.

2.5.2 Mandatory Insurance Coverage Requirements

Pursuant to the Aviation Law, aircraft operators must insure the following:

- the operated aircraft;
- the crew and personnel of the operated aircraft;
- second party's liability (persons or legal entities having a direct relation with the operation of the aircraft);
- third party's liability (persons or legal entities not having a direct relation with the operation of the aircraft); and
- aircraft incident investigation and aircraft accidents.

2.5.3 Placement of Insurance Outside of Jurisdiction

Under the prevailing Indonesian regulatory framework, insurers in Indonesia are required to prioritise domes-

tic reinsurance before placing risks abroad. This means that 100% foreign reinsurance placement is not automatically allowed. Insurers must demonstrate that domestic reinsurers cannot absorb the risk, and only then may they seek offshore coverage.

2.5.4 Enforceability of "Cut-Through" Clauses

An insurance/reinsurance "cut-through" or "loss payee" clause is enforceable under Indonesian law to the extent that it does not contravene any applicable laws, regulations or public policy of Indonesia.

2.5.5 Assignment of Insurance/Reinsurance

Under Indonesian law, it is not possible to assign contractual rights for purposes of security, except the right to payments or monies.

On a separate matter, if, under the assignment for security, the assigned object is insurance proceeds payable by the lessee or the lessee's insurer to the lessor for security purposes, such assignment has to be made in the form of a fiduciary security assignment agreement governed under Indonesian law, drawn up before an Indonesian notary and in the Indonesian language and registered with the Fiduciary Registry Office (failing which (i) the security assignment over the insurance proceeds of the lessee may not be enforceable in Indonesia, and (ii) the assignee will not have a priority right (security right), which may be pertinent in the event of bankruptcy of the lessee or the insurance company). In addition, if there is removable equipment to be secured separately from the airframe, then the most common form of security over such movable assets is fiduciary security. For the latter, the fiduciary security can be registered if granted by an Indonesian entity.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

Provided that the rental is not paid in advance by the lessee, then, generally, there is no restriction on a lessor's ability to terminate an aircraft lease (including to sell the aircraft following the lease termination). Fundamentally, it depends on the terms of the lease. Note that, under the Indonesian Civil Code, termination of a contract (including a lease agreement) requires a court order, unless both parties to the contract have waived the applicable article under the Indonesian Civil Code.

If the lease is governed by a foreign law, it is advisable that the lease contains a provision which specifically states that the termination of the lease can occur without the need of a court order. This is to prevent any issue if there is a challenge by the lessee on the unilateral termination by the lessor and such challenge is brought (for any reason) by the lessee before an Indonesian court.

To re-export an aircraft, the lessor will be required to obtain an export clearance from the Indonesian customs service and apply for certain licences (such as the security clearance, diplomatic clearance and flight approval).

The aircraft does not need to be physically located in Indonesia at the time of any such actions.

2.6.2 Lessor Taking Possession of the Aircraft

An “unfriendly” repossession may require a court judgment. Furthermore, with respect to the repossession of an aircraft, a deregistration of the aircraft would have to be applied for and would be granted upon fulfilment of all prevailing policies and administrative requirements of the DGCA. For export of the aircraft or of the equipment, customs, security and DGCA clearances are required.

The Aviation Law states that an Indonesian registered aircraft can be deregistered from the Indonesian Civil Aircraft Registry upon request of:

- the owner of the aircraft; or
- the creditor by virtue of a recorded irrevocable deregistration and export request authorisation (IDERA),

if the lessee is in default under its agreement and this deregistration process could be made without the need of a court order.

This will provide more protection for owners and/or creditors (including lessors) if they are to repossess the aircraft in the event of default by the Indonesian lessee.

Further, the Cape Town Convention also provides various forms of remedies that can be utilised by creditors

(which include the owner, mortgagee or lessor) and one of them is to take possession of the aircraft in the event of default by its debtor. Pursuant to the declarations made by the Republic of Indonesia, such remedies can be utilised without court action and without the leave of the court.

However, due to the issuance of Government Regulation No 32 of 2021 on the Management of Aviation Activities (the “Aviation Government Regulation”), which contradicts the Aviation law, there is now uncertainty as to whether in the event of a default by a lessee, in a situation where the owner/lessor is not named as the authorised party under an acknowledged and recorded IDERA, such owner/lessor can repossess the aircraft without a court action. The regulation now requires a final and binding court ruling for a deregistration request by an owner due to a default by a lessee.

Additionally, a Ministry of Transportation Regulation issued in 2021 also requires that a deregistration request be submitted by:

- a creditor having international interest based on temporary ruling from the court; and
- a party who has won an arbitration award or court ruling in the event of a default.

It should be noted that, under the hierarchy of Indonesian laws and regulations, provisions under an implementing government regulation and/or ministerial regulation should not be contrary to and must be consistent with the Law they are designed to implement. In this case, the Aviation Government Regulation issued in 2021 and Ministry of Transportation Regulation also of 2021 should not contradict the Aviation Law. However, this inconsistency has to date not been rectified by the government nor considered by the Indonesian courts.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts to decide aviation disputes and disputes may be heard either in the District Court or, if the parties agree to arbitration, in the nominated arbitral forum.

2.6.4 Summary Judgment or Other Relief

Under Indonesian law in general (and not specifically related to transactions subject to the Cape Town Convention), a summary process may be available to a mortgagee or a beneficiary of an acknowledgement of indebtedness that is made in a notarial deed form.

Where the party bringing the lawsuit is a mortgagee, the District Court may simply pronounce an exequatur judgment. Where the party bringing the lawsuit is a beneficiary of an acknowledgement of indebtedness, the court may, in general, grant the party an expedited proceeding as well. However, such an expedited proceeding would only be granted if the underlying loan transaction is deemed straightforward and the acknowledgment of indebtedness is executed by the borrower upon the receipt of the relevant sum.

It is doubtful that the Indonesian court would grant such proceeding in aircraft financing transactions (where the borrower is usually not an Indonesian party). Even though the summary process may not be available to the lessor, the lessor may still exercise the remedies available under the Cape Town Convention (to the extent the relevant agreement is subject to the Cape Town Convention).

To the extent the relevant agreement is subject to the Cape Town Convention and the lessee has agreed to such remedies, the types of remedies that are available to the lessor in Indonesia under the Convention are as follows:

- preservation of the aircraft object and its value;
- obtaining possession, control or custody of the aircraft object;
- immobilisation of the aircraft object;
- permission to lease out the aircraft object or to manage it and to obtain the income therefrom; and
- if at any time the debtor and the creditor specifically agree, to sell the aircraft object and to apply the proceeds therefrom to meet the debts.

Pursuant to the declarations made by Indonesia with respect to the Cape Town Convention and the Aviation Law, the court order for interim relief shall be issued within the following timeframe:

- for preservation of the value, the obtaining of possession, control or custody and/or immobilisation of the aircraft objects, not more than ten calendar days from the date of filing the application; or
- in the case of a lease or the management of the aircraft objects and the income therefrom and the sale of the aircraft objects and the application of the proceeds therefrom, not more than 30 calendar days from the date of filing the application.

The Aviation Law does not set out detailed procedures as to how a creditor (in this case the lessor) should file the request with the court. The Aviation Law simply states that the creditor may file a request with the competent court (ie, the court where the lessee is domiciled or the aircraft is situated) to issue a court order for injunctive relief.

The types of interim relief stated above are relatively new under Indonesian Law and, therefore, the request for such relief may meet many technical impediments, and the exercise of such remedies may take much longer than the timeframes stipulated in the Aviation Law. Further, the authors are not aware of any published court decisions dealing with such reliefs and remedies provided under the Cape Town Convention.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

In general, Indonesian courts should uphold and apply the law and jurisdiction chosen as long as the foreign law and jurisdiction chosen are not against public order.

Specifically for agreements that are subject to the Indonesian Aviation Law and the Cape Town Convention (namely security agreement, title reservation agreement and leasing agreement – each as defined in the Cape Town Convention), parties to such agreements are free to choose the law that will govern the agreements regardless of whether or not there is a connection between the parties or the transaction and the chosen law.

However, unless a bilateral treaty on the execution of foreign judgments exists between the Republic of Indonesia and the foreign country, any judgment obtained in the courts of such foreign country will not

be recognised in the courts of Indonesia. In Indonesian proceedings, a judgment of foreign court could be offered, and accepted, into evidence and may be given such evidentiary weight as the courts of Indonesia may deem appropriate under the circumstances.

Under Indonesian law, the lessee has no immunity from suit, execution, attachment or other legal process for commercial transactions.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Judgments from a foreign court are not recognised or enforceable in an Indonesian court. The Indonesian courts would not enforce any other order including:

- judgment;
- foreign decree; or
- other executive act confiscating the aircraft regardless of the mortgagee's security interest in it,

without a rehearing of the issues. However, in any Indonesian court proceedings, a judgment of a foreign court could be offered and accepted into evidence and may be given such evidentiary weight as the Indonesian court may deem appropriate under the circumstances.

As Indonesia has ratified the New York Convention on Foreign Arbitral Awards, arbitral awards rendered in foreign countries should be able to be enforced in Indonesia subject to compliance with certain conditions (as referred in 2.6.12 Enforcement of Foreign Arbitral Decisions).

2.6.7 Judgments in Foreign Currencies

If so requested, an Indonesian court may render a judgment in a currency that differs from legal tender in Indonesia. However, such a decision will be at the full discretion of the court.

2.6.8 Limitations on Lessors' Actions Following Termination

As long as such matters are agreed between the parties under the lease agreement, the lessor should be able to recover any default interest following termination of the lease for default and also additional rent, with certain limitations such as the principle of good

faith and reasonableness which could be applied by the court if challenged by the lessee during the proceeding.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

For any tax advice, please consult with an Indonesian tax consultant on this matter.

2.6.10 Mandatory Notice Periods

There are no mandatory notice periods for the termination of an aircraft lease under Indonesian law. A lessor must comply with any contractual notice periods contained in the lease. Additionally, although a lessor may not be contractually required under a lease to issue default notices in the event of default(s) by the lessee, it is recommended under common practice for a lessor to first issue default notice(s) to the lessee prior to terminating an aircraft lease. Usually, a default notice would be issued up to two or three times with a reasonable period in between to show good faith on the part of the lessor.

2.6.11 Lessees' Entitlement to Claim Immunity

Under Indonesian law, a lessee has no immunity sovereign or otherwise from suit, execution, attachment or other legal process for commercial transactions.

2.6.12 Enforcement of Foreign Arbitral Decisions

Indonesia has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Arbitral awards rendered in foreign countries should be enforceable in Indonesia, provided that the award:

- is rendered in a country with which the Republic of Indonesia is bound by a treaty, either bilateral or multilateral, concerning the recognition and enforcement of international arbitral awards;
- arises out of a dispute which is "commercial" in nature under Indonesian law;
- is not contrary to public order in the Republic of Indonesia; and
- has been registered with and an exequatur (writ of execution) obtained from the Chairman of the District Court of Central Jakarta.

2.6.13 Other Relevant Issues

Other than as mentioned above, for the purpose of enforcing its rights in repossessing an aircraft and exporting it, should the aircraft come under its possession, the lessor should ensure that all documentation pertaining to importation of the aircraft and any tax payments/exemptions upon importation are within its possession to allow the lessor or its attorney to apply for an export clearance. The lessor will need to provide copies of such documentation to the customs authorities.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Indonesian law recognises the concept of contractual assignment and novation.

However, as a general rule under Indonesian law, it is not possible to assign contractual rights for purposes of security, except the right to payments or monies and other in-rem rights (such as intellectual property rights). Further, Indonesian law may also not recognise or enforce documents governed by a foreign law purporting (i) to create a security interest in assets located in the Republic of Indonesia, such as the relevant insurance proceeds (except for aircraft objects in accordance with the Cape Town Convention and the Aviation Law), or (ii) to assign rights under documents governed by Indonesian law or assign other contractual rights governed by Indonesian law. This is why a security assignment is typically governed by non-Indonesian law.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Assignments of aircraft leases governed by New York or English law should be recognised and held valid under Indonesian law. The question of whether a lessee's consent is required to an assignment is a contractual matter for the parties and should be addressed in the aircraft lease.

It should be noted that, as it is not possible to assign contractual rights for purposes of security, except right to payments or monies, a security assignment cannot be governed under Indonesian law.

On a separate matter, if, under the assignment for security, the assigned object is insurance proceeds payable by the lessee or the lessee's insurer to the lessor for security purposes, such assignment has to be made in the form of a fiduciary security assignment agreement governed under Indonesian law, drawn up before a notary in Indonesian language and registered with the Fiduciary Registry Office (failing which, (i) the security assignment over the insurance proceeds of the lessee may not be enforceable in Indonesia and (ii) the assignee will not have a priority right (security right), which will be pertinent in the event of bankruptcy of the lessee or the insurance company). In addition, if there is removable equipment to be secured separately from the airframe, then the most common form of security over such movable assets shall be fiduciary security. For the latter, the fiduciary security can be registered if granted by an Indonesian entity.

2.7.3 Enforceability of Lease Assignments/Novations

If the lease assignment/novation results in a change to the owner of the aircraft as stated in the certificate of registration of the aircraft, then the certificate will need to be amended naming the new owner as the owner of the aircraft. Further, if the assignment or novation above results in the requirement for the lessee to issue a new IDERA in respect of the aircraft, upon the issuance of the new certificate of registration, such new IDERA will have to be recorded by the DGCA (subject to cancellation of the existing IDERA). In addition, if there is an existing certified designee letter (CDL) granted by the authorised party named in the relevant IDERA and the transfer results in a change to the certified designee under a CDL recorded with the DGCA, the existing CDL needs to be revoked and a new CDL can be recorded with the DGCA. In such case, a copy of the lease assignment/novation which has been legalised by a public notary will need to be filed with the DGCA for the purpose of (i) issuing a new certificate of registration of the aircraft naming the new owner as owner of the aircraft and/or (ii) the registration of the new IDERA and/or CDL.

With regard to language requirement, see **2.2.1 Mandatory Terms for Leases Governed by English or New York Law**.

2.7.4 Filing/Registration of Lease Assignments/Novations

There is no separate register of leases in Indonesia (see 2.3.4 **Registration of Leases With the Domestic Aircraft Registry**). However, if the lease assignment/novation results in a change to the owner of the aircraft as stated in the certificate of registration of the aircraft, change to the authorised party under the IDERA, and/or change to the certified designee under the CDL, see 2.7.3 **Enforceability of Lease Assignments/Novations**.

To the extent such assignment can be registered with the International Registry for the purpose of the Cape Town Convention, it should also be registered with the International Registry.

If the lease assignment or novation above results in change of the lessor, a notice should be filed with the DGCA informing it of the change of lessor so that such information can be updated by the DGCA in the Aircraft Register.

2.7.5 Taxes/Duties Payable on Assignment/Novation

For any tax advice, please consult with an Indonesian tax consultant on this matter.

2.7.6 Recognition of Transfer of Ownership Interests

If the transfer results in the change of owner whose name appears on the certificate of registration of the aircraft, then the certificate of registration will need to be reissued naming the new owner as the owner of the aircraft. Further, if the assignment will result in a change of the “authorised party” under the IDERA that has been registered with the DGCA, such recorded IDERA must first be revoked and, upon the issuance of a new certificate of registration, a new IDERA should be subsequently recorded with the DGCA. In addition, if there is an existing CDL granted by the authorised party named in the relevant IDERA in favour of a secured party and the transfer results in a change to the certified designee under a CDL recorded with the DGCA, the existing CDL needs to be revoked and a new CDL can be recorded with the DGCA.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

Pursuant to the Aviation Law, the owner as registered in the certificate of registration should be entitled to deregister the aircraft upon the occurrence of an event of default without a court order. However, as discussed in 2.6.2 **Lessor Taking Possession of the Aircraft**, due to the issuance of the Aviation Government Regulation, it is now unclear whether in the event of a default by a lessee where the owner does not hold an acknowledged and recorded IDERA, it can repossess the aircraft without a court order. Further, as a matter of practice, the granting of the deregistration approval may be deferred by the DGCA if such application for deregistration is disputed by the aircraft operator (ie, lessee).

In light of the Aviation Law and the Cape Town Convention, the authorised party specified in the IDERA should be able to request deregistration without any further consent of the lessee. In addition to the IDERA, it would be helpful if the owner or the lessor of the aircraft has secured a deregistration and export power of attorney and a deregistration consent from the lessee, consisting of (i) the statement of no dispute, to be signed by the owner and the aircraft operator; and (ii) the aircraft deregistration statement letter, to be signed by all parties involved in the lease transaction (based on forms prescribed by the DGCA). Pursuant to Ministry of Transportation Regulation No 52 of 2018 as amended, either the authorised party (under the IDERA) or the certified designee (in the event there is a recorded CDL) can apply for aircraft deregistration.

2.8.2 Lessee's/Operator's Consent

The Aviation Law does not require formal consent from the lessee for deregistration of the aircraft. However, as a matter of practice, the deregistration approval may be deferred by the DGCA if such application for deregistration is disputed by the aircraft operator (ie, lessee). Therefore, in practice, a mortgagee or lessor requires the co-operation of the lessee for the deregistration of the aircraft, which amounts to effective consent.

2.8.3 Required Documentation

For the purposes of deregistration of the aircraft, the relevant party (eg, the creditor) must obtain a Dereg-

istration Approval from the DGCA. Upon the issuance of the Deregistration Approval, the relevant party must complete Form 47-17 and provide other documents as required by the DGCA (such as a statement of no dispute and deregistration consent letter). The Director General will then deregister the aircraft in question from the Indonesian Aircraft Registry.

In addition, the relevant party should also obtain an Export Certificate of Airworthiness from the DGCA (to the extent required by the importing country), a Diplomatic Clearance from the Ministry of Foreign Affairs and a Security Clearance from the Air Force Base of the Republic of Indonesia (if the aircraft is flying out of Indonesia using non-Indonesian registration) as well as a Flight Approval from the DGCA. Prior to the export of the aircraft out of Indonesia, a Customs Clearance from the Directorate General of Customs and Excise should also be obtained.

2.8.4 Duration of Deregistration Process

Pursuant to the Cape Town Convention and the Aviation Law, the DGCA is obligated to deregister the aircraft within five working days as of the submission of the deregistration request enclosing the recorded IDERA. Further, other authorities in Indonesia will also be required to assist in the export of the aircraft out of Indonesia. Typically, the exercise of such remedies may take much longer than the timeframe stipulated in the Aviation Law.

If the deregistration is carried out with the full assistance of the lessee, in the authors' experience, the deregistration and exportation process will only take one to two weeks.

2.8.5 Aviation Authority's Assurances

Prior to the ratification of the Cape Town Convention, if requested, the Ministry of Transportation could issue such a statement of assurance. However, this is no longer provided following the ratification of the Cape Town Convention by Indonesia.

For deregistration of an aircraft using an IDERA recorded with the DGCA, the DGCA would usually not seek further evidence other than the original recorded IDERA itself and it will immediately process the deregistration once the original IDERA and deregistration

application documents have been received. Per the Aviation Law, the DGCA should process the deregistration within five working days upon complete receipt of the required documents.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

The associated costs for deregistration of the aircraft are mainly:

- official fees to the DGCA;
- legal fees;
- fees for processing customs clearance and other related licences; and
- costs for preservation of the aircraft pending its exportation.

The current official fee payable to the DGCA for deregistration of the aircraft is IDR3 million (approximately USD185 at the current exchange rate) per deregistration of an aircraft.

2.8.7 Deregistration Power of Attorney

If signed abroad, a power of attorney in general has to be notarised and apostilled/consularised. A deregistration power of attorney issued by an Indonesian airline does not need to be certified or legalised to be enforceable, but is subject to the language requirement referred to in 2.2.1 **Mandatory Terms for Leases Governed by English or New York Law**.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

In addition to being notarised and apostilled/consularised, translation of a document into Indonesian by a sworn translator is necessary if the document will be used as evidence before an Indonesian court. Any non-Indonesian language document will only be admitted as evidence before an Indonesian court once it has been translated by a sworn translator.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

Although not specifically regulated and legally required, it is advisable that a deregistration power of attorney issued by an Indonesian airline to be enforced in Indonesia be governed under Indonesian law.

2.8.10 Revocation of a Deregistration Power of Attorney

A power of attorney (except for recorded IDERA as mentioned below) will cease to exist upon the declaration of bankruptcy of the grantor. Therefore, it is advisable that, for agreements subject to the Cape Town Convention, the lessor should require the lessee to issue an IDERA naming the lessor as the authorised party and file the same with the DGCA for recording. In respect of the IDERA, the Aviation Law specifically states that the IDERA will survive a bankruptcy declaration or insolvency of its issuer.

2.8.11 Owner's/Lessor's Consent

If there is a recorded IDERA and/or CDL in place, the lessee's consent should not be required to export the aircraft. However, in practice the lessee's co-operation may be needed to export the aircraft out of Indonesia.

If required by the importing country, the authorised party under the IDERA must apply for an Export Certificate of Airworthiness (the "Export CoA") to the DGCA, which must be submitted prior to submitting the deregistration application. Prior to the issuance of the Export CoA, the DGCA will normally conduct a physical inspection of the aircraft at its location, which (from a technicality point of view) may require the lessee's co-operation.

See also 2.6.2 Lessor Taking Possession of the Aircraft.

2.8.12 Aircraft Export Permits/Licences

Aircraft export permits/licences are issued in Indonesia. It is not possible to obtain an export permit in advance. There is no official timeline. As a matter of practice, it may take three to seven working days as of the submission of the complete application. In addition, the application for the export licence should be processed by a licensed special agent.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

The associated costs for export of the aircraft include fees for processing customs clearance and other related licences, for which a customs agent licensed by the Customs Office must be appointed by the les-

sor. The estimated costs are between USD10,000 and USD12,000.

2.8.14 Practical Issues Related to Deregistration of Aircraft

The lessee may delay the deregistration process that is being carried out by the lessor by disputing the lessor's right to repossession of the aircraft. For example, the lessee could send an objection letter to the DGCA, objecting to the request for deregistration of the aircraft. This could significantly delay the whole process. However, this practice occurred prior to the enactment of the Aviation Law – there is a reasonable expectation that this should no longer occur following the enactment of the Aviation Law.

In addition, the lessee may, by their act or omission, put a halt to the export of the aircraft by failing to settle any of the customs requirements or to pay the required fees to the Airport Authority. In such cases, the Airport Authority may defer granting the aircraft a permit to leave the airport.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

Companies incorporated in or resident in Indonesia can be liquidated pursuant to Law No 40 of 2007 as amended (the "Company Law") and/or Law No 37 of 2004 (the "Bankruptcy Law").

Under the Company Law

Pursuant to the Company Law, dissolution of a company shall occur if:

- resolved by the general meeting of shareholders (with a quorum of at least $\frac{3}{4}$ of total shares with valid voting rights and approved by at least $\frac{3}{4}$ of total votes validly cast at the meeting);
- the duration of establishment as stipulated in the articles of association has expired;
- determined by the court;
- the bankruptcy status has been revoked by a final and binding judgment of the Commercial Court, and the bankruptcy estate of the company is insufficient to pay the bankruptcy cost;
- a state of insolvency has commenced; or

- the business licence of the company is revoked so that the company is obligated to liquidate itself as stipulated in the applicable laws and regulations.

Under the Bankruptcy Law

There are two proceedings governed by the Bankruptcy Law:

- declaration of bankruptcy; and
- suspension of payment proceedings.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Under the Bankruptcy Law, the difference between a declaration of bankruptcy (voluntary insolvency) and the suspension of payment (restructuring) proceedings is as follows.

- In a declaration of bankruptcy, once a company is declared bankrupt by the court, a receiver (curator) will be appointed with a view to liquidating the assets of the bankrupt company. The bankrupt company is, however, entitled to propose a composition plan. If the composition plan is approved by the creditors, the bankruptcy proceedings will be lifted, and the company can resume its business in accordance with the approved composition plan.
- In a suspension of payment proceedings, an administrator will be appointed with a view to facilitating the company in jointly managing the assets and coming up with a composition plan. If the composition plan is approved by the creditors, the suspension of payment proceedings will be lifted, and the company can resume its business in accordance with the approved composition plan. If the composition plan is not accepted, the company will be declared bankrupt, and the assets of the company will be liquidated.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

Based on the Bankruptcy Law, Indonesia maintains a structured approach to cross-border insolvency matters with specific protective mechanisms. The law contains provisions focusing primarily on preventing creditors from circumventing Indonesian proceedings

rather than facilitating genuine co-operation. These provisions require creditors obtaining payments from foreign assets to reimburse the bankruptcy estate, including where creditors transfer claims or debts to third parties with the intention of obtaining preferential treatment or set-off opportunities in foreign jurisdictions that would not be permitted under Indonesian law.

The Bankruptcy Law maintains flexibility by not restricting international co-ordination principles such as INSOL International Global Principles, allowing application where parties consent to follow frameworks like the UNCITRAL Model Law on Cross-Border Insolvency. This was illustrated in 2024 by Singapore's International Commercial Court's recognition of Indonesian Suspension of Debt Payment Obligations (SOP) proceedings of PT Garuda Indonesia (Persero) Tbk. This recognition provides cross-border benefits, extending SOP protections to foreign assets, and facilitating global restructuring while protecting debtors from adverse actions across multiple jurisdictions during post-restructuring processes.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

In respect of the IDERA, the Aviation Law specifically states that the IDERA will survive a bankruptcy declaration or insolvency of its issuer; while a deregistration power of attorney will not survive upon the declaration of bankruptcy.

2.9.5 Other Effects of a Lessee's Insolvency

In principle, the bankruptcy of a contract party does not result in the termination or expiry of the lease. The rights and obligations of the parties remain as set out in the lease. However, where the obligation of the receiver to perform under the lease conflicts with their duty to treat all unsecured creditors equally, the receiver has no obligation to perform and the contract counterparty will have to accept damages as an unsecured creditor.

Under Article 36 of the Bankruptcy Law, if at the time of bankruptcy declaration the bankrupt is party to an executory contract, the contract counterparty (non-bankrupt party) may request the receiver to confirm that it will perform the contract. If the receiver declines

or does not respond within the prescribed time-period, the contract terminates by operation of law, and the remedy of the contract counterparty is to claim for damages. If the receiver states willingness to perform, then the counterparty can insist on security against performance by the receiver. The aim of Article 36 is to provide certainty for the counterparties on the continuance of executory contracts.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

As mentioned above, where the obligation of the receiver to perform under the lease conflicts with their duty to treat all unsecured creditors equally, the receiver has no obligation to perform and the contract counterparty will have to accept damages as an unsecured creditor.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

Pursuant to the Bankruptcy Law, upon the declaration of bankruptcy, there is a 90-day automatic stay period, during which the right of the lessor to repossess will be suspended.

The Aviation Law shortens the automatic stay period with respect to aircraft objects under the possession of a bankrupt debtor by providing that such period should be consistent with the Cape Town Convention, ie, 60 days.

2.9.8 Liquidation of Domestic Lessees

Companies incorporated in or resident in Indonesia can be liquidated pursuant to the Company Law or the Bankruptcy Law.

Under the Company Law

Pursuant to the Company Law, dissolution of a company shall occur if:

- resolved by the general meeting of shareholders (with a quorum of at least $\frac{3}{4}$ of total shares with valid voting rights and approved by at least $\frac{3}{4}$ of total votes validly cast at the meeting);
- the duration of establishment as stipulated in the articles of association has expired;
- determined by the court;

- the bankruptcy status has been revoked by a final and binding judgment of the Commercial Court, and the bankruptcy estate of the company is insufficient to pay the bankruptcy cost;
- a state of insolvency has commenced; or
- the business licence of the company is revoked so that the company is obligated to liquidate itself as stipulated in the applicable laws and regulations.

Under the Bankruptcy Law

There are two proceedings governed by the Bankruptcy Law:

- declaration of bankruptcy; and
- suspension of payment proceedings.

2.9.9 Ipso Facto Defaults

The Indonesian legal framework prioritises a debtor's ability to reorganise, and therefore favours restructuring and rehabilitation over the immediate termination of contracts upon a party's insolvency.

2.9.10 Impact of Domestic Lessees' Winding-Up

In the case of an operating lease where the aircraft is not part of the lessee's company assets, the lessor/creditor/owner should be able to repossess the aircraft and export the aircraft out of Indonesia by virtue of the recorded IDERA or CDL, subject to certain licences mentioned above.

In either bankruptcy or suspension of payment proceedings, the lessor may not be able to receive payments from the lessee. To mitigate risks that the security deposit and maintenance reserve be deemed as part of the insolvency estate of the lessee, they should be fully applied against the obligations of the lessee prior to a declaration of bankruptcy or the commencement of suspension of payment proceedings, and such application be notified by the lessor under the relevant lease agreement.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The government of the Republic of Indonesia ratified the Cape Town Convention (both the Convention and the Protocol) by virtue of Presidential Regulation No 8 of 2007 on 20 February 2007 (the "Presidential

Regulation”). The Cape Town Convention is effective in Indonesia as of 1 July 2007.

Indonesia has not designated an entry point for the purpose of the registration of international interests with the International Registry.

2.10.2 Declarations Made Concerning Conventions

Indonesia has made declarations under Article 39 (1) (a) and (b), Article 40, Article 53 and Article 54 (2) of the Convention.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Article XIII of the Protocol applies domestically in Indonesia. Registration of an IDERA is the responsibility of the authorised party. To register an IDERA with the DGCA, the authorised party under the IDERA should file an application with the DGCA attaching the prerequisite documents. Upon receipt of the complete application, the DGCA will review the application. If everything is in order, the DGCA will then register the IDERA as evidenced by the countersignature of the IDERA by an official of the DGCA in the original IDERA. The original IDERA which has been countersigned by the DGCA will then be provided to the authorised party named therein (or its proxy). Normally, the process takes approximately one to two weeks to complete.

2.10.4 Enforcement of Conventions

To the best of the authors’ knowledge, provisions of the Convention and the Protocol have not been tested before Indonesian courts.

2.10.5 Other Conventions

Indonesia has not ratified the 1948 Geneva Convention on the International Recognition of Rights in Aircraft or the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

There are no specific restrictions on foreign lenders providing loans to finance aircraft purchases in Indonesia, subject to the following.

- Foreign exchange generated from an offshore loan must be first withdrawn by the borrower through an Indonesian foreign exchange bank. This provision, however, is not applicable to leasing transactions (where the Indonesian lessee is not directly receiving loans from the offshore creditors).
- Offshore loan reporting obligations must be carried out by a borrower, covering offshore borrowing plan, initial reporting, as well as periodical reporting to Bank Indonesia and the MOF. The reporting obligation to Bank Indonesia is carried out electronically and such reporting is also delivered to the MOF.

3.1.2 Effect of Exchange Controls or Government Consents

See 2.1.4 Exchange Controls.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Guarantees are permitted provided that they are in the commercial interests of the guarantor, and that there was or will be (as the case may be) a genuine, adequate and tangible corporate benefit in executing the documents and entering into the transactions contemplated thereunder.

3.1.5 Lenders’ Share in Security Over Domestic SPVs

It is advisable for a lender to take share security over a domestic special purpose vehicle that owns the financed aircraft. A pledge of shares is recognised under Indonesian law and could create a preference for the lender as a secured creditor over unsecured creditors, subject to compliance with prevailing law and regulations.

3.1.6 Negative Pledges

The concept of negative pledge is generally recognised under Indonesian law, particularly within the context of loan and financing agreements.

3.1.7 Intercreditor Arrangements

There are no material restrictions on intercreditor arrangements in Indonesia.

3.1.8 Syndicated Loans

Syndicated lenders may, on the basis of agency law, appoint a security agent to act on behalf of the syndicate lenders pursuant to the security agency provisions contained in the relevant financing agreements. The role of the security agent can include (i) enforcing the rights of the syndicate lenders under the relevant financing agreements and (ii) applying the proceeds of any foreclosure proceedings in accordance with the provisions of the relevant financing agreements.

3.1.9 Debt Subordination

Debt subordination is primarily achieved through contractual arrangement, including intercreditor arrangements.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer of debt under Indonesian law is recognised and is conducted through an instrument called a *cessie* under the Indonesian Civil Code. As far as Indonesian law is concerned, the transfer agreement must be made in writing and such transfer should be notified and acknowledged by the debtor.

3.1.11 Usury/Interest Limitation Laws

There are no specific laws that prohibit charging interest on loans. However, if the obligations of the debtor and creditor are disproportionately imbalanced in a loan agreement, the court may intervene (at the request of the disadvantaged party) to govern the obligations of the prejudiced party or declare the contract void.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

If the assigned object is insurance proceeds payable by the lessee or the lessee's insurer to the lessor for security purposes, such assignment has to be made in

the form of a fiduciary security assignment agreement governed under Indonesian law and drawn up before a notary in the Indonesian language and registered with the Fiduciary Registry Office (failing which (i) the security assignment over the insurance proceeds of the lessee may not be enforceable in Indonesia and (ii) the assignee will not have a priority right (security right), which may be very useful in the event of bankruptcy of the lessee or the insurance company). In addition, if applicable, a guarantee from a parent company of the lessee for the due and punctual payment and performance by the lessee of all the lessee's obligations under or pursuant to the head lease agreement.

3.2.2 Types of Security Not Available

If there is removable equipment to be secured separately from the airframe, then the most common form of security over such movable assets shall be fiduciary security. For such purpose, the fiduciary security can be registered if granted by an Indonesian entity.

3.2.3 Trust/Trustee Concepts

See 2.2.5 Recognition of the Concepts of Trust/Trustee.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

As mentioned above, Indonesian law does not recognise the concept of trust except in capital market matters and in the banking industry. Therefore, if the security assignment results in the trustee holding the aircraft in trust, from the perspective of Indonesian law, the trustee will be deemed legal owner of the aircraft. Please see 2.2.5 Recognition of the Concepts of Trust/Trustee.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

As a general rule under Indonesian law, it is not possible to assign contractual rights for purposes of security, except right to payments or monies and other in-rem rights (such as intellectual property rights).

The novation arrangement whereby the current lessor will transfer all of its rights and obligations under the lease to a new lessor (and the accompanying amendments to the lease) is permissible under Indonesian

law provided that the lessee is a party to such novation arrangement.

3.2.6 Choice of Foreign Law

Indonesian law may not recognise or enforce documents governed by a foreign law purporting (i) to create a security interest in assets located in the Republic of Indonesia, such as the relevant insurance proceeds (except for aircraft objects in accordance with the Cape Town Convention and the Aviation Law), or (ii) to assign rights under documents governed by Indonesian law or assign other contractual rights governed by Indonesian law. This is why a security assignment is typically governed by non-Indonesian law.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

The formalities required depend on the governing law of such assignment. As far as Indonesian law is concerned, the assignment agreement must be made in writing in the Indonesian language and such assignment should be notified and acknowledged by the account debtor (in this case the lessee). The acknowledgement by the lessee should contain provisions detailing all the rights and benefits assigned by the lessor to the security trustee, so the lessee cannot argue that it is not aware of the assignment of certain rights and benefits.

Further, if the assignment results in a change of certain information recorded in the aircraft registry maintained by the DGCA, this change should be notified to the DGCA. In addition, to the extent the assignment can be registered with the International Registry for the purpose of the Cape Town Convention, it should be so registered.

A security assignment that does not involve an Indonesian party does not need to be translated, certified, notarised or legalised to be enforceable against an Indonesian party.

3.2.8 Domestic Law Security Instruments

See 3.2.1 Typical Forms of Security and Recourse with regard to domestic law security instruments.

No domestic law security instruments and/or local law filings are required in order to make Cape Town

filings, except for the filing of IDERA and CDL to, and recorded by, the DGCA.

For the registration of fiduciary security, notarial fee and registration cost based on the value of the secured asset shall apply. For IDERA registration, the official fee payable to the DGCA is IDR2 million (or approximately USD123). There is no fee for CDL registration with the DGCA.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

There is no registration for the security assignment in Indonesia (except for the registration of fiduciary security over insurance and reinsurance proceeds under Indonesian law with the Fiduciary Registration Office).

3.2.10 Transfer of Security Interests Over Aircraft/Engines

To the extent the rights of the security trustee in respect of all relevant secured creditors claims are valid and enforceable under the governing law of the relevant document (which law, by virtue of Indonesian conflict of law rules, should be applied by Indonesian courts), from the perspective of Indonesian law, the transfer of such rights should be recognised in the courts of Indonesia.

3.2.11 Effect of Changes in the Identity of Secured Parties

The effect of changes in the identity of secured parties after a security assignment's execution primarily depends on the governing law of the security assignment and the law where it is registered. From the perspective of Indonesian law, with respect to fiduciary security over insurance and reinsurance proceeds, an Indonesian court may refuse to recognise the interest of a new creditor in the assets secured by the fiduciary security over insurance and reinsurance proceeds if (i) the provisions of the existing fiduciary security over insurance and reinsurance proceeds have not been amended or supplemented to expressly identify such new creditor as the fiduciary grantee thereunder; and (ii) the fiduciary registration certificates in respect of the fiduciary security over insurance and reinsurance proceeds have not been updated to reflect the change of the creditors.

3.2.12 “Parallel Debt” Structures

In general, Indonesian law does not recognise the concept of trust except in capital market matters and in the banking industry. Therefore, parallel debt structures are not recognised.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

The security assignment should not of itself create a permanent establishment (PE) obligation on the secured party in Indonesia.

For any tax advice, please consult with an Indonesian tax consultant on this matter.

3.2.14 Perfection of Domestic Law Mortgages

As mentioned above, the DGCA no longer maintains records of mortgages on aircraft registered in Indonesia.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

Under Law No 42 of 1999 on Fiduciary Security, an aircraft cannot be subject to fiduciary security. However, a spare engine secured separately from the airframe can be subject to fiduciary security.

3.2.16 Form and Perfection of Security Over Bank Accounts

The most common form of security over a bank account is fiduciary security, which is governed under Indonesian law, drawn up before a notary in Indonesian language and registered with the Fiduciary Registry Office.

3.3 Liens

3.3.1 Third-Party Liens

The creditors of the lessee are generally not entitled to attach an aircraft that is not owned by the lessee and they must therefore be classed as unsecured creditors.

In general, Indonesian law provides retention rights in relation to repair costs, salvage costs and craftsman costs. Further, the Indonesian government may detain an aircraft for unpaid taxes or charges related to the use of the aircraft and the airport authorities may also

detain an aircraft for unpaid charges related to the use of the aircraft.

Specifically for aircraft subject to the Cape Town Convention, pursuant to the declarations of the government of the Republic of Indonesia under the Cape Town Convention, the government declares that nothing in the Cape Town Convention shall affect its right or that of any entity thereof, or any intergovernmental organisation in which Indonesia is a member, or other private or public services in Indonesia, to arrest or detain an aircraft object under its laws for payment of amounts owed to the government of Indonesia, any such entity, organisation or provider directly relating to the service or services provided by it in respect of that or another aircraft object. Therefore, the existence of any outstanding liens in respect of unpaid airport charges may prevent the lessor or the lender from repossessing the aircraft.

Further, the rights of the repairers of the aircraft in their possession and rights of the Indonesian government for unpaid taxes or charges related to the use of the aircraft may also prevent the lessor or the lender from repossessing the aircraft.

3.3.2 Timeframe to Discharge a Lien or Mortgage

It may take up to two weeks to complete the cancellation of the mortgage recordation with the DGCA. Upon the review of the application, the DGCA will usually issue a statement letter confirming the cancellation of the mortgage recordation. This is only applicable to already existing mortgage recordation.

3.3.3 Register of Mortgages and Charges

In the past the DGCA maintained a special registry book (the “Special Registry”) in relation to any mortgage on aircraft registered in Indonesia and having an Indonesian nationality mark (PK). The effect of such registration was more of a public notice. However, such Special Registry is no longer maintained by the DGCA. Based on recent experience, the DGCA would reject any application to record a mortgage on aircraft registered in Indonesia.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

Statutory rights of detention or non-consensual preferential liens should only arise over the relevant aircraft, not on a “fleet-wide” basis.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

As mentioned above, the DGCA no longer maintains records of mortgages on aircraft registered in Indonesia.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

As with enforcing a loan or a guarantee, a court in Indonesia should give effect to a security assignment in accordance with its terms to the extent it is valid and enforceable under the governing law thereof.

3.4.2 Security Trustees' Enforcement of Their Rights

Subject to the discussion at 2.2.5 Recognition of the Concepts of Trust/Trustee and provided that the Indonesian court accepts the governing law of the security assignment and the application of equitable principles, the security trustee should be able to enforce their rights.

3.4.3 Application of Foreign Laws

In general, Indonesian courts should uphold and apply the law chosen where there is a connection between the parties or the transaction and the chosen law and the choice of law is not against public order, upon proof thereof.

Specifically for agreements that are subject to the Aviation Law and the Cape Town Convention (namely security agreement, title reservation agreement and leasing agreement – each as defined in the Cape Town Convention), parties to such agreements are free to choose the law that will govern the agreements regardless of whether or not there is a connection between the parties or the transaction and the chosen law.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Judgments from a foreign court are not recognised or enforceable in an Indonesian court. The Indonesian court would not enforce any other order including (i) judgment, (ii) foreign decree or (iii) other executive act confiscating the aircraft regardless of the mortgagee's security interest in it, without a rehearing of the issues. However, in any Indonesian court proceedings, a judgment of a foreign court could be offered and accepted into evidence and may be given such evidentiary weight as the Indonesian court deems appropriate under the circumstances.

Indonesia is a party to the New York Convention and Foreign Arbitral Awards are recognised in Indonesia without re-examination, although enforcement of a Foreign Arbitral Award requires a court order from the District Court. See 2.6.12 Enforcement of Foreign Arbitral Decisions.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

See 2.6.2 Lessor Taking Possession of the Aircraft with respect to a creditor.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

There are no specific courts to decide on security agreement/aircraft mortgage enforcement actions; usually it is the court where the lessee is domiciled.

3.4.7 Summary Judgments or Other Relief

See 2.6.4 Summary Judgment or Other Relief.

3.4.8 Judgments in Foreign Currencies

If so requested, an Indonesian court may render a judgment in a currency that differs from legal tender in Indonesia. However, this will be at the full discretion of the court.

3.4.9 Taxes/Fees Payable

For any tax advice, please consult with an Indonesian tax consultant on this matter.

3.4.10 Other Relevant Issues

It is considered advisable that any assignment of lessor's rights in favour of the lender for any aircraft

financings (such as assignment of the lessor's rights under the lease agreements or related documentations) be notified and acknowledged by the lessee. In addition, any assignment of existing fiduciary securities over insurance and reinsurance claims from the lessor to the lender for the purpose of financing must be registered with the Fiduciary Registration Office.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

Court proceedings occur in relation to the lessor's exercise of interim relief under the Cape Town Convention to obtain a court ruling to repossess an aircraft. Most of them involve default of the domestic party/airlines under the relevant instalment sale agreement or lease agreement in respect of the aircraft. Court rulings vary. Some accept the petitioner request for repossession of the aircraft and entry onto the prem-

ises where the aircraft is located but others reject petitioner claims on the basis of lack of jurisdiction due to the lease agreement opting for arbitration in SIAC (Singapore International Arbitration Centre) for settling any disputes arising under the lease agreement. Other rejections relate to ongoing proceedings in the US courts regarding such aircraft and also the court requesting further review of the alleged default. Indonesian courts do not take a uniform approach in their treatment of interim relief because they lack detailed process of law rules in treating interim relief under the Aviation Law and Cape Town Agreements. Another cause is lack of knowledge (on the part of Indonesian judges) about the possibility of filing for interim relief and being granted such relief under the Aviation Law even though there are separate ongoing proceedings between the parties concerning the defaults.

4.2 Current Legislative Proposals

As far as the authors are aware, there are no current proposals before the legislature relating to the above.

Trends and Developments

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Mochtar Karuwin Komar

Mochtar Karuwin Komar (MKK) is a leading independent Indonesian law firm, with its main office in Jakarta and a branch office in Singapore. Founded in 1971, MKK helps guide investors and businesses through the challenges of doing business in Indonesia, advising lenders and foreign investors on a broad range of project finance, asset finance and trade finance transactions, and M&A. The firm provides legal services of the highest quality – technically excellent and commercially sensible, delivered in a timely and

cost-effective manner. MKK has experts in all the areas of commercial law its clients need. In addition to five legal departments – corporate, litigation, banking and finance, projects, and energy – the firm has specialist practices in aviation and shipping finance, tax litigation, capital markets and employment. MKK's aviation team has ten attorneys, and its most recent notable deal in the aviation sector was representing a major Irish lessor in the delivery of 22 Airbus A320-200 aircraft to PT Super Air Jet.

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Introduction

Indonesia is the largest archipelago country in the world and the largest in terms of size and population in South-East Asia. It has more than 17,000 islands, making aviation not merely just a means of transport but essential infrastructure to carry out movement of people and goods within the country. In addition, with a population of 284 million, Indonesia has the largest aviation market for passengers and cargo, and the largest aviation industry in South-East Asia. It is considered one of the most important aviation markets in Asia, with several large airlines including its national air carrier PT Garuda Indonesia (Persero) Tbk (Garuda Indonesia) and major privately owned airlines such as Lion Group airlines (PT Lion Mentari (Lion Air), PT Batik Air Indonesia (Batik Air), PT Super Air Jet (Super Air Jet) and PT Wings Abadi (Wings Air)). In terms of aircraft ownership by airlines, based on the Civil Aircraft Register of 2025, most aircraft operated by Indonesian airlines are owned by international aircraft lessors, thus reflecting the important role of aircraft lessors in the Indonesian aviation industry.

Aviation in Indonesia is a regulated industry under the auspices of the Directorate General of Civil Aviation of the Ministry of Transportation of the Republic of Indonesia (DGCA). In the context of the Aviation Finance and Leasing Industry, the following are the main underlying regulations:

- Law No 1 of 2009 concerning Aviation (the "Law No 1 of 2009") as amended by Law No 6 of 2023 concerning the Stipulation of Government Regulation In Lieu of Law No 2 of 2022 concerning

Job Creation as Law (the "Omnibus Law", which together with Law No 1 of 2009 is referred to as the "Aviation Law");

- Government Regulation No 32 of 2021 concerning the Management of Aviation Activities (the "GR 32/2021");
- Government Regulation No 28 of 2025 concerning Implementation of Risk-Based Licensing (the "GR 28/2025");
- Ministry of Transportation (MOT) Regulation No 52 of 2018 concerning Aircraft Registration (the "MOTR 52/2018") as amended by MOT Regulation No 26 of 2021 concerning the Amendment to MOTR 52/2018 (the "Aircraft Registration Regulation"); and
- The Convention on International Interests in Mobile Equipment (the "Convention") and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the "Protocol" and, together with the Convention, the "Cape Town Agreements") – by virtue of Presidential Regulation No 8 of 2007 dated 20 February 2007 (the "Presidential Regulation"), the Cape Town Agreements have been duly ratified by the Republic of Indonesia.

Aviation Finance and Leasing Transactions Structure in Indonesia

Aircraft and engines in Indonesia are mostly operated with leasing schemes by Indonesian airlines and the following are the most common lease and financing structures adopted by Indonesian airlines:

- Operating Lease;

- Financing Lease;
- Sale-Lease Back (SLB);
- Sale of the Aircraft subject to a Lease; and
- Asset-Backed Securities Transactions.

Development in Doing Business Licensing Regulations for Airlines

Recently Indonesia has enacted GR 28/2025 which revokes Government Regulation No 5 of 2021 concerning Implementation of Risk-Based Licensing (the “GR 5/2021”) enacted as part of the Omnibus Law regulatory reform of 2021 related to the Indonesian doing business licensing regime.

Prior to the enactment of GR 5/2021, Indonesian airlines were required to hold doing business licences including a Commercial Scheduled Air Transport Licence and Commercial Non-Scheduled Air Transport Licence. However, following enactment of GR 5/2021, airlines will only need to hold a Business Identification Number (NIB) and Standard Certificate issued by the Online Single Submission (OSS) System (instead of a doing business licence), which shall cover the relevant business activities of the airline, ie commercial scheduled air transport, commercial non-scheduled air transport business activities and any other type of aviation business activities (as applicable). However, for doing business licences obtained by the airline prior to the introduction of the risk-based approach licensing system in 2021, as long as such licence is still valid and the airline is still conducting its business activities, the licence shall remain valid. Nevertheless, in practice, standard certificates will be needed to apply for technical permits if certain government agencies require. It has been observed that several Indonesian airlines have already transitioned to standard certificates.

GR 28/2025 also implies that for business licences issued prior to the promulgation of GR 28/2025, those licences shall remain valid.

Recent Developments in the Market and Trends in Transactions

Recent developments in the market

As readers may be aware, Garuda Indonesia went through a court-sanction debt restructuring in 2022, making it the largest debt restructuring involving

an Indonesian airline. Within three years of its debt restructuring, and based on recent media reports, during an Extraordinary General Meeting of Shareholders (EGMS) of Garuda Indonesia held on 30 June 2025, shareholders representing 74.29% of Garuda Indonesia’s shares voted in favour of continuing the restructuring programme, which will prioritise improving equity while restoring the airline’s fleet, expanding its route network and boosting passenger traffic. As reported, the airline plans to gradually increase its fleet to around 120 aircraft, up from the approximate current number of 100, including its budget carrier subsidiary PT Citilink Indonesia (Citilink), and to add at least 100 new routes by 2029.

Also, prior to the EGMS and according to media reports, Indonesia’s new sovereign wealth management agency that also manages Indonesian state-owned companies, Daya Anagata Nusantara Investment Management Agency (Danantara), has provided a loan to Garuda Indonesia in the amount of IDR6.6 trillion (approximately equivalent to USD407 million) through Danantara Aset Management (DAM), substantially to be granted to Garuda Indonesia’s subsidiary, Citilink. The funding is in response to Garuda’s request for restructuring to the Ministry of State-Owned Enterprises, which was approved. From the total loan amount of IDR6.6 trillion provided by DAM, IDR4.8 trillion (approximately USD296 million) is to be provided to Citilink, with the balance of IDR1.8 trillion (approximately USD111 million) to Garuda Indonesia.

Recent trends in transactions

Following the end of the COVID-19 pandemic era and resumption of air travel, there was an increase in new aircraft delivery deals between 2022 and 2023. However, the numbers were below those during the pre-COVID-19 era except for new airlines like Super Air Jet. Since 2024, there has been an increase in the number of aircraft traded and sold on lease to Indonesian airlines. The most common structure adopted is novation of existing leases: it has been observed that, in novation transactions, airlines prefer to have the same terms and conditions as outgoing lessors or owners, whilst the outgoing lessors or owners tend to prefer to accommodate the airlines’ interests as much as possible in order to smoothen the sale of the aircraft to the new lessor or owner.

Since 2023, aircraft financing transactions involving Indonesian airlines have resumed again, which were largely absent between 2021 and 2022. On the other hand, an increase of prepayment of financings by lessors to financiers have been observed in respect of aircraft leases to Indonesian airlines between 2023 and 2025. Many financings obtained prior to the COVID-19 pandemic have been prepaid and many security release works were also carried out, sometimes requiring involvement of the Indonesian airlines to acknowledge the release of any documentations that were previously issued in favour of the financing parties.

Enforcement of Cape Town Agreements in Indonesia

The Cape Town Agreements and the legal framework in Indonesia

The Cape Town Agreements were ratified by the Presidential Regulation in 2007 and the Indonesian government made a declaration that nothing in the Cape Town Convention shall affect its right or that of any entity thereof, or any intergovernmental organisation in which Indonesia is a member, or other private or public services in Indonesia, to arrest or detain an aircraft object under its laws for payment of amounts owed to the government of Indonesia, any such entity, organisation or provider directly relating to the service or services provided by it in respect of that or another aircraft object. Not long after the ratification, the Aviation Law was enacted in 2009 to replace the previous Law No 15 of 1992 concerning Aviation.

As a result of the enactment of the Aviation Law in 2009, the provisions of the Cape Town Agreements are accommodated in Chapter IX of the Aviation Law, which adopts key principles of the Cape Town Agreements. The most noteworthy provision of the Aviation Law is Article 82, which provides that the provisions of the Cape Town Agreements have the force of law in Indonesia and also constitute *lex specialis*, reinforced by the statement that in the event of any conflict or inconsistency between any provision of the Cape Town Agreements and any law or regulations in Indonesia, the provisions of the Cape Town Agreements shall prevail.

Chapter IX of the Aviation Law regulates International Interests over Aircraft Objects where, similarly to the provisions under the Cape Town Agreements, Aircraft Objects that can be encumbered with international interest are objects arising from security agreements, title reservation agreements and/or lease agreements where parties are free to choose the governing law of those agreements. The Aviation Law also requires that any international interests, including any assignment and/or subordination of such interest, must be registered with the [International Registry](#), which is done online in order to obtain priority upon enforcement.

In addition, Chapter IX of the Aviation Law also enables a debtor (in this case airline or aircraft operator) to issue an Irrevocable Deregistration and Export Request Authorization (IDERA) in favour of the creditor similar to the provisions stated in the Protocol to the Cape Town Agreements. The creditor under the IDERA is known as the “authorized party”. Under the Aviation Law, an IDERA can be issued in respect of the aircraft or helicopters that are registered with an Indonesian registration mark and the IDERA needs to be acknowledged by the DGCA and cannot be revoked without the authorised party’s consent. Once the IDERA is acknowledged, only the authorised party can file for deregistration of the Aircraft with the DGCA. In addition, only the authorised party can revoke the IDERA and the IDERA shall remain applicable during the debtor’s bankruptcy or its inability to pay its debts. An IDERA that is issued by the debtor shall be in an original prescribed form made available by the DGCA, known as DGCA Form 47-03.

Furthermore, under the Aircraft Registration Regulation, the authorised party under the IDERA may also appoint another party to be the beneficiary of the IDERA, known as the “certified designee”, through a Certified Designee Letter (CDL). In practice, this is usually done if the creditor under the IDERA is a lessor of the relevant aircraft and the aircraft is subject to financing, where the certified designees usually appointed are the financing parties via the CDL. Similar to the IDERA, the CDL needs to be executed by the authorised party of an IDERA in an original prescribed form known as DGCA Form 47-06. The CDL needs to be registered with the DGCA so that it can be acknowledged. Once the CDL is acknowledged, only the certified designee

can file for deregistration of the aircraft and only the certified designee can file for revocation of the CDL.

In addition, the Aviation Law also makes it possible for the filing by the creditor of an interim relief under the Cape Town Agreements through the district court where, pursuant to the declarations made by Indonesia and the Aviation Law, the court order for interim relief shall be issued within the following timeframes:

- for preservation of the value, the obtaining of possession, control or custody and/or immobilisation of the aircraft objects, not more than ten calendar days from the date of filing the application; or
- in the case of a lease or the management of the aircraft objects and the income therefrom and the sale of the aircraft objects and the application of the proceeds therefrom, not more than 30 calendar days from the date of filing the application.

Law No 37 of 2004 concerning Bankruptcy and Suspension of Payments states that upon the declaration of bankruptcy, there is a 90-day automatic stay period during which the right of the lessor to repossess will be suspended. However, the Aviation Law shortens the automatic stay period with respect to aircraft objects under the possession of a bankrupt debtor by providing that such period should be consistent with the Cape Town Agreements, ie, 60 days.

Repossession of aircraft using the IDERA and under the Cape Town Agreements

Repossession of the aircraft does not require permission of the court in the case of a friendly repossession. There is now some uncertainty that a court ruling may be required if it becomes unfriendly. To repossess an aircraft, deregistration would need to be applied and would be granted upon fulfilment of all administrative requirements; and for exportation of the aircraft or equipment, the customs, security, diplomatic and DGCA clearance will be required.

The Aviation Law states that an Indonesian registered aircraft can be deregistered from the Indonesian Civil Aircraft Registry upon request by (i) the owner of the aircraft or (ii) the creditor by virtue of a recorded IDERA, if the airline (ie the lessee or debtor) is in default under its agreement and this deregistration process

could be made without the need of a court order via the IDERA or CDL through the DGCA, which should be completed within five working days, but in practice it can be longer.

Further, the Cape Town Agreements also provide various forms of remedies for creditors (which include the owner, mortgagee or lessor) and one of them is to take possession of the aircraft in the event of default by the airline. Pursuant to the declarations made by the Republic of Indonesia, such remedies can be performed without court action and without the leave of the court. This is also stated in the Aviation Law itself, whereby a deregistration of the aircraft can be carried out without a court ruling in the event of default by a lessee of an aircraft.

However, due to the issuance of GR 32/2021, it is now unclear whether, in the event of a default by a lessee whereby the owner/lessor is not named as the authorised party under an acknowledged and recorded IDERA, such owner/lessor can repossess the aircraft without a court action. Article 15 (a)(7) of the GR 32/2021 now requires a final and binding court ruling for a deregistration request by an owner due to a default by a lessee. The Aircraft Registration Regulation also requires that a deregistration request be submitted by (i) a creditor having international interest based on an interim relief ruling from the court or (ii) a party that has won an arbitration award or court ruling in the event of a default. It should be noted that, under Indonesian laws and regulations, provisions under a government regulation and ministerial regulation should not be contrary to and must be consistent with the Law implemented by such regulations, as a law is higher in hierarchy compared to a government regulation or a ministerial level regulation.

How court treats interim relief filings in Indonesia

Some interim relief decisions by Indonesian courts between 2019 and 2020 have been published. The most common interim relief decisions concern Bell 407 Helicopters and Cessna Type C-208B Grand Caravan aircraft as well as Cessna Cargo Master aircraft. Most filings occur due to the operator's (i) default of payment under the underlying instalment sale agreement or (ii) payment default under the underlying lease agreement.

One court ruling granted the petitioner's request to repossess the helicopter and granted authorisation to enter the premises where the helicopter was located. However, other court rulings in different filings rejected such petition due to lack of proper jurisdiction (*forum non conveniens*) as the underlying lease agreements stated that any disputes arising out of the lease agreements should be settled in the Singapore International Arbitration Centre (SIAC). Other rejections were due to ongoing proceedings in the US courts regarding the aircraft and also the court requesting further review of the alleged default.

Based on the authors' review of these court decisions and as elaborated above, the Indonesian courts do not take a uniform approach in treating interim relief. This is because Indonesian courts lack detailed process of law rules in treating interim relief under the Aviation Law and Cape Town Agreements. Another cause is lack of knowledge (on the part of Indonesian judges) about the possibility of filing for interim relief and being granted such relief under the Aviation Law even though there are separate ongoing proceedings between the parties concerning the defaults.

Practical challenges of enforcing Cape Town Agreements and repossession in Indonesia

Based on the preceding discussion of how Indonesian courts treat interim relief, there are still practical challenges in enforcing Cape Town Agreements in Indonesia. One challenge is that the courts treat interim relief inconsistently. Interim relief can be very helpful for lessors or creditors that do not have an IDERA registered in their favour in filing for deregistration of the aircraft and also to gain possession of the aircraft should the repossession be carried out in a non-friendly manner. Indonesian law does not adopt the *stare decisis* principle, and so there is no doctrine of precedent, meaning that judges may adopt different stances.

Separately, the IDERA (and CDL if there is financing), which is introduced due to the Cape Town Agreements, can be a powerful tool for lessor or creditors to protect their interests. As previously elaborated, once an IDERA (as well as the CDL) is acknowledged by the DGCA, it provides the possibility for the authorised party (or the certified designee) to file for deregistration of the aircraft in the event there is a default by

the airline under the lease agreement. Nevertheless, even though an IDERA exists, challenges remain as the IDERA can only be used for deregistration of the aircraft with the DGCA.

For exporting aircraft, an IDERA itself is insufficient. In order to export, administrative and exportation requirements of the aircraft or equipment will also need to be met: export clearance (from customs), security and diplomatic clearance (from the Indonesian Armed Forces and Foreign Ministry if the aircraft is already deregistered) as well as Flight Approval from the DGCA will be required. In a friendly repossession, for these administrative requirements, the airline may be able to help the lessor obtain these permits and clearances; however, in a non-friendly repossession, the lessor or owner itself will need to file for them. Therefore, as a result, the lessor would always require airlines to issue a deregistration and export power of attorney (known as DPOA), which grants lessors or financiers (with substitution rights to their attorney) the authority to apply for these administration and exportation permits from the relevant Indonesian authorities beyond the DGCA.

It is worthy of note that when an aircraft delivery occurs, documentation obtained by the airline in relation to importation, customs, tax and relevant filings should be provided to the lessor or owner of the aircraft as these documents will be needed upon repossession of the aircraft. In the event of a lease restructuring, including lease novation, which will result in change of ownership of the aircraft, the new lessor or owner needs to be provided with copies of these documents from the existing lessor or owner, in preparation for repossessing the aircraft in the future. In certain cases, during novation deals, airlines may refuse to provide these documents to the new lessor or owner, giving the reason that the documents were provided upon delivery. Therefore, to anticipate this situation, it is important for incoming lessors or owners to request copies of the documentation from the outgoing lessors or owners.

IRELAND



Trends and Developments

Contributed by:

Maria McElhinney and Alice Boland
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A&L Goodbody LLP is one of the leading corporate law firms in Ireland. Its aviation and transport finance team is led by partners Marie O'Brien, Séamus Ó Cróinín, Maria McElhinney and Keith Mulhern. Collectively the team has unparalleled experience when advising on financing structures, including significant experience in the establishment of new aircraft leasing and financing platforms, joint ventures and sidecars, mergers and acquisitions, asset-backed securitisations, aircraft CLOs, aircraft portfolio sales,

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Introduction

2024 marked a significant milestone for the aviation industry, with global passenger demand returning to and surpassing pre-COVID-19 levels in many regions. The International Air Transport Association (the "IATA") reported an 11% increase in global passenger demand compared to the previous year, which equated to a 6% increase compared to 2019 levels. This resurgence was driven by robust performances in the largest passenger markets of Europe and North America and a continued recovery in the Asia-Pacific region. International passenger traffic also saw a notable increase and air cargo volumes rebounded after two years of decline, with full-year growth forecast at nearly 12%.

As the aviation industry continued to battle with the supply demand imbalance throughout 2024, availability of financing was very strong for many of the lessors allowing for increased trading and further M&A activity. Major geopolitical events in 2024 caused uncertainty in the global economy, albeit the aviation industry remains robust and is responding well to significant challenges. As the global hub for aircraft leasing, Ireland's important and wide-reaching role provides an insightful lens on the trends and developments within the industry.

Financing trends

The aviation industry in 2024 was marked by robust demand for capital, a resurgence in capital markets activity and continued innovation in financing structures. These trends have continued in the first few months of 2025. Investor interest in aviation assets remains high with capital availability outstripping the supply of new aircraft. As a result, lessors and airlines have found themselves in a competitive environment for aircraft acquisition, shifting bargaining power towards lessors and driving up asset values and lease rates.

US private equity continued to play a significant role, with firms such as Castlake, Oaktree, Carlyle, PIMCO, Apollo, KKR and Bain actively investing in leasing platforms and alternative lender structures. Japanese and Middle Eastern investors also increased their activity with notable growth in JOL and JOLCO transactions and the expansion of Middle Eastern les-

sors such as DAE and AviLease. The resilience and long-term outlook of the aviation sector has attracted both traditional and non-traditional investors, including institutional and private equity capital.

There has also been a marked return of aviation issuers to the capital markets, particularly among investment-grade lessors. Large-scale lessors such as BOC Aviation, Air Lease Corporation, AerCap and SMBC Aviation Capital issued significant volumes of unsecured bonds, taking advantage of tightening spreads and strong investor demand. The US unsecured bond market remained the cornerstone of funding for these entities, with more than USD150 billion in lessor bonds in circulation.

The aviation asset-backed securities (ABS) market also experienced a notable rebound. Seven new commercial aircraft ABS deals closed during 2024, with a combined value of USD4 billion, which while still below the 2019 peak, showed a clear sign of renewed investor confidence. The reopening of the ABS market was led by experienced issuers such as Carlyle Aviation Partners, SKY Leasing and BBAM as well as others. These transactions were characterised by tighter spreads, lower loan-to-value ratios and a focus on well-constructed portfolios.

The loan ABS and collateralised loan obligation (CLO) segment also grew in popularity, offering attractive risk-return profiles and drawing in new investors. The ABS and CLO trend is one that has continued into 2025 notwithstanding geopolitical uncertainty.

Warehouse financing has also remained popular, especially among non-investment grade lessors, as a means to quickly acquire assets before refinancing through the capital markets. However, the cost of warehouse debt was a challenge for some, and many facilities put in place during the COVID-19 pandemic were refinanced in the ABS market as conditions improved.

As in recent years, the M&A trend continued throughout 2024. The competitive environment and supply constraints led to increased M&A and portfolio trading activity. Large-scale portfolio acquisitions, such as Avolon's purchase of Castlake Aviation Limited and

platform sales in the regional aircraft space (eg, DAE's acquisition of Nordic Aviation Capital) were prominent. Trading volumes in the secondary market were robust with lessors and airlines both actively buying and selling aircraft to manage fleet age and capitalise on high asset values.

Capital availability was key for these acquisitions to occur with purchasers availing of numerous types of financial products to make these transactions succeed.

The financing trends in the aviation industry in 2024 and for the first few months of 2025 has reflected a sector in transition. This has been buoyed by strong investor appetite, a resurgence in capital markets activity and continued innovation in funding structures.

Supply chain issues

Although finance availability has been plentiful for numerous lessors, the lack of available aircraft places a constant strain on the industry. The aviation industry continues to grapple with the persistent supply chain issues which started during the COVID-19 pandemic. These issues primarily relate to challenges in securing parts, labour shortages and engine delivery issues, resulting in delayed aircraft deliveries and slower fleet expansion.

Market data shows that approximately 1,200 commercial passenger and freighter aircraft were delivered in 2024, representing a reduction from 2023 totals and well below the peak of 1,813 aircraft in 2018. The backlog for ordered aircraft has reached almost 17,000 with some delivery dates as far out as 2038. The supply chain issues have resulted in an aged global fleet and according to the IATA, the average age of the global fleet has risen to a record 14.8 years, representing a significant increase from the average of 13.6 years for the 1990-2024 period. An older fleet and increased fleet utilisation rates has resulted in an increased need for maintenance services and higher fuel burn.

According to market analysis, Airbus' and Boeing's 2025 first quarter delivery data suggests significant challenges on the path to achieving their respective

delivery targets for 2025. The consensus, within the industry, is that it will be closer to the end of the decade before production levels improve to pre-COVID-19 highs.

The background to these challenges is that demand for air travel continues to trend upwards with the IATA forecasting an 8% growth in traffic in 2025. The shortage and backlog of aircraft may limit lessor's growth strategies in the medium and long term. However lease rates were higher at the end of 2024 than they were the previous year across most asset types. Throughout 2024 lessors saw nearly all flyable aircraft placed on lease. Asset values also increased through 2024 with older narrowbodies seeing the largest increases in market values throughout 2024. The supply demand imbalance has led to increased trading on the secondary aircraft market and an increased amount of lease extensions.

The rise in lease rates and asset values has decisively shifted the balance of power towards lessors. Airlines, constrained by supply shortages and the need for capacity, have lost some of their previous negotiating leverage. Lessors now enjoy higher returns and can often be selective in their counterparties and asset placements. This dynamic is expected to persist as long as supply constraints remain, reinforcing the strategic importance and financial strength of the Irish leasing sector within the global aviation sector.

Tax changes

Changes in taxation practice and legislation throughout 2023 and 2024 has prompted many aviation lessors to review group holding structures. Aviation structures make use of special purpose vehicles (SPVs) through which aircraft are owned and leased and intra-group funding is funnelled through. The Irish Revenue Commissioners (the "Revenue") had historically viewed such SPV entities as "trading" entities provided that these entities were part of an active trading group.

Entities categorised as "trading" benefit from a 12.5% corporation tax rate (subject to any top-up required due to the application of the Pillar Two provisions (if applicable)). 2024 saw changes to the Revenue's practice regarding the categorisation of entities as

"trading" and trading status is now more closely considered on a standalone basis rather than in a group context. Entities with insufficient activities and not classed as "trading" entities are subject to a higher tax rate (a 25% corporation tax rate generally applies to non-trading income).

In terms of intra-group funding vehicles, the Finance Act (Finance (No. 2) Act 2023 (the "Act")) introduced changes, in the form of a "Qualifying Financing Company". This new concept provides companies involved in intra-group lending with the potential to make use of a specific tax treatment, subject to specific conditions being fulfilled. The primary benefit of this new concept is that subject to satisfying the relevant conditions, a Qualifying Financing Company can obtain a tax deduction for interest paid on external third-party finance borrowed for on-lending to a direct 75% trading subsidiary resident in an EU/EEA state.

These changes in practice did not impact upon the "Section 110" regime which remains a viable option for achieving tax neutrality. These changes led to several internal group structures, including the insertion of Section 110 vehicles and provides further considerations for the structuring requirements of new platforms going forward.

The Act also contained certain measures which can impact upon the Irish tax treatment of the outbound payments of interest, royalties and the making of distributions by an Irish tax resident entity (or the Irish branch of a non-resident company) to an "associated entity" resident for tax purposes in a "specified territory". A "specified territory" for these purposes broadly means a jurisdiction which is listed in Annex I of the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes or a zero tax territory.

A potential impact of these new rules is that they can "switch off" particular Irish interest withholding tax exemptions on payments to lenders (or permanent establishments of lenders) which are resident for tax purposes or established in specified territories in particular scenarios. The provisions have been of particular focus to lessors whose ultimate holding company is based in these territories or which are members of

groups which historically lent intra-group funds from these jurisdictions.

Insurance settlements

The first few months of 2025 saw the first wave of litigation in the Irish Commercial Court in Dublin relating to insurance claims arising out of the Russian invasion of Ukraine reach their conclusion. Following the implementation of sanctions on Russia in February 2022 by the EU and its global partners, which left more than 400 planes stranded in Russia, six lessors including Avolon, BOC Aviation, Nordic Aviation Capital, CDB Aviation, Hermes Aircraft A1264 Ltd and SMBC Aviation Capital filed a total of more than EUR2.5 billion of claims under their contingent and possessed (C&P) insurance policies with the High Court in Dublin.

These proceedings were grouped together and heard in a single trial, which started in June 2024. The proceedings were centred around the obligation of the insurers to compensate lessors for aircraft stranded in Russia and key issues included: whether there had been a physical loss; whether the lessors had a duty to mitigate their loss; whether the claims fell under the "war risk" or "all risk", "contingent" or "possessed" coverage; and whether lessors were obliged to seek compensation under the operator's policy first.

The cases represent the largest commercial court trial to take place in Ireland. In March 2025, Avolon, BOC Aviation, Nordic Aviation Capital, CDB Aviation, Hermes Aircraft A1264 Ltd and SMBC Aviation Capital reached settlements with, or discontinued their claims against, the remaining insurers bringing an end to the first wave of litigation. The terms of these commercial resolutions remain confidential.

Similar cases were brought by lessors, including Aer-Cap, Merx, DAE, Falcon 2019-1, KDAC and GASL Ireland Leasing A-1 in the English High Court in London in October 2024 with a substantial judgment in this trial expected in June 2025.

Outside of insurance litigation, lessors continue to attempt to agree settlements with Russian lessees under operator insurance policies. These settlement agreements are completed in line with applicable sanctions and often require the approval of the US

Office of Foreign Assets Control where there is a US nexus and potentially the US Bureau of Industry and Security where US export controls apply.

Throughout 2023 multiple settlements completed successfully. However, a slowdown in the volume of these settlement transactions was seen in 2024. This slowdown appears to have been influenced by various factors including: funding issues; additional designations under applicable freezing measures; and US sanctions on the Moscow Stock Exchange. Negotiations of these potential settlements remain ongoing and represent a key possible step for lessors to mitigate their losses in respect of aircraft previously leased to Russian airlines where they can be completed in a way that is compliant with applicable sanctions.

Tariffs

The introduction by the US of a new executive order establishing a “reciprocal” tariff policy in April 2025 has caused uncertainty within the aviation industry. This policy marks a significant shift, particularly for the aviation industry, as it ends long-standing exemptions for aircraft and related parts that had been in place under the Agreement on Trade in Civil Aircraft since 1980.

The introduction of tariffs comes at a time when the aviation industry is already grappling with supply chain disruptions, engine reliability issues and rising labour and maintenance costs. Tariffs add another layer of complexity and cost, potentially exacerbating existing bottlenecks and delays in aircraft deliveries.

Tariffs will increase costs for US imported aircraft and parts, disrupt established supply chains and likely drive up prices and lease rates across the aviation sector. While some mitigating measures exist, the overall effect will be to raise the cost base for aviation lessors, airlines and manufacturers, potentially slow fleet renewal and introduce new operational and contractual risks.

Although the tariff implementation remains fluid, the uncertainty caused by the possibility of further changes to tariff rates, scope and exemptions in response to international negotiations or retaliatory measures complicates long-term planning for all industry participants.

Conclusion

As we navigate 2025, the outlook for the aviation industry in Ireland is positive. The sector is expected to continue evolving and innovating, supported by strong leadership and a stable business environment. While supply chain constraints and macroeconomic and geopolitical uncertainties persist, the industry has demonstrated remarkable resilience and adaptability, positioning itself for continued growth and transformation in the years ahead.

ISRAEL

Law and Practice

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Gottlieb Gera & Co Advocates has a long-established Israeli-based aviation finance practice, advising financial institutions, manufacturers, owners, lessors and lessees on a wide range of aviation-related matters. The firm has extensive international experience on inward and outward-bound transactions, working in multiple jurisdictions in a variety of commercial and financing agreements. Clients turn to its experience in the acquisition and disposal of aircraft, engines and aviation portfolios, leveraged and PDP (pre-delivery payments) financings, operating leases, ACMI (aircraft, crew, maintenance and insurance) and

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

Corporation Tax on Lease or Loan Payments

The Income Tax Ordinance (New Version) 1961 (the “Ordinance”) provides generally that non-residents of Israel will be subject to income tax in Israel only with regard to income accruing or deriving from certain types of identifiable sources of income in Israel.

Notwithstanding the foregoing, an exemption from income tax exists under Israeli law in connection with interest payments and leasing or rental payments made by an Israeli resident to a non-Israeli resident in relation to an aircraft or aircraft engine that is used for transporting passengers or cargo on international routes, subject to meeting the requirements of the exemption.

Additionally, the applicable international tax treaty may dictate the tax treatment of such income and thus must be consulted on a case-by-case basis.

Withholding Taxes

Payments made by Israeli taxpayers to companies or individuals that are not deemed to be tax residents of Israel that constitute taxable income are subject to a withholding of tax at the source, which is typically between 20 and 25%. Certain exemptions under the Ordinance or international treaties may apply; however, a specific exemption certificate will need to be issued by the Israel tax authorities for financial institutions in Israel to effect payment.

VAT

Israel’s VAT Law provides that value added tax, which is currently 18%, is imposed on transactions and the importation of goods into Israel. Certain aircraft sale transactions with purchasers who provide scheduled international passenger or cargo transportation services for consideration may be zero rated for the purpose of VAT.

Capital Gains Tax

Aircraft sale transactions where the seller is an Israeli resident or the aircraft is physically located in Israel may be subject to capital gains tax. This should be examined on a case-by-case basis depending on the facts at hand.

1.1.2 Enforceability Against Domestic Parties

From a practical point of view, in any court proceeding, any sale agreement that is not in Hebrew or English should be translated into Hebrew or English. Ideally, this should be a certified translation.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Title to an aircraft, engine or any part that has a serial number is customarily transferred by a bill of sale that has been duly executed by the seller.

The sale of an ownership interest in an entity that owns an aircraft or engine will not be recognised as a sale of such aircraft or engine. However, a change of control in such entity could in certain circumstances require the consent of the Minister of Transport (whose authority was delegated to the Director General of the Israeli Civil Aviation Authority) if the new owners are not citizens or permanent residents of Israel.

1.2.2 Sales Governed by English or New York Law

Transfer of title to an aircraft or engine delivered in Israel through a bill of sale governed by English or New York law will generally be recognised in Israel, as Israeli legislation does not generally prohibit parties from choosing foreign law as the governing law of their contracts.

In the case of an aircraft, the Aviation Regulations (Registration and Marking of Aircraft) 1973 provide that the bill of sale must include the following details:

- the manufacturer, type and design of the aircraft;
- the serial number of the aircraft;
- the nationality and registration mark;
- the names of the seller and purchaser; and
- the date of transfer of ownership.

1.2.3 Enforceability Against Domestic Parties

From a practical point of view, in any court proceeding, it is advisable to have any bill of sale that is not in Hebrew or English translated into Hebrew or English.

1.2.4 Registration, Filing and/or Consent From Government Entities

Aircraft bills of sale are filed with the Israeli Registrar of Aircraft in connection with the registration of aircraft. The Registrar generally accepts duly executed bills of sale in Hebrew or English. To register a bill of sale that is in a language other than Hebrew or English, the Registrar may require a notarised and apostilled translation of the bill of sale into Hebrew or English. An original bill of sale is required to be presented to the Registrar to give effect to the registration.

In addition to the bill of sale, in order to register an ownership interest in an aircraft, an owner must submit an original aircraft registration application in the form prescribed by the Registrar and signed by the owner (or its authorised agent or representative) with the following attachments.

- If the application is made by a corporation, corporate authorisation must be given by the relevant organ of the relevant corporation duly empowering the individual executing the application to do so, approved and certified by such corporation's authorised signatory for such purpose. In the case of an Israeli corporation, the applicant must also submit sufficient proof of such corporation's registration with the Israeli Companies Registrar or another applicable authority.
- If the application is executed by an agent or representative of the owner of the aircraft, the application must expressly state the name of the owner and include details of the agent or representative and state that they are acting in such capacity, enclosing a notarised power of attorney from the owner presented not later than three years from its issuance. If the power of attorney is executed outside Israel, it should be notarised and apostilled.
- If the aircraft was previously registered in a foreign country, sufficient proof must be provided that such registration has been cancelled or is no longer valid.

- If the aircraft was not previously registered in a foreign country, an affidavit or other sufficient proof must be given that the aircraft has never been registered in a foreign country to the satisfaction of the Registrar.
- A receipt for the payment of the applicable registration fees in respect of the certificate of registration and issuance of the applicable registration marks must be provided.
- In the event of a change of ownership, in addition to the bill of sale as noted earlier, any previous certificates of registration for the aircraft – as well as sufficient proof regarding the change of ownership – must be provided.
- In respect of an aircraft not previously registered in Israel, proof of payment of the applicable customs payment (or exemption thereof) is required. The Registrar will accept an importation declaration regarding the import of the aircraft executed by the customs authority as sufficient proof.

The Registration Regulations also provide for additional registration requirements in special circumstances, such as in transfers by force of law, inheritance, and realisation of security.

The execution and delivery of a bill of sale do not require any government applications or consents. However, the registration of an aircraft by an owner who is not a citizen or permanent resident of Israel with the Israeli Registrar of Aircraft will require certain consents (see **2.3.4 Registration of Leases With the Domestic Aircraft Registry**).

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

For taxes and duties payable upon the execution or delivery of a bill of sale, or the consummation of a sale of ownership interest in an entity that owns an aircraft or engine, see **1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement**.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

Operating leases, wet leases and finance leases are generally permitted and recognised under Israeli law, as are leases over engines or spare parts.

2.1.2 Application of Foreign Laws

Leases involving a domestic party, or an asset situated in Israel, may be governed by a foreign law. However, Israeli courts may limit the application of foreign law if it is determined that its application would be incompatible with mandatory laws or the public policy of Israel – in each case, this has been narrowly construed. In certain cases, Israeli courts may also determine that certain mandatory legislation is applicable to persons, actions or assets located in Israel, notwithstanding the expressed intention of the parties.

2.1.3 Restrictions Concerning Payments in US Dollars

Subject to required tax withholding, if applicable, there are no material restrictions on payments by domestic lessees to foreign lessors being made in US dollars.

2.1.4 Exchange Controls

Israeli law does not contain exchange controls that prevent rent payments under a lease or repatriation of realisation proceeds, except with regard to withholding taxes and with regard to measures imposed by Israeli banks under applicable AML regulations.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

For taxes and duties payable upon the execution of a lease in Israel and/or by an Israeli party, see **1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement**.

2.1.6 Licensing/Qualification of Lessors

A foreign lessor does not have to be licensed or otherwise qualified in Israel in order to do business with a domestic lessee. However, for restrictions on foreign ownership of aircraft, see **2.3.4 Registration of Leases With the Domestic Aircraft Registry**.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

Leases governed by English or New York law should be drafted to reflect local legal terminology, local operational and regulatory requirements and/or relevant conditions precedent.

2.2.2 Tax and Withholding Gross-Up Provisions

Provisions relating to tax withholding and other withholding gross-up provisions are generally permissible and enforceable in Israel, provided that such provisions are not contradictory to any mandatory Israeli law or public policy.

2.2.3 Parts Installed or Replaced After a Lease's Execution

An aircraft lease may also cover parts that are installed or replaced on an aircraft or engine after the execution of the lease. Good practice would require the amendment of the lease should such parts be identifiable.

2.2.4 Risk of Title Annexation

The installation of an aircraft engine onto an airframe should not cause title in the engine to be annexed to that of the airframe. If an aircraft engine is owned or charged in favour of a third party, market practice is to put ownership plates on the engine that identify the owner and/or the holder of the charge, as well as providing for the appropriate contractual delineation and acknowledgement of the separate ownership of the engine.

2.2.5 Recognition of the Concepts of Trust/Trustee

The concept of trust and the role of an owner trustee are recognised in Israel.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The interests of the owner of an aircraft are registered with the Israel Aircraft Registry (the "Registry"), which is an owner registry maintained and operated by the Civil Aviation Authority of Israel. As the Registry is an owner registry, non-owner lessor interests may not be registered in the Registry.

An aircraft will be eligible for registration in the Registry if:

- it is owned by an Israeli citizen or permanent resident, or by a corporate entity registered in Israel where at least two thirds of its directors are Israeli citizens or permanent residents; and
- it is not registered in another jurisdiction.

However, the Minister of Transportation (whose authority was delegated to the Director General of the Israel Civil Aviation Authority) may order the registration of an aircraft that is not registered in another jurisdiction, but does not meet the conditions set out in the first bulleted point, if it is convinced that there is sufficient linkage between the aircraft and the State of Israel.

Pursuant to the Registration Regulations, the registration of an owner's interests with the Registry does not constitute a proof of title to the aircraft.

2.3.2 Registration If the Owner Is Different From the Operator

The owner of an aircraft is registered with the Registry, regardless of whether it is also the operator of the aircraft. As the Registry is an owner registry, operator interests may not be registered with the Registry.

2.3.3 Aircraft/Engine-Specific Registers

Israel does not maintain a register regarding leases of aircraft or engines.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

As the Registry is an owner registry, it does not provide for the registration of leases.

However, in order for a domestic operator to be able to operate an aircraft in Israel, the owner of such aircraft must register the aircraft with the Registry. As noted in **2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register**, the registration of an aircraft owned by a foreign person or entity with the Registry requires the consent of the Minister of Transportation (whose authority was delegated to the Director General of the Israel Civil Aviation Authority).

Additionally, under the applicable aviation regulations, an operator must file the lease agreement of an aircraft operated in Israel with the Civil Aviation Authority of Israel.

The failure of a foreign owner of an aircraft to obtain the consent of the Minister of Transportation (as delegated) would not allow for the registration of the aircraft in Israel. Thus, the receipt of such consent should be considered by the parties a condition precedent to the effectiveness of the lease.

2.3.5 Requirements for a Lease to Be Valid and Registrable

Leases regarding aircraft operated in Israel do not generally require a specific form in order to be valid. However, certain operational and regulatory requirements set out in local aviation regulations should be sufficiently addressed in the lease.

As the Israeli Registrar of Aircraft is an owner registry, leases may not be registered therein.

2.3.6 Taxes/Duties Payable for Registering a Lease

As noted in **2.3.3 Aircraft/Engine-Specific Registers**, aircraft leases are not registrable in Israel. Thus, taxes or duties do not apply to the registration of a lease.

2.3.7 Registration of Aircraft in Alternative Countries

Generally, commercial aircraft that are based in Israel are not registered in any jurisdictions other than Israel.

2.3.8 Requirements for Documents Concerning Registration

The Israeli Registrar of Aircraft requires that the original bill of sale be presented to give effect to registration of an aircraft. If the bill of sale is in a language other than Hebrew or English, a notarised and apostilled translation into Hebrew or English is required by the Registrar. For additional documentation that may be required, see **1.2.4 Registration, Filing and/or Consent From Government Entities**.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

For tax requirements of a foreign lessor, see **1.1.1 Taxes/Duties Payable Upon Execution of the Sales**

Agreement. The Israel Tax Ordinance places the duty to withhold and remit withholding tax on the payor.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A lease of aircraft to an Israeli lessee by a foreign lessor, or the enforcement thereof, would not typically create a permanent establishment for the lessor in Israel. The tax treatment of any transaction is dependent on the facts and circumstances of such a transaction and any applicable tax treaty.

2.4.3 Engine Maintenance and Operations

A foreign lessor may be liable in tort or on other grounds in Israel in respect of aircraft or engine maintenance and operations in the event that linkage is sufficiently established between the relevant damages and the actions or omissions of such lessor under the general principles of tort law.

2.4.4 Damage or Loss Caused by an Asset

Israel has not applied the doctrine of strict liability towards aircraft or engine owners or lessors, or financiers financing such assets on lease, who have no operational interests or duties regarding the aircraft or engine.

However, to the extent that a lessor is deemed to be the manufacturer or importer of an aircraft into Israel, such lessor may have exposure under Israel's Defective Products Liability Law 1980.

2.4.5 Attachment by Creditors

Creditors of a domestic lessee who do not hold possessory liens or statutory liens would not typically have a right to attach an aircraft owned by a third party that is unrelated to the domestic lessee, unless such a creditor can establish a direct linkage between the aircraft and the debt in question.

2.4.6 Priority of Third Parties' Rights

Israeli law provides certain third parties with the right to take a lien over an asset, such as a contractor that was given possession of an asset pursuant to the Contract for Services Law 1974 and an injured party pursuant to the Contract (Remedies for Breach of Contract) Law 1970.

Additionally, the Israel Airport Authority has a statutory lien over assets within its control to recover fees or charges due to it, which may limit or impose conditions on the rights of the lessor under the lease. The statutory lien grants certain preference to the Israel Airport Authority over other creditors.

Furthermore, the Minister of Defence is granted authority – pursuant to the Registration and Mobilisation of Equipment to the Israeli Defence Forces Law 1987 – to requisition any aircraft that is owned, controlled by, or within the possession of an Israeli entity, provided that reasonable payment is made to the owner or operator of the aircraft. Furthermore, additional compensation may be provided to the owner or operator of an aircraft if the aircraft is damaged during the requisition period.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

Israeli legislation does not impose an obligation to place any part of the insurances over an aircraft with domestic insurance companies.

2.5.2 Mandatory Insurance Coverage Requirements

The applicable Israeli aviation regulations establish mandatory minimum coverage requirements for commercial aircraft, which are determined based upon the maximum take-off mass of the aircraft in question.

2.5.3 Placement of Insurance Outside of Jurisdiction

The Israeli aviation regulations do not restrict reinsurances being placed outside Israel, provided that the foreign insurers and/or reinsurers are authorised to act under the applicable law of their jurisdiction.

2.5.4 Enforceability of “Cut-Through” Clauses

“Cut-through” clauses are generally enforceable to the extent that they are drafted properly and establish clear privity between the reinsurer and the party named as loss payee.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurance or reinsurance are generally permitted under Israeli law, to the extent that proper

notice is provided and consent is obtained (unless such assignment is expressly permitted without notice and consent under the relevant agreement).

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

Restrictions on a lessor's ability to terminate an aircraft lease, export an aircraft and/or sell an aircraft following the lease termination may be restricted in accordance with the provisions of the Insolvency and Economic Rehabilitation Law 2018 (the "Insolvency Law") or as a result of the requisition of the aircraft by the Minister of Defence, as noted in 2.4.6 Priority of Third Parties' Rights.

2.6.2 Lessor Taking Possession of the Aircraft

Involuntary physical repossession by the lessor would typically require a court order for the return of the asset to the lessor's control.

2.6.3 Specific Courts for Aviation Disputes

Israeli legislation does not refer aviation disputes to any specific court. Given the value of the dispute, civil disputes relating to aircraft would typically be within the jurisdiction of the district courts. Disputes concerning the enforcement of charges will sometimes be resolved before the registrar of the execution office.

2.6.4 Summary Judgment or Other Relief

Lessors wishing to enforce an aircraft lease should note that summary judgments are rarely granted in Israeli jurisprudence, as the threshold for opposing a summary judgment is very low.

Temporary remedies such as equitable or injunctive relief are factually dependent and will depend to a large extent on the "balance of convenience" between the parties as interpreted by the Israeli courts. In granting temporary injunctive relief, the courts are likely to require monetary collateral to secure the interests of the lessee and third parties. The court will also consider certain additional equitable considerations, including the proper disclosure of relevant facts and the lack of delay on the part of the lessor in applying to the court.

The estimated period for obtaining a court order is dependent on the facts and circumstances of the

relevant matter and generally ranges from weeks to months.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Foreign Governing Law

As Israeli legislation does not generally prohibit parties from choosing foreign law as the governing law of their contracts, Israeli courts will generally uphold a foreign choice of law that was made in good faith.

However, an Israeli court may refuse to apply such foreign law if its application would lead to a result that the court deems to be incompatible with Israel's public policy, which has been narrowly construed. In certain cases, Israeli courts may also determine that certain mandatory legislation is applicable to persons, actions or assets located in Israel, notwithstanding the expressed intention of the parties.

Submission to Foreign Jurisdiction

Israeli courts will generally acknowledge a contractual choice of a recognised foreign jurisdiction in disputes between contractual parties to a commercial agreement, unless there are special reasons justifying deviation from such choice, such as public policy, expiration of a limitation period in the foreign forum or insolvency proceedings in Israel. However, the contractual language should be clear about the exclusivity of such foreign jurisdiction.

Israeli courts have the power to stay an action where it is shown that there is some other forum having competent jurisdiction that is more appropriate for the trial of the action or in which the case can be tried more suitably, given the interests of all the parties.

Waiver of Immunity

Israeli courts will generally uphold a waiver of immunity by the parties of a lease, including a sovereign immunity.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

For the recognition of foreign arbitral awards by Israeli courts, see 2.6.12 Enforcement of Foreign Arbitral Decisions.

The recognition and enforcement of foreign judgments by Israeli courts is governed by the framework set out in the Foreign Judgments Enforcement Law 1958 (the “Enforcement Law”). Under the Enforcement Law, Israeli courts may – at their discretion – declare a foreign judgment to be enforceable if:

- it was obtained before a court of competent jurisdiction according to the laws of the state in which the judgment was given;
- it is no longer appealable;
- the obligations imposed by it are enforceable under the Israel laws applicable to enforcement of judgments and its content does not contradict the public policy, security or sovereignty of Israel; and
- it is enforceable in the country in which it was given.

The Enforcement Law further provides that a judgment will not be declared enforceable if any of the following is proven before the court:

- the judgment was obtained fraudulently;
- the defendant was not given a reasonable opportunity to make its claims and provide its evidence before the judgment was given;
- the judgment was made by a court that is not authorised to issue such judgment under the rules of international private law that apply in Israel;
- the judgment conflicts with another valid judgment given in the same matter between the same parties; or
- an action between the same parties in the same matter was not pending in any Israeli court at the time that the lawsuit was initiated in the foreign court.

The law further provides for a requirement of reciprocity whereby Israeli courts will not declare a judgment given in a particular country as enforceable in Israel if, under the laws of such country, judgments given by Israeli courts are not enforced. This requirement may be waived at the request of the Attorney General of the State of Israel. The Enforcement Law provides for a statute of limitations of five years from the date of the judgment being enforced.

A foreign judgment that was declared by the Israeli courts to be enforceable shall be considered as a judgment awarded in Israel for execution purposes.

The Enforcement Law provides for the recognition of a foreign judgment if the following conditions are satisfied:

- Israel has entered into an agreement with a foreign country applicable to the judgments of a court of such country;
- Israel undertook in such agreement with such foreign country to recognise foreign judgments of the same nature, with such undertaking applying only to foreign judgments that would be enforceable under Israeli law; and
- the foreign judgment meets the terms and conditions as set out in the agreement between Israel and such country.

Israel is a party to four treaties on the enforcement of foreign judgments – with Austria, Germany, the UK, and Spain. However, only the treaty between Israel and Germany has been implemented into domestic law.

2.6.7 Judgments in Foreign Currencies

Israeli law does not preclude lessors from obtaining a judgment in a foreign currency.

2.6.8 Limitations on Lessors’ Actions Following Termination

Israeli law does not limit contractual provisions that would allow a lessor to charge additional rent following termination of a lease for default, particularly if the aircraft is not returned to the lessor.

A lessor’s ability to recover default interest is limited under the Interest Law 1957, as well as the Insolvency Law.

2.6.9 Lessor’s Requirement to Pay Taxes/Fees

A lessor enforcing its lease may be subject to the payment of statutory court fees, which may range from a nominal amount up to 2.5% of the amount claimed under the lease.

2.6.10 Mandatory Notice Periods

To the extent that notice periods are contractually agreed by the parties, such provisions are typically respected by the courts. To the extent that notice periods are not provided contractually, the courts are likely to impute a reasonable notice period under the circumstances.

2.6.11 Lessees' Entitlement to Claim Immunity

A lessee that is a party to a commercial transaction is not entitled to sovereign immunity under Israeli law. For non-commercial transactions, sovereign immunity may be waived.

2.6.12 Enforcement of Foreign Arbitral Decisions

The State of Israel is party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and adopted the convention into local law through the New York Convention Implementation Regulations (Foreign Arbitration) 1978. The regulations provide that if another international treaty to which Israel is party applies to a certain arbitration process, the regulations would not apply to such arbitration.

Israeli courts will generally recognise and enforce an arbitral decision to which the 1958 Convention applies. However, according to the implementation regulations, the court may postpone the proceedings or require the posting of bail in the event that a party applies for a revocation or suspension of judgment with the competent authority of the jurisdiction in which the arbitration took place (or in accordance with the governing law thereof).

2.6.13 Other Relevant Issues

Israeli legislation and jurisprudence emphasise equitable considerations such as the doctrine of good faith and principles of fairness and reasonability. Such considerations may have a significant impact on the optimal course of action in the performance of a contract and in the enforcement of contractual rights.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

The concepts of contractual assignment and novation are recognised under Israeli law. The concept

of assignment is more prevalent in Israeli legislation, case law, and practice.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

The Assignment of Obligations Law 1969 provides that rights under an agreement such as an aircraft lease may be freely assigned without the debtor's consent, except to the extent that the transferability of such rights has been limited by the nature of the right, by law or by a contractual provision. An assignment of such rights under a New York or English law-governed document will generally be recognised by Israeli courts and deemed enforceable in Israel.

The Assignment of Obligations Law further provides that an obligation or liability may be assigned, if such assignment was agreed upon by the creditor, unless the transferability of the obligation or liability has been restricted by law.

2.7.3 Enforceability of Lease Assignments/Novations

For the enforceability of commercial agreements in Israeli court proceedings, see **1.2.3 Enforceability Against Domestic Parties**.

2.7.4 Filing/Registration of Lease Assignments/Novations

Aircraft and/or engine lease assignment and assumption agreements and/or novations are not registered with the Registry. To the extent that such agreements trigger a change of ownership of an aircraft, the change of ownership will need to be approved by the Minister of Transportation (whose authority was delegated to the Director General of the Israel Civil Aviation Authority), as set out in **2.3.4 Registration of Leases With the Domestic Aircraft Registry**.

2.7.5 Taxes/Duties Payable on Assignment/Novation

Israel currently imposes no taxes or duties on the assignment of aircraft leases.

2.7.6 Recognition of Transfer of Ownership Interests

According to the Israeli regulations, within ten days following change of ownership over the aircraft, the aircraft certificate of registration expires.

As the consent of the Minister of Transportation (whose authority was delegated to the Director General of the Israel Civil Aviation Authority) to the registration of a foreign-owned aircraft with the Israeli Registrar of Aircraft examines the ultimate beneficial ownership of the aircraft, a change in the ownership interest of an entity or the beneficial interest in a trust could be viewed as triggering a requirement to obtain a consent for such change in ownership prior to such change in ownership.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

The deregistration of an aircraft from the Registry is affected by a written request of the owner or a person granted power of attorney by the owner.

2.8.2 Lessee's/Operator's Consent

An aircraft owner may apply for the deregistration of an aircraft without the consent of the lessee or the operator. A mortgagee or lessor may apply for the deregistration of an aircraft as the attorney in fact on behalf of the owner by virtue of a notarised power of attorney. It should be noted, however, that – in practice – the Aircraft Registrar will likely hesitate to deregister an aircraft where the lessee or the operator contests such deregistration, without a court order.

2.8.3 Required Documentation

To deregister an aircraft from the Registry, the owner of the aircraft or the owner's attorney-in-fact must submit an online request for deregistration, accompanied by a certified resolution of the board of directors authorising the signatories to execute such a request. If the request is submitted on behalf of the owner (by the owner's attorney-in-fact), a notarised power of attorney shall be provided. The aircraft's original certificate of registration should be returned to the Registrar of Aircraft within five days of its cancellation.

To the extent that a pledge, charge or attachment has been placed over the aircraft, prior to the deregistration of the aircraft, one of the following is required:

- the consent of the holder of the charge, pledge or attachment;
- proof that such charge, pledge or attachment has been removed; or
- an order of the court or the registrar of the execution office expressly transferring or cancelling the charge or attachment.

2.8.4 Duration of Deregistration Process

A non-contested deregistration process of an aircraft may be completed within up to 14 working days following receipt of all required documentation.

2.8.5 Aviation Authority's Assurances

The Israel Aviation Authority does not provide advance assurance to an aircraft owner, mortgagee or lessor as to the prompt deregistration of an aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

There are no significant costs, fees or taxes chargeable in connection with the deregistration of an aircraft. If a charge has been placed over an aircraft, nominal charges may be imposed by the Registry in connection with its removal.

2.8.7 Deregistration Power of Attorney

Deregistration powers of attorney are generally recognised in Israel in a non-contested deregistration process, so long as the powers of attorney are notarised. However, the Israeli Registrar of Aircraft will not recognise a power of attorney that was made and signed more than three years before the date of submission of the deregistration request.

If a deregistration power of attorney is executed outside Israel, additional requirements (including apostilisation) may also apply.

Following insolvency proceedings for rehabilitation, any recognition of a deregistration power of attorney granted by an owner of an aircraft in favour of a financier may be subject to the discretion of the courts and therefore there is no guarantee that the Regis-

trar (or any other relevant governmental body) would recognise a deregistration power of attorney in such circumstances.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

To enforce a deregistration power of attorney, proof may be required as to the underlying authorities granting such power of attorney, and proof that the persons granting such power of attorney had the authority to do so under the relevant corporate documentation.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A deregistration power of attorney does not have to be governed by the laws of the State of Israel. However, it should be notarised and if executed outside Israel, it may be subject to additional requirements, which include apostillisation.

2.8.10 Revocation of a Deregistration Power of Attorney

A grantor will generally be unable to revoke a deregistration power of attorney that is deemed to be irrevocable. In extreme circumstances such as fraud, the court may order the revocation of an irrevocable power of attorney.

2.8.11 Owner's/Lessor's Consent

An aircraft owner that has lawfully taken possession of an aircraft, in accordance with the steps set out in **2.6.2 Lessor Taking Possession of the Aircraft**, may seek to deregister the aircraft from the Registry, which will generally allow such deregistration to the extent that the steps set out in **2.8.4 Duration of Deregistration Process** are adhered to and no pledges, charges or attachments exist over the aircraft. Typically, the export of the aircraft outside Israel is done by the lessee, being an Israeli entity and named as the importer of the aircraft into Israel. The authors are not familiar with an export process that was successfully performed without the lessee's consent and co-operation, based solely upon a power of attorney from the lessee.

Practically, an aircraft mortgagee or lessor who is not the owner of the aircraft will generally not be able to deregister the aircraft from the Registry without

obtaining the consent of the owner through a valid deregistration power of attorney or a court order.

2.8.12 Aircraft Export Permits/Licences

For the exportation of aircraft from Israel, certain documentation should be submitted to the customs authority prior to the exportation. Following the exportation of the aircraft from Israel, an export declaration is issued by the customs authority. Additionally, to deregister the aircraft from Israel for its registration in another jurisdiction, an export certificate of airworthiness should be issued by the Civil Aviation Authority of Israel.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

No significant costs, fees or taxes are charged in respect of the export of an aircraft.

2.8.14 Practical Issues Related to Deregistration of Aircraft

Please see **2.8.9 Choice of Laws Governing Deregistration Power of Attorney** and **2.8.11 Owner's/Lessor's Consent**.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

The Insolvency Law, together with the Execution Law 1967 and the regulations promulgated under each such law, provide for a legal framework pursuant to which lessees domiciled in Israel may enter into composition with creditors, economic rehabilitation operated by an insolvency trustee, or liquidation.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership Composition with Creditors

A lessee domiciled in Israel may apply to the court for a stay of proceedings in order to enter into a settlement with its creditors. The court will generally approve a stay of proceedings if the continued operation of the lessee is unlikely to harm its creditors, the lessee is able to finance the expenses of its operation during the stay of proceedings, and there is no real concern that the lessee is acting to defraud its credi-

tors. The actions of the lessee during the stay period shall be limited so that its continued operation during such period is geared toward the conclusion of the settlement.

Economic Rehabilitation

Upon the commencement of insolvency proceedings, the court may order the continuation of the operation of the lessee for the purpose of its economic rehabilitation, if the court is convinced that economic rehabilitation of the insolvent lessee is reasonably probable, that its continued operation with a view to rehabilitation is unlikely to harm its creditors, and that there are sufficient sources to finance the expenses of its operation during the rehabilitation period.

Liquidation

In the event that the court does not find that economic rehabilitation of the insolvent lessee is feasible, the court will order the liquidation of the lessee.

Receivership

Receivers are usually appointed to exercise a security, typically a pledge, mortgage or floating charge over the assets of a company. Receivers are also appointed to exercise an attachment over an asset (usually after a monetary judgement had been entered). Appointment of a receiver over an asset is also available as an interim measure in a civil dispute. A receiver is appointed only by an order of the court or of the registrar of the execution office. The typical roles of the receiver will be to seize, preserve, manage or sell assets.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

The Insolvency Law provides that Israeli insolvency authorities such as the courts and the registrar of the execution office shall co-operate with foreign insolvency authorities to facilitate domestic and overseas proceedings. The Insolvency Law further provides that domestic insolvency authorities may refrain from co-operation with foreign authorities where the exercise of jurisdiction by such authorities would infringe on Israeli public policy or if the Israeli courts find:

- that the foreign proceedings were fraudulently conducted; or

- that the debtor was not given a reasonable opportunity to make its claims in the foreign proceeding.

Israeli courts will generally recognise foreign insolvency proceedings as primary or ancillary proceedings in accordance with the jurisdiction that serves as the centre of main interest of the insolvent entity – following which, the administrators of the foreign insolvency proceeding may be provided with a wide range of remedies pursuant to the Insolvency Law.

The Insolvency Law, in effect, implements the UNCITRAL Model Law on Cross-Border Insolvency.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

A general deregistration power of attorney will expire upon the commencement of insolvency proceedings of the grantor. The effectiveness of an irrevocable deregistration power of attorney is likely to be subject to the limitations set out in 2.9.5 Other Effects of a Lessee's Insolvency and 2.9.10 Impact of Domestic Lessees' Winding-Up.

2.9.5 Other Effects of a Lessee's Insolvency

Where insolvency proceedings have been initiated with regard to a lessee that has possession of an aircraft, the lease may be set aside by mutual consent of the lessor and the insolvency trustee operating the insolvent lessee. If mutual consent cannot be reached, the insolvency court may order that the agreement be set aside if the court finds that setting aside the agreement is required for the economic rehabilitation of the lessee or to maximise the amount of return that would be repaid to the lessee's creditors.

Where the continued commercial operation of the aircraft under the lease is deemed necessary for the economic rehabilitation of the insolvent lessee, the court will generally approve the continuation of the lease, which would prevent the lessor from its repossession.

The Insolvency Law provides that, where the court has approved the continuation of an agreement during insolvency, payments incurred under such an agreement are deemed to be expenses of the insolvency proceedings, which are granted priority over secured creditors.

In the case of a true operational lease, the aircraft will not be deemed to be property of the lessee and will not be deemed included in the lessee's insolvency estate. However, in the case of certain finance leases, there is a risk that Israeli courts may find that the retention of the ownership was in fact a disguised pledge and rule that the aircraft is part of the lessee's insolvency estate and that the lessor is an unsecured creditor.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

A lender's actions as a creditor will generally be limited upon the commencement of insolvency proceedings of a borrower, as an automatic moratorium is imposed for the duration of the insolvency proceedings.

If the lender is a secured creditor and the insolvent borrower enters into operation by an insolvency trustee with a view towards its economic rehabilitation, the lender is barred from realising the asset charged in its favour in a fixed charge and may not perfect a floating charge without the approval of the court.

If the lender's debts are not secured, it will be repaid together with other unsecured creditors on a pro rata basis from those assets that remain in the borrower's insolvency estate following the repayment of secured debts, the insolvency trustee's expenses, certain categories of preferred debts, and debts secured by a floating charge.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

Pursuant to the Insolvency Law, upon the initiation of insolvency or rehabilitation proceedings, an automatic moratorium is imposed for the duration of the proceedings. The Insolvency Law provides that proceedings shall take place over a period of nine months, which may be extended for additional three-month periods by court order.

2.9.8 Liquidation of Domestic Lessees

A domestic lessee may be liquidated or placed into operation by an insolvency trustee by the initiation of insolvency proceedings in accordance with the Insolvency Law. Insolvency proceedings may be initiated by an application to the court by the insolvent lessee,

its creditor(s) or the Attorney General of the State of Israel.

2.9.9 Ipso Facto Defaults

Ipso facto default clauses are not recognised pursuant to the Insolvency Law. Termination of leases and repossession of aircraft during a moratorium is subject to the approval of the court, which may be denied even in such cases where the lessor can show that it has suffered performance defaults.

2.9.10 Impact of Domestic Lessees' Winding-Up

In the event that the court orders the winding-up and liquidation of a domestic lessee:

- assuming the aircraft is leased to the domestic lessee under a true operational lease, the aircraft remains the property of the lessor;
- if the trustee operates the aircraft during the rehabilitation period, the lease rentals due for such period will be deemed to be expenses of the insolvency proceedings, which are granted priority over certain creditors other than secured creditors holding fixed charges;
- if the security deposit and the accumulated maintenance reserves held by the lessor are held by court to be an asset of the lessor, it shall not be affected by the liquidation of the lessee; and
- any due and unpaid amounts of rent and/or maintenance reserves due for the period prior to the commencement of insolvency proceedings are most likely to be classified as unsecured debt and thus will be repaid to the lessor together with other unsecured creditors on a pro rata basis from those assets that remain in the lessee's insolvency estate following the repayment of secured debts, the insolvency trustee's expenses, certain categories of preferred debts, and debts secured by a floating charge.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The State of Israel is not a party to the Convention on International Interests in Mobile Equipment and the related Protocol on Matters specific to Aircraft Equipment.

2.10.2 Declarations Made Concerning Conventions

There is no applicable information in this jurisdiction.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

There is no applicable information in this jurisdiction.

2.10.4 Enforcement of Conventions

There is no applicable information in this jurisdiction.

2.10.5 Other Conventions

Israel is not a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft, nor is it a party to the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

Foreign lenders locally financing an aircraft may be subject to the Supervision of Financial Services (Regulated Financial Services) Law 2016, which in certain cases would require lenders to apply for a “financial services” licence in Israel, unless such lenders meet one of the exemptions provided under the law.

Regulations promulgated under the law exempted certain types of transactions and entities from the licensing requirement, including banks and insurers licensed in OECD member countries.

3.1.2 Effect of Exchange Controls or Government Consents

See 2.1.4 Exchange Controls.

3.1.3 Granting of Security to Foreign Lenders

Israeli law does not limit domestic borrowers from granting security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Downstream, upstream and cross-stream guarantees in favour of lenders are permitted in Israel.

3.1.5 Lenders' Share in Security Over Domestic SPVs

It is advisable for lenders to take share security over a domestic special purpose vehicle that owns the financed aircraft. A pledge of shares is recognised in Israel.

3.1.6 Negative Pledges

A negative pledge is recognised as a binding contractual obligation. Additionally, it is advisable to include and notate the negative pledge in any charges being registered to restrict the granting of any further charges over an asset or rights.

3.1.7 Intercreditor Arrangements

There are no material restrictions or requirements imposed on intercreditor arrangements.

3.1.8 Syndicated Loans

Israeli law recognises the concept of agency and the role of an agent under a syndicated loan.

3.1.9 Debt Subordination

The most common methods of subordination are debt subordination and collateral subordination.

Israeli law recognises subordination of collateral, which is typically effected through the grant of different degrees of charges or by placing specific fixed charges over certain assets, to which floating charges may be subordinated in certain circumstances.

Contractual subordination of debt is also recognised in Israel. However, it has no force and effect upon third-party creditors.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of all or part of an outstanding debt under an English or New York law-governed loan is generally permissible and recognised under Israeli law, assuming it is valid under its governing law and provided that the documentation is consistent with the requirements of the Assignment of Obligations Law 1969, as set out in 2.7.2 Assignment/Novation of Leases Under Foreign Laws.

3.1.11 Usury/Interest Limitation Laws

Israel's Interest Law empowers the Minister of Finance to set a maximum rate of interest that a lender may receive from a borrower with regard to certain types of prescribed transactions. An order promulgated under the Interest Law provides limitations to the maximum rate of interest that applies to loans in which the loan amount is linked to the consumer price index or indexed to the increase of anything other than a loan that is linked to a foreign exchange rate.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

The security provided in an aviation finance transaction in Israel varies based on the type of legal entity granting the security and the facts and circumstances of the particular financing.

A corporate borrower would typically provide:

- a charge over the financed asset;
- an assignment of insurances, warranties and proceeds payable for confiscation for hire;
- a floating charge over spare and future parts (to the extent not currently identifiable);
- an assignment by way of security over any proceeds payable under a lease agreement; and
- a tri-party subordination agreement between the lender, borrower and lessee.

If the borrower is a limited partnership, a pledge over the assets, spare parts and insurances should be provided. Floating charges cannot be registered over limited partnerships under Israeli law.

3.2.2 Types of Security Not Available

As noted in **3.2.1 Typical Forms of Security and Recourse**, a limited partnership cannot grant floating charges under Israeli law.

3.2.3 Trust/Trustee Concepts

The concept of a trust and the role of a security trustee in a financing transaction are generally recognised in Israel.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

Borrowers may generally assign their rights to an aircraft or under an aircraft lease (including in relation to insurances) to a security trustee pursuant to a charge or security assignment, as the case may be.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

A lessor may assign its rights and benefits under an aircraft lease without also assigning its attendant obligations thereunder.

3.2.6 Choice of Foreign Law

Should a financier wish to directly enforce a security assignment or guarantee that is governed by English or New York law, the law would have to be proven in Israeli courts.

There are certain provisions in the Guarantee Law that provide the guarantor a certain defence that may be expressly waived by the guarantor. However, certain provisions are mandatory, particularly with regard to individual guarantors, which may not be specifically waived to the guarantor's detriment.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

A security assignment must include:

- a brief description of the encumbered asset;
- the amount secured by the asset;
- the type of security; and
- the names of the assignor and assignee.

A security assignment granted by an Israeli corporate entity must be registered with the Companies Registrar within 21 days of its creation, unless an extension of such period is requested and approved. In certain circumstances, the extension may require further corroborative documentation to be provided.

If the security assignment is not registered with the Companies Registrar, it shall be deemed void with regard to the insolvency trustee of the grantor pursuant to the Insolvency Law and with regard to any third-party creditors.

3.2.8 Domestic Law Security Instruments

If an English or New York law-governed security assignment were to be taken in respect of an aircraft registered in Israel, such security should be registered in Israel through the filing of the applicable form.

As noted in **2.10 Cape Town Convention and Others**, the Convention on International Interests in Mobile Equipment has not been ratified in Israel.

Fees are payable with regard to pledge registration with the Israeli Pledges Registrar and notation of the pledge in the Aircraft Registry and on the aircraft Certificate of Registration.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

An English or New York law-governed security assignment and a domestic law security instrument may be registered domestically with the Pledges Registrar or Companies Registrar (depending on the nature of the borrower).

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests over aircraft and engines is generally recognised.

3.2.11 Effect of Changes in the Identity of Secured Parties

A change to the secured parties under a security assignment will generally require the parties to amend the registration of the security or to re-register the security. To the extent that re-registration is required, this may affect the preference date of the priority of the assigned security.

3.2.12 “Parallel Debt” Structures

“Parallel debt” structures may be utilised in Israel, provided that they are agreed contractually between the parties and do not result in “double counting” of debt – ie, that payment of a portion of the debt to the security trustee will automatically discharge the corresponding debt to the lender.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

Security assignment by itself should not create a permanent establishment of the secured parties in Israel.

3.2.14 Perfection of Domestic Law Mortgages

A domestic law charge or pledge over an aircraft or engine is perfected by its registration with the Companies Registrar (if the mortgagor is an Israeli company) or the Pledges Registrar (if the mortgagor is an Israeli individual, or a foreign individual or entity).

3.2.15 Differences Between Security Over Aircraft and Spare Engines

Security taken over aircraft and identifiable spare engines will typically take the same form of a fixed charge or pledge registered with the Companies Registrar or Pledges Registrar (as applicable). Additionally, in the case of a fixed charge or pledge over an aircraft, this security should also be notated in the register of the Registrar of Aircraft to prevent the deregistration of the aircraft without the consent of the holder of such pledge or charge. A charge or pledge over spare engines cannot be registered in the Israeli Registrar of Aircraft.

3.2.16 Form and Perfection of Security Over Bank Accounts

Security over a bank account will generally take the form of a floating charge over the account and any amounts received into the account in the future, unless the security is over a known deposit – in which case, a fixed charge may be taken.

Each of the above-mentioned forms of security should be perfected by its registration with the Companies Registrar or Pledges Registrar (as set out in **3.3.3 Register of Mortgages and Charges**).

Most banks limit the assignment of rights with regard to accounts; thus, it is preferable to provide notice to the bank and to receive its consent to any type of security created over the account. As banks have set-off rights, it is common practice to require the banks to expressly waive or subordinate certain of these rights in connection with the secured account.

3.3 Liens

3.3.1 Third-Party Liens

Israeli law provides certain third parties with the right to take a lien over an asset, such as a contractor that was given possession of an asset pursuant to the Contract for Services Law 1974 and an injured party pursuant to the Contract (Remedies for Breach of Contract) Law 1970.

According to the applicable Israeli law, repairer's costs and liens of a similar nature apply to the specific asset in possession of the contractor that was the provider to the contractor for the performance of the services and is limited to cover debt due and payable for the contracting transaction. The determination as to whether a contracting transaction covers only a specific work actually performed on the asset or series of transactions performed by the contractor is dependent upon the facts and circumstances of each case.

Fleet-wide liens are generally not recognised in Israel.

Pursuant to Israeli law, a lien expires once the asset is released from the possession of the applicable third-party creditor. Thus, where a third party wishes to enforce a lien, it should hold on to the detained asset until the full repayment of its debt. A holder of a possessory lien is deemed to be a secured creditor. If the debtor has entered into insolvency proceedings, however, the Insolvency Law provides that the court may instruct the holder of the lien to transfer the detained asset to the insolvency trustee and the secured debt shall be deemed to be an expense of the insolvency proceedings, which is granted priority over secured creditors.

3.3.2 Timeframe to Discharge a Lien or Mortgage

A pledge over an aircraft registered in the Pledges Registrar may be discharged on the day on which the request to discharge the pledge is submitted, if submitted physically at the offices of the Pledges Registrar or submitted electronically by the debtor. Otherwise, it will be discharged within three business days from the receipt of such a request.

A charge registered over an aircraft with the Companies Registrar is generally discharged within 14 busi-

ness days of the receipt by the Companies Registrar of the request to discharge.

3.3.3 Register of Mortgages and Charges

Mortgage interests may be registered:

- in the Companies Registrar, where they shall take the form of a charge, if the chargor is an Israeli company; or
- in the Pledges Registrar, where they shall take the form of a pledge, if the pledgor is a foreign entity or an Israeli individual or partnership.

Upon the registration of a charge or pledge over an aircraft, the interests of the mortgagee or security trustee may be noted in the Aircraft Register and endorsed upon the aircraft's certificate of registration.

If a pledge or charge is registered over an aircraft in the Aircraft Register, the Registrar will not permit any changes to the registration of the aircraft without one of the following:

- the consent of the holder of the charge or pledge;
- proof of the removal of the charge or pledge; or
- an order of the court or the registrar of the execution office expressly transferring or cancelling the charge or pledge.

The holder of a fixed charge or pledge will generally have priority over other creditors; however, certain limited creditors (eg, holders of possessory liens such as mechanics' liens) may be granted priority over a secured creditor. Upon the commencement of insolvency proceedings, the above-mentioned priority may further vary in accordance with the Insolvency Law and the rulings of the courts from time to time.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

See 2.4.6 Priority of Third Parties' Rights and 3.3.1 Third-Party Liens.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

To verify that an aircraft is free of encumbrances, it would be recommended that a potential purchaser search the Israeli Registrar of Aircraft, together with

the Pledges Registrar or the Companies Registrar (as applicable).

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

A loan or a guarantee is generally enforced against the borrower or guarantor through legal proceedings. The enforcement of a registered security assignment requires a court order or an order of the registrar of the execution office, depending on the nature of the secured property.

3.4.2 Security Trustees' Enforcement of Their Rights

As noted in **3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees**, the enforcement of a registered security assignment requires a court order or an order of the registrar of the execution office, depending on the nature of the secured property.

3.4.3 Application of Foreign Laws

Israeli courts will generally uphold a foreign governing law and submission to a foreign jurisdiction with regard to a finance or security document if such choice of law and jurisdiction were made in good faith.

The courts may refuse to apply such foreign choice of law and jurisdiction if their application would cause a result that the court determines to be incompatible with Israel's public policy. In certain cases, Israeli courts may also determine that certain mandatory legislation (eg, insolvency laws) is applicable to persons, actions or assets located in Israel, notwithstanding the expressed intention of the parties.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

For the recognition and enforcement of foreign judgments, see **2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards**.

For the recognition of foreign arbitral awards by Israeli courts, see **2.6.12 Enforcement of Foreign Arbitral Decisions**.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

See **2.6.2 Lessor Taking Possession of the Aircraft**.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

See **2.6.3 Specific Courts for Aviation Disputes** and **3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees**.

3.4.7 Summary Judgments or Other Relief

See **2.6.4 Summary Judgment or Other Relief**.

3.4.8 Judgments in Foreign Currencies

Israeli law does not preclude secured parties from obtaining a judgment in a foreign currency.

3.4.9 Taxes/Fees Payable

The enforcement of a security agreement or an aircraft mortgage by a secured party is subject to the payment of statutory court fees that may range from a nominal amount up to 2.5% of the secured debt. Additional amounts may need to be provided as collateral during the enforcement proceedings.

Tax implications of the enforcement of a security agreement or an aircraft charge depend on the facts and circumstances of the parties, the asset and the relevant transaction.

3.4.10 Other Relevant Issues

There are no other relevant issues that a lender should be aware of in relation to the enforcement of its rights in Israel.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are no other issues of note with regard to the domestic purchase, sale, lease or debt finance of aircraft.

4.2 Current Legislative Proposals

There are no significant proposals relating to the foregoing issues at present.

JAPAN



Law and Practice

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MORI HAMADA

1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

An aircraft sale and purchase agreement is subject to stamp duty if it is executed in Japan, while an engine sale agreement or a sale of an ownership interest in an entity is not subject to stamp duty. Stamp duty does not apply if the agreement is executed outside Japan, even if it is executed by a Japanese party.

1.1.2 Enforceability Against Domestic Parties

An aircraft sale and purchase agreement is not required to be translated, certified, notarised or legalised to be enforceable against a Japanese party.

However, if a party submits the agreement to the court as evidence, a Japanese translation must be attached.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Ownership of an aircraft or engine (including all installed parts) is transferred upon an agreement between a seller and a buyer. In order to perfect the transfer of an aircraft against a third party, registration in the aircraft register maintained by the Japan Civil Aviation Bureau (JCAB) of the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) is required. There is no equivalent registration system for independent engines. If ownership of an engine is transferred separately, transfer of possession of the engine or a registration of assignment of movables pursu-

ant to the Act on Special Provisions, etc, of the Civil Code Concerning the Perfection Requirements for the Assignment of Movables and Claims (Act No 104 of 12 June 1998) is required for perfection against a third party.

The sale of the ownership interest in an entity that owns an aircraft or engine is not effectively recognised as a sale of such aircraft or engine itself.

1.2.2 Sales Governed by English or New York Law

Under the Act on General Rules for Application of Law (Act No 78 of 21 June 2006), which is a statute of Japanese conflict of laws rules, the transfer of ownership of property is mandatorily governed by the law of the place where the property is located, while the parties can, in principle, freely choose the governing law of the transfer agreement itself. In the case of the aircraft, “the place where the property is located” is generally interpreted as “the jurisdiction where the aircraft is registered”. Therefore, if the subject aircraft is registered in Japan or the subject engine is located in Japan, that choice will be disregarded with respect to the transfer of ownership, even if the parties choose English law or New York law for the governing law of the sale agreement.

However, as explained in **1.2.1 Transferring Title**, the transfer is effective under Japanese law as long as the transfer of ownership is agreed between the parties. As a result, even if English law or New York law is chosen as the governing law of the sale and purchase agreement, the ownership can usually be validly transferred.

1.2.3 Enforceability Against Domestic Parties

A bill of sale is not required to be translated, certified, notarised or legalised to be enforceable against a Japanese party. However, in the case of a fresh registration of the imported aircraft in the aircraft registry, a notarised bill of sale must be submitted to the JCAB.

1.2.4 Registration, Filing and/or Consent From Government Entities

In order to register an aircraft with the JCAB, the bill of sale must be submitted as one of the supporting documents with the application for registration. The outline of the registration process for a newly imported aircraft is as follows.

- Applicant: owner.
- Standard processing period: one week from receipt of the application.
- Major supporting documents (an example for a simple case):
 - (a) application form;
 - (b) power of attorney (only in the case of an application by an agent);
 - (c) certificate of airworthiness;
 - (d) notarised bill of sale;
 - (e) certificate of non-registration;
 - (f) certificate of registered seal;
 - (g) document evidencing empty weight;
 - (h) receipt of registration tax (original);
 - (i) certificates of residence of more than two thirds of officers (if the applicant does not have any other aircraft registered in Japan);
 - (j) list of shareholders or annual securities report;
 - (k) certificates of residence of shareholders holding more than two thirds of voting rights; and
 - (l) other documents required by the JCAB.

No government applications or consents are required as a prerequisite to the execution and delivery of a bill of sale in relation to an aircraft or engine registered in Japan.

Please see **2.1.6 Licensing/Qualification of Lessors** regarding the requirements for the owner of an aircraft registered in Japan.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

Registration tax is payable upon registration of the transfer of an aircraft, while it does not apply to the sale of an engine or an ownership interest in an entity that owns an aircraft or engine. Please see **1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement** regarding stamp duty.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

In general, operating/wet/finance leases or leases concerning only engines or parts are permissible and recognised. Depending on the nature of parts, the independent legal title will be lost if the parts are attached to the aircraft and consist of the structure thereof, in which case the lessor will lose the ownership interests and thus the lease agreement will lose its base. See also **2.2.4 Risk of Title Annexation**.

2.1.2 Application of Foreign Laws

The Japanese conflict of laws rules allow parties to choose the governing law of the agreement as a matter of general principle. The parties to a lease may choose the governing law for a lease involving a domestic party or an asset situated in Japan. However, as an exception, under the Japanese conflict of laws rules, those provisions of the foreign law will not apply if the application thereof is against public policy.

2.1.3 Restrictions Concerning Payments in US Dollars

No material restrictions are imposed on domestic lessees making rent payments to foreign lessors in US dollars, but certain payments are restricted under the Foreign Exchange and Trade Act; see **2.1.4 Exchange Controls**.

2.1.4 Exchange Controls

In exceptional cases (eg, payment to a person residing in an area subject to international sanctions), cross-border payments are subject to governmental approval pursuant to exchange controls under the Foreign Exchange and Trade Act but, as a general rule, they are only subject to post facto reporting requirements.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

Stamp duty does not apply to a lease of an aircraft or an engine.

2.1.6 Licensing/Qualification of Lessors

It is not necessary for a lessor to be licensed or otherwise qualified in Japan to lease an aircraft to a Japanese lessee.

However, if the lessor is a foreign company, attention should be paid to the requirements for registration with the JCAB. In general, the aircraft operated by a Japanese lessee must be registered with the JCAB.

Under the Civil Aeronautics Act (Act No 231 of 15 July 1952), any aircraft owned by any person who falls under any of the following descriptions may not be eligible for registration:

- any person who does not have Japanese nationality;
- any foreign state or public entity or its equivalent in any foreign state;
- any juridical person or body established in accordance with the laws and regulations of any foreign state; and
- any juridical person of which the representative is any one of those listed in the preceding three items or of which one-third or more of the officers are those persons or one-third or more of voting rights are held by those persons.

It is usually impossible for a foreign lessor to meet the above requirements itself. As a practical solution, a foreign lessor often uses a special purpose company that meets the requirements as nominee title holder.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

There are no mandatory terms that are required to be in a lease (or ancillary documents thereto) governed by English or New York law that would not typically already be included.

2.2.2 Tax and Withholding Gross-Up Provisions

Tax and other withholding gross-up provisions are generally considered to be permissible and enforceable.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease can cover parts that are installed or replaced on an aircraft or engine after its execution if parties so agree under the lease agreement.

2.2.4 Risk of Title Annexation

The Civil Code (Act No 89 of 27 April 1896) has a concept of “accession” (*fugo*), whereby if two or more movable properties with different owners can no longer be separated without damage due to accession, the ownership of the composite thing belongs to the owner of the principal movable property. The same applies if excessive expense is required to separate the movables.

In most cases, aircraft engines installed on an aircraft can be easily separated without damage or excessive expense. Therefore, practitioners usually consider the risk of title annexation of the aircraft engines to be relatively low. In practice, an engine owner installs a nameplate on the engine to indicate its interest.

2.2.5 Recognition of the Concepts of Trust/Trustee

In Japan, the Trust Act (Act No 108 of 15 December 2006) provides for the concepts of a trust and a trustee.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

Legal ownership of an aircraft by an owner (lessor) may be registered in the aircraft register in Japan.

Upon registration of ownership in the aircraft register, the aircraft acquires Japanese nationality. In principle, the JCAB may not grant airworthiness certification to an aircraft that does not have Japanese nationality.

Registration of ownership of an aircraft serves as perfection against a third party as well (see 1.2.1 Transferring Title).

A trust beneficial interest of a registered aircraft may be registered, but it has no significant legal effect.

2.3.2 Registration If the Owner Is Different From the Operator

An aircraft must always be registered in the name of the owner in Japan (including cases where the owner is not the operator). It cannot be registered in the name of the operator if the operator is not the owner.

2.3.3 Aircraft/Engine-Specific Registers

There is no specific register for leases concerning aircraft or engines.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

In Japan, a lease of an aircraft cannot be registered in the aircraft register. In general, the lease of an aircraft is not subject to any consent from any governmental entity.

2.3.5 Requirements for a Lease to Be Valid and Registrable

A lease does not need to be in a specific form, translated, served, certified, notarised nor legalised to be valid. A lease cannot be registered (see 2.3.3 Aircraft/Engine-Specific Registers and 2.3.4 Registration of Leases With the Domestic Aircraft Registry).

2.3.6 Taxes/Duties Payable for Registering a Lease

A lease cannot be registered (see 2.3.3 Aircraft/Engine-Specific Registers and 2.3.4 Registration of Leases With the Domestic Aircraft Registry), and therefore will not be subject to registration tax.

2.3.7 Registration of Aircraft in Alternative Countries

In principle, aircraft based in Japan must be registered in Japan (except for foreign-registered aircraft operated by foreign airlines). There is no popular alternative country for registration.

2.3.8 Requirements for Documents Concerning Registration

See 1.2.4 Registration, Filing and/or Consent From Government Entities.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A lessee who leases an aircraft from a foreign lessor will be required to pay withholding tax under the domestic tax law of Japan. If the recipient of the rent is qualified to receive the rent without withholding tax under a double tax treaty, the lessee is not required to withhold tax.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor is not generally deemed to have a permanent establishment in Japan just because it is a party to a lease agreement with a Japanese lessee.

2.4.3 Engine Maintenance and Operations

Under the default rule of the Japanese Civil Code, the lessor of a lease is responsible for any necessary repairs. However, the parties may agree otherwise in the lease agreement, which is the case for most aircraft or engine leases.

2.4.4 Damage or Loss Caused by an Asset

Japanese law adopts the principle of negligence liability in principle. There are no express provisions imposing strict liability on aircraft or engine owners. Furthermore, considering the fact that, under aviation leasing practice, an airline lessee is solely responsible for the maintenance of the aircraft, practitioners generally consider that it is unlikely that a foreign aircraft or engine owner or lessor under a lease, or a financier financing the asset on lease, would be liable under the doctrine of strict liability as a result of damage or a loss caused by the asset. In practice, owners and financiers are included as additional insureds under third-party liability insurance.

2.4.5 Attachment by Creditors

Creditors are not entitled to attach assets that do not belong to the debtor. If the lessee's creditors attach an aircraft leased to the lessee but owned by another entity (ie, lessor as owner), the owner may bring a third-party action against the creditors to prevent such attachment.

2.4.6 Priority of Third Parties' Rights

Under Japanese law, assuming that the lease is an operating lease, the lessor's rights under the lease

(rent claims) are not considered to be claims secured by the aircraft or engine. Claims for rent are considered to be unsecured ordinary claims.

On the other hand, the lessor's interest in the aircraft or engine is not considered to be a security interest but is considered to be an absolute ownership interest.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

In general, it is not mandatory for owners or operators of aircraft registered in Japan to place insurance with domestic insurance companies.

From a regulatory perspective, the Insurance Business Act (Act No 105 of 7 June 1995) prohibits a foreign insurer without a branch office in Japan from executing an insurance contract pertaining to aircraft with Japanese nationality in principle. However, an insurance contract that covers Japanese registered aircraft used for commercial flights, cargo transported internationally by such aircraft and obligations arising from them is an exception.

If the insurance with respect to the aircraft in question does not fall under such an exception, it would not be practical for the owner or operator to find a foreign insurance company that would underwrite such insurance.

2.5.2 Mandatory Insurance Coverage Requirements

In order to operate air transport services or aerial work services in Japan, a licence from the MLIT is necessary, pursuant to the Civil Aeronautics Act. The MLIT requires applicants for such licences to ensure that an appropriate insurance policy is in place to cover the damages in the event of an aviation accident.

2.5.3 Placement of Insurance Outside of Jurisdiction

A reinsurance contract is also an exception to the restriction explained in **2.5.1 Requirement to Engage Domestic Insurance Companies**, so reinsurance can be placed outside of Japan up to 100% coverage.

2.5.4 Enforceability of “Cut-Through” Clauses

As long as the parties involved agree appropriately, a cut-through clause in insurance documents is enforceable.

2.5.5 Assignment of Insurance/Reinsurance

An assignment of claims under an insurance policy is generally permitted. However, the assignment of claims under a liability insurance policy is prohibited by the Insurance Act (Act No 56 of 6 June 2008).

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

In principle, a lessor may terminate the lease in accordance with the provisions of the lease agreement. However, there is a possibility that a court may, in its discretion, limit such lessor's right of termination depending on the circumstances, such as termination based on the lessee's default in the event of a minor breach of the lease agreement (eg, a single failure to pay rent) or termination based on a petition for an insolvency proceeding.

There are no material restrictions on the re-export of the aircraft or sale of the aircraft following the termination of the lease.

The aircraft does not have to be in Japan at the time of termination or sale.

2.6.2 Lessor Taking Possession of the Aircraft

If a lease is validly terminated, the lessor has a right to take physical possession of the aircraft without the lessee's consent. However, since self-help is not permitted under Japanese law, the lessor must obtain a court order or judgment if the lessee does not surrender the aircraft to the lessor.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts competent to decide aviation disputes.

2.6.4 Summary Judgment or Other Relief

A lessor seeking a judgment to order the lessee to deliver the aircraft to the lessor may apply to the court for an order of provisional disposition prohibiting the transfer of possession. The lessor must post a bond in the amount designated by the court. In general (not

aircraft-specific), it usually takes a few days after the application to obtain an order of provisional disposition prohibiting the transfer of possession.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

In general, a Japanese court will uphold:

- a foreign law as the governing law of an aircraft lease (see **2.1.2 Application of Foreign Laws**);
- submission to the jurisdiction of the foreign courts by the parties as far as the matter is not subject to the exclusive jurisdiction of Japan, and the foreign court has jurisdiction over such dispute under the laws of the jurisdiction where the foreign court is located; and
- a waiver of immunity by the parties to such lease.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Foreign Judgments

A judgment of a foreign court can be enforced in a court of Japan, without further consideration of the merits of the case, if all of the following conditions are satisfied:

- the foreign judgment concerned is duly obtained and is final and conclusive;
- the jurisdiction of the foreign court is recognised in light of Japanese laws;
- the service of process, accompanied by an appropriate Japanese translation, has been duly effected, in light of Japanese laws, on the defeated defendant other than by public notice, or the defeated defendant has appeared in the relevant proceedings without receiving service thereof;
- the foreign judgment is not contrary to public policy or the good morals doctrine in Japan; and
- judgments of Japanese courts receive reciprocal treatment in the courts of the foreign jurisdiction concerned.

Foreign Arbitral Awards

Japan has ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), and a foreign arbitral award can be enforced in a court of Japan without further consideration of the merits of the case, unless certain

conditions set forth in the Arbitration Act (Act No 138 of 1 August 2003) are met, which are substantially the same as those set forth in the New York Convention.

2.6.7 Judgments in Foreign Currencies

There are several precedents of judgments obtained in a foreign currency. However, there is a possibility that the debtor may be allowed to pay in Japanese yen if it so wishes.

2.6.8 Limitations on Lessors' Actions Following Termination

There are basically no limitations on a lessor's ability to recover default interest or to charge additional rent following termination of the lease upon default, as long as it is not against public policy.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

In order to judicially enforce the lease and recover possession of the aircraft, the lessor must first obtain a court judgment ordering the lessee to return the aircraft to the lessor and then apply to the court for enforcement of that judgment.

The lessor must pay fees to the court for such proceedings.

The lessor must also deposit with the court in advance the costs to be incurred by the court in enforcing the judgment, although these costs may be reimbursed by the lessee. In addition to the court fees, the lessor must also bear the legal fees of their legal counsel.

2.6.10 Mandatory Notice Periods

There is no mandatory notice period for terminating an aircraft lease under Japanese statutes.

2.6.11 Lessees' Entitlement to Claim Immunity

As far as a commercial lease is concerned, an aircraft lessee is unlikely to be entitled to sovereign immunity from the civil jurisdiction of Japan. Sovereign immunity can be waived by written contract.

2.6.12 Enforcement of Foreign Arbitral Decisions

See **2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards**.

2.6.13 Other Relevant Issues

There are no other material issues.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Under Japanese law, it is possible to contractually replace the parties to a contract, which can be achieved through the assignment of contractual status (and the assignment of claims and assumption of obligations).

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Although Japanese conflict of laws rules applicable to the governing law of the assignment of contractual status are not clear, it would arguably be safer if the assignment or novation is made in compliance with the governing law of the lease agreement being assigned or novated.

2.7.3 Enforceability of Lease Assignments/Novations

See 1.1.2 Enforceability Against Domestic Parties.

2.7.4 Filing/Registration of Lease Assignments/Novations

There is no registration system for leases and their assignment or novation. However, if the owner of the aircraft is changed (which occurs at the same time as a change of lessor), such a change must be registered. See also 1.2.4 Registration, Filing and/or Consent From Government Entities and 2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register regarding the registration of ownership.

2.7.5 Taxes/Duties Payable on Assignment/Novation

There are no taxes/duties payable in respect of the assignment or novation of a lease agreement.

2.7.6 Recognition of Transfer of Ownership Interests

A transfer of the ownership interest of the entity (or the beneficial interest in the trust) owning an aircraft (with the legal title to the asset remaining with that entity) will be treated as a transfer of the ownership interest

or the trust beneficial interest, not as a transfer of the aircraft itself.

However, as explained in 2.1.6 Licensing/Qualification of Lessors, to register an aircraft in Japan, the owner must not meet certain characteristics (in particular, one-third of the owner's voting rights held by foreigners). If the transfer of ownership results in the requirements no longer being met, the registration will be deleted.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

The owner of an aircraft registered in Japan can apply to the JCAB for deregistration.

2.8.2 Lessee's/Operator's Consent

Theoretically, an aircraft owner can apply for deregistration without the lessee's or operator's consent.

2.8.3 Required Documentation

The following documents are typically required in an application for deregistration by the JCAB:

- application for deregistration;
- power of attorney (only in the case of an application by an agent);
- certificate of registered seal;
- certificate of residence of the owner (only in the case of individual losing Japanese nationality);
- aircraft registration certificate; and
- request for telegram of aircraft deregistration certificate (if required for registration in a foreign jurisdiction).

2.8.4 Duration of Deregistration Process

The standard processing period is one week from receipt of the application.

2.8.5 Aviation Authority's Assurances

The JCAB does not provide advance assurances to an aircraft owner or mortgagee as to the prompt deregistration of the aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

Although the amount is not large, registration tax is payable for the deregistration of the aircraft.

2.8.7 Deregistration Power of Attorney

The JCAB has prepared and made public a form of power of attorney for deregistration applications on its website. Such power of attorney is supposed to be affixed with the registered seal of the owner of the aircraft. The language of the form is Japanese. Such power of attorney cannot be registered.

A deregistration power of attorney that is not prepared based on the form may be accepted by the JCAB. However, it must cover the descriptions in the form and must be accompanied by a Japanese translation.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

When applying to the JCAB for the deregistration of an aircraft, a certificate of registered seal of the owner, issued within three months, is required as one of the supporting documents.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

The form prepared by the JCAB does not have a governing law provision.

2.8.10 Revocation of a Deregistration Power of Attorney

Even if a deregistration power of attorney is expressed to be irrevocable, the grantor may be allowed to revoke it if there is a compelling reason.

2.8.11 Owner's/Lessor's Consent

An owner (mortgagor or lessor) can export the aircraft without the lessee's consent. A mortgagor may be allowed to export the aircraft without the owner's or lessor's consent.

2.8.12 Aircraft Export Permits/Licences

Exports are minimally regulated from the point of view of maintaining international peace and security under the Foreign Exchange and Foreign Trade Act (Act No 228 of 1 December 1949). In certain circumstances, an export permission from the Minister of Economy, Trade and Industry may be required to export an aircraft.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

There are no significant fees to be charged in respect of the export of an aircraft.

2.8.14 Practical Issues Related to Deregistration of Aircraft

There are no other material issues.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

There are three main insolvency proceedings under Japanese law:

- a bankruptcy proceeding under the Bankruptcy Act (Act No 75 of 2 June 2004);
- a corporate reorganisation proceeding under the Corporate Reorganisation Act (Act No 154 of 13 December 2002); and
- a civil rehabilitation proceeding under the Civil Rehabilitation Act (Act No 225 of 22 December 1999).

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

A bankruptcy proceeding is a liquidation type of insolvency proceeding, while a corporate reorganisation proceeding and a civil rehabilitation proceeding are restructuring types of insolvency proceedings.

A corporate reorganisation proceeding is only available to a stock company (*kabushiki-kaisha*), which is the most common form of business company in Japan.

A civil rehabilitation proceeding is a type of debtor-in-possession (DIP) proceeding. In bankruptcy proceedings and civil rehabilitation proceedings, the enforcement of security interests by secured creditors is not prevented. On the other hand, in a corporate reorganisation proceeding, secured creditors may not freely enforce their secured interest outside the proceeding.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

The Bankruptcy Act provides that, if foreign insolvency proceedings are taken against the bankrupt, the bankruptcy trustee may request the foreign trustee to co-operate and provide any necessary information for the proper implementation of the bankruptcy proceeding, and the bankruptcy trustee shall endeavour to do the same for the proper implementation of the foreign insolvency proceeding. There are similar provisions in the Corporate Reorganisation Act and the Civil Rehabilitation Act.

Under the Act on Recognition of and Assistance for Foreign Insolvency Proceedings, which is based on the UNCITRAL Model Law on Cross-Border Insolvency, a foreign trustee may file a petition with a court for recognition of foreign insolvency proceedings. Upon such filing, the court may issue an order of recognition of the foreign insolvency proceeding and order a stay on compulsory execution or other procedures on the debtor's property, as necessary.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

It is the owner of an aircraft, not the lessee, who applies for deregistration under the Japanese aircraft registration system. Therefore, a deregistration power of attorney from a lessee is irrelevant. Insolvency proceedings with respect to a lessee do not have any effect on the validity of the deregistration power of attorney from the owner.

If the owner becomes subject to an order commencing a bankruptcy proceeding, the deregistration power of attorney will be automatically terminated. Unlike a bankruptcy proceeding, the deregistration power of attorney will not be automatically terminated even if the owner becomes subject to an order commencing a corporate reorganisation proceeding or civil rehabilitation proceeding.

2.9.5 Other Effects of a Lessee's Insolvency

In the case of an operating lease, if an insolvency proceeding commences with respect to the lessee, the trustee (or the lessee in the case of a civil rehabilitation proceeding) is given an option to terminate or

continue the lease. If the termination option is chosen, the lease will be terminated.

The lessor may also terminate the lease if they have already been entitled to terminate the lease pursuant to the provisions of the lease agreement before the commencement of the insolvency proceeding, or if the lessee does not pay the rent accrued after the commencement of the insolvency proceeding. However, the lessor may not terminate the lease due to non-payment of the insolvency claims. If the lease is validly terminated, the lessor may repossess the aircraft outside the insolvency proceedings.

The aircraft will not be deemed part of the lessee's property.

In the case of a finance lease, the lessor is treated as a secured creditor with a security interest in the aircraft.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

As mentioned in 2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership, in a corporate reorganisation proceeding, secured creditors are prevented from enforcing their security interests to collect their claims, although the secured creditors are given preferential treatment in the reorganisation plan.

In a civil rehabilitation proceeding, the debtor may apply to the court for an order to suspend the enforcement procedure of the security interests for a reasonable period of time. In addition, the debtor subject to a civil rehabilitation proceeding may file a petition to the court for permission to have security interests that exist on its assets extinguished, by paying to the court the amount of money equivalent to the value of the assets if the relevant assets are indispensable for the continuation of the business of the debtor.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

After the commencement of an insolvency proceeding, the legal procedures (such as compulsory execution) for the collection of insolvency claims cannot generally be exercised. However, in a bankruptcy proceeding and a civil rehabilitation proceeding, the

secured creditors are not subject to such restrictions, in principle. There is no limitation on the period for such restrictions.

However, please note that, in the case of a lessee's insolvency, since the aircraft is an asset of the owner rather than the lessee, the owner's lender may enforce its mortgage (as long as an enforcement event under the mortgage exists) irrespective of the lessee's insolvency proceeding.

2.9.8 Liquidation of Domestic Lessees

In general, the lessee (as debtor) or its creditors, including the lessor, may make a petition with the court for the commencement of insolvency proceedings. Upon the petition, the court will make an order of commencement of insolvency proceedings if it finds the grounds for such proceedings.

2.9.9 Ipso Facto Defaults

The validity of an ipso facto termination clause (ie, a clause providing for automatic termination, or giving the lessor the right to terminate the lease, upon a petition for insolvency proceedings) is likely to be denied by the court, considering court precedents.

2.9.10 Impact of Domestic Lessees' Winding-Up

If a Japanese lessee becomes subject to an insolvency proceeding, the effect will be as follows.

Aircraft

Unless the lease is terminated, the lessee may continue to use the aircraft.

Lease Rentals

Unpaid lease rentals accrued before the commencement of the insolvency proceeding may only be paid in accordance with the insolvency plan (usually with material discount). The lease rentals accrued after the commencement of the insolvency proceeding may be paid from the insolvency estate at any time without going through insolvency proceedings.

Lease Security Deposit

The lease security deposit held by the lessor is not affected.

Maintenance Reserves

The treatment of the payment obligations of the lessee with respect to the maintenance reserve (supplemental rent) is the same as that of the lease rentals. The treatment of the amount deposited to the lessor as maintenance reserve is the same as that of the lease security deposit.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

Japan has not signed the Convention on International Interests in Mobile Equipment and the related Protocol on Matters specific to Aircraft Equipment.

2.10.2 Declarations Made Concerning Conventions

See 2.10.1 Conventions in Force.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

See 2.10.1 Conventions in Force.

2.10.4 Enforcement of Conventions

See 2.10.1 Conventions in Force.

2.10.5 Other Conventions

Japan is not a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft or the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

In principle, registration under the Money Lending Business Act (Act No 32 of 13 May 1983) is required to provide loans in Japan, unless otherwise specifically permitted under other laws.

There are no material restrictions on borrowers using the loan proceeds.

3.1.2 Effect of Exchange Controls or Government Consents

There are no exchange controls or government consents that would be material to any financing or repa-

triation of realisation proceeds under a loan, guarantee or security document; see **2.1.4 Exchange Controls**.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Downstream, upstream and cross-stream guarantees in favour of lenders are permitted.

No consideration, corporate benefit or registration is required for a guarantee to be valid. However, in providing the guarantee, directors need to fulfil their duty of care. If there is not a 100% capital relationship between the guarantor and the obligor, a corporate approval of the conflict of interest transaction may be required, depending on the circumstances.

3.1.5 Lenders' Share in Security Over Domestic SPVs

As a step-in right, it is advisable for a lender to have a security interest over the shares of the Japanese special purpose company that owns the financed aircraft. A pledge of shares (*kabushiki shichi ken*) is recognised.

3.1.6 Negative Pledges

A negative pledge is generally recognised.

3.1.7 Intercreditor Arrangements

No material restrictions or requirements are imposed on intercreditor arrangements.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent such as the facility agent under a syndicated loan are recognised.

3.1.9 Debt Subordination

In practice, the following two methods of debt subordination are often used.

Condition Method

An agreement between the subordinated creditor and the debtor to repay the subordinated creditor on

the condition that the preferential claims have been repaid.

Consensually Subordinated Insolvency Claim

An agreement between the subordinated creditor and the debtor that, in the event of the commencement of insolvency proceedings, the claim will be treated as a consensually subordinated insolvency claim in such proceedings, pursuant to the insolvency laws.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of an outstanding debt under an English or New York law-governed loan is permissible and recognised, provided that such transfer or assignment is valid under English law or New York law.

3.1.11 Usury/Interest Limitation Laws

The Interest Rate Restriction Act (Act No 100 of 15 May 1954) provides for a limitation on maximum interest rates. The maximum annual interest rates permitted under the Interest Rate Restriction Act are as follows, and an agreement is void and unenforceable in respect of any amount in excess thereof:

- if the principal amount is less than JPY100,000, the interest rate is 20%;
- if the principal amount is between JPY100,000 and JPY999,999, the interest rate is 18%; and
- if the principal amount is JPY1 million or more, the interest rate is 15%.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

A typical security package for an aircraft financing transaction for a Japan-registered aircraft is as follows:

- aircraft mortgage under the Aircraft Mortgage Act (Act No 66 of 1953);
- security assignment (lease receivables, insurance claims, warranties, etc);
- account pledge;
- share pledge (if the owner is a special purpose corporation); and
- parent undertaking (if the owner is a special purpose corporation).

3.2.2 Types of Security Not Available

It is not possible to create an aircraft mortgage over the engines only, although an aircraft mortgage on an aircraft covers the engines installed in that aircraft. See also **3.2.15 Differences Between Security Over Aircraft and Spare Engines**.

A pledge cannot be created over an aircraft registered in Japan.

3.2.3 Trust/Trustee Concepts

The concept of a trust and the role of the security trustee are recognised under the Japanese Trust Act, although security trusts are not often used in Japan.

However, the validity of the security trust structure created under foreign law is not necessarily clear in Japan. In this regard, in a cross-border aircraft financing transaction involving a security trust structure established under foreign law, a security interest governed by Japanese law is sometimes created to secure the parallel debt, in order to avoid using the foreign security trust structure.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

A borrower can assign its rights under an aircraft lease or insurance to a security trustee, pursuant to a security assignment. Although it is possible for the owner to assign the right to the aircraft (ownership) to a security trustee pursuant to a security assignment, it is not practically used as the amount of registration tax is considerably high.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It is possible to assign only the rights, without also assigning the attendant obligations of the lessor under an aircraft lease.

3.2.6 Choice of Foreign Law Security Assignment

Regardless of the parties' choice of governing law, under the Japanese conflict of laws rules, the effect of an assignment of claims vis-à-vis the obligor or a third party is mandatorily governed by the law applicable to the claims assigned.

Guarantee

The parties can choose the governing law of a guarantee, so it may be governed by English or New York law.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

Under Japanese law, a security assignment can be created by an agreement between the assignor and the assignee. It is perfected by:

- a notice to the obligor with a certified date (*kakutei hidzuke*);
- the consent of the obligor with a certified date (*kakutei hidzuke*); or
- registration in the claim assignment registration file maintained by the Legal Affairs Bureau (in the case of monetary claims, and this perfection is valid only vis-à-vis a third party, not an obligor).

In practice, the consent of the obligor is obtained, and the parties have it stamped by a public notary with a certified date.

Failure to perfect results in the assignee not being able to assert its security interest against a third party.

A security assignment is not required to be translated, certified, notarised or legalised to be enforceable against a Japanese party. However, if a party submits the agreement to the court as evidence, a Japanese translation must be attached.

3.2.8 Domestic Law Security Instruments

If the claims to be assigned under a security assignment include claims governed by Japanese law, the obligor's consent with a certified date should be obtained in relation to such claim assignment; see **3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments**. Obtaining a certified date stamp from a notary public costs JPY700 per document.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

For the purpose of perfection, if the governing law of a claim is foreign law, the security assignment cannot be registered, but the security assignment for an engine located in a foreign jurisdiction can be registered pur-

suant to the Act on Special Provisions, etc, of the Civil Code Concerning the Perfection Requirements for the Assignment of Movables and Claims.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests over an aircraft and engines is recognised.

3.2.11 Effect of Changes in the Identity of Secured Parties

Where a security trust structure (or a parallel debt structure) is adopted, the security interests continue to be validly held by the security trustee even if there is a change of lender (due to an assignment of its loan claims). Where a security trust structure is not adopted, if a lender transfers its loan claims, the procedures relating to the transfer of the security interest must also be carried out.

3.2.12 “Parallel Debt” Structures

A parallel debt structure is possible under Japanese law, but it is rarely used in domestic transactions; see also 3.2.3 Trust/Trustee Concepts.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A foreign lessor is not generally deemed to have a permanent establishment in Japan just because it is a party to a security assignment.

3.2.14 Perfection of Domestic Law Mortgages

An aircraft mortgage under Japanese law is perfected upon registration of the aircraft mortgage in the aircraft register, pursuant to the Aircraft Mortgage Act.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

It is not possible to create an aircraft mortgage over the engines only. In practice, instead of an aircraft mortgage, a security assignment (*joto-tanpo*) is available for engines. Please see 3.2.14 Perfection of Domestic Law Mortgages regarding perfection.

A security assignment over an engine is perfected upon delivery or a registration of assignment of movables pursuant to the Act on Special Provisions, etc,

of the Civil Code Concerning the Perfection Requirements for the Assignment of Movables and Claim.

3.2.16 Form and Perfection of Security Over Bank Accounts

A pledge is usually used to take security over a bank account. In practice, an account pledge is perfected by consent from the account bank with a certified date stamped by a notary public.

3.3 Liens

3.3.1 Third-Party Liens

Unlike ships, there are no specific statutory liens (*sakidori tokken*) for aircraft or engines under Japanese law. The ordinary statutory liens for movable property apply to aircraft or engines, but a third party cannot register these liens over an aircraft or engine. If there are competing statutory liens on the aircraft that is subject to the aircraft mortgage, the priority of the aircraft mortgage is equal to the first priority statutory liens under the Civil Code. The first priority statutory liens under the Japanese Civil Code are statutory liens for leases of immovables, lodging at hotels and transportation, which are unlikely to arise on the aircraft.

3.3.2 Timeframe to Discharge a Lien or Mortgage

A statutory lien or aircraft mortgage is extinguished when the relevant secured obligations are paid in full. The standard period of time for processing the deregistration of an aircraft mortgage is one week from the date of application.

3.3.3 Register of Mortgages and Charges

An aircraft mortgage can be registered in the aircraft registry. Registration of an aircraft mortgage operates as perfection against a third party.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

Pursuant to the Commercial Code (Act No 48 of 9 March 1899), if performance is due on a claim arising between merchants from an action that constitutes a commercial transaction for both parties, a creditor may retain an object belonging to the debtor that the creditor has gained possession of in the commercial transaction with the debtor, until the claim is satisfied. Please see 3.3.1 Third-Party Liens regarding non-consensual preferential liens.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser can search the aircraft register to verify that an aircraft is free of aircraft mortgages. Please note that other encumbrances do not appear on the aircraft registry, and that the accuracy of the descriptions in the aircraft registry is not guaranteed.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

There are two major methods for a creditor to enforce a security assignment:

- the creditor obtains the claims definitively and applies the value of the claims to the secured obligations; or
- the creditor sells the claims to a third party and applies the proceeds to the secured obligations.

These processes can be done without the involvement of the court.

In order to enforce (collect) the loan or guarantee, the creditor must first obtain a court judgment and apply to the court for an attachment of the debtor's assets.

3.4.2 Security Trustees' Enforcement of Their Rights

If, under a security assignment, security is granted to a security trustee by a lessor in respect of its rights under an aircraft lease, that security trustee can enforce its rights under the security assignment pursuant to a notice and consent (with certified date) executed by that lessor and the relevant lessee, respectively, in connection with such security assignment.

3.4.3 Application of Foreign Laws

See 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards.

However, the following security interests are subject to mandatory Japanese conflict of laws rules:

- security interest: governing law;
- aircraft mortgage: the laws of the jurisdiction where the aircraft is registered;

- security assignment of claims: the governing law of the claims;
- share pledge: the governing law of the issuer; and
- account pledge: the governing law of the account.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

See 2.6.6 Domestic Court's Recognition of Foreign Judgments/Awards.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

A Japanese aircraft mortgage does not entitle the mortgagee to take physical possession of the aircraft. If the secured party acquires the ownership of the aircraft as a result of the enforcement of the aircraft mortgage, the secured party may take physical possession of the aircraft without the consent of the lessee. However, if the lessee does not voluntarily surrender the possession of the aircraft to the secured party, the secured party must obtain a court order or judgment.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

The district court having jurisdiction over the location of the aircraft at the time of issuance of a commencement order for enforcement of the aircraft mortgage has jurisdiction as the execution court.

3.4.7 Summary Judgments or Other Relief

A creditor is generally entitled to provisional relief under the Civil Provisional Remedies Act, which is designed to cover the period before obtaining a court judgment necessary for enforcement. Since a secured creditor can judicially enforce its security interest without a court judgment, provisional relief is not usually used.

There is a special provisional relief with respect to the enforcement of aircraft mortgages. An aircraft mortgagee is entitled to apply to the court for a provisional order to deliver the aircraft registration certificate, which is necessary for flight, before the petition for enforcement of the aircraft mortgage, to prevent the aircraft from flying away from the current location. Such provisional relief does not require a bond.

3.4.8 Judgments in Foreign Currencies

See 2.6.7 Judgments in Foreign Currencies.

3.4.9 Taxes/Fees Payable

A borrower who pays interest to a foreign lender will be required to pay withholding tax under the domestic tax law of Japan. Although registration tax will apply to a registration of a security interest in an aircraft, it is usually borne by the borrower.

3.4.10 Other Relevant Issues

There are no other material issues.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are no other material issues.

4.2 Current Legislative Proposals

In May 2025, the Diet passed a bill titled the “Act on Security Assignment Agreement and Title Retention Agreement” (provisional translation), which sets out rules regarding security assignments over movables and receivables. This law is expected to come into effect within two years and six months from the date of promulgation.

Until now, there have been no explicit statutory provisions governing security assignments of movables and receivables or title retention, and the practical operation and legal relationships arising from such security interests have been left to interpretation. The purpose of this law is to enhance legal certainty and predictability in commercial transactions by clearly defining, at the statutory level, the nature of the security interests created by these agreements, as well as the scope of secured obligations, the order of priority and the methods for enforcement.

In addition to the methods for enforcement described in 3.4 Enforcement, the law clarifies that direct collection is permitted for security assignments over receivables, and that enforcement by judicial auction through the court is available for security assignments over movables (including engines).

Trends and Developments

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Mori Hamada & Matsumoto has an aviation practice team mainly based in Tokyo and Bangkok, as well as in other East Asian offices. The team advises leasing companies, banks, equity investors and airlines on all aspects of aircraft transactions, including financial compliance, regulatory, disputes and tax matters. It advises on numerous JOL/JOLCO formation transactions each year. In addition to a strong corporate and finance practice, the firm also has strength in

tax, litigation and bankruptcy matters. For example, it has represented investors in aircraft leasing transactions and taken action for the cancellation of tax reassessment, which was upheld by the courts based on the firm's arguments. Other highlights include the turnaround financing transaction of Japan Airlines in its corporate rehabilitation proceedings, which was awarded the Structured Finance Deal of the Year in 2012 at the ALB Japan Law Awards.

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Taro Omoto has a practice covering various financing transactions and financial regulations, focusing particularly on complicated financial products such as real estate and aircraft-backed finance, aviation

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Unique Features of Japanese Aviation Finance and Leases

Lessors

One of the unique characteristics of Japanese aviation lessors is that many are small to medium-sized business enterprises engaging in various businesses (or their subsidiary special purpose companies, or SPCs) rather than large specialised leasing companies. These business enterprises purchase and lease aircraft typically for tax purposes, among others; for example, lessors can utilise the depreciation cost to partially offset the profits they earn from their main business. Adding aviation leasing to the list of businesses they engage in may enable lessor companies to enjoy preferable tax status. These lessors often obtain debt financing to partially finance the purchase of aircraft.

Against this backdrop, some small to medium-sized business enterprises have a need for securitised products to decrease the size of their investment lots. In this regard, TK and NK structures, which are unique Japanese leasing structures, are widely utilised.

- TK stands for *tokumei kumiai*, where several investors (which are business enterprises) make equity contributions to a business operator pursuant to a *tokumei kumiai* agreement (legally speaking, not equity but a kind of debt). The business operators are typically wholly owned subsidiary SPCs of Japanese leasing companies. They utilise the funds contributed by investors, together with limited recourse loans from lenders, to purchase and lease aircraft.

- NK stands for *nin-i kumiai*, where several investors (which are business enterprises) and a general partner (which is typically a wholly owned subsidiary SPC of a Japanese leasing company) form a partnership pursuant to a *nin-i kumiai* agreement. The partnership utilises the funds contributed by the investors, together with limited recourse loans from lenders, to purchase and lease the aircraft. An NK structure is used particularly for leases to US airlines, for example, because of the US–Japan tax treaty.

A TK/NK fund is usually formed for a particular aircraft; funds with a portfolio of multiple aircraft are not common in Japan. Investors in TK/NK funds can enjoy tax benefits since they can recognise depreciation costs and reduce taxable income to a certain extent, although recognition is significantly restricted by tax laws, compared to investors who directly own the aircraft. Usually, more than half of the purchase price is funded by a limited recourse loan, so TK/NK investors can enjoy the leverage effect.

From a regulatory point of view, TK interests and NK interests are treated as securities for the purpose of Japanese securities regulation. More precisely, Japanese securities regulation classifies securities into two types (type 1 and type 2). TK interests and NK interests are type 2 securities, which are less liquid securities.

Being treated as securities, sales of TK interests and NK interests are regulated under the Financial Instruments and Exchange Act. Generally speaking, the

entity selling these interests – which are typically the leasing companies that are the parent companies of the TK/NK SPCs – must be registered as type 2 financial instruments business operators, while the entity selling the aircraft is not regulated.

In addition to TK/NK structures, trust structures are also used, where the aircraft is held by a trustee, and investors invest in the trust beneficial interest of the aircraft. Trust beneficial interests are also classified as type 2 securities for the purpose of Japanese securities regulation.

Lease structure

TK and NK funds are classified into Japanese Operating Leases (JOLs) and Japanese Operating Leases with Call Option (JOLCOs), based on the lease structure. A JOL is a straightforward operating lease contract, while a JOLCO is an operating lease contract where the lessee has the option to purchase the aircraft at a particular time during the lease term at the expected fair value at the time of exercise. The lease term under a JOLCO tends to be longer than that under a JOL.

Contractually speaking, there is no guarantee that the lessee will exercise the option, but parties usually expect that lessees are likely to exercise the option, and anticipate a certain level of cash flow based on that expectation. As such, economically speaking, a JOLCO is more similar to a finance lease, even if it is classified as an operating lease under Japanese accounting and tax rules.

Lessee

Japan adopts an owner registry system (and a system for registering mortgages).

Foreign-owned aircraft cannot be registered. However, Japanese registration is generally required if the aircraft is operated in Japan. Therefore, if a foreign owner wants to lease an aircraft to a Japanese lessee, a special arrangement is used where the owner sells the aircraft to a Japanese SPC owned by a Japanese company, and then buys back the aircraft and leases it. Nominal instalment payments for the buyback will not be paid until the aircraft is deregistered from Japan; thus, legal title continues to be vested in the

Japanese SPC titleholder, which gives the basis for Japanese registration.

Recent Trends

Aviation finance civil law framework

There are no major proposals relating specifically to aviation finance. Amendments to the general legal framework of security interests had been discussed, and the relevant act was passed at the Diet in May 2025, setting forth rules regarding security assignments over movables and receivables. This law is expected to come into effect within two years and six months from the date of promulgation.

Aviation finance regulatory framework

As explained above, TK and NK interests are treated as securities for the purpose of securities regulation, and sales thereof are regulated under Japanese securities regulations. Generally speaking, entities that offer these interests must be registered as type 2 financial instruments business operators and must comply with various regulations on sales activities.

In this regard, the relevant regulations were amended in 2023, with the new law imposing the obligation of “taking into account the best interests of customers” in the conduct of business. Furthermore, such entities are currently required to deliver statutory explanatory documents when they sell securities to their customers (with some exceptions). The new law has changed the framework, and the duty to deliver such statutory document has been changed to the duty to provide relevant information, which can be achieved through electromagnetic methods as well. The new rules took effect in April 2025.

In addition, more Japanese aviation leasing companies register as asset managers (more precisely, as financial instruments business operators conducting an asset management business). The asset management of funds investing in aircraft is not, in principle, a regulated business under Japanese securities regulations, but if the investment is made through a trust structure (which is typically used for leases to US lessees), the funds are treated as funds investing in securities rather than physical assets since trust beneficial interests are treated as securities. In order to formulate and manage such funds, an asset manager

licence is required unless certain licensing exemptions are available, such as those for funds offered only to professional investors.

Financer

As the COVID-19 pandemic has ended, interest and demand in aviation financing and leasing is becoming stronger again among Japanese investors and lenders. However, the recent significantly weakened Japanese yen and inflation are making it more difficult for Japanese investors to purchase aircraft because the aircraft price is becoming significantly high when considered in terms of the yen.

Against this backdrop, engine leases are starting to draw more attention from investors and banks. Compared to aircraft, engines have a number of unique features, such as limited availability of registration. Under the Cape Town Convention, engines can be registered independently from aircraft, but there is no registration system for engines in many jurisdictions, including Japan, which has not signed the Cape Town Convention. Japanese investors and lenders seem to be in the process of educating themselves on the unique features of engines.

Another trend is stronger interest in the JOL structure. Many sellers and investors prefer the JOLCO structure, since they consider it to be less risky than the JOL structure. For JOLCO transactions, investors have high regard for the credit of the lessee, since the lease term is generally longer, and they expect that the lessee will exercise the option. For that reason, in the case of JOLCOs, transactions with top-tier airlines tend to be preferred, but the profitability of JOLCOs for investors tends to be relatively low, and the supply of JOLCOs is limited as well. As such, more leasing companies have started to become interested in providing JOL products to investors.

With respect to lenders, in addition to foreign banks and city banks that have been active in this field for a long time, more regional banks are showing interest in the aviation finance sector because of recent relatively weak demand for funds from ordinary business corporations, particularly in the countryside. These new entrant banks typically participate in a syndicated loan

structure – for example, through a secondary transaction.

Lessee

After the COVID-19 pandemic, the performance of Japanese legacy carriers has recovered dramatically. For example, the operating revenue of ANA Holdings for the fiscal year ending March 2025 was JPY2,261 billion, which is a record high, and the net profit was JPY153 billion, which was stable from the previous year. The revenue of Japan Airlines for the fiscal year ended March 2025 was JPY1,844 billion, a record high since its relisting, and the net profit was JPY107 billion (up 12% year-on-year).

At the same time, however, considering the shrinking and aging population of Japan, demand for domestic routes is not expected to increase significantly. For example, Japan Airlines announced in March 2024 that it will replace the aging B-767s currently used in domestic routes with the smaller A321neo, thereby downsizing the aircraft used for domestic routes. At the same time, Japan Airlines announced that it will purchase additional A350-900 and B787-9 aircraft for international flights, thereby increasing and upsizing international aircraft.

For the low-cost carrier (LCC) market, a new type of LCC that can be used for longer haul flights is becoming popular. ZIPAIR Tokyo, a wholly owned subsidiary of JAL, started operation in 2020 and now flies to Asian, US and Canadian cities. In April 2024, ANA started a new brand, AirJapan, under a similar concept, which now flies to Bangkok, Seoul and Singapore.

In line with global trends, environmental issues are becoming more important for Japanese lessees, which are replacing older aircraft with new more environmentally friendly aircraft. There have also been a number of regulatory updates from an environmental viewpoint. First, Japan is participating in ICAO's Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) and has made it mandatory to submit an operation plan on measures in accordance with CORSIA for bilateral operations involving aircraft weighing more than 5,700 kg and emitting more than

10,000 tons of CO₂, in applying for the necessary licences to operate international air transport services.

With the global commitment of IATA to zero emissions by 2050, in June 2022 the Civil Aeronautics Act and the Airport Act were amended to create a new framework to promote decarbonisation in the civil aviation sector. Pursuant to the new law, the Ministry of Land, Infrastructure, Transport and Tourism of Japan issued the basic policy for promoting decarbonisation in the civil aviation sector in December 2022. In May 2023, the Ministry of Economy, Trade and Industry of Japan proposed that Japanese fuel suppliers would be required to raise the ratio of sustainable aviation fuel (SAF) to the total aviation fuel supplied to 1:10 (10%) by 2030. In January 2024, pursuant to the new law, Japanese airlines filed decarbonisation plans with the Ministry of Land, Infrastructure, Transport and Tourism, including matters such as the use of SAF equivalent to 10% or more of the total fuel procured and the introduction of low-carbon aircraft. Airports also prepare their own decarbonisation plans, pursuant to which various initiatives will be undertaken by airlines and airports, including the introduction of low-carbon aircraft, SAF, batteries, LEDs and electric vehicles.

Given these regulatory circumstances and the increasing sustainability disclosure requirements applicable to financial institutions and airlines, there will be an increased focus on sustainability and transition financing in aviation finance.

LITHUANIA

Law and Practice

Contributed by:

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Šulija & Partners specialises in aviation finance transactions, as well as corporate and compliance matters. The team supports clients daily with various aspects of aircraft trading, financing and leasing, including dry lease, wet lease and ACMI (aircraft, crew, maintenance and insurance) agreements, and serves as local legal advisers in complex cross-border aviation financing transactions. Furthermore, the firm provides legal support for various aviation services, securing or clearing aircraft mortgages, and

advising on specific sector regulations. The team's specialised expertise caters to a wide range of stakeholders within the aviation industry, including financial institutions, investors, lessors, lessees, airlines, and service providers. Since its establishment, the firm has served numerous international companies, which comprise approximately half of its client base. Šulija & Partners' commitment to excellence and international expertise distinguishes it as a trusted legal partner in the region.

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

The execution of an aircraft or engine sale agreement (including the sale of an ownership interest in an entity) does not trigger any taxes in Lithuania. Lithuania does not have a concept of trust; thus, legal and beneficial ownerships are also not separated.

However, the proceeds arising from the sale of an aircraft or engine are taxable in Lithuania, subject to certain exceptions. In certain cases, a company selling assets in Lithuania and forecasting sales revenue might be required to register as a VAT payer.

1.1.2 Enforceability Against Domestic Parties

If the aircraft is sold on the Lithuanian soil, one should consider tax implications and the requirements of the country of registration.

If the aircraft has been registered in Lithuania, an aircraft bearing Lithuanian registration will be considered as immovable property by reason of the Civil Code of Lithuania 2001 and transfer of immovable property – following overriding local laws – is subject to notarial certification in Lithuania. The public notary may notarise the agreement made in Lithuanian or both in Lithuanian and any other foreign language.

Provided the engine is not considered part of an aircraft, the transfer of an engine is not required to be certified by a notary in Lithuania. However, the parties may request notarisation of such contract.

A translation into Lithuanian of the sale agreement and/or bill of sale and/or other document evidencing the transfer of title to an aircraft may be required for submission to the civil aviation authority for aircraft ownership re-registration purposes. However, as a matter of practice, short documents in English are being accepted by the aviation authority without translation into Lithuanian (see **1.2.3 Enforceability Against Domestic Parties**).

1.2 Transfer of Ownership

1.2.1 Transferring Title

If an aircraft is registered in Lithuania, the transfer of the aircraft must be concluded in written form and notarised by a public notary following the requirements of Lithuanian laws.

An aircraft engine is considered part of the aircraft. Thus, the title of an engine can be effected and evidenced either by:

- the aircraft sale and purchase (or similar) agreement;
- a separate sale and purchase agreement for the engine; and
- an acceptance certificate (or transfer deed), which is required but can be drafted as part of the sale and purchase agreement or signed as a separate document – the acceptance certificate does not need to be notarised.

Industry practice in Lithuania applies insofar as the engine or other significant parts (auxiliary power unit or landing gears) are separately specified in the aircraft sale agreement.

The sale of the ownership interest in an entity that owns an aircraft or engine is not recognised as a sale of such aircraft or engine. The same entity will remain the direct owner of aviation assets; however, as a result of the sale of ownership interest in such entity, the ultimate owner may change.

1.2.2 Sales Governed by English or New York Law

The English law or New York law bill of sale is recognised as a document evidencing the title to an aircraft before it is registered in Lithuania. For aircraft registration purposes in Lithuania, the English or New York law bill of sale needs either to be submitted in its original form for the review of a specialist from the aviation authority or as a notarised and apostilled copy.

However, if the title to an aircraft that is already registered in Lithuania is transferred, the asset is considered to be covered by mandatory local laws. This means that such a sale and purchase (or other) agreement on the transfer of title needs to be notarised locally (see **1.2.1 Transferring Title**). In practice, a

short-form sale and purchase agreement governed by the laws of Lithuania is often concluded for aircraft re-registration purposes. However, the parties also enter into a parallel English or New York law sale and purchase agreement, which is further accompanied by a customary English law or New York law bill of sale.

1.2.3 Enforceability Against Domestic Parties

A bill of sale evidencing the transfer of title to an aircraft may be required by the Lithuanian civil aviation authority during the registration of an ownership interest. The aviation authority needs to either take sight of the original documents or have a copy of the bill of sale notarised and apostilled. As a matter of practice, documents in English are accepted without requiring translation.

If the aircraft has already been registered during the transfer of title, a notarised sale and purchase agreement or a similar document must also be submitted to the aviation authority (see 1.2.2 Sales Governed by English or New York Law).

1.2.4 Registration, Filing and/or Consent From Government Entities

A bill of sale does not need to be filed to any government entity in Lithuania and is not subject to any consent from the government entity, except that the civil aviation authority may request the bill of sale (and its translation into Lithuanian) to be filed if the owner wishes to register the aircraft in Lithuania.

The bill of sale is required so that the aviation authority can verify the title of the aircraft before registering it. If requested, the aviation authority produces a copy for its own registration purposes, and the original document filed by the applicant is returned.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

No taxes or duties are payable in Lithuania for executing and/or delivering a bill of sale or consummating the sale of the ownership interest in an entity that owns an aircraft or engine.

If a bill of sale is submitted for aircraft registration purposes, standard aircraft registration fees apply.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

There are no non-permissible types of operating, wet or finance leases in Lithuania. Lithuanian law establishes the principle of freedom of contract, allowing parties to conclude any types of agreements.

However, this matter may arise on a case-by-case basis when certain contract clauses come into question (eg, hell or high water clauses and excessive fines). The authors consider, however, that courts are more likely to take a non-interventionist approach and would endeavour to uphold the clauses agreed upon by the parties.

2.1.2 Application of Foreign Laws

There are no restrictions in Lithuania on choosing a foreign law as the governing law for any lease agreement.

2.1.3 Restrictions Concerning Payments in US Dollars

There are no restrictions in Lithuania relating to payment of rent under the lease in US dollars or any other foreign currency. However, payments for wet lease contracts are normally agreed upon in euros.

2.1.4 Exchange Controls

There are no exchange control laws in Lithuania.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

No taxes or duties are due for executing a lease in Lithuania or as a consequence of an original or copy of a lease being brought into Lithuania either physically or electronically.

2.1.6 Licensing/Qualification of Lessors

There are no requirements for the lessor to be licensed or otherwise qualified in Lithuania to enter into any lease arrangements with a domestic lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

The laws of Lithuania do not provide for any mandatory terms to be included in the lease (or ancillary documents thereto) governed by English or New York law that would not typically already be included.

2.2.2 Tax and Withholding Gross-Up Provisions

Tax and other withholding gross-up provisions are permissible and should be enforceable in Lithuania.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease in Lithuania covers parts that are installed or replaced on an aircraft or engine after its execution. For the avoidance of doubt, it is advisable for the parties to sign an amendment to the lease once parts of an aircraft or engine are replaced to ensure the replaced parts are properly identified and captured under the lease.

2.2.4 Risk of Title Annexation

The risk of title annexation depends on whether the engine is properly identified and separated from the airframe. It is possible to argue that an engine may be considered a part of an aircraft, and title to such an engine may be transferred together with the transfer of title to the aircraft. However, the authors are not aware of any practical cases where an engine owned by a third party has been annexed because it is attached to a third-party aircraft.

2.2.5 Recognition of the Concepts of Trust/Trustee

Lithuanian law does not distinguish between legal and beneficial interests. Similarly, the concept of a trust is not recognised in the Lithuanian jurisdiction in the same way as in common law countries.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The Lithuanian civil aircraft register is an owner register. Lithuanian law does not distinguish between legal and beneficial interests; only the legal owners are registered. An aircraft is registered in the name of the owner and the owner is indicated in the aircraft certificate of registration.

However, from a local law perspective, the aircraft certificate of registration is not a proof of ownership over the aircraft. The main effect of registering the owner's interest is that the aircraft owner, or a person acting on behalf of the aircraft owner, must submit an application for registration or deregistration of an aircraft.

The register records both the owners and operators of an aircraft, but lessor interests (specifically, if it is an intermediate lessor) are not noted on the aircraft register.

2.3.2 Registration If the Owner Is Different From the Operator

An aircraft may be registered in the Lithuanian Civil Aircraft Registry if the aircraft owner is different from the operator - although, in either case, only if there is a link with Lithuania. Thus, it is not possible to register an aircraft in Lithuania based on lease-in, lease-out structures, unless the aircraft is operated by a Lithuanian person. A civil aircraft may be registered in Lithuania if:

- the owner of the aircraft is a citizen of Lithuania, a citizen of another EU state, another natural person entitled to exercise freedom of movement within the EU, or a legal entity registered in Lithuania, a Lithuanian state, or a Lithuanian municipality;
- the aircraft belongs to a legal or natural person of a foreign state if more than half of its flights are performed from an airport in Lithuania; and
- the aircraft will be operated by a Lithuanian legal or natural person, or a citizen of another EU state, or another natural person exercising the right to freedom of movement within the EU.

2.3.3 Aircraft/Engine-Specific Registers

There are no specific registers in Lithuania for leases concerning aircraft or engines.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

The lease of an aircraft is not registered in Lithuania, but the civil aircraft register does record the operator of an aircraft and requires evidence of the link between the aircraft owner and its operator. For this reason, a lease agreement or equivalent documents translated into Lithuanian (in practice, the translation of the entire

document is not required) must be submitted to the civil aviation authority for aircraft registration purposes. Failure to provide the lease may result in the civil aviation authority refusing to register the operator of the aircraft.

The leases are not subject to any consent from any government entity. However, the civil aviation authority typically checks the aircraft's maintenance, insurance, and other non-commercial clauses to ensure that the aircraft is properly maintained and safely operated.

2.3.5 Requirements for a Lease to Be Valid and Registrable

There are no specific requirements for a lease to be valid or accepted by the civil aviation authority as evidence of the link between the owner and the operator. However, the lease should clearly state that the right of possession over the aircraft is transferred to the operator. This should be evidenced either by the respective clauses in the lease or by a separate acceptance act between the lessor and lessee.

2.3.6 Taxes/Duties Payable for Registering a Lease

Lease agreements are not registrable in Lithuania.

2.3.7 Registration of Aircraft in Alternative Countries

Aircraft that are based in Lithuania are primarily registered in Lithuania. Some aircraft are registered in Malta or Poland and based in Lithuania.

2.3.8 Requirements for Documents Concerning Registration

As a matter of practice, the civil aviation authority requires copies of all documents to be presented - although, in the case of a bill of sale, either the original document or its notarised and apostilled copy must be submitted to the civil aviation authority. Upon confirming the authenticity of the copies of the originals, the originals are immediately returned to the applicant.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A foreign lessor will not be taxed in Lithuania just because it is leasing a commercial aircraft to a Lithuanian entity or because such aircraft is registered in Lithuania.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor will not be deemed to be resident or domiciled in Lithuania just because it is leasing a commercial aircraft to a Lithuanian entity or because such aircraft is registered in Lithuania.

2.4.3 Engine Maintenance and Operations

Please refer to 2.4.1 Tax Requirements for a Foreign Lessor for details.

2.4.4 Damage or Loss Caused by an Asset

Owners, lessors, financiers or others with no operational interest in an aircraft would not be held strictly liable (ie, liable without fault) or vicariously liable (ie, liable without fault for another party's obligations) for damages caused when an aircraft was operated by a third party. An owner, however, might be required to prove that it did not have operational control.

2.4.5 Attachment by Creditors

The Law on Aviation 2000 provides that an aircraft can be prohibited from leaving a Lithuanian airport if, among other things, airport charges or air navigation fees are not discharged in respect of that aircraft or if it fails to comply with safety requirements.

2.4.6 Priority of Third Parties' Rights

If an aircraft is subject to a mortgage, the mortgagee has a priority claim over other creditors of the lessee. See also 2.4.5 Attachment by Creditors.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

It is not mandatory in Lithuania that either all or part of the insurances be placed with domestic insurance companies, provided that insurance is placed with insurance companies of European Economic Area countries. Other insurance companies from third countries require permission from the Bank of Lithuania.

2.5.2 Mandatory Insurance Coverage Requirements

As a member of the EU, Lithuania is bound by the requirements of Regulation (EC) No 785/2004 and applies the minimum insurance requirements provided

in this regulation. The regulation specifies the minimal insurance coverage for the liability of third parties. The minimum insurance coverage per accident for each aircraft depends on the maximum take-off mass. The Lithuanian civil aviation authority is authorised to control whether operators comply with the requirements of this regulation. International lessors often contractually require airlines to purchase insurance policies with higher limited liability, as the portion of the claim settlement in excess of the limits would not be covered by the insurance policy.

2.5.3 Placement of Insurance Outside of Jurisdiction

Reinsurance can be placed outside Lithuania. Lithuanian insurance laws are compliant with applicable EU regulations. However, it is considered to be a business risk of the fronting company (insurer) to settle the insured's claim. Thus, the fronting company would deal with reinsurers and then make the payments in accordance with the initial insurance contract.

2.5.4 Enforceability of “Cut-Through” Clauses

It is not certain how cut-through clauses would be enforced in Lithuania as, owing to the absence of fronting requirements, cut-through clauses are not customarily found in the contracts entered into on behalf of Lithuanian companies.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurance (reinsurance) are often used in aviation finance transactions and, in the authors' view, should generally be enforceable from the perspective of Lithuanian law. Assignments should be perfected by making relevant notifications to or seeking acknowledgements from a debtor.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

If the contract provides for cases where the lessor may terminate the agreement and repossess the aircraft, the lessor may enforce such rights subject to the terms and conditions of the agreement and its governing law. Lithuanian law states that parties may agree on the conditions of terminating the agreement. However, if no such agreement is made, relevant provisions of Lithuanian law apply – stating that the nature of the lessee's breach must be taken into considera-

tion (as material or non-material) and the lessor must file a default notice requesting the lessee to comply with its respective obligations prior to terminating the lease.

The aircraft does not need to be physically located in Lithuania at the time of aircraft lease termination. Ferrying the aircraft to another EU jurisdiction does not require any permits.

2.6.2 Lessor Taking Possession of the Aircraft

Repossession of the aircraft must be exercised peacefully. If an operator does not voluntarily surrender the aircraft, the owner or lessor would not be entitled to enforce the repossession by force. The use of self-help remedies is very limited under Lithuanian law and is allowed only when expressly permitted by law. The owner or lessor will be permitted to repossess the aircraft without the co-operation of an operator when it is specifically authorised to do so by the court. An enforceable court order will be enforced by a bailiff, with the assistance of the police, if necessary.

2.6.3 Specific Courts for Aviation Disputes

Lithuanian law considers an aircraft registered in Lithuania as immovable property. The procedural laws of Lithuania state that lawsuits regarding rights in rem to immovable property, regarding the use of immovable property or regarding the cancellation of a lien on immovable property shall be brought before the court of the location of the immovable property or its main part. There are no specific courts to hear the aviation disputes. The courts of general competence generally decide aviation disputes, unless parties agreed to settle their disputes through arbitration.

2.6.4 Summary Judgment or Other Relief

A summary judgment can be obtained for monetary claims only – although there are several procedural rules that need to be complied with. Specifically, the debtor should not be established in a foreign jurisdiction, and there should be no unfulfilled obligations of the lessor for which remuneration is due and the debtor requests such obligations to be fulfilled. The estimated timeframe for obtaining a summary judgment is two business days from the moment the respective motion is brought before the court.

An injunction can be issued by the court pending final resolution of proceedings if the lessor manages to plausibly substantiate its claim and proves that, without the injunction, the execution of the court decision may become difficult or impossible. The estimated timeframe for obtaining an injunction is three business days from the moment the respective motion is brought before the court.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Aircraft lease, finance and security transactions where one party is based in a foreign jurisdiction are customarily governed under the English or New York laws. Such choice of law (as well as the choice of any other foreign law) should normally be recognised in Lithuania, respecting the freedom of contract – provided that the choice is expressly demonstrated in the contract and there are no contradictory overriding Lithuanian rules.

However, by reason of the Civil Code 2001, an aircraft bearing a Lithuanian registration will be deemed as immovable property in Lithuania and transactions on the transfer of ownership rights and other rights in rem to immovable property (aircraft) will be subject to notarial certification in Lithuania. For this reason, transfer of interests in or creation of security interest (eg, mortgage) over an aircraft bearing Lithuanian registration must be carried out in accordance with Lithuanian law requirements. Relevant agreements must be governed by the laws of Lithuania.

If an aircraft is registered in Lithuania, Lithuanian courts should have exclusive jurisdiction to hear any type of dispute regarding rights in rem to an aircraft or the cancellation of a lien on an aircraft. There is a lack of relevant case law to determine whether any relevant foreign court judgment falling within the scope of the exclusive jurisdiction of Lithuanian courts would be recognised and enforced in Lithuania.

Lithuanian courts should generally uphold a waiver of immunity by the parties to the lease.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Lithuanian courts are precluded from re-examining the case on its merits and will generally recognise and enforce a final judgment of a foreign court or an arbitral award, provided the dispute does not fall within the exclusive jurisdiction of Lithuanian courts and other respective conditions prescribed in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), EU law, national law and bilateral treaties (as applicable) for recognising and enforcing a foreign court or an arbitral award are met.

2.6.7 Judgments in Foreign Currencies

A lessor under an aircraft lease may obtain a judgment in a foreign currency.

2.6.8 Limitations on Lessors' Actions Following Termination

There is no statutory limitation on the default interest rate and parties are free to agree on the default interest rate. However, a Lithuanian court is entitled to exercise some policing over default interest rates and can reduce clearly excessive interest rates (even if they were contractually agreed).

2.6.9 Lessor's Requirement to Pay Taxes/Fees

The court fees and bailiff fees are generally applicable for the purposes of enforcement of the lease. The amount of court and bailiff fees depends on the nature and the amount of claim, but should generally not exceed EUR30,000 in total. The legal fees are subject to an agreement between the lessor and the local law firm.

2.6.10 Mandatory Notice Periods

The notice periods shall be established by the lease contracts and the governing law. If Lithuanian law is chosen as the governing law and there are no provisions on notice periods agreed in the lease, mandatory notice periods prescribed in the Civil Code 2001 will apply, requiring a 30-days' notice to be submitted prior to termination due to a material breach of the contract.

2.6.11 Lessees' Entitlement to Claim Immunity

None of the private companies in Lithuania are entitled to any right of immunity from suit. State immunity from suit can be waived.

2.6.12 Enforcement of Foreign Arbitral Decisions

Lithuania is a party to the New York Convention, effective from 12 June 1995. Lithuania can be considered a favourable jurisdiction for the recognition and enforcement of foreign arbitral awards.

2.6.13 Other Relevant Issues

There are no other relevant issues that lessors should be aware of in relation to the enforcement of their rights in Lithuania.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Lithuanian law recognises the concepts of contractual assignment and novation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

An assignment/novation of leases under foreign laws should generally be held valid and enforceable by domestic courts. Assignments should be perfected by making relevant notifications to the lessee.

2.7.3 Enforceability of Lease Assignments/Novations

There is no requirement for the lease assignment/novation to be translated, certified, notarised or legalised to be enforceable against a domestic party.

2.7.4 Filing/Registration of Lease Assignments/Novations

Lease assignments are neither registered nor reported to the Lithuanian authorities.

However, the civil aircraft register records the operator of an aircraft and thus needs to see the link between the owner of the aircraft and its operator (see **2.3.4 Registration of Leases With the Domestic Aircraft Registry**). If this link changes owing to a lease novation (eg, a change of the lessee), such a lease novation needs to be reported to the civil aviation authority (and translated into Lithuanian, if requested by the civil

aviation authority). Failure to provide the lease novation, which changes the link between the owner and the operator, may result in the civil aviation authority cancelling the registration of the aircraft.

2.7.5 Taxes/Duties Payable on Assignment/Novation

There are no taxes or duties payable in Lithuania in respect of any assignment and assumption/novation agreement or as a consequence of an original or copy of it being brought into Lithuania physically or electronically.

2.7.6 Recognition of Transfer of Ownership Interests

The transfer of ownership interests of the entity (or the beneficial interest in the trust) owning an aircraft (with the legal title to the asset remaining with that entity) does not trigger any legal changes in the ownership of an aircraft.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

The aircraft can be deregistered if a relevant application is submitted to the civil aviation authority by the owner or a person duly authorised by the owner. However, if the aircraft is mortgaged or seized by court order, it cannot be deregistered until the mortgage is cleared or the consent of the mortgagee is received. Additionally, any existing seizure order must be lifted.

2.8.2 Lessee's/Operator's Consent

A lessee's or operator's consent is not required to deregister the aircraft.

2.8.3 Required Documentation

To deregister the aircraft in Lithuania, the owner (or a person authorised by the owner) would need to file a respective application to the civil aviation authority, accompanied by an original of the certificate of registration and proof of payment of the state fee.

2.8.4 Duration of Deregistration Process

The legal acts state that the decision on deregistering the aircraft must be passed within ten calendar days upon receipt of the necessary documents. In practice, the deregistration is performed in one or two business days.

2.8.5 Aviation Authority's Assurances

Civil aviation authorities in Lithuania do not provide advance assurances as to prompt deregistration of the aircraft. In practice, the deregistration – provided that all required documents are in place – is very quick.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

The fees payable for the deregistration of an aircraft are not significant (a EUR57 fee is payable for the deregistration and a EUR35 fee is payable for the issuance of the deregistration certificate).

2.8.7 Deregistration Power of Attorney

Under Lithuanian law, a lessee may neither register nor deregister the aircraft without a power of attorney issued by the owner. Therefore, it is arguable that the lessee's authority in the form of a deregistration power of attorney to permit the deregistration of the aircraft is null and void because of the rule that no person can transfer more rights than they have. A deregistration power of attorney issued by the owner for deregistration of an aircraft registered in Lithuania should be notarised (and apostilled, if applicable).

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

No additional documents are required to enforce the deregistration power of attorney, other than those specified in 2.8.3 Required Documentation.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A deregistration power of attorney issued in respect of an aircraft registered in Lithuania should be governed by the laws of Lithuania and notarised by a public notary. However, as noted in 2.8.7 Deregistration Power of Attorney, the enforceability of a deregistration power of attorney issued by the lessee is questionable.

2.8.10 Revocation of a Deregistration Power of Attorney

The legal standing regarding the irrevocability of the power of attorney is not completely certain. The Civil Code 2001 includes such a case that “a contract may determine the cases when an irrevocable power of attorney is issued”. However, the possibility may not

be completely eliminated that the revocation of any power of attorney potentially made by a principal may be deemed enforceable under Lithuanian law.

2.8.11 Owner's/Lessor's Consent

An aircraft owner may export the aircraft without the lessee's consent under the laws of Lithuania (subject to the aircraft being physically repossessed), although the mortgagee's consent will be required for the purpose of deregistration (see 2.8.1 Deregistering Aircraft in This Jurisdiction). A mortgagee may not export the aircraft without the owner's consent, unless the mortgage is enforced and the right of ownership to the aircraft is transferred to the mortgagee.

The aircraft does not need to be in Lithuania at the time of deregistration and/or export.

2.8.12 Aircraft Export Permits/Licences

The export procedure applies when EU goods are transported out of the EU customs territory to third countries or to special fiscal territories. In this case, an electronic export declaration must be submitted.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

There are no significant costs/fees/taxes that are charged in respect of the export of an aircraft.

2.8.14 Practical Issues Related to Deregistration of Aircraft

There are no significant practical issues that an aircraft owner or mortgagee or lessor should be aware of in respect of the deregistration of aircraft in Lithuania.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

Most relevant laws of Lithuania governing restructurings, reorganisations, insolvencies, and liquidations are:

- the Law on Insolvency of Legal Entities 2019;
- the Civil Code 2001; and
- the Law on Companies 2000.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Restructuring and bankruptcy proceedings in Lithuania are regulated by the Law on Insolvency of Legal Entities. The restructuring process aims to preserve a viable company in temporary difficulties, while still operating, and to help it avoid bankruptcy by getting assistance from creditors to overcome financial difficulties through economic, technical, organisational and other measures. The bankruptcy process is aimed at liquidating a legal entity – ie, removing an insolvent market participant from the market, even though bankruptcy proceedings can be transformed into restructuring proceedings and vice versa.

The law states that bankruptcy proceedings can be carried out in out-of-court and in-court proceedings. The out-of-court bankruptcy proceedings are subject to the consent of the company's creditors by a qualified majority of votes (75%) and some additional conditions prescribed in the law. The restructuring proceedings can only be carried out under the supervision of the court.

Bankruptcy and restructuring proceedings can be voluntary (initiated by the company itself) or involuntary (initiated by the creditors).

According to the Civil Code 2001, reorganisation is described as the end of a legal entity without a liquidation procedure. A company may be reorganised in the following principal ways:

- merging; and
- splitting (dividing).

As a matter of transaction law, reorganisation typically involves M&A transactions or is the result thereof. A resolution to reorganise a legal person shall be passed by members of the legal person or by the court in cases provided for by law.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

Lithuania has not enacted any specific legislation based on the UNCITRAL Model Law on Cross-Border Insolvency. However, Lithuania has established a legal

framework for cross-border insolvency co-operation within the EU, primarily based on the Regulation (EU) 2015/848 and respective provisions of the Law on Insolvency of Legal Entities that ensure co-operation between courts and insolvency practitioners in different member states.

For cases involving non-EU countries, Lithuanian courts apply principles of international co-operation and reciprocity to manage cross-border insolvency issues.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

The initiation of the insolvency proceedings should not affect the validity of the deregistration power of attorney. However, the deregistration power of attorney will be considered to have expired in the event that the lessee is liquidated as a result of the insolvency proceedings and deregistered from the Register of Legal Entities.

Please also refer to **2.8.7 Deregistration Power of Attorney** regarding the potential unenforceability of a deregistration power of attorney issued by the lessee.

2.9.5 Other Effects of a Lessee's Insolvency

From the date of entry into force of the court order to open a bankruptcy case, all deadlines for the fulfilment of a legal entity's obligations are considered to have expired. The insolvency administrator may inform the lessor that the lease agreement will continue if the administrator finds it economically reasonable for the company and its creditors.

The law does not prohibit the lessor from terminating the lease and repossessing the aircraft when insolvency procedures are initiated. The rights of the lessor to repossess the aircraft should generally be respected and not be affected by the insolvency procedures.

If restructuring proceedings are initiated, an aircraft lease agreement may be considered an essential agreement under the Law on Insolvency of Legal Entities. The law prohibits creditors from terminating or changing the terms of an essential agreement to the detriment of the lessee until a court order approving the restructuring plan takes effect.

The aircraft will not be deemed part of the lessee's property simply owing to the initiation of insolvency or restructuring proceedings.

Claims of the mortgagees, employees, and the State will have priority in insolvency proceedings over the lessor's claims (lease rentals, other payments due to the lessor, etc).

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The main risk for a lender if a borrower, a guarantor or an entity providing security becomes insolvent is related to the lender's reduced ability to recover any due and unpaid sums. A mortgage as a mean of security should grant the highest level of security in such cases.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

After the court accepts an application on the initiation of an insolvency case, the assets of the legal person may be seized according to the already-issued executive documents. However, the realisation of these assets and/or collection is suspended, except when the court allows the bailiff to complete the sale of property.

If the court refuses to start the insolvency case, the recovery and sale of property is renewed from the date of the respective court ruling coming into force. From the date of entry into force of the court order to open a bankruptcy case, the deadlines for the fulfilment of all obligations of a legal entity are considered to have expired. The insolvency administrator may inform the lessor that the lease agreement will continue if they find it economically reasonable for the company and its creditors.

If restructuring proceedings are initiated, the law prohibits creditors from terminating or changing the terms of an essential agreement to the detriment of the company until a court order approving the restructuring plan takes into effect. If the court terminates the restructuring or bankruptcy proceedings, the calculation of interest and penalties, as well as the recovery proceedings are resumed.

2.9.8 Liquidation of Domestic Lessees

A domestic lessee may be liquidated through voluntary or involuntary insolvency proceedings (see 2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership), under the decision of the shareholders of the lessee, a court's decision, or the decision of the Register of Legal Entities.

A domestic lessee may be placed in administration by court order, law, or transaction. In the cases provided for by the Civil Code 2001, administration may be determined by an administrative act.

2.9.9 Ipso Facto Defaults

The enforceability of ipso facto default clauses may be subject to limitations imposed by the insolvency laws of Lithuania. In particular, lessors may be prohibited from terminating the lease and repossessing an aircraft during the restructuring proceedings until a court order approving the restructuring plan takes into effect.

2.9.10 Impact of Domestic Lessees' Winding-Up

After the initiation of insolvency proceedings, repossessing the aircraft may require court approval or coordination with the insolvency administrator.

Lease rentals, maintenance reserves, and any other payments due from the lessee to the lessor may be subject to moratoria (see 2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings), permanent termination (in the case of bankruptcy proceedings), or payment under a restructuring plan approved by the court (in the case of restructuring proceedings).

The ability to set off any of the lessee's obligations against the lease security deposit may be affected by the limitations imposed by the insolvency laws.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

In June 2024, the Lithuanian Parliament passed a law ratifying the Convention on International Interests in Mobile Equipment (the "Cape Town Convention"). The law came into force on 1 July 2025.

2.10.2 Declarations Made Concerning Conventions

Lithuania has made the following declarations.

- Declaration under Article 39 (1)(a) of the Cape Town Convention – stating that all non-consensual rights or interest that under Lithuanian law have priority over an interest in an object equivalent to that of the holder of a registered international interest will have priority over a registered international interest, whether in or outside insolvency proceedings and whether such international interest registered before or after Lithuania ratifies the Protocol on Matters specific to Aircraft Equipment (the “Protocol”).
- Declaration under Article 39 (1)(b) of the Cape Town Convention – stating that nothing in the Cape Town Convention shall affect the right of Lithuania or a Lithuanian entity, intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of Lithuania for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object or another object.
- Declaration under Article 40 of the Cape Town Convention – stating that a non-consensual right or interest arising under the laws of Lithuania on the basis of which an object is seized or detained shall be registrable under the Cape Town Convention as if the right or interest were an international interest and will be regulated accordingly.
- Declaration under Article 54 (2) of the Cape Town Convention – stating that any remedy available to the creditor under any provision of the Cape Town Convention that is not expressed therein to require application to the court may be exercised without leave of the court.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Lithuania has not made a declaration under Article XXX(1) of the Protocol. Irrevocable deregistration and export request authorisations (IDERAs) are not submitted to and not recorded with the Lithuanian civil aircraft register at this time.

2.10.4 Enforcement of Conventions

In November 2022, the Supreme Court of Lithuania ruled that the EU does not have exclusive jurisdiction

over matters regulating the enforcement process of judgments from EU member state courts. Therefore, according to the Supreme Court of Lithuania, the provisions of the Cape Town Convention pertaining to the enforcement actions (protecting the interests of holders of security interests or international interests) do not apply in the absence of separate accession by the member state to this international treaty.

Given the recent ratification of the Cape Town Convention by the Lithuanian Parliament, this case law is expected to change. However, no such changes are anticipated in the near future, as the law ratifying the Cape Town Convention came into force only on 1 July 2025.

2.10.5 Other Conventions

Lithuania is also a party to the following major air law treaties:

- the Chicago Convention on International Civil Aviation 1944, effective from 7 February 1992, and a number of protocols relating to its amendments;
- the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage 1929, effective from 19 February 1997 and its Hague Protocol 1955, effective from 19 February 1997;
- the Guadalajara Supplementary Convention to the Warsaw Convention 1961, effective from 9 March 1997;
- the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963, effective from 19 February 1997;
- the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, effective from 3 January 1997;
- the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 and its Protocol 1988, effective from 3 January 1997;
- the Montreal Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991, effective from 21 June 1998; and
- the Montreal Convention for the Unification of Certain Rules for International Carriage by Air 1999, effective from 29 January 2005.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

There are no legislative restrictions in Lithuania on foreign lenders financing an aircraft locally or on borrowers using the loan proceeds.

3.1.2 Effect of Exchange Controls or Government Consents

There are no exchange controls or government consents in Lithuania that would be material to any financing or repatriation of realisation proceeds under a loan, guarantee or security document.

3.1.3 Granting of Security to Foreign Lenders

There are no legislative restrictions in Lithuania on borrowers granting security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Corporate guarantees are permitted and should be enforceable in Lithuania.

3.1.5 Lenders' Share in Security Over Domestic SPVs

The pledge of shares is recognised in Lithuania.

3.1.6 Negative Pledges

Negative pledge is recognised in Lithuania.

3.1.7 Intercreditor Arrangements

Intercreditor arrangements are recognised in Lithuania.

3.1.8 Syndicated Loans

Syndicated loan agreements are recognised in Lithuania.

3.1.9 Debt Subordination

Debt subordination is recognised in Lithuania.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

Transfer or assignment of all or part of an outstanding debt under an English or New York law-governed loan is recognised in Lithuania.

3.1.11 Usury/Interest Limitation Laws

There is no statutory limitation on the interest rate between commercial parties and parties are free to agree on the interest rate. However, a Lithuanian court is entitled to exercise some policing over interest rates and can reduce clearly excessive interest rates (even if they were contractually agreed).

3.2 Security

3.2.1 Typical Forms of Security and Recourse

Aircraft mortgage along with third-party guarantees are the most typical forms of security granted in aviation finance transactions. The debtor is also sometimes required to get its own shares pledged and refrain from certain actions limiting the debtor's capacity to repay the debt.

3.2.2 Types of Security Not Available

As long as the contractual arrangements concerning the securities are not conflicting the overriding local laws, all types of securities are permitted and should generally be enforceable in Lithuania.

3.2.3 Trust/Trustee Concepts

The concept of trust and security trustee is generally not recognised in Lithuania. In practice, parallel debt arrangements are agreed in contractual documentation.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

Security assignments should generally be permissible and enforceable in Lithuania. Assignment of a mortgage is subject to notarial certification and performance of the required amendments in the mortgage documentation.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

If a mortgage constitutes security, a creditor may transfer their rights under the mortgage without transferring the secured claim.

3.2.6 Choice of Foreign Law

Security over immovable property (aircraft is deemed to be immovable property) must be governed by the laws of the Republic of Lithuania.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

Any assignment amending the terms of a mortgage agreement shall be subject to notarial certification. Failure to comply with notarial form renders the agreement null and void.

3.2.8 Domestic Law Security Instruments

Any mortgage over the aircraft must be governed by local laws and subject to a notarial certification. Notary fees should generally not exceed EUR500. Additional costs related to the translation into Lithuanian of corporate documents of parties to a mortgage agreement should be expected.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

English or New York law-governed security assignments are not locally registered.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

Any mortgage or amendment of such mortgage over the aircraft must be governed by local laws and subject to a notarial certification.

3.2.11 Effect of Changes in the Identity of Secured Parties

See 3.2.10 Transfer of Security Interests Over Aircraft/Engines.

3.2.12 “Parallel Debt” Structures

Parallel debt structures are customarily contractually agreed. However, the authors are not aware of any case law related to their practical enforcement.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment will not be deemed to be resident, domiciled, or carrying on business in Lithuania.

3.2.14 Perfection of Domestic Law Mortgages

Any mortgage over the aircraft must be governed by local laws and subject to a notarial certification. It is advisable for the mortgaging of an aircraft engine to also be notarised.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

Mortgage over an aircraft that is an immovable property in Lithuania must be certified by a public notary.

3.2.16 Form and Perfection of Security Over Bank Accounts

It is advisable for security over a fund held in a bank account to be certified by a public notary.

3.3 Liens

3.3.1 Third-Party Liens

As mentioned in 2.4.5 Attachment by Creditors, the Law on Aviation 2000 provides that an aircraft can be prohibited from leaving a Lithuanian airport if, among other things, airport charges or air navigation fees are not discharged in respect of that aircraft or if it fails to comply with safety requirements.

The Civil Code 2001 also prescribes that the lawful possessor of an object belonging to another person, who has the right of claim against the owner of the object, may detain such object until the claim is satisfied. This right is often exercised by maintenance, repair and overhaul entities (MROs) in the event that the repair costs are not covered.

3.3.2 Timeframe to Discharge a Lien or Mortgage

Provided that all necessary documents are collected, it takes approximately between one and five business days to clear a local law mortgage.

3.3.3 Register of Mortgages and Charges

Mortgages over aircraft are recorded in the Register of Contracts and Restrictions of Rights and such data is available to the civil aviation authority.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

As noted in 3.3.1 Third-Party Liens, a repair organisation or any other lawful possessor of an aircraft may exercise the right of detention over a particular aircraft.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

An application can be submitted to the local aviation authority. Also, the searches in the Register of Con-

tracts and Restrictions of Rights can be made to verify existence of any mortgages over an aircraft.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

Security assignment would be enforced in the same way as a loan or guarantee. However, a local law mortgage should be enforced in out-of-court proceedings by making an application to a public notary.

3.4.2 Security Trustees' Enforcement of Their Rights

The concept of trust and security trustee is generally not recognised in Lithuania. If a security trustee is not a creditor, its rights to enforce a security can be jeopardised. In practice, parallel debt arrangements are agreed in contractual documentation to minimise the risks related with the enforcement procedures.

3.4.3 Application of Foreign Laws

The choice of foreign law as the governing law of a finance or security document will be upheld in any action in the courts of Lithuania, provided that:

- this choice is made expressly and clearly demonstrated by the terms of the contract and circumstances of the case; and
- overriding mandatory provisions of the Lithuanian laws can be applicable – in particular, the aircraft shall be deemed as immovable property in Lithuania pursuant to the provisions of the Civil Code 2001 and the law states that ownership right and other rights in rem in an immovable property will be governed by the law of the state where the asset was situated at the moment of change of its legal status (thus, in the event the title of the aircraft changed or security over aircraft was created when the aircraft was registered in Lithuania, the overriding Lithuanian law requirements pertaining to the ownership right and other rights in rem in the aircraft may be applicable).

The submission to a foreign jurisdiction will be upheld in any action in the courts of Lithuania.

However, in the absence of entirely consistent case law on this issue, the authors cannot completely

exclude the likelihood that Lithuanian courts may be of the opinion that by reason of Lithuanian law an aircraft registered in Lithuania will be treated as an immovable property for civil law purposes. Therefore, claims relating to in rem rights – including the usage of the aircraft – should be subject to the exclusive jurisdiction of the Lithuanian courts.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

See 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

Repossession of the aircraft must be exercised peacefully. If an operator does not voluntarily surrender the aircraft, the secured party would not be entitled to enforce the repossession by force. The use of self-help remedies is very limited under Lithuanian law and is allowed only when expressly permitted by law. The secured party shall be permitted to repossess the aircraft without the co-operation of lessee or operator when it is specifically authorised to do so by the court. An enforceable court order will be enforced by a bailiff, with the assistance of the police, if necessary.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

See 2.6.3 Specific Courts for Aviation Disputes.

3.4.7 Summary Judgments or Other Relief

As mentioned in 2.6.4 Summary Judgment or Other Relief, summary judgments can be obtained for monetary claims only – although there are several procedural rules that need to be complied with. Specifically, the debtor should not be established in a foreign jurisdiction, and there should be no unfulfilled obligations of the lessor for which remuneration is due and the debtor requests such obligations to be fulfilled.

An injunction can be issued by the court pending final resolution of proceedings if the secured party manages to plausibly substantiate its claim and proves that, without the injunction, the execution of the court decision may become difficult or impossible.

The court may order the claimant to pay a specific amount as security of future losses of the defendant in connection with the injunction or legal proceedings.

3.4.8 Judgments in Foreign Currencies

A secured party may obtain a judgment in a foreign currency.

3.4.9 Taxes/Fees Payable

An aircraft mortgage is enforced through non-court proceedings by a public notary making a respective executive entry. A secured party shall pay the notary fee, which should not exceed EUR500.

If security is enforced through court proceedings, a secured party should expect the court fees and bailiff fees. The amount of court and bailiff fees depends on the nature and the amount of claim, but should generally not exceed EUR30,000 in total. The amount of legal fees related to the enforcement is subject to an agreement between the lessor and the local law firm.

3.4.10 Other Relevant Issues

There are no other relevant issues that a lender should be aware of in relation to the enforcement of its rights in Lithuania.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are no other material issues and/or any material court judgments that are relevant to the purchase, sale, lease or debt finance of an aircraft registered domestically and/or involving a domestic party in Lithuania.

4.2 Current Legislative Proposals

Lithuania has ratified the Cape Town Convention and additional legislative changes related to the implementation of the provisions of the Cape Town Convention are expected shortly.

MADAGASCAR



Law and Practice

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John W Fooks & Co is a full-service corporate, commercial law firm with offices in Madagascar, Mauritius and Senegal, providing support to business and industry across French-speaking Africa. The firm's multilingual legal team, comprising six resident partners and 20 associates, is the only legal practice in the region with a combination of Napoleonic and English law expertise – making the firm the obvious choice when it comes to international transactions in francophone Africa. Its particular strengths are in assisting

inward investors in the region and in reconciling their common law understanding of business with the realities of working under legal systems derived from the Napoleonic Code. The firm's expertise in advising local and international clients has earned the trust of listed and unlisted domestic, as well as international, corporations, banks and financial institutions, light and heavy industrial firms, state-owned enterprises and government departments.

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

Transfer of ownership is subject to the payment of administrative fees of MGA354,000 (approximately USD80).

The fees associated with filing the ownership interest of an aircraft will depend on the tonnage of the aircraft. The fees vary between MGA600,000 (approximately USD136) and MGA2 million (approximately USD453).

1.1.2 Enforceability Against Domestic Parties

While it is not mandatory, it is advisable for a sale agreement written in a foreign language to be accompanied by a French translation made by a Malagasy sworn translator. Sometimes local courts accept English documents, but this is not always the case. Whether they are accepted or not mainly depends on the decision of the judge in charge of the matter (if the matter goes to court).

1.2 Transfer of Ownership

1.2.1 Transferring Title

A sale agreement or a bill of sale is typically required for the transfer of title of an aircraft or engine. These do not extend to the inclusion of all installed parts, such as an auxiliary power unit (APU), unless so established in the agreement.

The sale of the ownership interest in an entity that owns an aircraft or engine does not in itself constitute the sale of the aircraft or the engine.

1.2.2 Sales Governed by English or New York Law

It is possible for a bill of sale to be governed by a foreign law (including English or New York law); such an agreement will be recognised in Madagascar. The most important requirements under Malagasy law are that the foreign law-governed bill of sale should be (i) manually signed by the authorised signatory; and (ii) notarised.

1.2.3 Enforceability Against Domestic Parties

While it is not mandatory to provide a translation, a bill of sale written in a foreign language should be accompanied by a French translation made by a Malagasy sworn translator, in order to be enforceable against a domestic party. Sometimes local courts accept English documents; see **1.1.2 Enforceability Against Domestic Parties**.

1.2.4 Registration, Filing and/or Consent From Government Entities

Bills of sale should be registered with the Malagasy Civil Aviation Authority (CAA). The period of completion of registration is estimated to be one week, but administrative delays may occur.

There are no government applications or consents required as a prerequisite to the execution and delivery of a bill of sale in relation to an aircraft or engine registered in Madagascar. It should be noted that there is no separate engine registry within the CAA.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

No taxes are payable for executing and/or delivering a bill of sale or consummating the sale of the ownership interest in an entity that owns an aircraft or engine, including where title to that aircraft or engine is transferred while it is:

- located in this jurisdiction;
- over international waters; or
- in transit to/from this jurisdiction.

The fees that should be paid are the fees requested by the CAA during the registration of the bill of sale or the deregistration of the aircraft (which are reasonable).

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

There are no known types of operating/wet/finance leases or leases concerning only engines or parts that are neither permissible nor recognised.

2.1.2 Application of Foreign Laws

It is permitted for a lease involving either a domestic party or an asset in Madagascar to be governed by a foreign law. Malagasy law allows the parties to a contract to choose the governing law of their contract freely. Note that the lease can be governed by foreign law as long as the provisions of the lease do not breach Malagasy public order and good morals.

2.1.3 Restrictions Concerning Payments in US Dollars

No material restrictions are imposed on domestic lessees making rent payments to foreign lessors in US dollars, as long as this arrangement is established in the lease agreement.

2.1.4 Exchange Controls

There are no exchange controls that could prevent rent payments under a lease or any repatriation of realisation proceeds, if the lease is enforced by a foreign lessor. Payments of rents are considered as *opérations courantes*, or current operations, and are not subject to any specific exchange control procedure.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

The fee payable to the CAA when registering a lease is MGA408,000 (approximately USD92). Other than this, no additional fees are foreseen.

2.1.6 Licensing/Qualification of Lessors

A lessor does not need to be licensed or otherwise qualified in Madagascar to do business with a domestic lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

Any lease must contain the following terms and conditions:

- effective date and date of expiry of the lease;
- details of the lessor and the lessee;
- a description and details of the aircraft (type, manufacturer, serial number);
- a statement specifying that the aircraft is under the care and custody of the lessee for the duration of the lease;

- a statement specifying the party liable for the ongoing airworthiness of the aircraft as well as for the maintenance of the aircraft for the duration of the lease;
- a statement specifying if a sublease is permitted; and
- the termination provisions of the lease.

Most of the time, the foregoing are already contained in a lease (or ancillary documents thereto) governed by English or New York law.

2.2.2 Tax and Withholding Gross-Up Provisions

Tax and other withholding gross-up provisions are permissible and enforceable under Malagasy law.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease may cover parts that are installed or replaced on an aircraft or engine after its execution. For this purpose, it is necessary to sign an addendum to the initial lease agreement.

2.2.4 Risk of Title Annexation

The aircraft engines installed on an airframe should be indicated and legally separated from the aircraft in order to avoid the risk of title annexation; otherwise, the engines will not be considered as separate assets from the aircraft, legally speaking. The use of nameplates is recommended, to clearly identify the actual owner of the aircraft engines installed on an airframe.

2.2.5 Recognition of the Concepts of Trust/Trustee

The concept of a trust is not expressly provided for in any legal provision in Madagascar. However, the Malagasy Contract Law gives free rein to the parties to establish the terms and conditions of their contract. This includes the right to appoint an entity or an individual to represent and act on behalf of several parties driven by the same interest.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The concept of legal or beneficial ownership does not exist under Malagasy law. However, the identity of the lessor of an aircraft can be noted on the aircraft reg-

ister and will, subsequently, appear on the certificate of registration of that aircraft.

2.3.2 Registration If the Owner Is Different From the Operator

In all cases, if the owner is different from the operator, the certificate of registration of the aircraft will clearly identify which person is the owner and which is the operator of the aircraft.

2.3.3 Aircraft/Engine-Specific Registers

There is no separate register for leases (aircraft or engines) in Madagascar. Leases are registered with the Aircraft Register.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

Leases should be registered on the Aircraft Register and are not subject to any consent from government authorities.

The requirements are as follows.

- A registration application must contain the following information: date of the lease, duration of the lease and details of the applicant. The application must be signed by the applicant.
- The lease must be annexed to the application.

No government applications or consents are required as a prerequisite to the execution and delivery of an aircraft and/or engine lease in relation to an aircraft registered in Madagascar.

2.3.5 Requirements for a Lease to Be Valid and Registrable

There is no specific requirement with respect to the form of the lease. The most important part is the signing of the lease by the lessor and the lessee.

2.3.6 Taxes/Duties Payable for Registering a Lease

The fee payable for registration is MGA408,000 (approximately USD92). Apart from the registration fee, there are no other taxes (including stamp duties payable for registering the interest of the lessor). In all cases, if the CAA requires any other administrative fees (of negligible amount), a receipt is always provided to the applicant.

2.3.7 Registration of Aircraft in Alternative Countries

The registration of aircraft in alternative countries is not applicable in Madagascar. Aircraft habitually based in Madagascar should be registered on the Aircraft Register.

2.3.8 Requirements for Documents Concerning Registration

There is no specific requirement with respect to a document to be accepted and registered. However, a power of attorney should be notarised.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A foreign lessor will not be required to pay any income or capital gains or other taxes upon leasing an aircraft or engine to a domestic lessee. However, any payment of rent made by the lessee to the lessor will be subject to a withholding income tax of 10%. This will be withheld by the paying entity (ie, the lessee). This is why there are tax gross-up clauses in lease agreements.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor would not be deemed to be resident, domiciled, carrying on business or subject to any taxes as a result of its being a party to, or its enforcement of, the lease.

2.4.3 Engine Maintenance and Operations

In principle, the lessee/operator is liable for the operation and maintenance of an aircraft or engine.

It is not possible for the lessor, as owner (but not operator), to be held responsible for the operation of the aircraft unless damage is suffered and can be attributed to an act or default of the lessor/owner, namely, in the case of an accident, drug trafficking, etc.

Malagasy law distinguishes between strict liability that may arise for the operator of the aircraft (as lessee/operator) and any potential fault based on the liability of the lessor or owner arising from the ownership of the aircraft.

In all cases, the lease should contain a statement specifying the party liable for the ongoing airworthiness of the aircraft, as well as for the maintenance of the aircraft, for the duration of the lease.

2.4.4 Damage or Loss Caused by an Asset

Malagasy law distinguishes between the strict liability that may arise for the operator of the aircraft (as lessee/operator) and any potential fault based on the liability of the lessor or owner arising from the ownership of the aircraft.

2.4.5 Attachment by Creditors

The retaining right is the right of a creditor to retain in their possession a debtor's asset in an event of default and until full payment of the debts. This is applicable to movable assets and properties. Note that the retaining right is not subject to any agreement or registration formalities in order to be enforceable. The creditor's security is materialised by its right to retain in its possession the asset that is the object of the dispute. For example, an aircraft maintenance service company is entitled to retain the aircraft in its possession if the aircraft operator fails to pay the maintenance fees.

2.4.6 Priority of Third Parties' Rights

In terms of ranking, employees' salaries, court fees, legal fees (eg, bailiff's fees), taxes and other state fees, suppliers' debts secured by rights of detention (*droit de rétention*), mortgages and pledges (possessory and non-possessory pledges) take priority over a lessor's rights under an aircraft or engine lease.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

The main insurance of the aircraft must be subscribed with a local insurance company. Reinsurance can be subscribed with foreign insurance companies.

2.5.2 Mandatory Insurance Coverage Requirements

According to Malagasy law, airlines and aircraft operators must have insurance covering their liability towards passengers, luggage, cargo and third parties regarding acts of war, terrorism, hijacking of aircraft, acts of sabotage, illicit apprehension of aircraft and civil turmoil.

2.5.3 Placement of Insurance Outside of Jurisdiction

Reinsurances of up to 100% coverage can be placed outside Madagascar.

2.5.4 Enforceability of "Cut-Through" Clauses

According to the Malagasy Insurance Law, it is possible for rights belonging to the insurer, and conferred on this party under the reinsurance agreement, to be conferred to third parties whenever permitted by general law. Therefore, it follows that cut-through clauses in such documents are enforceable under Malagasy law.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurances/reinsurances are permitted.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

There are no restrictions on the lessor's ability to terminate an aircraft lease and sell the aircraft following that termination, except if any limitations were established in the lease agreement in this regard. The aircraft does not need to be physically located in Madagascar for any such termination and sale to take place, but the consent of the lessee to carry out the deregistration of the aircraft, given the termination of the agreement, is required. This consent is not required if the deregistration of the aircraft is a result of an event of default.

With regard to the re-export of the aircraft in such circumstances, from a contractual point of view, the main conditions are:

- the irrevocable deregistration authorisation (IDE-RA);
- the deregistration power of attorney (DPOA);
- the usual deregistration and export government guarantee; and
- any clause of the lease allowing the lessor to export the aircraft if an event of default occurs and is continuing.

The lease should provide a clause allowing the lessor, by serving notice, to require the lessee to deliver the aircraft to a specific location; in addition, the DPOA should expressly allow the lessor to require a pilot of

the lessee or any other pilot to fly the aircraft to the specific location.

From an administrative point of view, an export certificate of airworthiness (ECA) is required. The ECA is issued by the CAA following an application made by the lessor, subject to a technical airworthiness assessment made by the responsible authority.

The CAA remains entitled to require any further documents that it deems relevant (eg, a document evidencing that the aircraft was duly authorised by the customs authorities to enter and stay in Madagascar).

2.6.2 Lessor Taking Possession of the Aircraft

If a DPOA/irrevocable power of attorney has been granted by the lessee to the lessor, neither the consent of the former nor a court order is required.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts in Madagascar to deal with aviation disputes. This type of dispute is normally brought before the commercial courts.

2.6.4 Summary Judgment or Other Relief

It is possible for a lessor to obtain a summary judgment, or equitable or other injunctive relief, pending final resolution of judicial proceedings for such purposes, if the following conditions are met:

- the applicant party proves the existence of a grounded fear that the counterparty will cause a serious or barely repairable action to its rights;
- the applicant party proves the urgency of the matter, which is not compatible with the delay of the main judicial proceedings;
- the applicant party gives summary evidence of its rights; and
- the court should not consider that the harm caused to the other party does not considerably supersede the damage that the injunctive relief is envisaged to avoid.

The estimated period to obtain such a court order could be immediate or up to 30 days, depending on the specific injunctive relief requested to the court.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Malagasy courts will uphold a foreign law as the governing law of an aircraft lease, as well as the submission to foreign jurisdictions if the parties so choose (choice of law and of jurisdiction clauses or agreements), and also a waiver of immunity by the parties to that lease, if the issues in dispute are regarded as non-disposable rights or inalienable rights.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Malagasy courts would recognise and enforce a final judgment of a foreign court or an arbitral award after an exequatur order by a Malagasy court. An exequatur order is a decision of a Malagasy court to enforce a foreign judgment in Madagascar after a final verification that the foreign judgment is not in breach of public order and good moral standards (eg, any decision that may constitute a threat to national defence cannot be enforced in Madagascar). The case will not be re-examined on its merits.

2.6.7 Judgments in Foreign Currencies

It is possible for a lessor under an aircraft lease to obtain a judgment in a foreign currency if the lease agreement sets forth this possibility.

2.6.8 Limitations on Lessors' Actions Following Termination

It is possible for a lessor to recover default interest (or the compounding thereof). However, after termination of the lease for default, including if the lessee fails to return the aircraft, it would not be possible to charge additional rent, although it would be possible to claim the repossession of the aircraft and compensation for the damages incurred by the lessor, given the lessee's failure to return the aircraft.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

A lessor under an aircraft lease is not required to pay taxes or fees in a significant (ie, non-nominal) amount in connection with the enforcement of an aircraft lease.

2.6.10 Mandatory Notice Periods

The lessor is only obliged to comply with the mandatory notice periods for termination of the aircraft lease that are established in the lease agreement.

2.6.11 Lessees' Entitlement to Claim Immunity

The lessee is not entitled to claim sovereign or other immunity from suit. In all cases, immunities can be waived.

2.6.12 Enforcement of Foreign Arbitral Decisions

On 16 July 1962, Madagascar became a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Therefore, the national courts recognise and enforce arbitral decisions.

2.6.13 Other Relevant Issues

There are no other relevant issues of which a lessor should be aware in relation to the enforcement of its rights.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Madagascar recognises the concepts of contractual assignment and novation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Agreements governed by New York or English law would be upheld by a Malagasy court. Whether the consent of the lessee would be required would depend on the law governing the lease agreement and the assignment or novation agreement. Under Malagasy law, consent is required and for registration purposes, consent is mandatory.

2.7.3 Enforceability of Lease Assignments/Novations

In principle, there is no need to translate, certify, notarise or legalise an aircraft and/or engine lease assignment and assumption/novation. However, it is advisable for these assignments and assumptions/novations to be notarised/authenticated to be enforceable against a domestic party. In addition, should the enforcement be carried out via the Malagasy judicial courts, a certified translation thereof by a Malagasy sworn translator is required.

2.7.4 Filing/Registration of Lease Assignments/Novations

It is necessary to register and file an aircraft and/or engine lease assignment and assumption/novation with the Aircraft Register for them to be enforceable in Madagascar. However, they are not subject to any consent from a government entity.

For the formalities concerning registration, leases should be registered on the Aircraft Register and are not subject to any consent from government authorities.

The requirements are as follows.

- A registration application must contain the following information: the date of the lease, the duration of the lease and details of the applicant. The application must be signed by the applicant.
- The lease must be annexed to the application.

No government applications or consents are required as a prerequisite to the execution and delivery of an aircraft and/or engine lease in relation to an aircraft registered in Madagascar.

There is no specific requirement with respect to the form of the lease. The most important is the signature of the lease by the lessor and the lessee.

2.7.5 Taxes/Duties Payable on Assignment/Novation

Assignment and assumption/novation agreements are not subject to taxes/duties.

2.7.6 Recognition of Transfer of Ownership Interests

Transfer of ownership interests would not be considered, per se, as transfer of ownership of the aircraft.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

Deregistration of an aircraft can be carried out by its owner, lessor or any other entity with a power of attorney signed by the lessor.

The steps required to achieve deregistration consist of filing the relevant application before the CAA and

providing the latter with the documents required for deregistration.

2.8.2 Lessee's/Operator's Consent

An aircraft owner, mortgagee or lessor can apply for the deregistration of the aircraft without the lessee's or operator's consent. The consent of the lessee or operator is not required for the deregistration of the aircraft.

2.8.3 Required Documentation

The documents required for deregistration of an aircraft are a deregistration application in respect of the aircraft, signed by the applicant (the lessor or its representative with power of attorney signed by the lessor) and filed at the CAA. The application must contain the following information:

- a reason for the deregistration (eg, termination of a lease agreement for any event of default); and
- details of the aircraft.

The following documents are also required by the CAA to proceed with the deregistration:

- an IDERA;
- a DPOA;
- a signed deregistration application letter (the CAA may ask the lessor to complete and sign a deregistration form);
- a copy of the documents evidencing the need for deregistration; and
- the original of the certificate of registration of the aircraft.

The CAA is entitled to ask for any other documents it considers relevant.

2.8.4 Duration of Deregistration Process

If all the documents required for deregistration are in good order, the deregistration process should take approximately ten to 20 working days from the filing of the application at the CAA. However, this may be subject to administrative delays.

2.8.5 Aviation Authority's Assurances

The CAA does not provide advance assurances to an aircraft owner, mortgagee or lessor as to the prompt deregistration of the aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

The fees to be paid for the deregistration of an aircraft are MGA354,000 (approximately USD80), which is not a significant amount. The fees are payable at the time of application for deregistration.

2.8.7 Deregistration Power of Attorney

DPOAs are recognised, but should be notarised. The DPOA should be filed with the CAA. There are no associated costs.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

No additional documents are required (eg, supporting corporate documentation) in order to enforce a DPOA.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A DPOA can be governed by a foreign law provided that its provisions do not breach Malagasy public order and good morals.

2.8.10 Revocation of a Deregistration Power of Attorney

It is not possible to revoke an irrevocable power of attorney if the beneficiary (the attorney or a third party) does not give its consent, except if just cause for revocation exists (eg, abuse of the granted powers). For revocation purposes, the written consent of the beneficiary is mandatory.

2.8.11 Owner's/Lessor's Consent

From a strictly legal perspective, it is possible for the lessor/owner/any party named in the IDERA and Certified Designee Confirmation Letter to export an aircraft unilaterally. However, as a matter of practice, any formality in connection with a transaction involving a local lessee (especially if that lessee is the national airline) is subject to the approval of the latter. For deregistration/export purposes, an aircraft should be in Madagascar for inspection purposes in order to be issued with an export certificate.

2.8.12 Aircraft Export Permits/Licences

From a contractual point of view, the IDERA, DPOA and, eventually, any clause of the lease allowing the lessor to export the aircraft if an event of default occurs and is ongoing are the main conditions for an aircraft to be exported. The lease should provide a clause allowing the lessor, by serving notice, to require the lessee to deliver the aircraft to a specific location. The DPOA should expressly allow the lessor to require a qualified pilot to fly the aircraft to the specific location.

From an administrative point of view, an export certificate of airworthiness (ECA) is required. The ECA is issued by the CAA following an application made by the lessor, subject to a technical airworthiness assessment made by the CAA. It should be noted that it is not possible to obtain an ECA in advance because this is subject to the technical assessment of the CAA at the time of export.

The CAA remains entitled to require any further documents that it deems relevant (eg, a document evidencing that the aircraft was duly authorised by the customs authorities to enter and stay in Madagascar).

The ECA is issued by the CAA within approximately ten to 20 working days from the application.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

The main fee is for receipt of the ECA, which is subject to the payment of MGA1 million (approximately USD226) to MGA6 million (approximately USD1,358).

2.8.14 Practical Issues Related to Deregistration of Aircraft

The main significant practical issue that an aircraft owner or mortgagee or lessor should be aware of in respect of the deregistration of an aircraft in Madagascar is administrative delays, which are very common.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

Law No 2003-042 dated 3 September 2004, amended and supplemented by Law No 2007-018 dated 27 July 2007 (the “Insolvency Law”) governs insolvency pro-

ceedings in Madagascar. The Insolvency Law introduces three types of collective insolvency proceedings:

- preventative settlements;
- judicial reorganisation; and
- liquidation.

These are applicable to corporate insolvency proceedings against a Malagasy company to the extent that it is duly incorporated and has its main interest in Madagascar.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Preventative Settlement (*Règlement Préventif*)

The preventative settlement (*règlement préventif*) is aimed at avoiding a debtor’s cessation of payment (*cessation de paiements*) or the cessation of its activity, and allowing the clearing of its debts by way of an arrangement with creditors. In this proceeding, the company’s manager will petition the commercial court by stating the company’s economic and financial situation and presenting proposals for the reorganisation of the company. If the court deems that the proposals are likely to lead to the company’s reorganisation, the president of the court will appoint a conciliator who will look for an arrangement between the debtor and its creditors. The arrangement will then be subject to the approval of the court president and will suspend any lawsuits that may have been initiated by creditors against the debtor for the payment of their debts.

Judicial Reorganisation (*Redressement Judiciaire*)

The judicial reorganisation (*redressement judiciaire*) is designed to save the debtor company and to clear its debts by way of a composition proposal (*offre de concordat*) with its creditors. If a debtor is unable to meet its current liabilities out of its disposable assets, it must file a declaration of cessation of payment at the commercial court within 30 days from its cessation of payment in order to initiate the collective proceedings for judicial reorganisation. It is also required to lodge a composition proposal at the court specifying the measures and conditions envisaged to redress the company within 15 days from the filing of the declaration. The court will then issue a judgment establishing

the cessation of payment, ordering the judicial reorganisation (if the debtor proposal is accepted by the court) and appointing the official receiver. The judgment will result in:

- the assistance of the company's current directors/managers by a receiver in the administration, and disposal of the company's assets;
- the constitution of creditors into a single body, represented by the receiver;
- the suspension and prohibition of any individual proceedings;
- the suspension of registration of any securities; and
- the production and verification of debts by the creditors.

The judgment also suspends the accruing of legal and contractual interests and any interest on overdue payments. It should be noted that the composition proposal is subject to the approval of the court after its adoption by the debtor's creditors. Where the court does not approve the composition proposal or if the composition is cancelled (due to failure by the debtor to comply with its commitments), the court will convert the judicial reorganisation into judicial liquidation.

Liquidation (*Liquidation des Biens*)

The purpose of the liquidation (*liquidation des biens*) procedure is to realise the debtor company's assets in order to clear its debts. The judge orders the liquidation when it appears that the debtor has not made a serious proposal for reorganisation that would allow for its financial recovery and the clearing of its liabilities. When the judgment is pronounced, it results in the removal of the directors of the debtor's company from the administration and disposal of the company's assets, the declaration and verification of creditors' claims, and the winding-up of the company and realisation of its assets or sale of its business for the payment of claims.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

Madagascar has been a party to a cross-border initiative (CBI) programme that comprises a policy framework between multiple countries throughout eastern and southern Africa and the Indian Ocean, providing

full support from their co-sponsor. It is similar to the concept adopted by states in the Indian Ocean and the cross-border programme set by the Indian Ocean Commission in 2014. Therefore, the CBI has been put in place to facilitate co-operation between states in the Indian Ocean such as Mayotte, Madagascar, the Comoros, Mauritius and the Seychelles. Nevertheless, there are no specific provisions that mandate cross-border co-operation preventing restricted parties from adopting co-ordination principles such as the American Law Institute and International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases 2001, and the INSOL International (International Association of Restructuring, Insolvency and Bankruptcy Professionals) Global Principles for Multi-Creditor Workouts 2000.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

Irrevocable powers of attorney regarding the assets which make up the estate of the insolvent party will not survive its insolvency. However, and taking into account that the aircraft is not owned by the lessee/insolvent, the aircraft is not part of the insolvency estate, which is why the DPOA will survive. If the amounts regarding the lease are not paid, the lessor may invoke an event of default to terminate the agreement, requesting the repossession and deregistration of the aircraft through a DPOA.

2.9.5 Other Effects of a Lessee's Insolvency

In Madagascar, the declaration of the insolvency of a lessee does not suspend a lease agreement and the aircraft will not be deemed part of the lessee's property.

However, given that Madagascar has adhered to the Cape Town Convention and Protocol (see 2.10 Cape Town Convention and Others), the following options must be considered when it comes to repossession of the aircraft.

Madagascar has chosen alternative A of Article XI of the Cape Town Protocol. In other words, if the lessee is declared insolvent, the receiver(s) must give back the aircraft within a maximum waiting period of 60 calendar days unless the lessee executes the outstanding obligations and commits to execute all its future

contractual obligations. The aircraft must immediately be returned to the lessor upon the occurrence of a new event of default and the lessee cannot claim any further delay.

Any attempt to delay or prevent the repossession of the aircraft by the lessor after the expiry of the waiting period of 60 days is prohibited.

Subject to the foregoing, which is fully recognised and applicable in Madagascar, the Cape Town Protocol does not prevent the lessor from using any remedy available in local legislation.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

If a borrower, guarantor or an entity becomes insolvent, the main risk is the lack of sufficient assets to provide for the payments due to the creditors, including the lender, which, if it does not have a guarantee of its own (eg, a mortgage), will be deemed as any other common creditor to be paid equally in accordance with the debtor's existing assets.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

No moratorium or similar stay is imposed in connection with insolvency proceedings. Additionally, the declaration of the lessee's insolvency does not suspend the execution of the lease agreement, but the insolvency administrator, under applicable law, can always terminate it by undertaking to pay the retributions corresponding to the existing period between the date when the insolvency took effect and the end of the term established in the contract, or the date on which termination by the insolvent would have been possible.

2.9.8 Liquidation of Domestic Lessees

The methods by which a domestic lessee can be liquidated or placed in administration or receivership are judicial reorganisation (*redressement judiciaire*) and liquidation (*liquidation des biens*). See 2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership.

2.9.9 Ipso Facto Defaults

Performance defaults are required to repossess an aircraft during a lessee insolvency proceeding.

2.9.10 Impact of Domestic Lessees' Winding-Up

If a domestic lessee is wound up by a court or administration proceeding, the lease is not automatically terminated upon the issuance of the insolvency judgment. The following scenarios may apply.

- Scenario 1: The receiver(s) can decide to continue the lease subject to the payment of the rent. If the receiver(s) and the lessee fail to pay the rent or any other payment obligations under the lease, the lessor is no longer required to perform its obligations. The lessor can also send a notice period of 30 days to the lessee and the receiver(s) to remedy the situation. Failing that, the lease is automatically terminated. The termination of the lease for non-payment of rent means that the lessor can repossess the aircraft and proceed with the deregistration and export of the aircraft.
- Scenario 2: If the lessor wants to terminate the lease upon the issuance of the insolvency judgment as a result of any pre-insolvency reasons, the lessor must introduce its claim for termination before the commercial court within 30 days following the second publication of the insolvency judgment in the newspaper. The judge will only decide to grant the termination if they consider that the lessee is unable to provide sufficient guarantee in respect of the payment of the rent. If the termination is granted, the lessor will be entitled to proceed with the repossession, deregistration and export of the aircraft.
- Scenario 3: If the lessor wants to terminate the lease after the issuance of the insolvency judgment as a result of any post-insolvency reasons, the lessor must introduce its claim for termination before the commercial court within 15 days after it has been informed of the lessee's default. The judge will only decide to grant the termination if they consider that the lessee is unable to provide sufficient guarantee in respect of the payment of the rent. If the termination is granted, the lessor will be entitled to proceed with the repossession, deregistration and export of the aircraft.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The Convention on International Interests in Mobile Equipment (the “Convention”) and the related Protocol on Matters specific to Aircraft Equipment (the “Protocol”) are in force in Madagascar. There is no implementing local legislation, but the Convention and Protocol are applicable and enforceable in Madagascar, as the adherence of the Republic of Madagascar was authorised by Law No 2012-009.

However, Madagascar has not designated an “entry point” pursuant to Article XIX of the Protocol.

2.10.2 Declarations Made Concerning Conventions

At the time of Madagascar’s adherence to the Convention, the Republic of Madagascar made declarations in respect of Articles 39 (1) (a) and (b), 40, 53 and 54 (2).

At the time of Madagascar’s adherence to the Protocol, the Republic of Madagascar made declarations in respect of the following articles:

- Article XXX (1) relating to Article VIII;
- Article XXX (2) relating to Article X;
- Article XXX (3) relating to Article XI; and
- Article XXX (1) relating to Article XII and Article XIII.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Article XIII of the Protocol is applicable in Madagascar. There is no specific procedure for the submission and recording of an IDERA on the Aircraft Register. The most important action is that the IDERA is filed with the CAA (which is in charge of the records in the Aircraft Register).

2.10.4 Enforcement of Conventions

There is no known precedent of enforcement of the Convention or the Protocol in Madagascar.

2.10.5 Other Conventions

Madagascar is a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft, but not to the 1933 Rome Convention for the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

There are no restrictions on foreign lenders financing an aircraft locally, or on borrowers using the loan proceeds.

3.1.2 Effect of Exchange Controls or Government Consents

There are no exchange controls or government consents required in respect of financing or repatriation of realisation proceeds under a loan, guarantee or security document.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Downstream, upstream and/or cross-stream guarantees are not permitted under Malagasy law.

3.1.5 Lenders’ Share in Security Over Domestic SPVs

Taking share security over a domestic special-purpose vehicle (SPV) that owns the financed aircraft is possible, but this kind of situation has not yet arisen. Pledges over shares are permitted.

3.1.6 Negative Pledges

Negative pledges are recognised.

3.1.7 Intercreditor Arrangements

There are no material restrictions or requirements imposed on intercreditor arrangements.

3.1.8 Syndicated Loans

While the concept of agency and the role of an agent (such as the facility agent) under a syndicated loan does not exist per se in Madagascar, from a practical perspective, this concept is recognised. In addition, the Malagasy Contract Law gives free rein to the parties to establish the terms and conditions of their contract. This includes the right to appoint an entity or an individual as an agent.

3.1.9 Debt Subordination

There is no specific method of debt subordination that is expressly permissible and recognised by Malagasy law. However, in practice, subordination agreements are permissible and recognised.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

It is permissible to transfer or assign all or part of an outstanding debt under an English or New York law-governed loan.

3.1.11 Usury/Interest Limitation Laws

There are usury or interest limitation laws in Madagascar. For instance, in commercial contracts, any interest beyond 6% is considered usurious.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

The typical form of security and recourse granted in an aviation finance transaction domestically is a mortgage.

3.2.2 Types of Security Not Available

It is not possible to set up pledges over aircraft or related collateral such as engines, as they are subject only to mortgages.

3.2.3 Trust/Trustee Concepts

Under Malagasy law, the concept of a trust and of a security trustee are not expressly provided for in any legal provision. However, Malagasy Contract Law gives free rein to the parties to establish the terms and conditions of their contract. This includes the right to appoint an entity or an individual to represent and act on behalf of several parties driven by the same interest.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

It is permitted for a borrower to assign to a third party, including a security trustee, its rights to the aircraft or under an aircraft lease, pursuant to a security assignment or a mortgage.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

Under Malagasy law, it is possible to assign the rights and benefits only, without also assigning the attendant obligations of the lessor under an aircraft lease.

3.2.6 Choice of Foreign Law

It is permitted and enforceable for security assignments or guarantees to be governed by English or New York law.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

It is a requirement to have a written contract duly signed by the authorised signatories of the parties to that contract. The registration of such an assignment with the CAA is also advisable in order to be enforceable. While this is not mandatory, it is advisable for a security assignment written in a foreign language to be accompanied by a French translation made by a Malagasy sworn translator. Sometimes, local courts accept English documents, but this is not always the case. Whether they are accepted mainly depends on the decision of the judge in charge of the matter (if the matter goes to court).

3.2.8 Domestic Law Security Instruments

If an English or New York law-governed security assignment were to be taken in respect of an aircraft registered in Madagascar, there would be no need to take an additional specific domestic security instrument.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

It is permissible to register an English or New York law-governed security assignment or a domestic law security instrument domestically. The registration is made at the CAA.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of such security interests is recognised.

3.2.11 Effect of Changes in the Identity of Secured Parties

If the identity of the secured parties under a security assignment changes after its execution, the security

interests are not jeopardised, as long as this change is documented and updated at the CAA.

3.2.12 “Parallel Debt” Structures

These types of structures have not been seen in Madagascar.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment would not be deemed to be resident or domiciled in Madagascar and would not be subject to any taxes as a result of its being a party to, or its enforcement of, any such security assignment.

3.2.14 Perfection of Domestic Law Mortgages

A domestic law mortgage over an aircraft or engine should be registered with the tax authority and the CAA in order to be perfected. In practice, this kind of situation has not been seen in Madagascar.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

There are no differences between the form of security (or perfection) taken over an aircraft and that taken over spare engines.

3.2.16 Form and Perfection of Security Over Bank Accounts

Security over a bank account usually takes the form of a pledge. A pledge over a bank account should be registered with the tax authority and the companies' registry to be perfected.

3.3 Liens

3.3.1 Third-Party Liens

The Malagasy Security Law does not provide for any specific provisions on liens. However, the closest concepts under Malagasy law are the retaining right and the possessory pledge.

The Retaining Right

The retaining right is the right of a creditor to retain in its possession a debtor's asset in an event of default and until full payment of the debts. This is applicable to movable assets and properties. It should be noted that the retaining right is not subject to any agreement or registration formalities in order to be enforceable.

The creditor's security is materialised by its right to retain in its possession the asset that is the object of the dispute. For example, an aircraft maintenance service company is entitled to retain an aircraft in its possession if the aircraft operator fails to pay the maintenance fees.

The Possessory Pledge

The possessory pledge is an agreement between a pledgee and a pledgor that allows the pledgee to enter into possession of an agreed movable asset (excluding an aircraft) until full payment of the debt. This is not applicable to an aircraft, as it is not considered to be a movable asset under the Malagasy Security Law and the Civil Aviation Code.

Neither the retaining right nor the possessory pledge is subject to registration formalities. These securities are only materialised by the creditor taking possession of the assets.

3.3.2 Timeframe to Discharge a Lien or Mortgage

There is no specific timeframe to discharge a lien or mortgage over an aircraft. From the authors' experience, this may take up to six months. The main issue in Madagascar is the risk of an administrative delay.

3.3.3 Register of Mortgages and Charges

The Aircraft Register operated by the CAA is the register for mortgages and charges. The interests of an aircraft mortgagee or security trustee can be noted on the Aircraft Register and the effect of any such notation is enforceability towards third parties.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

There are no specific provisions on liens under the Malagasy Security Law. The closest concept is that Madagascar has made a declaration under Article 39 of the Convention right of detention in favour of employees, fees, taxes and royalties due to the Republic of Madagascar or any other public entities, and the right of detention in favour of suppliers (eg, in respect of maintenance services) means that they have priority over registered international interests. None of the provisions of the Convention will prevent the Republic of Madagascar or any public entity or any supplier of a public entity from performing its right of

detention over a specific asset. Also, Madagascar has made a declaration under Article 40 of the Convention. All non-consensual rights or interests resulting from the seizure of the aircraft ordered by a judgment can be registered as international interests.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser of an aircraft should check the Aircraft Register to verify that an aircraft is free of encumbrances.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

There are no relevant differences in Madagascar between enforcing a security assignment and enforcing a loan or guarantee.

3.4.2 Security Trustees' Enforcement of Their Rights

It would be permitted for a third party (a security trustee, etc) to enforce its rights under a security assignment pursuant to a notice and acknowledgement executed by the lessor and the lessee, respectively, in connection with that security assignment.

3.4.3 Application of Foreign Laws

Courts in Madagascar will uphold a foreign law as the governing law of a finance or security document, as well as the submission to a foreign jurisdiction.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Malagasy courts will accept and enforce a final judgment of a foreign court or an arbitral award, without re-examination of the matter, to the extent that an exequatur order is obtained via a local court and that any such final judgment or exequatur award does not contain provisions that are contrary to public order and morals.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

It would be possible for a secured party to take physical possession of an aircraft to enforce a security

agreement/aircraft mortgage without the lessee or operator's consent.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

Commercial courts are generally competent to decide enforcement actions under a security agreement/aircraft mortgage.

3.4.7 Summary Judgments or Other Relief

It is possible for a secured party to obtain a summary judgment pending a final resolution of judicial proceedings to enforce a security agreement/aircraft mortgage. However, this is only possible if there is urgency and if there is no possibility of the counterparty challenging the request of the lessor.

3.4.8 Judgments in Foreign Currencies

It is possible for a secured party under a security agreement/aircraft mortgage to obtain a judgment in a foreign currency.

3.4.9 Taxes/Fees Payable

In order to enforce its claims, the secured party is liable to pay court fees, which are nominal in the Malagasy judicial court.

3.4.10 Other Relevant Issues

There are no other relevant issues of which a lender should be aware in relation to the enforcement of its rights.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are no other issues or court judgments that are relevant to these matters.

4.2 Current Legislative Proposals

There are no current legislative proposals that are relevant to these matters.

MALAYSIA



Law and Practice

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ABDULLAH CHAN

1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

Stamp duty is payable in Malaysia on instruments and not on transactions. An instrument is required to be stamped within 30 days of its execution. If an instrument is executed outside Malaysia, then it must be stamped within 30 days after the date an instrument is brought into Malaysia either physically or by any electronic means (including for example, by email). For contracts generally, documents that are not stamped are inadmissible in court as evidence. Stamp duty is payable on an aircraft or engine sale agreement on a nominal basis. If the contract is for the sale of an ownership interest in an entity, then a contract for the sale of shares is similarly subject to stamp duty on a nominal basis. Stamp duty is, in addition, payable on the bill of sale that transfers title to such aircraft or engine, and/or on a share transfer form, on an ad valorem basis, if the asset is located in Malaysia at the time of the sale or where a domestic party is party to such sale agreement.

1.1.2 Enforceability Against Domestic Parties

The sale agreement does not need to be translated, certified, notarised or legalised to be enforceable against a domestic party. However, the sale agreement must be stamped with the Inland Revenue Board of Malaysia (IRBM) in order for the sale agreement to be admissible as evidence in court, including for example where there may need to be an enforcement proceeding against a domestic party.

1.2 Transfer of Ownership

1.2.1 Transferring Title

A bill of sale may be used to transfer title to an aircraft or engine, and its wording may specify that all installed parts are included in the transfer of title. If the entity that owns the aircraft or engine remains the same, albeit with a change in the entity's ownership/shareholding, that is not separately recognised as a sale of such aircraft or engine itself.

1.2.2 Sales Governed by English or New York Law

A bill of sale that is governed by English or New York Law is recognised to transfer title to an aircraft or engine. In order for the bill of sale to be recognised and enforceable in Malaysia, the bill of sale should be stamped with the applicable ad valorem stamp duty, and it must be attested and registered within seven clear days after its execution.

1.2.3 Enforceability Against Domestic Parties

A bill of sale does not need to be translated, notarised or legalised to be enforceable against a domestic party. However, the bill of sale must comply with the Bills of Sale Act 1950, will need to be stamped in order to be admissible as evidence in court, and will need to be registered accordingly.

1.2.4 Registration, Filing and/or Consent From Government Entities

A bill of sale must comply with the required statutory form and should be registered once it is stamped. It shall be attested by an advocate and solicitor of the High Court, by a Magistrate or Registrar or Assistant Registrar of the High Court, or by a commissioner for oaths or a notary public.

The estimated time for stamping a bill of sale is approximately two to four weeks; the estimated time for registering a bill of sale at the High Court of Malaya is approximately three to ten business days.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

An ad valorem stamp duty is payable on a bill of sale, in accordance with the value of the asset being transferred, if the sale occurs when the asset is in Malaysia or if the bill of sale was executed in Malaysia.

If the sale is evidenced by a sale of the ownership interest in a company, then ad valorem stamp duty would be payable on the share transfer form.

If the asset is over international waters or in transit to/from Malaysia at the time the title transfer takes place, then there is no transfer within the jurisdiction of Malaysia.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

Operating/wet/finance leases over aircraft are recognised and are registrable in Malaysia. Leases concerning only engines or parts are similarly recognised but are not registrable.

2.1.2 Application of Foreign Laws

A lease involving either a domestic party or an asset situated in Malaysia may be governed by a foreign law. Malaysian courts have recognised and accepted parties' choice of contracting law.

2.1.3 Restrictions Concerning Payments in US Dollars

There are no material restrictions imposed on domestic lessees making rent payments to foreign lessors in US dollars generally, subject to a domestic lessee being able to evidence its obligation to make such payments.

The Malaysian central bank, Bank Negara Malaysia (BNM), must approve leases for aggregate sums over MYR100 million that fall within the definition of a "borrowing" under the Bank Negara Malaysia Foreign Exchange Notices ("BNM Notices"). Once such approval is obtained prior to the entry into a finance lease, there is no separate approval required for individual payments to the foreign lessor.

2.1.4 Exchange Controls

Domestic entities and individuals may make or receive payments in foreign currency to or from non-residents for any purpose. A foreign lessor may repatriate funds from Malaysia provided that the repatriation occurs in a foreign currency.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

Stamp duty is payable on a lease that is executed in Malaysia and/or a lease that is executed by a domestic party, upon an original or copy of a lease being brought into Malaysia either physically or by any electronic means (including for example, by email).

2.1.6 Licensing/Qualification of Lessors

A lessor does not have to be licensed in order to do business with a domestic lessee.

If a lessor is carrying on a Labuan Leasing Business (defined as "the business of letting or sub-letting property on hire for the purpose of the use of such property by the hirer") then that lessor would need to have a Labuan Leasing Licence granted by the Labuan Financial Services Authority (LFSA), prior to leasing aircraft to a domestic lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

There are no mandatory terms for aircraft leases. The following would be included as a matter of Malaysian law compliance:

- matters pertaining to the commercial operations of a lessee (such as the Air Operator's Certificate and the Air Service Licence);
- the documents to effect a registration of the lease on the Malaysian civil aircraft register (the "Aircraft Register") maintained by the Civil Aviation Authority of Malaysia (CAAM);
- registration of a lessor's security interests; and
- stamp duty declaration.

2.2.2 Tax and Withholding Gross-Up Provisions

A Malaysian party is obligated to deduct withholding tax when making payments to a non-resident in respect of services rendered in Malaysia. It is common to see a tax gross-up provision and a withholding gross-up provision in leases. Such a term would be valid and enforceable on the basis that it has been contractually agreed between the parties.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease can cover parts that are installed or replaced on an aircraft or engine after the lease's execution, provided the installation/replacement of such parts is specifically provided for in the lease.

2.2.4 Risk of Title Annexation

There is a risk of title annexation in respect of aircraft engines installed on an airframe. For example, if an

aircraft should be subject to a lien within Malaysia, and the aircraft is detained with the subject aircraft engines installed.

In addition, Malaysia recognises a separate title/ownership over aircraft engines pursuant to the International Interests in Mobile Equipment Act 2006, if such ownership interests in the aircraft engines are registered on the International Registry. CAAM does not itself maintain a registry of interests in aircraft engines. In practice, lessors and/or financiers with interests in particular/specific engines would obtain a charge and register such charge against the lessee pursuant to the Companies Act 2016, to put third parties on notice as to the existence of such charge.

2.2.5 Recognition of the Concepts of Trust/Trustee

CAAM has recognised and has accepted the registration of leases where one of the parties is an owner trustee, subject to such owner trustee being able to satisfy the statutory requirements for the registration of a lease.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The interests of the legal owner are noted on the Aircraft Register. Only the registered legal owner or a party named in the Irrevocable Deregistration Authorisation (IDERA) may deregister an aircraft from or make changes in an aircraft's registration details at the Aircraft Register.

2.3.2 Registration If the Owner Is Different From the Operator

Malaysia operates an owner registry. The Aircraft Register will reflect the name of the legal owner as well as the name of the (Malaysian) aircraft operator.

2.3.3 Aircraft/Engine-Specific Registers

An aircraft lease is registrable on the Aircraft Register. However, the Aircraft Register does not provide for the separate registration of leases of aircraft engines.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

The foreign owner of an aircraft may, if the aircraft is leased to a qualified person (as defined in the Civil

Aviation Act 1969), register the lease on the Aircraft Register. Such registration is a mandatory procedural/administrative requirement if the aircraft is to be operated by a Malaysian entity. A lessor's interests would be registered only if the lessor were also the owner.

Aircraft leases are not generally subject to any consent from any government entity. However, if a lessor entity is a Labuan entity (see **2.1.6 Licensing/Qualification of Lessors**), then the entry into each lease would be subject to the prior approval of the LFSA.

The applicable form (CAAM/AW/7101-01) and supporting documents would need to be submitted to CAAM, in order to effect the registration of a lease in accordance with the Civil Aviation Regulations 2016 and the Civil Aviation Directive (CAD) 7101.

2.3.5 Requirements for a Lease to Be Valid and Registrable

A lease does not need to be in a specific form, may be executed under hand and may be in the English language, with no requirements for a local law translation.

There are no requirements for serving, certification, notarisation, or legalisation for the lease to be legal and valid under Malaysian law. However, the lease and other transaction documents would need to be stamped in order to be admissible as evidence in court. If any transaction documents contain a power of attorney, then the execution of that power of attorney needs to be attested and the power of attorney would need to be registered accordingly.

2.3.6 Taxes/Duties Payable for Registering a Lease

There is no tax or duty that arises upon registering a lease. CAAM imposes a fee to register a lease on the Aircraft Register.

2.3.7 Registration of Aircraft in Alternative Countries

Aircraft such as business jets that are based in Malaysia, and which are operated as private aircraft and not on a commercial basis, are typically registered on the United States of America Federal Aviation Authority register or one of the European registers such as those of San Marino or Denmark. Commercial aircraft

operated by a Malaysian air operator would need to be registered with CAAM.

2.3.8 Requirements for Documents Concerning Registration

CAAM does not require any document to be notarised and/or authenticated before it will accept and process the registration of an aircraft. Documents that are not in Bahasa Malaysia, or in a foreign language other than English, will need to be officially translated into the English language.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A foreign lessor that is deemed to be a tax resident of Malaysia would be subject to income tax upon leasing an aircraft or engine to a Malaysian lessee.

The obligation to deduct withholding tax on payments made to a foreign lessor is on the lessee. Failure to withhold accordingly would result in a penalty being imposed on the lessee/payer.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

Being a party to, or attempting to enforce, or enforcing a lease, does not deem a foreign lessor to be a resident, domiciled or carrying on business in Malaysia.

2.4.3 Engine Maintenance and Operations

There are no liabilities in respect of aircraft or engine maintenance and operations imposed on a foreign lessor under a lease as a result merely of the foreign lessor being a party to such lease.

2.4.4 Damage or Loss Caused by an Asset

Pursuant to the Civil Aviation Act 1969, where material damage or loss is caused by an aircraft in flight, taking off or landing, or by any person in any such aircraft, or by any article falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention.

2.4.5 Attachment by Creditors

A creditor of a domestic lessee could attach an aircraft leased to that domestic lessee but owned by a differ-

ent entity in the event a creditor was able to obtain a court order that would permit such attachment: for example, if a creditor were to obtain a monetary judgment and then sought to enforce the monetary judgment by way of a writ of seizure.

2.4.6 Priority of Third Parties' Rights

There are certain liens that will take priority over a lessor's rights, although liens are generally not registrable in the Aircraft Register. This includes liens in favour of airline employees for unpaid wages, liens or other rights of an authority of Malaysia relating to taxes or other unpaid charges and liens in favour of repairers of an aircraft object in their possession to the extent of service or services performed.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

Obtaining insurance from any party other than a licensed general insurer (ie, licensed pursuant to the Financial Services Act 2013) requires the prior approval of the BNM. In practice, domestic insurance companies would provide insurance coverage and the domestic insurance companies would then reinsure the insurances with foreign insurance companies – in respect of the liability and hull insurances.

2.5.2 Mandatory Insurance Coverage Requirements

Article 50 of the Montreal Convention 1999, which mandates state parties to require a carrier to maintain adequate insurance covering the carrier's liability, has been incorporated into Malaysian law pursuant to the Carriage by Air Act 1974.

2.5.3 Placement of Insurance Outside of Jurisdiction

Pursuant to the Financial Services Act 2013, except with the prior written approval of the BNM, no person shall enter into or cause to be entered into, a contract of general insurance of such description as may be prescribed by the BNM with an insurer other than a licensed general insurer. At the moment all licensed general insurers are Malaysian entities.

Reinsurances may be placed outside Malaysia.

However, reinsurances up to 100% coverage cannot be placed outside Malaysia.

2.5.4 Enforceability of “Cut-Through” Clauses

A “cut-through clause” is valid and enforceable in Malaysia, as having been agreed commercially between the parties.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurance/reinsurances are permitted.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors’ Abilities

There are no restrictions on a lessor’s ability to:

- terminate the leasing of an aircraft,
- re-export the aircraft, and/or
- sell the aircraft following such termination,

subject always to these matters being provided for in the lease itself.

It is recommended that a lessor/financier obtain a deregistration power of attorney as well as an IDERA upfront at the commencement of a lease.

The aircraft does not need to be physically located in Malaysia at the time of any such action(s).

2.6.2 Lessor Taking Possession of the Aircraft

A lessor can take physical possession of the aircraft without the lessee’s consent in accordance with the Cape Town Convention, which Malaysia has ratified. However, in Malaysia the practice is that lessors will usually seek a court order prior to obtaining physical possession of an aircraft.

2.6.3 Specific Courts for Aviation Disputes

There are no courts in Malaysia that deal specifically with aviation matters/disputes. In general, aviation disputes have been adjudicated by the civil courts, in particular the Commercial High Court. A recent case is *AirAsia X Berhad v BOC Aviation Limited and 14 Others*[2021] LNS 188, which considered and determined the first ever legal dispute that involved issues pertaining to the applicability of the Cape Town Convention in Malaysia.

2.6.4 Summary Judgment or Other Relief

It is possible to obtain a summary judgment, equitable or other injunctive relief pending final resolution of judicial proceedings to enforce an aircraft lease.

In relation to a monetary judgment, if matters are clear-cut, parties may opt for summary judgment to expedite proceedings and reduce costs. The court evaluates the claim based on the claimant’s affidavit(s) without the need for a trial or witness examinations, typically concluding within six to eight months. However, in complex cases and/or where the remedy sought is not merely restricted to a monetary judgment, the lessor must prepare for a full trial. The granting of summary judgment depends on various factors, including the presence of triable issues or a defence in the case.

In the Malaysian context, seeking aircraft possession through a mandatory injunction may significantly expedite the process, typically taking about six to eight weeks for an ex parte injunction compared to nine to 18 months for a full trial.

2.6.5 Domestic Courts’ Approach to Foreign Laws and Judgments

Malaysian courts will uphold and give effect to the governing law chosen by the parties to a contract. The expressed intention of the parties as to the laws governing the contract will be regarded as the proper law of the contract. A lease agreement governed by a foreign law will therefore be recognised and enforced by a Malaysian court, provided the application of the foreign law is not in opposition to (Malaysian) public policy and that the choice is bona fide and legal.

Malaysian courts will uphold the submission to a foreign jurisdiction – the domestic court should not interfere with the foreign court’s determination save in exceptional circumstances where the foreign proceedings are vexatious or oppressive.

Companies are not generally entitled to immunity from suit. A party may waive its entitlement to sovereign or other immunity from suit by contractually agreeing to the same.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

The Reciprocal Enforcement of Judgments Act 1958 (REJA 1958) permits the registration and enforcement of judgments obtained in certain countries such as the United Kingdom. A judgment registered under REJA will have the same force and effect as if it had been a judgment originally entered or acquired in the registering court.

A judgment obtained in the senior courts of England and Wales would be recognised and enforced by Malaysian courts without re-examination of the issues provided that all of the following criteria are met:

- the judgment was not obtained by fraud;
- the effect of enforcing the judgment does not contravene the public policy of Malaysia;
- there was no denial of natural justice;
- the English court having jurisdiction in the matter applied the appropriate law;
- the matter in dispute in the proceedings in the English court had not previously to the date of the judgment in the English court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter;
- such English court had jurisdiction to adjudicate the cause of action upon which such judgment was given;
- the judgment was obtained in a jurisdiction to which REJA applies;
- such judgment is final and conclusive;
- such judgment is registered in the High Court of Malaysia;
- rights under the judgment are vested in the person by whom the application for registration of such judgment in the High Court of Malaysia was made; and
- any judgment sum expressed in a currency other than Malaysian ringgit shall be registered as if it were a judgment for such sum in Malaysian ringgit as, on the basis of the rate of exchange prevailing on the date of the judgment of the English court, is equivalent to the sum so payable.

Malaysian courts do not automatically recognise a judgment obtained in a state that is not a reciprocating country under REJA, and thus it is not directly

enforceable by the courts in Malaysia. A fresh action based on the judgment of such court may be brought before the Malaysian courts.

Malaysia has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). An award made in connection with a domestic arbitration, or an award from a foreign state which is a party to the New York Convention, shall be recognised as binding and shall be enforceable by entry as a judgment in terms of the award or by action.

2.6.7 Judgments in Foreign Currencies

A judgment or order made in a Malaysian court will be expressed in the Malaysian currency in an amount equivalent to the applicable foreign currency amount.

2.6.8 Limitations on Lessors' Actions Following Termination

There is no limitation on the lessor's ability to recover default interest (or the compounding thereof) or to charge additional rent following termination of the lease for default, including where the lessee fails to return the aircraft, subject to such provisions being reflected in the lease itself.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

Any lease would usually provide that all taxes are borne by the lessee. A lease would need to be stamped in order to be admissible as evidence in court. If the lease was not yet stamped at the time a lessor sought to enforce the lease, then the lessor would need to stamp the lease, and incur a late stamping penalty, prior to commencing the (enforcement) court proceedings in reliance on such lease.

2.6.10 Mandatory Notice Periods

A lessor ought to comply with the terms of its aircraft lease, including any terms pertaining to notice periods, when terminating such aircraft lease.

2.6.11 Lessees' Entitlement to Claim Immunity

Companies are not generally entitled to immunity from suit. Immunity is granted under very specific and particular circumstances: for example, where statute has granted immunity to persons holding particular positions. Parties may waive their entitlement to sovereign

or other immunity from suit by agreeing contractually to the same.

2.6.12 Enforcement of Foreign Arbitral Decisions

Malaysia has adopted the New York Convention. The provisions on recognition and enforcement of an arbitral award have been incorporated in the Malaysian Arbitration Act 2005. An award made in connection with a domestic arbitration or an award from a foreign state which is a party to the New York Convention shall be recognised as binding and shall be enforceable by entry as a judgment in terms of the award or by action.

2.6.13 Other Relevant Issues

There are no other relevant issues that a lessor should be aware of in relation to the enforcement of its rights.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

In general, Malaysia recognises the concepts of contractual assignment and novation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

A legal assignment is valid pursuant to the Civil Law Act 1956 if:

- the debt or chose in action is one that is existing;
- the assignment is in writing under the hand of the assignor;
- the assignment is absolute and not by way of charge only; and
- there is express written notice of the assignment to the obligor.

A novation is valid if:

- there is an intention to novate;
- the novation may be expressed or may be implied from conduct;
- there is consideration; and
- there is consent of the parties concerned.

Unlike assignment, there is no requirement of notice in writing of the novation being given for the novation to have effect.

2.7.3 Enforceability of Lease Assignments/Novations

There are no requirements for a lease assignment or assumption/novation to be notarised, certified or legalised to be enforceable against a domestic party.

Stamping is required if a lessor/financier intends to enforce a lease assignment or assumption/novation against a domestic party.

If the assignment or assumption/novation or any transaction documents contains a power of attorney, (i) the execution of the power of attorney must be authenticated by, inter alia, an advocate and solicitor of the High Court of Malaya, a commissioner for oaths or a notary public; and (ii) the power of attorney must be registered accordingly.

2.7.4 Filing/Registration of Lease Assignments/Novations

If an aircraft lease assignment or assumption/novation results in a change in the details recorded at the Aircraft Register, then the owner of the aircraft needs to make the relevant filing with CAAM in order to reflect those changes accordingly. The changes may be affected by filing in the relevant form with CAAM. No consent is required from any government entity in respect of such changes.

If an aircraft and/or engine lease assignment or assumption/novation results in a change in the security structure of such lease, then the lessor/financier will need to register the applicable new security accordingly.

There are no government applications or consents required as a prerequisite to the execution and delivery of an aircraft and/or engine lease assignment and assumption/novation in relation to an aircraft registered domestically.

2.7.5 Taxes/Duties Payable on Assignment/Novation

Stamp duty is payable in respect of such assignment and assumption/novation agreement, within 30 days of execution in Malaysia, or within 30 days of a copy being brought into Malaysia, either physically or by electronic means.

2.7.6 Recognition of Transfer of Ownership Interests

If the shareholders of the owner should change, but the owning entity itself remains the same, then there is no requirement to make any changes to the details of the aircraft as recorded in the Aircraft Register.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

An application for deregistration may only be made by the registered owner or a person authorised by the registered owner. A financier/mortgagee will typically have requested that the owner execute an IDERA prior to the commencement of the lease, and will have filed the IDERA with CAAM.

In order to deregister an aircraft, the following will be required:

- the applicable CAAM form (ie, CAAM/AW/7101-04);
- evidence that each person who has legal or beneficial interest in the aircraft has been satisfied or has consented to the transfer (this requires any mortgage to be discharged prior to the deregistration); and
- the applicable fees.

2.8.2 Lessee's/Operator's Consent

An aircraft owner may, and a mortgagee may (in reliance on an IDERA), apply for the deregistration of the aircraft without the lessee's or operator's consent. A lessor who is not also an owner may not apply to deregister an aircraft.

2.8.3 Required Documentation

Please refer to **2.8.1 Deregistering Aircraft in This Jurisdiction** for the required documents when applying to deregister an aircraft. A lessor who is not also an owner may not deregister an aircraft.

2.8.4 Duration of Deregistration Process

Deregistration is usually effected within three to five working days of the submission of a complete application to CAAM.

2.8.5 Aviation Authority's Assurances

CAAM does not provide advance assurances to an aircraft owner, mortgagee or lessor as to the prompt deregistration of the aircraft. However, with sufficient notice and prior engagement with CAAM, the deregistration process may be completed in a more expedited manner.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

A fee of MYR300 is payable upon filing an application for deregistration of an aircraft.

2.8.7 Deregistration Power of Attorney

A deregistration power of attorney is recognised by CAAM. The execution of a power of attorney would need to be in accordance with the Powers of Attorney Act 1949; it would need to be attested/notarised and stamped and then registered accordingly in order to be enforceable against a domestic party.

If the power of attorney is in any language other than English or Bahasa Malaysia, a translation into the English or Bahasa Malaysia language will need to be prepared.

CAAM will not permit deregistration based on a deregistration power of attorney alone, and it would treat the deregistration power of attorney as evidence of the authorised signatories representing the owner or mortgagee, as the case may be.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

At the point of time when an application is made for deregistration, CAAM would require evidence, such as a board resolution or a valid power of attorney, pertaining to the extent of the authority provided by the donor(s) of the power(s) of attorney to the individuals concerned.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

If the form of the power of attorney complies with the Powers of Attorney Act 1949, and the power of attorney has been registered accordingly, CAAM has recognised deregistration powers of attorney governed by foreign laws. In certain instances, lessors

have registered both a foreign law-governed and a domestic law-governed power of attorney.

2.8.10 Revocation of a Deregistration Power of Attorney

An irrevocable power of attorney may only be revoked at the consent of the donee.

2.8.11 Owner's/Lessor's Consent

An aircraft owner, mortgagee or lessor may export the aircraft without the lessee's consent. It is advisable for the deregistration power of attorney to also include the authority to export the aircraft, and not merely to deregister the aircraft. A lease/mortgage may also include language on the right to export the aircraft.

The asset does not need to be located in Malaysia at the time of deregistration as deregistration is effected by way of documents. In order to export an aircraft, the aircraft owner, mortgagee or lessor would need to have a copy of the earlier customs form (Form K1) which was issued (by the Royal Malaysian Customs) at the time of the importation of the aircraft into Malaysia. Export is similarly effected by way of documents.

2.8.12 Aircraft Export Permits/Licences

There is no general requirement to obtain an export permit or licence, but the relevant export declaration must be made to the Royal Malaysian Customs before the aircraft may be exported out of Malaysia.

Generally, the following documents and information are required for export:

- export declaration;
- invoice;
- export licence (only applicable to certain categories of goods, which does not usually include aircraft); and
- other relevant documents as requested by the customs authorities.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

There are no significant costs/fees/taxes that are charged in respect of the export of an aircraft.

2.8.14 Practical Issues Related to Deregistration of Aircraft

Please see 2.8.1 Deregistering Aircraft in This Jurisdiction for the applicable requirements to be met in order to effect a deregistration of an aircraft.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

Restructuring, reorganisations, insolvencies and liquidations in Malaysia are governed by the Companies Act 2016. There are two types of liquidation in Malaysia, namely compulsory winding-up and voluntary winding-up. Winding-ups facilitate the appointment of an insolvency practitioner as liquidator, who will, inter alia:

- collect and realise assets;
- undertake a proof of debt exercise to resolve creditor claims;
- investigate past transactions for potential draw-back;
- distribute dividends to creditors in satisfaction of claims; and
- eventually, dissolve the company, which thereby ceases to exist.

Voluntary liquidation commences with the passing of a members' resolution to wind up the company. Compulsory liquidation is court-based and is initiated by a creditor.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Compulsory winding-up may apply where a company is unable to pay its debts. This is typically initiated by the filing of a winding-up petition by a creditor, for non-payment of debts as and when they fall due.

There are two types of voluntary winding-up:

- a members' voluntary winding-up – when the company is solvent and the liquidator is appointed at a members' meeting; and

- a creditors' voluntary winding-up – when the company is insolvent and the liquidator is appointed by the creditors at a creditors' meeting.

There are three corporate restructuring mechanisms:

- a scheme of arrangement;
- a corporate voluntary arrangement; and
- a judicial management.

Scheme of Arrangement

Any company or a creditor of a company, and a liquidator if a company is in the process of being wound up, and a judicial manager if a company is in judicial management, may initiate a scheme of arrangement. The applicant seeks an order of court to convene meetings of the members and various classes of creditors of the company. The voting threshold to achieve agreement to the terms of a scheme is 75% of the total value of creditors or class of creditors and members, or class of members present and voting at the court-convened class meeting.

The court may grant restraining orders of an initial period of three months, which may be renewed for a period of up to a further nine months. While a restraining order is in force, the company is not permitted to dispose of any property or to acquire any new property other than in the ordinary course of its business, and if it does, the disposition or acquisition will be void.

Corporate Voluntary Arrangement

The Corporate voluntary arrangement (CVA) is only available to private companies, excluding companies that are holders of licences issued under the Financial Services Act 2016 (FSA 2016) and the Capital Markets and Services Act 2007 (CMSA 2007), and a company that has created a charge of its assets. A company under judicial management may make a CVA proposal through the judicial manager. A liquidator of a company under liquidation may also make a proposal. The CVA process starts with the appointment of a nominee, who must be a licensed insolvency practitioner. It is a requirement that the proposed CVA and a statement of affairs must be submitted to the nominee. The nominee is required to monitor the company's affairs during the moratorium and to form an opinion as to

whether the proposed arrangement has a reasonable prospect of being approved and implemented, and whether the company will have sufficient funds during the moratorium to enable it to carry on business.

Judicial Management

Either the company or a creditor may make an application for the appointment of a judicial manager. Besides inability to pay debts, the applicant must show that there is a reasonable probability of preserving all or part of the company as a going concern, and that the interests of creditors would be better served than with a winding-up. A debenture holder may object to the application, and if it signals that it intends to appoint a receiver, or receiver and manager, the court must dismiss the application unless public interest requires that the court should override the debenture holder's objection.

The appointment of a judicial manager displaces the directors. The judicial manager manages the business and must within 60 days (which can be extended by the court) present a proposal to the creditors of the company. The judicial manager has to summon a meeting of creditors to consider and vote on the proposal. The voting threshold is 75% in value of creditors whose claims have been accepted by the judicial manager. Any proposal that is approved is binding on all creditors. The judicial manager oversees the implementation of the proposal. If a proposal is not approved at the creditor meeting, the court would normally discharge the judicial management order, and either receivership or liquidation would occur.

Receivership

Receivership involves debenture holders appointing a receiver to realise company's assets in their interest. It is not concerned with the economic viability of the company; the focus is on getting the debt back as soon as possible. The right to appoint a receiver is usually derived from a debenture, save where the court makes an order for such appointment. However, courts are only able to appoint receivers pursuant to applications of the aggrieved parties. The right to appoint a receiver is not a cause of action and cannot stand on its own.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

There is no provision under the Companies Act 2016 for cross-border assistance or co-operation relating to Malaysian insolvency proceedings with a foreign dimension. Malaysia has not incorporated the UNCITRAL Model Law on Cross-Border Insolvency into domestic legislation.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

The Malaysian courts have held that if a power of attorney has not been revoked, its validity is not affected by any insolvency or bankruptcy.

2.9.5 Other Effects of a Lessee's Insolvency

If the liquidator determines that the lease is an “unprofitable contract” then the liquidator may, with leave of the court or the committee of inspection, disclaim such contracts, at any time within 12 months after the commencement of the winding-up or such extended period as is allowed by the court.

Malaysia made a declaration under the Aircraft Protocol, that it shall apply Article XI, Alternative A of the Protocol in its entirety to all types of insolvency proceedings, and that the waiting period for the purposes of Article XI(3) of that Alternative shall be 40 working days. This is subject to whatever commercial terms may be reflected in the lease.

Assets that are subject to a lease are not deemed part of the lessee's property so long as the owner of the asset is able to evidence their/its rights of ownership over the asset.

If the lessor's rights are secured (eg, where there is a registered charge or mortgage), then the lessor will have priority over unsecured creditors, to the extent of their security interests.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

In insolvency proceedings, secured creditors will have priority over unsecured creditors to the extent of their security interests. If a lender's rights against a borrower, a guarantor or an entity providing security are

not registered accordingly, then other secured creditors will have priority over the lender.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

There is no automatic moratorium or similar stay for insolvency proceedings. However, the corporate rescue mechanisms may permit moratorium periods if the applicable conditions are met:

- scheme of arrangement – up to three months, with an extension up to nine months;
- corporate voluntary arrangement – 28 days, with extension up to 60 days; and
- judicial management – up to six months, with extension for another six months.

2.9.8 Liquidation of Domestic Lessees

A domestic lessee may be liquidated via a compulsory or voluntary winding-up. Please refer to **2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership**.

In a receivership, an insolvency practitioner is appointed as a receiver, or as a receiver and manager, by a secured creditor under the terms of a security document, usually a debenture containing a fixed or floating charge or both.

2.9.9 Ipso Facto Defaults

Ipso facto defaults are recognised during insolvency proceedings, to the extent the right to repossess on such ipso facto default is specifically provided for.

2.9.10 Impact of Domestic Lessees' Winding-Up

There is no impact on the aircraft per se if a domestic lessee is wound up. However, a mortgagee or lessor can technically repossess an aircraft by exercising their respective enforcement powers in the mortgage/lease.

A liquidator may disclaim the lease contract on the basis of it being an “unprofitable contract”.

In the case of *AirAsia X Berhad v BOC Aviation Limited and 14 Others*[2021] 1 LNS 188, the High Court declared, inter alia, that lessors are unsecured credi-

tors notwithstanding that the lease documents provided for security deposits and maintenance reserves to be held by the lessors. Security deposits and maintenance reserves paid pursuant to lease agreements are regarded, subject to the specific language used in the lease documents, as the absolute property of the lessors and not securities over the assets of AAX. As such, the security deposits are considered as being the property of the lessors.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The Convention and the Protocol are in force in Malaysia, by virtue of the International Interests in Mobile Equipment (Aircraft) Act 2006. It is not necessary to obtain AEP codes for registering international interests in Malaysia.

2.10.2 Declarations Made Concerning Conventions

Malaysia has made declarations under Articles 39 (1) (a), 39 (1)(b), 40, 53 and 54 (2) of the Convention as well as under Articles XXX(1), (2) and (3) of the Protocol.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Article XIII of the Protocol has been adopted into domestic Malaysian law. An IDERA would need to be filed with CAAM and will then be notated on the Aircraft Register.

2.10.4 Enforcement of Conventions

The Malaysian courts have had very limited experience in enforcing the Convention or the Protocol.

In the case of *AirAsia X Berhad v BOC Aviation Limited and 14 Others*[2021] LNS 188, it was held that the scheme (of arrangement as sought by AirAsia X) is an insolvency-related event under Article XI of the Protocol, relying on the facts that:

- the scheme is formulated in the context of an insolvency procedure;
- the scheme is also an arrangement that is collective in that it is “concluded on behalf of creditors generally or such classes of creditors as collectively represent a substantial part of indebtedness”; and

- the court’s approval is required for its implementation.

In addition, the phrase “(no) obligations (of the debtor) under the agreement” as stated in Article XI(10) of the Protocol includes the obligation of the debtor to pay the rentals under the agreement. Reading Article XI(7), (10) and (11) together, the court concluded that in the event the debtor chooses not to terminate the agreement when an insolvency-related event has occurred or the creditor does not exercise its right to repossess the aircraft, the obligations under the agreement including the obligations to pay the rentals cannot be modified by the debtor unless with the consent of the creditor. However, the court then went on to state that the proposed scheme was seeking to compromise the lessors’ claims for damages and was unrelated to Article XI(10) of the Protocol and, in this instance, AirAsia X did not require the consent of the lessors in respect of the proposed 99.95% haircut on the lessors’ claims.

2.10.5 Other Conventions

Malaysia is not a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft and the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

A Malaysian resident may borrow in foreign currency up to MYR100 million equivalent from a foreign lender. Any sums above this amount will be subject to BNM approval.

3.1.2 Effect of Exchange Controls or Government Consents

Prior approval from the BNM is necessary for any lending or granting of security not explicitly permitted under the BNM notices. Residents are permitted to make or receive foreign currency payments to or from non-residents for any purpose. Non-residents may repatriate funds, including income or proceeds from the sale of ringgit assets (such as property in Malay-

sia), as long as the repatriation is in foreign currency and the conversion from ringgit is done in accordance with the BNM notices.

3.1.3 Granting of Security to Foreign Lenders

The BNM regulates the provision of financial guarantees to foreign lenders. Non-bank residents may provide financial guarantees, to secure a non-resident's borrowing, with exceptions for special purpose vehicles or if the resident arranges to repay the borrowing in foreign currency other than through a call upon a financial guarantee due to default. The BNM's prior approval is required for borrowing beyond these limits or in the specified exceptions.

Other than financial guarantees, borrowers may provide security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Subject to the conditions in **3.1.1 Restrictions on Lending and Borrowing**, downstream, upstream and/or cross-stream guarantees in favour of lenders are permitted.

Corporate benefit may be more easily demonstrated in downstream guarantees. However, it is more challenging to establish corporate benefit in upstream guarantees and cross-stream guarantees. If no corporate benefit can be shown, a liquidator may challenge the guarantee.

3.1.5 Lenders' Share in Security Over Domestic SPVs

It is advisable for a lender to take share security over a domestic special purpose vehicle (SPV) if the domestic SPV only owns aircraft financed by a particular lender.

It is possible to create a share charge which is registrable against the shareholder, to the extent the shareholder is a corporate entity. A pledge of shares is less common in Malaysia.

3.1.6 Negative Pledges

A negative pledge is recognised as a pledge to abstain from creating any form of charge, encumbrance or security.

3.1.7 Intercreditor Arrangements

There is no material restriction or requirement imposed on intercreditor arrangements, and an intercreditor agreement would be enforceable subject to the payment of the applicable stamp duty on the transaction documents.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent such as the facility agent and security agent to secure a syndicated loan is recognised.

3.1.9 Debt Subordination

A debt subordination is permissible and is recognised. It is legally valid under Malaysian contract law and is typically accomplished through an intercreditor or subordination agreement between the various classes of creditors and the debtor.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of all or part of an outstanding debt under an English or New York law-governed loan is permissible and recognised.

3.1.11 Usury/Interest Limitation Laws

An interest payment obligation is common in conventional financing arrangements. In Sharia-compliant financing, the imposition of Riba (usury) is prohibited. Instead, alternative structures used are those such as fee-based, profit-based, or sale-based arrangements.

There is otherwise no law limiting usury or interest.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

The typical forms of security and recourse granted in a domestic aviation finance transaction would include:

- assignment of insurances;
- assignment of reinsurances;
- IDERA;
- deregistration power of attorney;
- guarantees (by a parent company or by shareholders);
- sublease assignment (if there are multiple layers in the lease structure);
- mortgage over the aircraft; and, sometimes,

- a charge over a bank account.

3.2.2 Types of Security Not Available

Security may be granted over an aircraft or related collateral such as engines, warranties or insurances. However, not necessarily every type of security is registrable.

In Malaysia, there is a no separate register for engines, warranties or insurances – however, assignments and charges are registrable against corporate entities, and they will be valid against a liquidator and third parties.

3.2.3 Trust/Trustee Concepts

The concept of a trust and the role of a security trustee are recognised in Malaysia.

A parallel debt structure is not common because it establishes distinct debt obligations between the borrower and the security agent, with potential extra costs such as stamp duty. While a joint and several creditor structure is feasible, the preferred method is to implement a security agency or trust arrangement.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

A borrower may assign to a security trustee pursuant to a security assignment or a mortgage its rights to the aircraft or under an aircraft lease (including in relation to insurances).

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

Please see **2.7.2 Assignment/Novation of Leases Under Foreign Laws**.

It is possible to assign the rights and benefits only without also assigning the obligations of the lessor under an aircraft lease.

3.2.6 Choice of Foreign Law

A security assignment or a guarantee may be governed by English or New York law, and the relevant contracts/documents would need to be stamped in order to be enforceable.

A security assignment would also typically be registered as a charge against the domestic party, at either

the Companies Commission of Malaysia (CCM) or the LFSA, as the case may be, in order to be valid against a liquidator and third parties.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

A security assignment would need to be stamped in order to be admissible as evidence in court. If the assignment contains a power of attorney, then the assignment also needs to comply with the provisions of the Powers of Attorney Act 1949.

Please see **2.7.2 Assignment/Novation of Leases Under Foreign Laws** for legal assignments.

3.2.8 Domestic Law Security Instruments

An English or New York law-governed security assignment would give rise to a charge which may then be registered against the domestic borrower – at either the CCM or the LFSA, as the case may be.

Cape Town filings may be made without domestic law security instruments and/or local law filings. The International Interests in Mobile Equipment (Aircraft) Act 2006 supersedes any conflicting or inconsistent provisions of any other written law to the extent of a conflict or inconsistency.

An ad valorem stamp duty is payable on mortgages and charges. The stamp duty on powers of attorney is MYR10 and the fees to register at the High Court starts at MYR35. The mortgage/charge registration fee is MYR300 or USD100 (for a Labuan company). The fee to register a mortgage with CAAM is MYR2,000.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

If the security assignment of a domestic law security interest creates a charge, then the charge may be registered against the domestic party at the CCM or the LFSA, as the case may be.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

Novations and assignments over aircraft and/or engines are recognised. For registration purposes, any existing/past security interests are typically dis-

charged simultaneously with the registration of the new security interests over the aircraft and/or engines.

3.2.11 Effect of Changes in the Identity of Secured Parties

The security interest of the secured parties may not necessarily be jeopardised if the identity of the secured parties changes, to the extent that the changes are then reflected in new/additional registrations.

3.2.12 “Parallel Debt” Structures

Malaysian law accepts that security interests in favour of a security trustee may secure debts owed to lenders.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment will not be deemed to be resident, domiciled, carrying on business or subject to any taxes as a result of its being a party to, or its enforcement of, such security assignment.

3.2.14 Perfection of Domestic Law Mortgages

A domestic law mortgage over an aircraft or engine would be perfected in accordance with the following:

- the mortgage would be stamped in accordance with the Stamp Act 1949;
- any power of attorney contained in the mortgage would be in accordance with the provisions of the Powers of Attorney Act 1949;
- the charge created by the mortgage would be registered against the domestic party, at either the CCM or the LFSA, as the case may be; and
- in relation to an aircraft mortgage – the mortgage would also be registered with CAAM.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

The Aircraft Register does not provide for registration of engines separately and independent from the registration of aircraft. Therefore, it is not possible to register any off-wing engines with CAAM and hence no security over an engine is registrable with CAAM. All other perfection steps as provided in **3.2.14 Perfection of Domestic Law Mortgages** would apply equal-

ly to security over an aircraft and engines, save that security over engines is not registrable with CAAM.

3.2.16 Form and Perfection of Security Over Bank Accounts

The usual form of security is a charge over the bank account. Such a charge is perfected in a similar manner as a mortgage, as provided in **3.2.14 Perfection of Domestic Law Mortgages**, save that a charge over a bank account is not registrable with CAAM.

3.3 Liens

3.3.1 Third-Party Liens

The following statutory liens may apply to aircraft:

- liens in favour of airline employees for unpaid wages;
- liens or other rights held by Malaysian authorities for unpaid taxes or charges related to the use of the aircraft, owed by the owner or operator;
- liens in favour of repairers for services performed on and value added to the aircraft while it is in their possession; and
- liens held by the Authority for unpaid fees or charges owed by the operator or owner of the aircraft, as per the Civil Aviation Regulations 2016.

Malaysia recognises fleet liens (to cover all debts owed to the repairer) and the lienholder's rights continue even without possession of the aircraft.

Rights of a lienholder include the following.

- If a salvage lien exists on an aircraft, the lienholder (the salvor) is entitled to claim salvage expenses from the owner.
- Possessory or contractual lien will take precedence over the terms of an aircraft lien; the lienholder's rights will be governed by the terms of the contract.
- Air navigation charges – If there is a default in the payment of air navigation charges, the Civil Aviation Authority of Malaysia (CAAM), acting on behalf of the government, may seize the aircraft until the charges are paid. It does not matter if the charges were incurred by a person who is no longer the operator of the aircraft at the time of seizure.

3.3.2 Timeframe to Discharge a Lien or Mortgage

A lien on an aircraft can be discharged when the lienholder repossesses the aircraft. Once the aircraft is repossessed, the lienholder may recover any outstanding debts or obligations secured by the lien. Once these debts or obligations are fully satisfied, the lien can be discharged. The time period required will depend on when the lienholder's debts or obligations are satisfied.

A mortgage over an aircraft, once settled by the domestic party, would be subject to the execution of a deed of release and revocation, as well as the filing of the statutory discharge forms with the CCM or the LFSA, as the case may be, as well as with CAAM.

3.3.3 Register of Mortgages and Charges

Most security interests, including charges and mortgages, are registrable at the CCM or the LFSA within 30 days and one month respectively, from their date of creation. Once a mortgage or charge is registered, a certificate of registration of charge would be issued by the CCM. The details of the registered charge will be disclosed in any company search conducted at the records of CCM or LFSA.

The interests of an aircraft mortgagee may be noted on the Aircraft Register. The effect of such notation is that the aircraft may not be deregistered from the Aircraft Register until the mortgage is discharged and/or until the aircraft mortgagee should consent to such deregistration.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

A contractual lien may supersede the terms of an aircraft lien that may arise under common law. In particular, the terms of the contract determine the extent of the lienholder's rights: for example, if an aircraft repair or maintenance contract specifically provides for a fleet lien or provides that the lienholder's rights continue to subsist even without having possession of the aircraft.

From a statutory perspective, if an aircraft flies over or into European airspace, for example, the UK Civil Aviation Authority (CAA) monitors Eurocontrol charges on behalf of Eurocontrol and has authority to detain

aircraft on Eurocontrol's behalf. The CAA has the authority to detain an aircraft for unpaid navigational charges. The aircraft may be detained in the United Kingdom for unpaid charges which relate to one specific aircraft, or which relate to any other aircraft in the operator's fleet.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser could search the Aircraft Register as well as the International Registry of Mobile Assets (the "International Registry") to verify that an aircraft is free of encumbrances.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

In the event that the transaction documents are duly stamped, they would therefore be admissible in court and would be relied on for purposes of enforcement. There is no difference between enforcing a security assignment or loans or guarantees in that respect.

3.4.2 Security Trustees' Enforcement of Their Rights

So long as the assignment satisfies the requirements as set out in 2.7.2 Assignment/Novation of Leases Under Foreign Laws, then the assignment would be enforceable.

3.4.3 Application of Foreign Laws

Please refer to 2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Please refer to 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

In Malaysia, a lessor or lender might seek to reclaim the aircraft in a default. The lessor or lender could simply take delivery and possession of the aircraft if the agreement includes such remedies.

However, there are several reasons for the lessor or lender to obtain a court order before taking posses-

sion. The lessee might resist the repossession, and CAAM will likely require evidence of the default, especially if there are changes to be made in the Aircraft Register. Without a court order, the lessor or lender might struggle to obtain the necessary documents and clearances from CAAM to continue operating the aircraft after a default.

Notably, there has been no precedent in Malaysia where a lessor, owner or lender was barred from deregistering and removing an aircraft from the country. Nonetheless, taking possession without a court order carries litigation risks, such as potential lawsuits from aggrieved passengers if the repossession is later deemed wrongful.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

There are no courts dealing specifically with aviation matters/disputes. Aviation matters/disputes are typically adjudicated by the Commercial Division of the Civil Courts and will usually, due to the quantum of the claims and/or the nature of the remedies sought, be heard in the High Courts.

3.4.7 Summary Judgments or Other Relief

In court proceedings, it is generally possible to seek and obtain monetary damages through a summary judgment process; and an injunction pending the court's final decision. Obtaining possession of an aircraft through a mandatory injunction process can also be much quicker, taking about six to eight weeks for an ex parte injunction compared to nine to 18 months for a full trial.

A summary judgment may be applied for, in straightforward and clear-cut disputes. The court will decide the claim based on the claimant's affidavits without a trial or witness examinations. The decision to grant summary judgment depends on factors such as whether there are triable issues or a defence in the case.

In the event of an application for an equitable or other injunctive relief, there is no automatic requirement for bond or guarantee to be provided, subject to the relief applied for.

3.4.8 Judgments in Foreign Currencies

Malaysian courts generally do not issue judgments in foreign currencies. Any judgment or order sought in a foreign currency will be converted to an equivalent amount in Malaysian currency.

3.4.9 Taxes/Fees Payable

A secured party is not required to pay taxes or fees in a non-nominal amount in connection with the enforcement of a security agreement/aircraft mortgage.

3.4.10 Other Relevant Issues

There are no other relevant issues that a lender should be aware of in relation to the enforcement of its rights.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

Please refer to 2.10.4 Enforcement of Conventions. Specifically, in the case of *AirAsia X Berhad v BOC Aviation Limited and 14 Others*[2021], the High Court declared, inter alia, that lessors are unsecured creditors notwithstanding that the lease documents provided for security deposits and maintenance reserves to be held by the lessors. Security deposits and maintenance reserves paid pursuant to lease agreements are regarded, subject to the specific language used in the lease documents, as the absolute property of the lessors and not securities over the assets of AirAsia X. As such, the security deposits are considered as being the property of the lessors.

4.2 Current Legislative Proposals

The Malaysian Aviation Commission (Dissolution) Act 2024 and the Civil Aviation Authority of Malaysia (Amendment) Act came into force on 1 August 2025. With the merger between CAAM and MAVCOM, CAAM has taken over MAVCOM's economic regulatory functions and is now solely responsible for the technical, safety and economic oversight of the aviation industry in Malaysia.



Law and Practice

Contributed by:

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Fenech & Fenech Advocates was established in 1891 and is today one of the largest top-tier multi-disciplinary law firms in Malta, recognised as a leader in practice areas including corporate/commercial, aviation, financial services, taxation, litigation, M&A, shipping and maritime law, telecommunications, media and technology (TMT) law, international trade and employment. The firm has a long-standing aviation practice advising some of the biggest aircraft lessors in the world, national airlines, owners, managers, les-

sees, financiers and aircraft MRO facilities. Fenech & Fenech Advocates' expertise, spanning structured sale/leaseback transactions, financed leases, sale and purchase deals, management operations, aircraft registrations and insurance claims, gives the firm a thorough knowledge of the aviation business. Legal services are complemented by a full-service licensed corporate services provider, Fenlex, offering company incorporation, trust, directorship, accounting and compliance services, among others.

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ADVOCATES

1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

VAT

According to the Fifth Schedule to the VAT Act, the supply of aircraft destined to be used by airline operators for reward chiefly for international transport of passengers and/or goods is exempt from value-added tax.

Stamp Duty

An aircraft or any part thereof is not a chargeable asset for the purposes of the Duty on Documents and Transfers Act (DDTA) and, accordingly, the transfer of an aircraft or any part thereof falls outside the scope of the DDTA. Conversely, and with reference to the sale of an ownership interest in an entity that owns an aircraft or a part thereof, the DDTA does bring to charge the transfer of marketable securities, as defined at the rate of 2% subject to any available exemptions.

Income Tax and Capital Gains Tax

An aircraft, or part thereof, does not fall within the list of chargeable assets for capital gains tax purposes and, accordingly, assuming that an aircraft, or a part thereof, is booked as a fixed asset for accounting purposes, the transfer of said assets would fall outside the scope of capital gains tax in Malta. Where a Maltese entity owns an aircraft or part thereof, which is booked as a current asset for accounting purposes (ie, “stock in trade”), the revenue generated from the transfer of said asset would be deemed as income and would be subject to tax in Malta.

The Income Tax Act (ITA) brings to charge an exhaustive list of assets that includes the transfer of securities, as defined. For the purposes of the ITA, securities are “shares and stocks, and such like instruments that participate in any way in the profits of the company and whose return is not limited to a fixed rate of return [...]”. Therefore, the transfer of securities or an interest in a partnership (eg, owning an aircraft or part thereof) would be subject to capital gains tax in Malta, subject to any applicable exemptions.

1.1.2 Enforceability Against Domestic Parties

If executed outside Malta and in a language which is neither English nor Maltese, it is advisable for a sale agreement to be translated, certified, notarised or legalised to be enforceable against a domestic party.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Under Maltese law, the act that constitutes “transferring title” to an aircraft, engine or other installed parts is the private sale/purchase agreement entered into by the parties, the terms and conditions of which, together with any usages of trade, prevail over the provisions of the Maltese Civil Code. This agreement, which transfers the interest of the seller in the aircraft object to the buyer according to its terms, must:

- be in writing;
- relate to an aircraft object of which the seller has power to dispose; and
- enable the aircraft object to be identified in conformity with the First Schedule to the Aircraft Registration Act (the “Act”) which substantively reproduces the text of the Convention on International Interests in Mobile Equipment (Cape Town, November 2001) (the “Convention”) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the “Aircraft Protocol”).

The sale/purchase agreement is normally followed by a bill of sale drawn up for the purpose of recording the transaction contemplated by the agreement between the parties.

Provided they belong to the same transferring owner, the sale/purchase agreement would extend to include all installed parts, such as an APU, unless otherwise specified in the agreement.

The sale of the ownership interest in an entity that owns an aircraft or engine will be recognised for what it is: a change in the shareholders of the company owning the asset and by implication a change in the beneficial ownership of the asset.

1.2.2 Sales Governed by English or New York Law

The transfer of title to an aircraft or engine physically delivered in Malta will be recognised in the event that the bill of sale is governed by English or New York law pursuant to and subject to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the “Rome I Regulation”).

As regards minimum substantive requirements, the bill of sale will be recognised if it is substantively valid according to the law by which it is governed. However, the bill of sale or any condition therein must not be manifestly incompatible with the public policy (*ordre public*) of Malta.

1.2.3 Enforceability Against Domestic Parties

As stated previously, if executed outside Malta and in a language which is neither English nor Maltese, it is advisable for a bill of sale to be translated, certified, notarised or legalised to be enforceable against a domestic party.

1.2.4 Registration, Filing and/or Consent From Government Entities

The Act imposes an obligation on the Director General responsible for Civil Aviation in Malta (the “Director General”) to record in the Malta Aircraft Register (the “Register”) the full name, address, email address and telephone number of the natural or legal persons having ownership rights on the aircraft. The Act also imposes an obligation on the registrant to inform the Director General of any change in the particulars that were furnished when the application for the registration of the aircraft was made. Accordingly, evidence of a change in ownership will need to be given to the Director General forthwith or within five working days of a demand in writing from the Director General.

The Director General will generally require a certified true copy of the bill of sale in English, and, if emanating from outside the European Union (EU), it will also need to be notarised and apostilled.

A bill of sale is not subject to any consent from any government entity nor are any government applications or consents required as a prerequisite to the

execution and delivery of a bill of sale in relation to an aircraft or engine registered in Malta.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

No taxes or duties are payable for executing and/or delivering a bill of sale or consummating the sale of the ownership interest in an entity that owns an aircraft or engine while it is located in Malta, or that is over international waters or is in transit to/from Malta.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

All types of aircraft leasing and leasing of engines or parts are permissible under Maltese law to the extent that they are not in breach of public policy and will be enforceable in accordance with their terms.

2.1.2 Application of Foreign Laws

A lease involving either a domestic party or an asset situated in Malta can be governed by a foreign law pursuant to and subject to the Rome I Regulation.

2.1.3 Restrictions Concerning Payments in US Dollars

There are no material restrictions imposed on Maltese lessees making rent payments to foreign lessors in US dollars.

2.1.4 Exchange Controls

There are no exchange control rules existing in Malta that could prevent rent payments under a lease or any repatriation of realisation proceeds if such lease is enforced by a foreign lessor.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

No taxes/duties are payable for executing a lease physically in Malta and/or by or to a domestic party or as a consequence of an original or copy of a lease being brought into Malta either physically or electronically.

2.1.6 Licensing/Qualification of Lessors

A lessor does not have to be licensed or otherwise qualified in Malta to do business with a Maltese lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

There are no mandatory terms required to be in a lease (or ancillary documents thereto) governed by English or New York law that would not typically already be included. However, where the lease agreement is required to be submitted for the purpose of registration of the aircraft (if the aircraft is leased), the Director General (unless an exemption is granted) will require that the agreement refers only to Maltese registration marks, which can be reserved in advance of delivery of the aircraft to the lessee.

2.2.2 Tax and Withholding Gross-Up Provisions

Tax and other withholding gross-up provisions are permissible and enforceable in Malta.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease agreement providing that parts of an aircraft or engine installed or replaced after its execution will be subject to the terms thereof is valid and binding without requiring any further steps or formalities.

2.2.4 Risk of Title Annexation

Under Maltese law, where two items belonging to different owners have been united in such a manner as to form a whole but can nevertheless be separated without considerable damage to either of them, each of the owners shall retain the ownership of their own item and shall be entitled to demand separation. Furthermore, under the Act, where an engine has been attached to an airframe that is not also owned by the airframe owner, each of the owners shall retain the ownership of their respective item and the engine shall not accede to the airframe.

2.2.5 Recognition of the Concepts of Trust/Trustee

The concept of a trust and the role of an owner trustee under a lease is recognised under Maltese law.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The Director General is under an obligation to record the full name, address, email address and telephone number of the natural or legal persons having ownership rights in the aircraft, the ownership rights in the aircraft when held by a trustee as well as the details of any international interests registered on the aircraft in the international registry established by virtue of the Convention (the "International Registry") and subsequently all transactions relating thereto.

According to the Act, the Director General will also note in the Register, if requested to do so by the registrant or by any other interested person, the lessor rights relating to the aircraft or an engine when the lessor is a person different from the owner.

Where information is inserted in the Register by means of a record or a notation, that information becomes public and is considered to be within the knowledge of third parties.

2.3.2 Registration If the Owner Is Different From the Operator

The Register is an operator register. Thus, the aircraft may be registered in Malta in the name of the aircraft operator even if the operator is not also the owner. However, in the case of an owner who is not also the operator, such owner may only register the aircraft if the aircraft is under construction or is temporarily not being operated or managed.

2.3.3 Aircraft/Engine-Specific Registers

There is no specific register for leases concerning aircraft or engines.

2.3.4 Registration of Leases With the Domestic Aircraft Registry Registration of Lease and Lessor's Interest in the Register

A lease agreement is not required to be registered in the Register. However, the Director General is required to record, among other things, the full name, address, email address and telephone number of the natural or legal persons under whose name the aircraft is registered and in what capacity the registrant has

registered the aircraft, including if it is acting under a temporary title such as a lease. The lease agreement must be submitted with the other required technical and legal documentation to the Director General for the aircraft to be registered. A lessor's interest will only be registered in the Register as described in 2.3.1 **Notation of Owner's/Lessor's Interests on Aircraft Register**.

Consequences for Failing to Register the Lease and Lessor's Interest

The application for registration of an aircraft will not be processed and a certificate of registration will not be issued if the relative lease agreement is not submitted to the Director General. If the lessor's interest is not recorded in the Register, that information will not become public and will not be considered to be within the knowledge of third parties.

Government Applications or Consent

A copy of the lease agreement must be filed with the Director General if the aircraft is registered in Malta by an operator under temporary title.

Formalities

Lease agreements are not registered in the Register as such. However, they are required to be submitted with the relevant application form for aircraft registration and other supporting documents so that the details thereof can be recorded in the Register.

Estimated Time Period for Completion

Provided that all the necessary documents are in order and the aircraft is in the required technical condition, with advance co-ordination with the Authority for Transport in Malta (the "Authority"), aircraft registration can occur immediately after delivery to the lessee.

2.3.5 Requirements for a Lease to Be Valid and Registrable

For the lease agreement to be submitted for the purposes of registration of an aircraft, the agreement must:

- be in English – if in any other language, it must be accompanied by a certified translation;
- contain the date as to when the agreement was made and its duration;

- be a certified true copy and, if executed outside Europe, be legalised and apostilled; and
- make reference solely to the Maltese registration marks and not to the previous registration marks of the aircraft unless an exemption is granted by the Director General.

Signatures (and initials on each page) must be authenticated.

2.3.6 Taxes/Duties Payable for Registering a Lease

There are no taxes or duties payable in respect of the submission of the lease agreement.

2.3.7 Registration of Aircraft in Alternative Countries

Most, if not all, aircraft habitually based in Malta are also registered in the country.

2.3.8 Requirements for Documents Concerning Registration

Subject to any exemption which the Director General may provide, the submission of certain documents in original form, translated, notarised and/or authenticated is required before the application for registration of an aircraft is processed and accepted. These include the lease agreement as discussed in 2.3.5 **Requirements for a Lease to Be Valid and Registrable** (if the aircraft is leased), and a certificate of insurance issued by an insurance company certifying that an insurance policy has been bought and showing an abstract of the most important provisions of the insurance contract. Such certificate must be in its original format and contain a valid date and signature between the insurer and the insured. In addition, the Director General requires evidence that the requirements imposed by the Act relating to registration marks and the fire-proof plate have been fulfilled. However, the Director General shall, at all times, require at least the following documents before issuing the certificate of registration.

The bill of sale or other proof of ownership of the aircraft, which must be:

- a certified true copy of the original;
- notarised and apostilled if originating from outside the EU; and

- accompanied by a certified translation if it is not in English.

A deregistration certificate or formal notification by the civil aviation authority of the state in which the aircraft was previously registered (if the aircraft was previously so registered) in its original format and showing the registered encumbrances, if any.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A foreign lessor is not liable to pay any taxes under Maltese law simply by virtue of the fact that they lease an aircraft or engine to a Maltese lessee.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

The ITA provides that where a person owns, leases or operates any one or more aircraft(s) or aircraft engine(s) (irrespective of the country of registration of said aircraft or aircraft engine) that is used for, or employed in, the international transport of passengers or goods, any income of such person that is derived or otherwise arises from the ownership, leasing or operation of such aircraft or aircraft engine is deemed to have arisen outside Malta regardless of whether the aircraft may have called at, or operated from, any airport in Malta.

Where the lessor is deriving income that does not fall under the above provision, the determination as to whether such income would be considered to arise in Malta would depend on a number of factors, including the terms of the lease (wet lease or dry lease), where the aircraft is based, the tax residence of the lessee/lessor and the provisions of any applicable double tax treaties.

Where there is indeed a charge to tax, tax will be withheld at source by the resident payer upon payment to a non-resident payee unless authorisation is obtained from the Commissioner for Inland Revenue (CIR) to withhold tax at a lower rate or to refrain from withholding tax altogether.

2.4.3 Engine Maintenance and Operations

Liabilities in respect of aircraft or engine maintenance and operations can be imposed on a foreign lessor if

and as stipulated in the lease agreement, which will be enforceable in accordance with its terms.

2.4.4 Damage or Loss Caused by an Asset

The doctrine of strict liability applies very limitedly in Malta since its non-contractual liability regime (tort law) is largely fault-based.

2.4.5 Attachment by Creditors

The aircraft cannot legally be attached by creditors of the lessee since it is not owned by the lessee. The lessee only has a right of possession and use of the aircraft during the lease period. In the case of malicious demand made to the Maltese Court to arrest an aircraft which is not owned by the debtor defendant, the person suing out such a warrant would be liable to a penalty of not less than the commercial value of the lease which the aircraft or engine may attract during the period when the aircraft or engine was maliciously arrested.

2.4.6 Priority of Third Parties' Rights

A lessor is not given any priority unless their interest is registered as an international interest in the International Registry or constitutes a foreign security interest that is recognised under the Act. However, certain privileges will take priority over a registered international interest. If not so registered or recognised, the lessor will rank *pari passu* with other unprivileged creditors of the lessee as stipulated by the Act.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

It is not mandatory for all or part of the insurances to be placed with Maltese insurance companies.

2.5.2 Mandatory Insurance Coverage Requirements

Mandatory insurance coverage requirements are those prescribed by EU Regulation 785 of 2004 on insurance requirements for air carriers and aircraft operators as well as the Civil Aviation (Insurance Requirements for Air Carriers and Aircraft Operators) Order (Subsidiary Legislation 499.41).

2.5.3 Placement of Insurance Outside of Jurisdiction

Reinsurances can be placed outside Malta for full coverage.

2.5.4 Enforceability of “Cut-Through” Clauses

It is a general principle of law that contracts shall only be operative as between the contracting parties. Thus, if a reinsurer has bound himself directly in favour of an insured party to make good for losses, then a “cut-through clause” should be enforceable in Malta. To the extent that the reinsurer has not bound themselves directly in favour of the insured party and the arrangement is agreed between the insured and the original insurer only, there are doubts as to the enforceability of the cut-through clause as the provision grants rights to the insured who is not a party to the reinsurance contract.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurances/reinsurances are permitted under Maltese law.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors’ Abilities

There are no restrictions under Maltese law on a lessor’s ability to terminate an aircraft lease. However, if the lessor terminates the lease for reasons that are not contemplated in the agreement or generally valid at law, the lessee may seek damages for breach.

Restrictions on Lessor’s Ability to Re-export the Aircraft

There are no restrictions under Maltese law on a lessor’s ability to re-export the aircraft. However, transporting the aircraft out of Malta will be subject to certain authorisations to fly. The lessor must be in possession of a recorded irrevocable deregistration and export request authorisation (IDERA) issued in their favour by the registrant of the aircraft in the form set out in Annex 1 of the Second Schedule to the Act or any other recorded deregistration power of attorney (PoA) issued in their favour by the registrant of the aircraft. In addition, the lessor must, together with the other steps outlined in 2.8.1 **Deregistering Aircraft in This Jurisdiction**, certify and submit supporting documents to the satisfaction of the Director General that all registered international interests ranking in prior-

ity to that of the lessor have been discharged or that the holders of such interests have consented to the deregistration and exportation of the aircraft.

Restrictions on Lessor’s Ability to Sell the Aircraft

There are no restrictions under Maltese law on a lessor’s ability to sell the aircraft following termination of the lease agreement provided that the lessor has title and capacity to sell the aircraft.

Location of the Aircraft

It should not be necessary for the aircraft to be physically located in Malta for termination of the lease or for the sale of the aircraft to take place. However, the Act defines the word “export” as the exportation and physical transfer of an aircraft from the territory of Malta.

2.6.2 Lessor Taking Possession of the Aircraft

If the lessee is in default under the lease and the lessor dissolves or terminates the lease in accordance with the law, the lessor would be entitled to take physical possession of the aircraft without the lessee’s consent. It should be noted that the rights competent to a lessor to terminate a lease in the event of a default by the lessor are also exercisable by a mortgagee of the aircraft. The aircraft can be repossessed without the need for judicial intervention. To the extent that the support of the court is required, the court is bound to render full support as expeditiously as possible.

2.6.3 Specific Courts for Aviation Disputes

Malta does not have any specialised courts for deciding aviation disputes.

2.6.4 Summary Judgment or Other Relief

Summary Judgment

The provisions relating to special summary proceedings in the Code of Organisation and Civil Procedure (COCP) will apply, *inter alia*, in relation to a claim:

- for the recovery of a debt which is certain, liquidated and due, and not consisting of the performance of an act; or
- for the eviction of an operator, lessee or other occupants, including any members of their staff from aircraft.

In instituting such summary proceedings, the lessor must, in the court application, declare that in their belief there is no defence to the action. The court application must be in writing in the prescribed form and sworn under oath.

Injunctive Relief

There are a number of precautionary warrants available to a lessor by way of interim/injunctive relief pending final judicial determination. These include the right to freeze or attach assets of the lessee as security for monetary claims and the right to arrest the aircraft or aircraft engine. The purpose of the latter is to secure a debt or claims or to secure the rights of the lessor in the context of a dissolution or termination of the aircraft lease by the lessor as a result of a default on the part of the lessee and the subsequent repossession of the aircraft.

The demand for the issue of any of the aforementioned acts must be made by an application, and contain:

- the origin and nature of the debt or claim sought to be secured;
- in the case of a debt, the amount of such debt and, where applicable, judicial costs; and
- in the case of a warrant of arrest of an aircraft or engine, the warrant sued out by means of an application on the prescribed form, which must state in a clear manner such particulars as to enable the identification of the aircraft/aircraft engine, the name of the authority under whose control the arrested aircraft/aircraft engine may be, as well as their location.

The application has to be confirmed on oath by the lessor who, *inter alia*, must:

- bring the action in respect of the claim within the time prescribed by law; and
- 15 days prior to the application for the precautionary act, call upon the defendant to pay the debt or provide sufficient security.

Injunctive relief can typically be obtained from the court within two business days or less.

Other Relief

Following judicial determination of a lessor or mortgagee's claim, apart from an executive warrant of arrest of aircraft, a new executive warrant was recently introduced for the ejection or expulsion from the aircraft of the operator, lessee or other occupants, including any members of their staff, within a period of not less than four and not more than eight days from the day they are so enjoined by the court executing officer. In default, the operator, lessee or other occupants, including any members of their staff, will be removed from the aircraft concerned. For the purpose of executing the aforementioned warrant, the aircraft indicated therein will be detained in Malta.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Maltese courts will be expected to uphold:

- a foreign law as the governing law of an aircraft lease subject and pursuant to the Rome I Regulation;
- the submission to a foreign jurisdiction as regards an aircraft lease subject to and pursuant to Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels Recast Regulation"); and
- a waiver of immunity by the parties of such lease.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Final Judgment of a Foreign Court

In civil and commercial matters, domestic courts will recognise and enforce a final judgment of an EU member state court without re-examination of the matter pursuant to and subject to the Brussels Recast Regulation. In the case of a final judgment delivered by a court of a non-EU member state, the domestic courts will recognise and enforce such a judgment without re-examination of the matter in accordance with and subject to any relevant multilateral or bilateral arrangement between Malta and the respective country in which the foreign court is located or, failing this, in accordance with and subject to national law, this being Articles 826 and 827 of the COCP.

Arbitral Awards

Foreign arbitration awards to which the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 apply will be enforced by the courts of Malta upon their registration with the Malta Arbitration Centre (MAC). The Arbitration Act lays down that such awards shall be treated as executive titles and enforceable in Malta in the same manner as if such award were a domestic arbitration award. Recognition and enforcement of the award may be refused in the instances stipulated by the Arbitration Act.

2.6.7 Judgments in Foreign Currencies

Money judgments awarded by the courts of Malta are denominated in the current lawful currency of Malta, this being the euro. However, the courts of Malta ordinarily accede to specific applications for the currency to be converted into and expressed in a foreign currency with the rate of exchange, typically but not always obtained at the time when the obligation was due and not at the time of delivery of the judgment.

2.6.8 Limitations on Lessors' Actions Following Termination

Recovering Default or Compound Interest

As a general rule, the Maltese Civil Code restricts the charging of interest up to 8% per annum. Compounding of interest is not enforceable in Malta unless the obligation to pay interest is due for a period of more than one year and certain procedures prescribed in the Code are followed. However, limitations on the rate of interest and the compounding thereof do not apply to certain debts or obligations which are:

- secured by a mortgage; or
- due under a lease of a ship or aircraft, including an aircraft engine, whether registered in Malta or otherwise and whether governed by Maltese law or otherwise.

Charging Additional Rent Following Termination of Lease for Default

There are no limitations under Maltese law on a lessor's ability to charge additional rent following termination of lease for default (including where the lessee

fails to return the aircraft). However, certain provisions in the lease agreement relating to additional rent payable in a default scenario may be recharacterised by the courts of Malta as another agreement (such as an agreement on additional rent being characterised as a penalty clause), which would then be subject to certain limitations or discretions applicable to the recharacterised transaction.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

In enforcing an aircraft lease, a lessor is required to pay judicial costs which are generally determined based on the value of the claim. No taxes related to the enforcement are due.

2.6.10 Mandatory Notice Periods

Unless required by the lease agreement, a lessor is not required by Maltese law to comply with any mandatory notice periods to terminate an aircraft lease.

2.6.11 Lessees' Entitlement to Claim Immunity

Generally, immunity does not apply in the context of commercial activities outside official state functions.

2.6.12 Enforcement of Foreign Arbitral Decisions

See 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards.

2.6.13 Other Relevant Issues

Unlike other leases, aircraft leasing under Maltese law is characterised by party autonomy whereby the relationship between the parties is governed, primarily, by the agreement between them in accordance with its terms. In the case of conflict with the provisions of the Maltese Civil Code, the terms and conditions of the aircraft lease agreement will prevail.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

The concepts of contractual assignment and of novation are recognised under Maltese law.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Validity of an Assignment or Novation Agreement Governed by New York or English Law

A New York or English law-governed assignment and assumption agreement or novation agreement (or deed) will be held valid by a Maltese court pursuant to and subject to the Rome I Regulation.

Lessee's Consent for Assignment or Novation of Lessor's Rights

With regards to an assignment governed by Maltese law, the lessee's consent is not required. The lessee must acknowledge the assignment in writing unless they are formally notified of the assignment by judicial letter.

With regards to novation, the lessee's consent would be required if the novation were governed by Maltese law.

Mandatory Terms Required to Be Included in an Assignment or Novation Agreement

Certain mandatory terms must be included in an assignment governed by Maltese law. For instance, the assignor is not answerable for the solvency, whether present or future, of the debtor unless they have expressly bound themselves thereto.

In a novation governed by Maltese law, no mandatory terms are required, but novation is not to be presumed; the intention to effect it must be clearly apparent.

2.7.3 Enforceability of Lease Assignments/Novations

If executed outside of Malta, it is advisable for an aircraft and/or engine lease agreement and assumption/novation to be certified, notarised or legalised to be enforceable against a domestic party and to be accompanied by a certified translation if the agreement is not in English or Maltese.

2.7.4 Filing/Registration of Lease Assignments/Novations

Filing or Registration of an Aircraft and/or Engine Lease Assignment and Assumption/Novation

An aircraft and/or engine lease assignment and assumption/novation does not have to be registered or filed in the Register. However, the registrant of the aircraft is obliged to inform the Director General in writing of any change in the particulars which were furnished to the Director General upon application being made for the registration of the aircraft or the title thereto or the termination of the operator's temporary title.

Failure to give notice constitutes an administrative offence under the Act, and the Authority may:

- issue a warning in writing to such person; or
- impose an administrative penalty on such person.

Requirement for Government Applications or Consent

An aircraft and/or engine lease assignment and assumption/novation is not subject to any consent from any government entity, nor are any government applications or consents required as a prerequisite to the execution and delivery of an aircraft and/or engine lease assignment and assumption/novation in relation to an aircraft registered domestically.

2.7.5 Taxes/Duties Payable on Assignment/Novation

No taxes/duties are payable in respect of such assignment and assumption/novation agreement, or as a consequence of an original or copy being brought into Malta either physically or electronically.

2.7.6 Recognition of Transfer of Ownership Interests

Malta would not regard a transfer of ownership interests as tantamount to a transfer of the legal title to the aircraft as this can only occur through a sale/purchase agreement as specified in 1.2.1 Transferring Title.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

Persons Who Can Deregister an Aircraft in Malta

The registrant or any person in whose favour a recorded IDERA or PoA has been issued by the registrant can deregister an aircraft registered in Malta.

The Steps to Achieve Deregistration

Where the registrant of the aircraft wishes to deregister it, they must make a written request to the Director General to this effect. However, an aircraft for which there is a recorded IDERA may not be so deregistered on the request of the registrant unless that IDERA is the subject of a revocation in terms of Annex 4 to the Second Schedule of the Act or the holders thereof have consented to the deregistration. The same applies when the aircraft is the subject of an undischarged mortgage or an international interest. It will not be so deregistered unless all holders of such mortgages or international interests have also consented to the registration.

In the event that deregistration is to be effected by a person other than the registrant, the following apply.

- The registrant of the aircraft must first have issued an IDERA substantially in the form set out in Annex 1 to the Second Schedule to the Act or PoA in favour of that person, be it the owner or lessor of the aircraft or a mortgagee (the “Authorised Party”), and must submit such IDERA or PoA for recordation in the Register in accordance with the procedure outlined in 2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment.
- The Authorised Party may appoint a certified designee (the “Certified Designee”) with respect to the IDERA by filing a designation with the Authority substantially in the form set out in Annex 2 to the Second Schedule to the Act or any delegate with respect to the PoA, as the case may be, whose details shall also be recorded in the Register.
- A request must be submitted to the Authority substantially in the form set out in Annex 3 to the Second Schedule to the Act, identifying a recorded IDERA in the Register and signed by the Authorised Party or Certified Designee or, if the Authorised Party or Certified Designee is not a natural

person, by any person duly authorised to represent them including by means of a power of attorney.

- If the request indicates that it was signed in Malta, it will be accepted by the Authority without additional formalities. If it indicates that it was signed outside Malta, it will be accepted by the Authority if notarised locally to the satisfaction of the Director General, and the latter may in their discretion also ask that the document is duly apostilled or legalised, particularly if the document is signed outside the European Union.
- The Authorised Party, or their delegate or Certified Designee must certify in accordance with the Act and submit supporting documents to the satisfaction of the Director General that all registered international interests ranking in priority to the Authorised Party have been discharged or that the holders of such interests have consented to the deregistration and export of the aircraft.

Subject to applicable aviation safety laws and regulations (which do not include any requirement for the issuance of an export certificate of airworthiness or for any documents in the possession of, or any action by, the operator of the aircraft), the Authority will honour a request for deregistration and export of the aircraft submitted by effecting the deregistration of the aircraft and taking all action within its power to effect or facilitate the exportation of the aircraft:

- (a) expeditiously and, in any case, no later than five working days following receipt of the request;
- (b) without the consent or approval of the registrant or any other person or entity, or the consent or approval of any court or administrative or other order or decision of any kind, or any need for the Authority to investigate external facts or impose additional requirements; and
- (c) regardless of whether the Authorised Party or their Certified Designee is in possession of the aircraft.

2.8.2 Lessee's/Operator's Consent

An aircraft owner, mortgagee or lessor cannot apply for the deregistration of the aircraft without being in possession of a recorded IDERA or PoA issued in their regard by the registrant and without following

the steps as outlined in 2.8.1 Deregistering Aircraft in This Jurisdiction.

2.8.3 Required Documentation

See 2.8.1 Deregistering Aircraft in This Jurisdiction and 2.8.2 Lessee's/Operator's Consent.

2.8.4 Duration of Deregistration Process

The deregistration process should be swift provided:

- the lessor produces the documents outlined previously;
- the lessee co-operates with the lessor and the authorities; and
- there are no registered interests on the aircraft in question.

2.8.5 Aviation Authority's Assurances

The Authority provides advance assurances to an aircraft owner, mortgagee or lessor as to the prompt deregistration of the aircraft on the IDERA itself where-in the Authority, by countersigning the IDERA, confirms that the Authorised Party, or Certified Designee as the case may be, may procure the deregistration of the aircraft from the Register on written demand without the consent of the registrant and that, upon such demand, the authorities in Malta shall co-operate with the Authorised Party, or Certified Designee as the case may be, with a view to the speedy completion of such action.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

A fee of EUR50 is payable on application for deregistration.

2.8.7 Deregistration Power of Attorney

A PoA will be recognised and there are no specific formalities required for its validity except that it be issued by the registrant of the aircraft and that there is no other IDERA or PoA registered in the Register. For a PoA to be enforceable against a domestic party, it must be submitted to the Director General so that its details and the details of any delegate under the PoA are recorded in the Register. It is also advisable for it to be translated, certified, notarised and legalised if executed outside Malta and if drawn up in a language which is not English or Maltese.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

Proof of identity of the person empowered under a deregistration PoA is required, together with proof that it was signed by the registrant or the person duly authorised to represent them, as well as supporting documents to the satisfaction of the Director General that all registered international interests ranking in priority to the Authorised Party have been discharged or that the holders of such interests have consented to the deregistration and exportation of the aircraft.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A PoA does not have to be governed by the laws of Malta.

2.8.10 Revocation of a Deregistration Power of Attorney

A PoA is granted by way of security. Thus, if expressed to be irrevocable, it cannot be revoked by the grantor without the consent of the person in whose favour the PoA is issued.

2.8.11 Owner's/Lessor's Consent Without the Lessee's Consent

An aircraft owner, mortgagee or lessor may export the aircraft only if such owner, mortgagee or lessor is in possession of and presents a registered and valid IDERA or PoA issued in their favour by the registrant of the aircraft, and the necessary steps outlined in 2.8.1 Deregistering Aircraft in This Jurisdiction have been followed.

Without the Owner's or Lessor's Consent

If empowered by the mortgage deed, a mortgagee can procure the exportation of the aircraft without requiring consent of the mortgagor or lessor.

Steps at the Time of Negotiating the Lease or Mortgage

An IDERA and/or PoA should be issued in favour of the owner, mortgagee or lessor, as a condition precedent to the lease.

Physical Location of the Asset

There should be no need for the asset to be physically located in Malta at the time of deregistration. Howev-

er, with regard to exporting the aircraft, the Act defines the word “export” as the exportation and physical transfer of an aircraft from the territory of Malta.

2.8.12 Aircraft Export Permits/Licences

No aircraft export permits/licences are needed to export an aircraft from Malta. However, transporting an aircraft out of Malta will be subject to certain authorisations to fly.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

A nominal fee will be charged where a permit to fly or export conformity statement is required to be issued by the Authority.

2.8.14 Practical Issues Related to Deregistration of Aircraft

There should be no significant practical issues that an aircraft owner or mortgagee or lessor should be aware of in respect of the deregistration of aircraft in Malta. Proof of removal of registration marks must be provided to the Authority.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

The primary law and statutory regime in Malta governing restructurings, reorganisations, insolvencies and liquidation as regards a lessee incorporated in Malta is the Companies Act (CA) and the regulations made thereunder. A new Pre-Insolvency Act, Chapter 631 of the Laws of Malta (PIA) was introduced in December 2022 implementing Directive (EU) 2019/1023 of the European Parliament and of the Council on preventative restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

The PIA, however, specifically provides that the stay of certain enforcement action by creditors concerning aircraft is excluded from the pre-insolvency debtor protection afforded generally under the PIA, which may not be construed as limiting or restricting, among others:

- any action in rem against an aircraft or aircraft engine;
- any proceedings that may be instituted by the holder of a registered mortgage or a privileged creditor over an aircraft or aircraft engine, or any other actions or proceedings to which an aircraft or aircraft engine may be subject in terms of the Act; and
- any warrant of arrest, whether in personam or in rem, of an aircraft or aircraft engine.

Certain provisions in the Act, including Articles 23 and 36 of the First Schedule, specifically regulate certain matters related to the insolvency of a debtor whereby a debtor includes a lessee under an aircraft lease agreement.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Voluntary and Involuntary Restructurings and Reorganisations

Under the CA, the following procedures are contemplated.

- *Compromise or arrangement between a company and its creditors* this is a procedure whereby the court orders a meeting between the debtor company and its creditor(s) for the negotiation of a compromise. If the compromise meets the approval of creditors and the debtor company, it will be binding thereon.
- *Out-of-court voluntary mediation* this is an out-of-court compromise or arrangement between the debtor company and its creditors by unanimous agreement and through the intervention of a mediator chosen by the parties themselves.
- *Company recovery procedure* this gives companies in financial difficulty the opportunity to recover by means of a moratorium on court actions against it. However, a Maltese company whose main object or function is to own, hold, operate, charter, manage or lease any aircraft or aircraft engine (including, automatically, a company which is or was in possession of an Air Operator's Licence) cannot seek protection of the company recovery procedure, thus giving preference to airline creditors.

A pre-insolvency process and restructuring mechanism is now also possible under the PIA implementing the EU Restructuring Directive. The provisions of the PIA do not apply in so far as these may be inconsistent with, or in so far as these may be construed as limiting or restricting, the application of the Convention and the Protocol or the Act, among others.

Insolvencies and Receivership

If a company is no longer viable, the CA provides for the following types of insolvency procedures:

- creditors' voluntary winding-up; or
- dissolution and winding up by the court.

With regards to the creditors' voluntary winding-up, the shareholders of a company decide to dissolve the company in instances where the directors thereof do not certify that the company is solvent. Thus, the winding-up happens under the control of a liquidator appointed by the creditors.

In the case of dissolution and consequential winding up by order of the court, such order may be made if, *inter alia*, the relevant company is unable to pay its debts. Dissolution and winding up in this case take place under the control of the court.

In the case of the winding-up of a company by the court, the CA provides for the appointment of an official receiver. The official receiver is appointed, primarily, for the purpose of carrying out such investigations as deemed appropriate and submitting to the court, if they think fit, a preliminary report as to, *inter alia*, the causes of the failure of the company and whether further enquiry is desirable as to any matter relating thereto.

The official receiver may also be appointed as the provisional administrator of the company before the winding-up order is made, and will assume the role of liquidator after a winding-up order is made until a liquidator is officially appointed and whenever there is a vacancy in this role.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

Article 24 of the First Schedule to the Act, which substantively reproduces the text of the Convention and the Protocol, provides that where the aircraft object is situated in Malta and Malta is not the primary insolvency jurisdiction, the Maltese courts shall, in accordance with the laws of Malta, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article 23 of the First Schedule to the Act providing for remedies on insolvency.

As an EU member state, Malta is required to implement the provisions of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. The Regulation, which also covers pre-insolvency proceedings such as rescue, adjustment of debt, reorganisation or liquidation, sets out EU-wide rules to establish:

- which court has jurisdiction over an insolvency case;
- the applicable national law; and
- recognition by all other EU countries of a judgment opening insolvency proceedings in one EU country.

Malta has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

A PoA or an IDERA will survive the liquidation of the lessee in that it will continue to be binding on the liquidator.

2.9.5 Other Effects of a Lessee's Insolvency

With regard to whether the lease will be set aside and whether the lessor will be prevented or delayed from repossessing the aircraft upon termination of the lease, see **2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings**.

The aircraft will not be deemed to be part of the lessee's property and the liquidator will be obliged to pay the lessor out of the assets of the company, if any, in accordance with the rules relating to ranking of creditors. See also **2.4.6 Priority of Third Parties' Rights**.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The main risks for a lender depend on whether or not security for the loan exists. In the case of an unsecured loan, the lender will rank *pari passu* with other creditors with the risk of recovering only a part of the debt.

As regards registered mortgages, special privileges and all actions and claims to which an aircraft may be subject, such shall not be affected by the bankruptcy and/or insolvency of the mortgagor or owner occurring after the date on which the mortgage was created or the special privilege, action or claim arose.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

As a general rule, creditors cannot take legal action against a company in liquidation unless authorised to do so by the competent court. However, an exception exists with respect to a lessee in the context of a lease of an aircraft. Maltese law provides that such a lease shall be immediately dissolved or terminated by the lessor at any time in the event of a default which includes the insolvency of the lessee. Such dissolution or termination allows the lessor, after notice to the lessee, to take possession of the aircraft (including an aircraft engine) without first obtaining court authorisation.

2.9.8 Liquidation of Domestic Lessees

Apart from the methods outlined in 2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership as regards liquidation, a Maltese lessee can also be dissolved and wound up when the shareholders thereof resolve to dissolve it and where, in the opinion of the directors, the company is solvent.

2.9.9 Ipso Facto Defaults

Ipso facto defaults are recognised and can form the basis on which an aircraft is repossessed during a lessee insolvency proceeding.

2.9.10 Impact of Domestic Lessees' Winding-Up

As regards the impact on the aircraft and the lease rentals, see 2.9.5 Other Effects of a Lessee's Insolvency.

The lease security deposit and the maintenance reserves (whether classified as reserves or supplemental rent) would depend upon whether such deposit and reserves have been transferred to the lessor or not. In the latter case, such are expected to fall within the general pool of assets for distribution to creditors generally according to their ranking.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The Convention and the Protocol have the force of law in Malta. It is not necessary to obtain "authorised entry point" (AEP) codes for registering international interests.

2.10.2 Declarations Made Concerning Conventions

Malta has made declarations under Articles 39 (1)(a) and (4), 40, 53 and 54 (2) of the Convention.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Article XIII of the Protocol applies domestically.

The procedure for submitting and recording the IDERA in the Register is as follows.

- The IDERA has to be submitted in writing to the Authority substantially in the form set out in Annex 1 to the Second Schedule of the Act identifying an aircraft registered or to be registered in the Register and signed by the registrant of the aircraft, or if the registrant is not a natural person, by a person who is duly authorised to represent the registrant including by means of a power of attorney.
- Two copies of such an IDERA are to be submitted to the Authority and the latter will acknowledge receipt of that IDERA by executing one such copy and returning it.
- If the IDERA indicates that it was signed in Malta, it will be accepted by the Authority without additional formalities. However, an IDERA that indicates that it was signed outside Malta will be accepted by the Authority if notarised locally to the satisfaction of the Director General and the Director General in his discretion may also ask that the IDERA is duly apostilled or legalised.

- Unless the aircraft has not yet been registered in the Register or if another recorded IDERA for that aircraft has not been revoked, the Authority will:
 - (a) record the IDERA within two working days of receipt;
 - (b) promptly confirm that recordation is complete; and
 - (c) issue a declaration stating that pursuant to the recordation of the IDERA the Authority undertakes not to deregister the aircraft, unless consented to by the Authorised Party or their Certified Designee if so recorded.

2.10.4 Enforcement of Conventions

The Maltese courts have had very little experience in enforcing the Convention since its ratification in 2010. In one case, the courts were asked to consider whether the arrest of an aircraft by an Italian creditor in terms of detention rights provided under Italian law and enforced in Malta in virtue of Regulation 44/2001 EC (predecessor of the Brussels Recast Regulation) was incompatible with the rights of a lessor who was in the process of repossessing the aircraft in terms of his rights under the Convention.

While the matter was resolved amicably pending final judicial determination of the issue, it appeared that the courts were inclined to give precedence to European Union law over the provisions of the Convention in this case.

2.10.5 Other Conventions

Malta is not a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft and neither is it a party to the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

There are no restrictions on foreign lenders financing an aircraft locally or on borrowers using the loan proceeds, provided that the lender is not carrying out the business of a credit or financial institution in Malta

through any form of physical presence in the Maltese territory.

3.1.2 Effect of Exchange Controls or Government Consents

There are no exchange controls or government consents that would be material to any financing or repatriation of realisation proceeds under a loan, guarantee or security document.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

In terms of Article 136 of the CA, a company is allowed to guarantee the obligations of a third party provided this is not prohibited by its memorandum and articles of association.

3.1.5 Lenders' Share in Security Over Domestic SPVs

It is advisable for a lender to take share security over a domestic special purpose vehicle (SPV) that owns the financed aircraft. Article 122 of the CA provides for the pledging of securities. In the case of a private company, the right to pledge is excluded unless specifically allowed by its memorandum and articles of association.

3.1.6 Negative Pledges

A negative pledge is recognised under Maltese law as an undertaking not to perform specific actions.

3.1.7 Intercreditor Arrangements

An intercreditor arrangement shall be valid and enforceable between the relevant parties if made in writing without the need of any other formality or registration. However, in order to have effect in relation to third parties, such arrangement must be registered:

- at the ship registry by means of an annotation;
- at the Register by means of an annotation; and
- in all other cases, at the Public Registry by means of a note.

Such public registrations are not required for the agreement to be binding between the parties and are accordingly rarely made.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent under a syndicated loan are recognised.

3.1.9 Debt Subordination

There are no prohibited methods of debt subordination.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of all or part of an outstanding debt under an English or New York law-governed loan is permissible and recognised subject and pursuant to the Rome I Regulation.

3.1.11 Usury/Interest Limitation Laws

See 2.6.8 Limitations on Lessors' Actions Following Termination.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

The typical forms of security and recourse granted in an aviation finance transaction domestically come in the form of:

- a mortgage over the aircraft in terms of the Act;
- an international interest over aircraft objects in terms of the Convention;
- a recorded IDERA and/or PoA issued in favour of the financing entity by the registrant of the aircraft; and
- a pledge over the shares of the borrowing SPV.

3.2.2 Types of Security Not Available

Under Maltese law, an aircraft or aircraft engine may constitute security for a debt or other obligation either by agreement (including a mortgage or a pledge) or by operation of the law (special privileges). However, the following should be noted.

- Any security over the aircraft shall not extend to any engine attached to the airframe when such engine does not belong to the owner of the airframe who has granted the security.

- As regards a mortgage, only a registered aircraft or a share in such aircraft may be the subject of a mortgage and such will attach to any proceeds from any indemnity arising from any mishaps as well as any insurance proceeds (except for an indemnity payable under a liability policy).
- As regards an international interest in terms of the Convention, such interest applies in respect of aircraft objects (airframes, aircraft engines or helicopters).
- As regards aircraft engines and other separate items belonging to the debtor, the creditor may request that these be transferred/assigned to their benefit by way of security or request that they are pledged in their favour. Such engines or separate items may also be encumbered by means of a general hypothec over all the assets of a debtor existing at the time.

3.2.3 Trust/Trustee Concepts

The concept of a trust and the role of a security trustee is recognised in Malta.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

A borrower may assign to a security trustee pursuant to a security assignment or to a mortgage its rights to the aircraft or under an aircraft lease (including in relation to insurances).

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It is possible to assign the rights and benefits only without also assigning the attendant obligations of the lessor under an aircraft lease.

3.2.6 Choice of Foreign Law

A security assignment or a guarantee governed by English or New York law will be fully enforceable subject to and pursuant to the Rome I Regulation.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

Article 2095F of the Civil Code lays down the requisite formalities for the validity of a security assignment under Maltese law. Ownership of the property is acquired by the creditor as soon as the debtor and/or

the transferor and the creditor enter into an agreement in writing designating the following:

- the property being transferred;
- the secured obligations, which may be existing or future obligations; and
- the rights of the transferee in the event of default as stipulated in the agreement.

A transfer by way of security operates as a transfer with regard to third parties:

- in the case of debts and rights against an obligor, when the obligor is notified of or acknowledges the assignment; or
- in the case where the rights consist of property, there is no obligor and the title to the property is registered in a public registry, when the transfer is registered in the relevant register.

Failure to comply with the above-mentioned formalities would result in an invalid and unenforceable security assignment.

If executed outside Malta, it is advisable for a security assignment to be translated, certified, notarised or legalised to be enforceable against a domestic party.

3.2.8 Domestic Law Security Instruments

Where a security assignment governed by English or New York law is taken in respect of an aircraft registered in Malta, no Maltese law security instrument is required. To make Cape Town filings, it is not mandatory to have a domestic law security instrument and/or to make local law filings. The costs for executing a domestic law security instrument and to complete local law filings depend on the type of security in question.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

Security assignment agreements do not need to be registered. If the security assignment has been registered on the International Registry, such must be recorded in the Register. Where copies of agreements are submitted to the Director General, a certified true copy of the original will suffice if the document was

signed in Europe. Otherwise, the copy must be certified, notarised and apostilled.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests over an aircraft and/or engines is recognised.

3.2.11 Effect of Changes in the Identity of Secured Parties

A change in the underlying beneficiaries of the security trust held by the trustee will not jeopardise the security assignment.

3.2.12 “Parallel Debt” Structures

Under Maltese law, the security trustee has an independent right to the secured debt.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment would not be deemed to be resident, domiciled, carrying on business or subject to any taxes by reason of its being a party to, or of its enforcement of, such security assignment.

3.2.14 Perfection of Domestic Law Mortgages

A mortgage over an aircraft or a share therein is provided on a statutory form and must be executed by the owner of the aircraft or its duly authorised representatives (mortgagor) in favour of its creditor or security trustee (mortgagee) in the presence of, and attested by, a witness or witnesses.

Subsequently, the mortgage must be submitted to the Director General for registration. The Director General must record such mortgage in the order of time (day and hour) in which it is produced to him for that purpose as well as any other relevant details or instructions.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

There is no difference between the form of security (or perfection) taken over an aircraft and that taken over spare engines except that mortgages cannot be registered with regard to the latter alone.

3.2.16 Form and Perfection of Security Over Bank Accounts

Security over a bank account (such as a lease receivables account) is created through a contract of pledge which is perfected once notice has been given by a judicial act served on the bank or once the bank has acknowledged the pledge in writing.

3.3 Liens

3.3.1 Third-Party Liens

Certain third-party debts are secured by a special privilege over the aircraft or engine in terms of and subject to the conditions of Article 42 of the Act. Such third-party debts include:

- wages due to crew in respect of their employment on the aircraft;
- any debt due to the holder of a possessory lien for the repair and preservation of the aircraft to the extent of the service performed on and value added to the aircraft;
- the expenses incurred for the repair and preservation of the aircraft to the extent of the service performed on and value added to the aircraft; and
- taxes, duties and/or levies due to the government of Malta in respect of the aircraft.

A fleet lien is not recognised under Maltese law.

Generally, a special privilege grants the person, in whose favour it may arise, priority over other creditors. Without prejudice to the rights of a holder of a possessory lien, it does not entitle such person to take possession of the aircraft or engine but may constitute the basis for an action in rem against the aircraft or engine. A claimant having an action in rem against an aircraft or engine may also procure the issue of a precautionary warrant (or an executive warrant, following judicial determination of the claim) of arrest against the aircraft or engine in accordance with the provisions of the COCP.

A privilege is capable of registration in terms of Article 31 of the Act.

3.3.2 Timeframe to Discharge a Lien or Mortgage

A possessory lien is extinguished once the aircraft is voluntarily released from the custody of the creditor.

With regard to mortgages, the Director General shall, on production of a duly signed and attested mortgage deed together with a receipt for the secured money, make an entry in the Register to the effect that the mortgage has been discharged.

3.3.3 Register of Mortgages and Charges

There is no separate register of mortgages and charges. Mortgages are registered in the Register in the name of the mortgagee or security trustee. The day and hour in which mortgages are produced for registration are also recorded with the result that if there is more than one mortgage registered in respect of the same aircraft or share, the mortgagees shall be entitled in priority, one over the other, according to the date and the time at which each mortgage is recorded in the Register. A registered mortgage shall attach to the aircraft or share therein in respect of which it is registered until it is discharged and, inter alia, entitles the mortgagee or security trustee to exercise the rights reserved for mortgagees by virtue of the Act.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

Statutory rights of detention or non-consensual preferential liens can arise over an aircraft. However, these do not extend to the fleet.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser of an aircraft can search the Register to verify whether that aircraft is free of registered encumbrances.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

Given that in the event of a security by title transfer the creditor is already in possession and the legal owner of the security, on enforcement, they will have the right, by notice in writing to the debtor, to realise the property held by selling the property or (if so agreed) by setting off or netting its value and applying such value in discharge of the secured obligations.

3.4.2 Security Trustees' Enforcement of Their Rights

As a general rule, an assignee can only exercise the rights assigned to them after due notice of the assignment has been given to the debtor by means of a judicial act. However, where an assignment is made by way of security, there is no requirement for notice to be given by judicial act and any writing, including by electronic means, will suffice.

3.4.3 Application of Foreign Laws

Domestic courts will uphold a foreign law as the governing law of a finance or security document pursuant and subject to the Rome I Regulation and the submission to a foreign jurisdiction pursuant and subject to the Brussels Recast Regulation.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

See 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

A secured party should be able to take physical possession of the aircraft to enforce a security agreement/aircraft mortgage without the lessee's or operator's consent where this was specifically provided in the security agreement/aircraft mortgage and/or where a recorded IDERA or PoA issued in their favour by the registrant is in place and the necessary steps outlined in 2.8.1 Deregistering Aircraft in This Jurisdiction have been followed.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

Enforcement action disputes would fall within the competence of the Civil Courts.

3.4.7 Summary Judgments or Other Relief

See 2.6.4 Summary Judgment or Other Relief.

3.4.8 Judgments in Foreign Currencies

See 2.6.7 Judgments in Foreign Currencies.

3.4.9 Taxes/Fees Payable

In enforcing a security arrangement/aircraft mortgage, a secured party is required to pay judicial costs which are generally determined based on the value of the claim. No taxes related to such an enforcement are due.

3.4.10 Other Relevant Issues

Lenders should be aware that the special privileges listed in Article 42 of the Act rank in preference to all other claims whether they be secured by a duly registered mortgage, international interest or a recognised foreign mortgage.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

See 2.6.13 Other Relevant Issues.

4.2 Current Legislative Proposals

The answers provided throughout this guide reflect recent amendments to the Act and various related legislation introduced through Act No XXXVII of 2021 entitled "An Act to Amend Various Laws relating to Aircraft Registration", which came into force on 6 July 2021, the enactment of the PIA and the enactment, on 1 January 2024, of a new Air Navigation Act as Chapter 641 of the Laws of Malta, designed to modernise and consolidate the earlier legal framework, replacing the older Civil Aviation (Air Operators' Certificate) Act, the Air Navigation Order and the Civil Aviation (Air Transport Licensing) (Fees) Regulations.

Trends and Developments

Contributed by:

Nicholas Valenzia and Joshua Chircop
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Mamo TCV Advocates is a leading law firm in Malta in the aviation sector, covering the full spectrum of aviation-related legal work and noted for its experience in complex corporate structures relating to the ownership and operation of aircraft. The firm spe-

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MAMO TCV
ADVOCATES

Malta remains a jurisdiction of choice for the aviation sector, including in the finance and leasing space. The registry of aircraft has risen to over 930 planes, and there are now almost 60 local air operators. In recent years, the likes of Ryanair, Lufthansa's Eurowings and Wizz Air have chosen to fly to Malta, which is testament to the island's offering for big players. The Maltese market continues to be rife with activity, with several air operators and maintenance organisations seeking to set up shop there and establish entities licensed with the Transport Malta Civil Aviation Directorate (TMCAD). A fair number of M&A deals have also taken place there, with prospective buyers on constant look-out for operators, and MROs already established on the ground. By way of example, in the past year, EasyJet has acquired the Maltese SR Technics maintenance facility. With this in mind, lenders and lessors are prepared to fund aircraft registered in Malta, and significant financing and security is being provided for large fleets of aircraft.

Cape Town Convention

In the first quarter of 2025, Malta once again achieved a top ranking in the Cape Town Convention Compliance Index, coming first in Europe and second worldwide, scoring 95 out of 100. Malta's compliance with the Cape Town Convention on International Interests in Mobile Equipment and the Aircraft Protocol thereto on Matters Specific to Aircraft Equipment (CTC) has been ranked as Very High.

The explanatory comments to the Index noted that, in Malta, the "CTC prevails over national law and is comprehensively implemented through legislation, rules and regulations. There is judicial precedent with both mixed outcomes relating to compliance with the terms and intent of CTC (Wind Jet S.p.A.) and outcomes that are substantially compliant with the terms and intent of CTC (Air X Charter vs. Avmax; Hi Fly). Such precedent has medium predictive value for the outcome of future cases with similar facts. There has been positive practical experience on CTC issues. Malta is and should remain eligible for the OECD discount. The government has established a communications channel with AWG, and work on CTC issues has been effective and efficient".

One of the most noteworthy cases in this respect concerned *Air X Charter Limited and Air X Aircraft Finance I Limited v Mamo TCV Advocates* as deputy curators acting on behalf of Avmax Aircraft Leasing Inc, Bank of Utah and The Malta Transport Authority.

The exercise of rights under the Irrevocable De-Registration and Export Request Authorisation (IDERA) was highlighted in this ground-breaking decree delivered by the First Hall, Civil Court when it was called upon to determine whether a warrant of prohibitory injunction could be issued to stop the holder of an IDERA registered in Malta from enforcing the IDERA and deregistering an aircraft from the Maltese Registry. The court ultimately upheld the rights granted by the IDERA, rejecting the warrant of prohibitory injunction that aimed to restrict those rights, claiming that the law is clear and does not allow for any exceptions in the manner in which an IDERA is implemented or enforced – meaning the power granted to any authorised person or certified designee under an IDERA is binding.

Represented by Mamo TCV Advocates, Avmax, as owner of eight aircraft registered in Malta, and Bank of Utah (as owner trustee of the Aircraft) successfully staved off a warrant of prohibitory injunction from limiting their rights to enforce their IDERAs over the aircraft.

Cell Companies

Pursuant to amendments to the Companies Act in recent years, the Companies Act (Shipping and Aviation Cell Companies) Regulations ("the Regulations") allow for the incorporation of cell companies that conduct aviation business. The Regulations also allow for the conversion into a cell company of an existing company that conducts aviation business. A cell company may create one or more cells within itself for the purposes of segregating and protecting cellular assets. Each cell has distinct assets and liabilities and can therefore be used to carry out separate and distinct business from the cell company and from the other cells.

The Regulations cement Malta's position as a leading jurisdiction in the aviation business. Aviation companies are able to segregate their assets and liabilities

into various cells, which are considered to be a distinct patrimony from the core company and the remaining cells, whilst taking full advantage of the cost benefit of maintaining one company as opposed to several. Importantly, a creditor of one particular cell only has recourse to the assets of that particular cell, and not the remaining cells or the core company. As a result, the insolvency of one particular cell has no impact on the remaining cells or the core company itself.

Cell companies have been regulated under Maltese law for some time, and are used by insurance companies under the Companies Act (Cell Companies Carrying on Business of Insurance) Regulations, and also by securitisation vehicles and investment companies with variable share capital under the Securitisation Act. The Second Schedule to the Civil Code also allows for the use of segregated cells by foundations and associations.

In their short lifetime, Maltese aviation cell companies have already proved to be a success, with asset owners choosing to place their aircraft into cell structures. Such cells have also received the wholehearted support of global lenders who have provided significant financing in respect of aircraft owned by such cells.

Air Navigation Act

In recent years, Malta has continued to strengthen and streamline the legal framework applicable to its aviation sector, and on 1 January 2024 introduced the Air Navigation Act (Chapter 641 of the Laws of Malta) (“the Act”). The Act repealed the Civil Aviation (Air Operators’ Certificates) Act (Chapter 218 of the Laws of Malta), the Air Navigation Order (Subsidiary Legislation 499.09) and the Civil Aviation Subsidiary (Air Transport Licensing) (Fees) Regulations (Subsidiary Legislation 499.33).

The primary objective of the Act is to govern aircraft navigation within Maltese airspace and to establish technical compliance standards. The Act applies to aircraft registered in Malta and accompanying crew, together with aircraft present in Malta, irrespective of where it has been registered. However, it does not apply to state aircraft.

According to the Act, the competent authority responsible is the TMCAD (the “Competent Authority”), established under the Authority for Transport in Malta Act (Chapter 499 of the Laws of Malta). This authority exclusively oversees aircraft navigation over Maltese airspace and ensures compliance with technical standards for Malta-registered aircraft and their operations.

The Act mandates that the Competent Authority shall fulfil those obligations under the Chicago Convention and European Union Regulations concerning aviation safety. One such obligation is to ensure that aircraft and related components, such as engines and propellers, comply with the environmental protection requirements outlined in Annex 16 of the Chicago Convention, the Carbon Offsetting and Reduction Scheme for International Aviation.

Article 5 of the Act empowers the Competent Authority, with the consent of the Minister, to issue Regulatory Instruments that have the force of law. This power has been delegated by law in view of the Competent Authority’s obligation in the public interest to ensure adequate safety standards within the aviation industry. It is responsible for the oversight of aircraft operations, for ensuring the safety of all crew members, passengers and cargo on board. Accordingly, the Competent Authority is obliged to ensure the security, public order and the safety of air navigation in Malta. The Competent Authority therefore has a duty to take such measures to address risks pertaining to safety, privacy, protection of personal data and security, that may arise from time to time pursuant to aircraft operations. By way of example, on 24th March 2025, TMCAD issued a Regulatory Instrument on the Safety and Security of Aircraft and Passengers.

Sanctions

Sanctions imposed against Russia and ancillary countries remain at the forefront of advice sought by financiers and operators in the day-to-day operations of their aircraft. The 16th EU sanctions package represents a significant tightening of restrictions on Russia, with a strong focus on closing any existing gaps and preventing the circumvention of measures by engaging foreign aviation operators. By expanding bans in key sectors such as aviation and trade, the

EU is looking to put pressure on Russia's economic capabilities and limit the country's ability to sustain military operations.

Upcoming Developments

The Malta Financial Services Advisory Council has launched a National Strategy for the Financial Services Sector which is proposing areas where Malta could become a centre of excellence, particularly in the aircraft leasing space. Malta is already a well-established jurisdiction in the aviation sector, with legislative and accounting frameworks, and commercial and infrastructural systems which are conducive to attracting further investment in the aviation industry.

The Council, together with FinanceMalta and other stakeholders, is focused on identifying factors such as availability of space, financing, and personnel experienced in aviation set-up to enhance Malta's competitiveness. The local legal infrastructure is being improved with measures relating to the enforcement of share pledges in Maltese aviation companies, and further facilitation tools are being added relating to aircraft importations. The authorities are also looking at a possible expansion of Malta's double tax treaty network, in particular with key jurisdictions representing potential targets for aircraft leasing business. Significant work has already been undertaken in this respect, and further developments are expected soon.

Conclusion

Malta is a jurisdiction of choice for financiers and lessors with global lenders already well acquainted with the local set-up and with a history of financing significant portfolios of assets. This is partly due to the island's robust legal framework, creditor-friendly legislation, and strategic adoption of international conventions. The ratification of the Cape Town Convention provides legal certainty and streamlined enforcement of security interests, making Malta attractive to financiers. The Aircraft Registration Act further enhances this by allowing for the registration of international interests, fractional ownership, and IDERAs, while ensuring transparency and protection for stakeholders. Additionally, Malta continues to offer a competitive corporate tax regime and flexible corporate structures, including securitisation and cell companies, which support efficient aircraft leasing and financing operations generally.

NIGERIA

Law and Practice

Contributed by:

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Streamsowers & Köhn



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Streamsowers & Köhn (SSK) is a leading commercial law firm, which provides legal advisory services to a varied clientele that includes Nigerian and international companies and organisations, governments and government departments, and individuals. SSK operates out of offices in Lagos, Abuja and Port Harcourt. The firm's partners are recognised as leading lawyers both in local and international legal circles.

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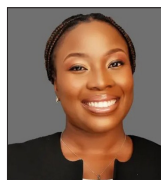
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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

Stamp Duty

In Nigeria, the execution of an aircraft or engine sale agreement will attract stamp duties at an ad valorem rate of 1.5%.

Capital Gains Tax

The gains realised from the sale will be subject to capital gains tax. Capital gains tax at the rate of 10% arises on gains accruing to domestic parties upon the sale of an aircraft or engine. This tax also arises from the sale of ownership interests in Nigerian companies for proceeds in excess of NGN100 million. A roll-over relief exists where the proceeds from the sale of the aircraft or engine are used to purchase a new aircraft or engine within 12 months before or after the sale.

For foreign sellers spending an aggregate of 183 days or more in Nigeria in the year of assessment, and foreign companies managed and controlled from outside Nigeria during the year of assessment, capital gains tax will arise solely on any sums received or brought into Nigeria.

Other Duties

Where an aircraft or engine or other part is imported following a sale, it will be import-duty free. Notwithstanding the foregoing, the Finance Act 2023 imposes an additional 0.5% charge on goods (including aircraft) imported into Nigeria from outside the region. The Finance Act 2023 also mandates operators and lessors with income derived from Nigeria to file tax returns as a condition of continued operation.

VAT is applicable on goods physically present in or imported into Nigeria. However, VAT will not arise where an aircraft or engine is for commercial purposes. These incentives do not apply to private aircraft.

1.1.2 Enforceability Against Domestic Parties

It is advisable for a sale agreement to be professionally translated into English (the official language of Nigeria) where the sale agreement is not in English.

The sale agreement as translated should then be certified and/or notarised in the applicable manner for that country. Nigerian courts will not enforce an agreement made in a foreign language.

1.2 Transfer of Ownership

1.2.1 Transferring Title

The transfer of title of an aircraft or engine must be effected through a written agreement, and the parties to the agreement will specify the terms and conditions that must be met for title to pass to the buyer. This position also applies to all installed parts, such as an auxiliary power unit (APU).

The sale of ownership interests in an entity that owns an aircraft or engine will be recognised as a sale of such aircraft or engine once it is agreed in the sale instrument that all the interests in such entity are being acquired.

1.2.2 Sales Governed by English or New York Law

A transfer instrument, such as a bill of sale, may specify that it is governed by English or New York law. Such clauses are recognised and enforced by Nigerian courts, provided that the terms and basis of the agreement are not contrary to public policy, tainted with fraud or in any way illegal.

The minimum substantive requirements for such a bill of sale will be akin to the minimum requirements for a valid contract. These include:

- the correct identification of the parties (ie, the seller and the buyer);
- the consideration for the sale;
- a precise description of the aircraft or engine or other part being sold;
- the date of the transaction; and
- the signatures of the parties.

1.2.3 Enforceability Against Domestic Parties

A bill of sale, if executed in a language other than the Nigerian official language (which is English), should be translated into English. It should be certified or notarised, particularly if the document is to be tendered in a court proceeding.

1.2.4 Registration, Filing and/or Consent From Government Entities

A bill of sale showing evidence of ownership of an aircraft should be registered and filed with the Nigeria Civil Aviation Authority (NCAA). It is one of the documents that the NCAA requests at the time of registration of an aircraft.

Where the bill of sale is being registered and filed along with the aircraft, the formalities include the submission of an application to the NCAA in a form and manner acceptable to the NCAA. The application must:

- certify that the aircraft meets the eligibility criteria set out in Part 4 of the Nigeria Civil Aviation Regulations (“Nig.CARs”);
- provide evidence of ownership; and
- be signed.

Where the bill of sale is being registered as an interest, the NCAA does not stipulate any formalities, but Part 4 of the Nig.CARs states that the requirements for the registration of legal interests in an aircraft must be as prescribed by the NCAA.

To be eligible for registration, an aircraft should be owned by any of the following persons:

- a Nigerian citizen;
- an individual citizen of another state who is lawfully a permanent resident in Nigeria;
- a corporation lawfully organised and doing business under the laws of Nigeria, where the aircraft is based and primarily used in Nigeria;
- a government entity of Nigeria or political subdivision thereof; or
- a foreign person who has leased the aircraft to one of the above-mentioned persons, in which case, the leased aircraft –

a) may remain on the Nigeria registry only for as long as the lease remains in effect, and the certificate of registration must include the names and addresses of the lessee and, if different, the operator of the aircraft; and

b) may not also be registered under the laws of any other state and may not be more than 25 years old

(if used for commercial air transport – cargo) and not more than 22 years old (if used for commercial air transport – passengers).

There is no period stipulated by law for completion of registration of a bill of sale or other instrument creating an interest in an aircraft.

No government applications or consents are prerequisite to the execution and delivery of a bill of sale in relation to an aircraft or engine registered in Nigeria.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

Stamp duties arise ad valorem on the execution of a bill of sale instrument. The documents may be in written or electronic form. The law provides that no bill of sale will be registered until the document has been duly stamped.

The obligation to pay duties arises on the bill of sale irrespective of the location of the aircraft or engine, as long as the place of performance is Nigeria.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

Operating, wet and finance leases are permissible and recognised in Nigeria. Leases concerning only engines or aircraft parts are also permissible.

2.1.2 Application of Foreign Laws

A lease involving a domestic party, or an asset situated in Nigeria, can be governed by foreign law. Nigerian courts are inclined to respect the sanctity of contracts and uphold a foreign jurisdiction clause. However, Nigerian courts may in certain instances assume jurisdiction over any matter subject to such a foreign law clause and have held that upholding such a clause is discretionary. Circumstances that the courts will take into consideration when faced with an application to stay an action filed in breach of a foreign jurisdiction clause, include the following:

- where the evidence on the issue of fact is situated or more readily available, and the effect of that on

the relative convenience and expense of a trial as between the courts of each jurisdiction;

- whether the law of the foreign court applies and, if so, whether it differs from Nigerian law in any material respects; and
- to what country and how closely either party is connected, and whether the defendants genuinely desire trial in the foreign country or are only seeking procedural advantages – examples of such instances include:
 - (a) where the defendant is resident within the jurisdiction of the court;
 - (b) if the subject matter of the suit is located within the jurisdiction; or
 - (c) if the contract was entered into in Nigeria.

2.1.3 Restrictions Concerning Payments in US Dollars

No material restrictions are imposed on domestic lessees making rent payments to foreign lessors in US dollars, as long as the domestic lessees fully comply with – among other things – foreign exchange rules, as well as tax and AML regulations.

2.1.4 Exchange Controls

Nigerian laws permit the repatriation of the proceeds of valid transactions in any convertible currency, provided that the necessary documentation is duly completed and submitted to an authorised dealer. Authorised dealers are banks licensed by the Central Bank of Nigeria to operate in the foreign exchange market.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

Stamp duties arising from the execution of a lease are applicable to both physical and electronic documents and would arise once performance is within the jurisdiction.

Lease payments are subject to withholding taxes at a rate of 10%. For non-resident companies, the taxes withheld are treated as their final tax. Importantly, taxable persons in countries with whom Nigeria has a double tax agreement (DTA) will be taxed based on the provisions of the DTA.

2.1.6 Licensing/Qualification of Lessors

Foreign lessors need not be licensed or qualified in Nigeria to do business with domestic lessees.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

Most lease contracts in Nigeria with foreign governing law clauses include typical clauses that are contained in lease contracts for aircraft and aircraft parts. Nigerian law does not stipulate that certain lease terms be excluded in a lease agreement, as parties are free to stipulate the terms that will govern the lease agreement.

2.2.2 Tax and Withholding Gross-Up Provisions

Gross-up provisions are common and have been enforced by superior courts of record in Nigeria. However, sums representing taxes or penalties borne by companies on behalf of another person or company are disallowed as a deductible expense.

2.2.3 Parts Installed or Replaced After a Lease's Execution

Parties are free to amend the terms of their lease to cover engines and other parts installed or replaced on an aircraft after the execution of the lease.

2.2.4 Risk of Title Annexation

If the interest in an engine installed in an airframe is held by a person other than the person who holds interest in the airframe, the risk of title annexation does exist. The realisation of the interest in the aircraft engines is, however, subject to the registration of such an interest with the NCAA at the time it is created.

2.2.5 Recognition of the Concepts of Trust/Trustee

The concept of a trust and the role of an owner trustee under a lease is recognised in Nigeria. The legal framework for trusts in Nigeria is the received common law of England. There is currently no specific statute governing private trusts in Nigeria.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The interests of an owner (legal or beneficial) or a lessor of an aircraft, including aircraft engine and pro-

pellers intended for use in Nigeria, are noted in the aircraft register maintained by the NCAA.

The notation of an owner or lessor's interest in the register establishes the priority of such interest in the aircraft in the event of any disputes or insolvency proceedings. The Civil Aviation Act (CAA) 2022 states that, upon the registration of such interest, no document affecting title to, or any interest in, such aircraft or engine or any other part will be valid – except between the parties to it – unless it is contained in the register.

Such notation also alerts potential buyers or other interested parties about the existing security interest.

2.3.2 Registration If the Owner Is Different From the Operator

An aircraft can be registered in Nigeria in the name of the operator or owner. Under the Nig.CARs' General Policies, Procedures and Definitions, an "operator" is defined as "the person, organisation or enterprise engaged in or offering to engage in an aircraft operation (ICAO)" and "the person who causes or authorises the operation of an aircraft, such as the owner, lessee or bailee of an aircraft, or the PIC [pilot in command]". Thus, an owner is subsumed within the definition of an operator. It is usual to have the names of the operator and owner included on the certificate of registration if they are distinct entities.

2.3.3 Aircraft/Engine-Specific Registers

There is no specific register for leases concerning aircraft or engines. Such leases are noted in the aircraft register maintained by the NCAA. The NCAA is required to record in the national civil aircraft register any title to, or any interest in, any civil aircraft registered in Nigeria and in any aircraft engine, propeller or appliance intended for use on any aircraft registered in Nigeria.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

A lease and a lessor's interest must be registered and filed in the aircraft register maintained by the NCAA. Consequences for failing to do so are similar to the consequences for failure to register the title to an

aircraft. Leases are not subject to consent from any government entity.

In many cases, a lease is registered at the time of registration of the aircraft. The formalities required for such a process include:

- an application in the prescribed form;
- a certificate or notice of deregistration from the previous state of registry (which is received by the NCAA directly from the state of registry) or, if the aircraft is new, a letter from the state of manufacture confirming that the aircraft has not been registered in any other state;
- a document showing proof of aircraft ownership (eg, a bill of sale);
- if the aircraft is owned by a company, the names of the directors of the company owning or leasing the aircraft and their specimen signatures;
- if the aircraft is on lease, a certified copy of the lease agreement with evidence of stamp duty payment;
- a certified copy of a current aircraft insurance certificate; and
- proof of payment of the prescribed fees.

There is no statutory estimated period for completion of the registration of an aircraft/engine lease.

In Nigeria, no government applications or consents are prerequisite to the execution and delivery of an aircraft and/or engine lease.

2.3.5 Requirements for a Lease to Be Valid and Registrable

A lease need not be in a specific form to be valid and registrable in the aircraft register. However, where the lease or document transferring title is written in a language other than English, such document must be translated into English for it to be acceptable by the NCAA. The translated document must be certified, notarised or legalised in the manner legally recognised in the country where the transaction was conducted.

2.3.6 Taxes/Duties Payable for Registering a Lease

No taxes or duties are payable for registering a lease with the NCAA. However, registration of a lease will attract statutory fees as prescribed by the NCAA.

2.3.7 Registration of Aircraft in Alternative Countries

For private jets and charter aircrafts that are habitually based in Nigeria, popular alternative countries for registration include San Marino and Bermuda. However, commercial aircraft habitually based in Nigeria must be registered in Nigeria.

2.3.8 Requirements for Documents Concerning Registration

The Nig.CARs do not specifically stipulate that any document be in its original form. However, if any relevant document is in a language other than English, such document must be translated and must comply with the process for authentication of documents in the jurisdiction in which it was issued and/or notarised.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

Foreign lessors are subject to withholding tax at the rate of 10% on lease payments. Where the lessor is from a country that has a DTA with Nigeria, the withholding tax payable will be subject to the terms of the DTA. DTAs do not exempt the payee from the payment of withholding tax in its entirety; rather, they adjust the applicable withholding tax on each transaction based on the agreed maximum rate prescribed in the DTA. Therefore, where the domestic withholding tax rate is lower than the one prescribed in the DTA, the domestic rate will apply. However, where the domestic rate is higher than the rate in the DTA, the DTA rate will apply.

The tax withheld represents the final tax for non-resident lessors, and the obligation and liability to withhold and remit lie with the local lessee.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

The sole act of leasing an aircraft will not create tax residency in Nigeria. Tax residency arises for individuals on the basis of the length of time spent in Nigeria within a period of assessment and, for companies, arises upon incorporation.

Foreign lessors may become liable for tax where such a lessor is a non-resident company and derives income from its Nigerian operation.

2.4.3 Engine Maintenance and Operations

There are no laws in Nigeria that impose liability on a foreign lessor in respect of aircraft or engine maintenance solely on the basis of such lessor being a party to the lease agreement. It is usual for the parties to specify in their lease agreements the extent of the liabilities of each party.

2.4.4 Damage or Loss Caused by an Asset

The doctrine of strict liability does not apply to a foreign aircraft, engine owner or lessor under a lease, or financier financing an asset on lease, based on the fact that they hold such an interest. The Montreal Convention and the rules of that convention govern damage or loss occasioned by an asset in circumstances covered by the Montreal Convention. For other claims, the general law of tort will apply.

2.4.5 Attachment by Creditors

Only properties owned by the lessee may be attached in satisfaction of a debt. Creditors of a domestic lessee cannot therefore attach a leased aircraft owned by a different entity in satisfaction of a debt. It is, however, important that an owner registers its interest with the NCAA as notice to third parties that the aircraft is not owned by the lessee.

2.4.6 Priority of Third Parties' Rights

Nigeria made declarations under Article 39 (1) of the Cape Town Convention on International Interests in Mobile Equipment and its Protocol (the "Cape Town Convention") to the effect that certain non-consensual rights will have priority over registered interests. These rights include:

- liens in favour of workers for unpaid wages arising since the time of a declared default under a contract to finance or lease the subject object for services performed relating to that object; and
- liens in favour of repairers of an object in their possession to the extent of services performed on, and value added to, that object.

These third-party rights will have priority whether or not the lease/lessor is registered in the Nigerian aircraft register.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

In Nigeria, even though it is mandatory for carriers operating air transport services to and from Nigeria to maintain relevant insurance, it is not mandatory for all the insurance coverage to be obtained from a domestic insurance company.

2.5.2 Mandatory Insurance Coverage Requirements

The CAA 2022 imposes mandatory insurance coverage requirements. The specific range of insurance that should be maintained is set out in Part 18 of the Nig. CARs, which establishes the minimum insurance sums based on the maximum take-off weight (MTOW) of a fixed-wing aircraft or a rotary-wing aircraft. The minimum insurance cover for aircraft operating in Nigeria must correspond to the aircraft's available capacity.

2.5.3 Placement of Insurance Outside of Jurisdiction

Section 72 (1) of the Insurance Act 2003, which is applicable to the aviation industry, prohibits the insurance or reinsurance of a risk of a property in a Nigerian business except with a Nigerian insurance or reinsurance company. This provision is interpreted and enforced by the National Insurance Commission ("NAICOM") to bar the insurance or reinsurance of aircraft or aircraft equipment with a foreign company. The Insurance Act 2003 does not provide a percentage of the risk that is required to be mandatorily insured or reinsured in Nigeria.

However, there are circumstances whereby the NAICOM may permit a risk to be insured or reinsured with a foreign insurer or reinsurer, following an application by a person seeking to maintain foreign insurance or reinsurance. In such circumstances, the applicant must satisfy NAICOM that as a result of the exceptional nature of the risk, the risk cannot be placed with an insurer or reinsurer in Nigeria.

The Insurance Act 2003 does not restrict the insurance or reinsurance risk in Nigeria to any particular insurance or reinsurance company or group of companies. Thus, a person seeking to obtain insurance or reinsurance is at liberty to spread the risk among

different insurance or reinsurance companies. In practice, a percentage of aviation risk is retained in the Nigerian market and is spread among insurance companies, while the bulk of the risk is reinsured with foreign reinsurance companies.

2.5.4 Enforceability of "Cut-Through" Clauses

Cut-through clauses in insurance/reinsurance agreements are enforceable in Nigeria.

2.5.5 Assignment of Insurance/Reinsurance

Assignment of insurance and reinsurance is permitted subject to the terms of the contract.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

There are no restrictions on a lessor's ability to terminate an aircraft lease or re-export the aircraft and/or sell the aircraft following such termination. Once the lessor terminates in line with the lease agreement, an application can be made to the NCAA for the deregistration of the aircraft and subsequent export.

There is also no requirement under the law that the aircraft must be physically located in Nigeria at the time of such action by the lessor.

2.6.2 Lessor Taking Possession of the Aircraft

Where the lease is constituted as an international interest under the Cape Town Convention and the lessee has executed an irrevocable deregistration and export request authorisation (IDERA), a court order is not required for the lessor to take physical possession of an aircraft subject to a lease. The lessor can take physical possession of the aircraft by presenting the IDERA to the NCAA and deregistering and exporting the aircraft out of Nigeria.

A lessor who has a deregistration Power of Attorney (DPOA) may also take physical possession of an aircraft without the lessee's consent and a court order. Notably, a DPOA does not carry the same legal authority or international recognition as an IDERA. Where these instruments do not exist, a lessor must obtain a court order to take physical possession of an aircraft without the lessee's consent.

2.6.3 Specific Courts for Aviation Disputes

Aviation and the safety of aircraft form part of the matters which, by virtue of Section 251 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), fall within the exclusive jurisdiction of the Federal High Court. Aviation matters that fall within the jurisdiction of the Federal High Court include matters falling within the Montreal Convention (ie, liability for the carriage by air of passengers and cargo as governed by that convention), as well as contractual disputes involving aircraft and/or interests in aircraft and aircraft parts.

2.6.4 Summary Judgment or Other Relief

A lessor may obtain equitable or other injunctive relief pending the final resolution of judicial proceedings to enforce an aircraft lease.

With regard to summary judgment, the lessor may be required to prove – among other things – that there is no genuine dispute of material facts regarding outstanding debt. Summary judgments in Nigeria are applicable to monetary claims.

Temporary restraining orders and injunctions are available to a lessor to prevent the lessee from removing the aircraft from a particular jurisdiction or to allow the lessor to recover possession of the aircraft. In order to grant injunctions, courts usually require the lessor to prove that there is risk of irreparable loss and to give an undertaking in the event that the court finds that the application for temporary restraining orders was frivolously made.

Applications for summary judgments that are not contested could take between nine and 12 months to determine. Contested applications could last for 18 months.

Injunctions, particularly those for interim relief, could be applied for and obtained within days to a month.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Nigerian courts recognise parties' choice of foreign law and jurisdiction and will, as a general rule, give effect to the parties' choice of a foreign governing law. However, Nigerian courts may assume jurisdiction over any matter subject to such a foreign law clause

in certain instances and have held that upholding such a clause is discretionary.

Circumstances that a court will consider in deciding whether to uphold a foreign jurisdiction clause are listed in 2.1.2 Application of Foreign Laws.

A waiver of immunity by parties to a lease can be waived and this will be recognised by the courts.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Nigerian courts recognise and enforce a final judgment of a foreign court as well as foreign arbitral awards without examining the merits of the matter, except where a party is contesting an application to recognise and enforce on grounds such as the judgment or award being contrary to public policy.

2.6.7 Judgments in Foreign Currencies

A lessor under an aircraft lease, where the consideration is denominated in foreign currency, can obtain judgment in the foreign currency.

2.6.8 Limitations on Lessors' Actions Following Termination

Default interest is a matter of contract and is therefore subject to the agreement of the parties. However, any clause in a lease pertaining to default interest should be reasonable, as Nigerian courts generally do not enforce clauses that appear to be punitive.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

No taxes arise from actions to enforce aircraft leases. However, the lessor must pay filing fees to the court if enforcement involves an application to the courts. Where the relief is monetary, filing fees will depend on the sum claimed up to the maximum limit where a claim exceeds the stipulated threshold.

2.6.10 Mandatory Notice Periods

There are no mandatory notice periods for the lessor to comply with if it terminates the lease, except as may be provided in the lease agreement. A reasonable notice period is, however, advisable.

2.6.11 Lessees' Entitlement to Claim Immunity

In general, private business entities do not have the privilege of claiming immunity from legal actions. However, a lessee that enjoys sovereign or other immunity is entitled to claim immunity from suit except where such immunity has been waived. It is important that such a waiver of immunity by the sovereign entity is clearly stated.

2.6.12 Enforcement of Foreign Arbitral Decisions

Nigeria is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"). The New York Convention has been domesticated in Nigeria and has now been incorporated into local law by Section 60 of the Arbitration and Mediation Act 2023.

Nigerian courts will recognise and enforce an arbitral award.

2.6.13 Other Relevant Issues

It is possible that a lessee may approach the courts to obtain an injunction to stop the deregistration and export of an aircraft when an event of default occurs under the lease agreement. The lessor should therefore ensure that adequate records are being kept of the performance of the lessee's obligations under the lease agreement. This is to ensure that evidence of a breach is not contestable.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Contractual assignment and novation are both recognised under Nigerian law.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

An assignment or novation of an aircraft lease governed by New York or English law will be considered valid under Nigerian law. The need for lessee's consent will be subject to the terms of the aircraft lease agreement as there are no laws in Nigeria that specifically require that a lessee's consent should be obtained for an assignment or novation. Generally, there are also no mandatory terms required under Nigerian law to be included in such agreements or deeds.

2.7.3 Enforceability of Lease Assignments/Novations

If the lease agreement and the assumption/novation is in a language other than English, it is advisable that they be translated into English, certified and notarised if they are to be submitted before a court in Nigeria in respect of an enforcement proceeding.

2.7.4 Filing/Registration of Lease Assignments/Novations

An aircraft or engine lease assignment and assumption/novation must be filed at the NCAA as required by the Nig.CARs. The assignment or novation is not subject to consent from any government entity.

The formalities required for registration are as follows:

- completion of the application form;
- where the aircraft is new with no prior registration, a letter from the state of manufacture is required – however, where there has been prior registration, a certificate or notice of deregistration is required from the previous state of registration;
- proof of aircraft ownership (eg, a bill of sale);
- the names of the directors of the company owning or leasing the aircraft and their specimen signatures giving authority to register or operate the aircraft in Nigeria and indicating who among them has the mandate to transact on their behalf on matters relating to aircraft registration or operation;
- means of identification (eg, a copy of a government-issued identification document, or passport or any other identification card approved by the NCAA if owned by an individual, or a certified copy of the certificate of incorporation if owned by a company);
- a certified copy of the lease agreement if the aircraft is on lease with stamp duties paid;
- a certified copy of the power of attorney from the owner or lessor and the lessee (or both) (if applicable);
- a certified copy of a current aircraft insurance certificate;
- proof of payment of the prescribed fees; and
- a certified copy of the air transport licence, air operating permit or permit for non-commercial flight.

There is no estimated period for completion. However, where all the required documents are submitted, the process should be completed within a two-to-three month period.

Government consent is not a prerequisite for the execution and/or delivery of an aircraft and/or engine lease assignment and assumption/novation.

2.7.5 Taxes/Duties Payable on Assignment/Novation

Stamp duties will be assessable on an assignment agreement if an original or copy of it is brought into Nigeria physically or electronically.

2.7.6 Recognition of Transfer of Ownership Interests

Assuming that the ownership interest of the entity (or the beneficial interest in the trust) owning an aircraft is transferred with the legal title to the asset remaining with that entity, such instance would not be considered as a transfer of title to the aircraft and there will be no requirement to notify the NCAA.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

The holder of a certificate of registration, owner or lessor or their duly authorised attorney, the holder of a valid DPOA or an IDERA can apply to the NCAA to deregister an aircraft. The NCAA on its own, under certain conditions, may deregister an aircraft.

Generally, to deregister an aircraft, the applicant will complete the appropriate application form, which will be submitted to the NCAA along with a cover letter addressed to the director general of the NCAA requesting the deregistration of the aircraft, the original certificate of registration of the aircraft and other relevant documents. Where an applicant is seeking to deregister based on an IDERA, the authorised party or certified designee of an IDERA can request the deregistration of an aircraft by submitting a formal application letter stating the reason for the exercise of the IDERA, the official application form for deregistration, a copy of the IDERA, and evidence of payment of statutory charges.

2.8.2 Lessee's/Operator's Consent

An aircraft owner, mortgagee or lessor can apply for the deregistration of the aircraft and the consent of the operator to deregister is not required, except where consent is required in the relevant agreements.

2.8.3 Required Documentation

The requirements for deregistration of an aircraft are as follows:

- a formal application letter addressed to the director general of the NCAA requesting the deregistration of the aircraft and the official application form for deregistration;
- the operator's/lessor's/owner's copy of the current certificate of registration; duly endorsed on the reverse side;
- evidence of payment of statutory charges;
- a notarised DPOA duly executed by the owner if the applicant is not the owner or authorised operator;
- a statement of the reason for deregistration; and
- evidence of the sale (if sold).

To discharge a security interest that has been registered at the International Registry, the applicant will be required to obtain the written consent of the mortgagee (if different from the applicant). The applicant will also be required to present an IDERA granted by the debtor, mortgagor or lessee.

2.8.4 Duration of Deregistration Process

The timeline for deregistration at the NCAA can vary but for simple uncontested cases, a timeline of circa three weeks from the date of submission may be expected.

For the International Registry, it is typically 48 to 72 hours upon submission of the application.

2.8.5 Aviation Authority's Assurances

The NCAA does not provide advance assurances to an aircraft owner, mortgagee or lessor as to the prompt deregistration of the aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

The fees applicable to the deregistration of an aircraft at the NCAA depend on the type of aircraft and the MTOW of the aircraft. For a fixed-wing aircraft, the cost of deregistration ranges from NGN45,000 to NGN450,000, depending on the MTOW of the aircraft, whereas for a rotary aircraft, the cost of deregistration ranges from NGN135,000 to NGN180,000, depending on the MTOW.

2.8.7 Deregistration Power of Attorney

The NCAA will recognise a DPOA. An irrevocable DPOA will be stamped ad valorem at the rate of 1.5%, whereas a revocable DPOA is stamped at the flat rate of NGN500.

A DPOA is usually registered at the NCAA along with the other documents required for the registration of a security interest in an aircraft. Where the DPOA is in a language other than English, it is advisable that the DPOA be translated and notarised in the manner required under the law of the jurisdiction in which it is issued and filed with the NCAA, to be enforceable against a domestic party.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

Part 4 of the Nig.CARs, which contains provisions for deregistration, does not specify the documents to be submitted when applying for deregistration. However, it absolves the NCAA (and also requests an indemnity) from any liability that may arise from defects in documents, records and depositions submitted to it in support of an application for deregistration. Supporting corporate documentation will therefore include similar (updated) documentation required for registration of the aircraft.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A DPOA does not have to be governed by Nigerian law.

2.8.10 Revocation of a Deregistration Power of Attorney

Generally, an irrevocable power given for valuable consideration or for a fixed period not exceeding 12

months cannot be revoked by the grantor and will remain irrevocable until the consideration and/or interest is satisfied or until the term expires.

2.8.11 Owner's/Lessor's Consent

There is no legal requirement that prohibits an aircraft owner, mortgagee or lessor from exporting an aircraft without the lessee's consent.

Where deregistration and exportation out of Nigeria is sought by an owner, the owner may indicate its willingness for the aircraft to remain on the Nigerian registry. It is therefore necessary, where applicable, for a mortgagee to seek the consent of the owner or lessor to export the aircraft.

An owner, mortgagee or lessor should, however, ensure that clear terms permitting it to export the aircraft without the lessee's consent are included in the lease agreement. The aircraft need not be physically present in Nigeria in order to be deregistered. For export, however, the aircraft needs to be in Nigeria.

2.8.12 Aircraft Export Permits/Licences

The NCAA issues an Export Certificate of Airworthiness for an aircraft registered in Nigeria upon being satisfied of the existence of certain conditions.

An application for an Export Certificate of Airworthiness is made in the required form and manner acceptable to the NCAA. Part 5 of the Nig.CARs sets out the information and references required when making an application for an Export Certificate of Airworthiness. There is no provision permitting the Export Certificate of Airworthiness to be obtained in advance.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

No taxes are charged in respect of the export of an aircraft, but fees are payable to the NCAA. The export fee varies based on the type, features and MTOW of the aircraft. Fees for a fixed-wing aircraft range from NGN54,000 to NGN2.88 million, whereas the fees for a rotary aircraft range from NGN360,000 to NGN1.08 million.

2.8.14 Practical Issues Related to Deregistration of Aircraft

It is usual for the NCAA to request a statement on the reason for the deregistration of the aircraft. The NCAA does not require the removal of registration marks from an aircraft before deregistration is granted.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

In Nigeria, the statutes that govern restructuring and insolvency include:

- the Companies and Allied Matters Act 2020 (CAMA);
- the Insolvency Regulations 2022;
- the Companies Winding Up Rules 2012;
- the Federal Competition and Consumer Protection Act 2019;
- the Investment and Securities Act 2025;
- the Securities and Exchange Commission Rules 2013 (as amended in 2024); and
- the Asset Management Corporation of Nigeria Act 2010 (as amended in 2021).

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

The voluntary and involuntary restructuring, reorganisation and insolvency processes available in Nigeria include:

- members voluntary winding-up;
- court ordered winding-up;
- administration and company voluntary arrangement;
- arrangement and compromise;
- management buyout;
- M&A; and
- takeover.

A company may be wound up by the court if:

- the company has by special resolution resolved that the company be wound up by the court;
- default is made in delivering the statutory report to the Corporate Affairs Commission (the agency

responsible for company oversight in Nigeria) or in holding the statutory meetings;

- the number of members is reduced to below two in the case of companies with more than one shareholder;
- the company is unable to pay its debts;
- the condition precedent to the operation of the company has ceased to exist; or
- the court is of the opinion that it is just and equitable that the company should be wound up.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

Nigeria is yet to adopt the UNCITRAL Model Law on Cross-Border Insolvency or any other law or convention that mandates cross-border co-operation or provides for judicial assistance for overseas insolvency proceedings. There are also no laws that specifically provide for the recognition and enforcement of cross-border insolvencies or reliefs sought therefrom.

The Nigerian courts under the Foreign Judgments (Recognition and Enforcement) Act may recognise and enforce a foreign judgment, provided that the judgment is final and conclusive, has no appeal against it, and there is reciprocity.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

An irrevocable DPOA or an IDERA granted by a lessee to a lessor, owner or mortgagee of an aircraft should not be voided by the liquidation of the lessee. However, the IDERA will cease to operate where the lessee is dissolved.

2.9.5 Other Effects of a Lessee's Insolvency

A lease will not be set aside upon the lessee being put into liquidation – although it may be terminated by the liquidator. The lessor is entitled, under the lease agreement, to terminate said lease and repossess the aircraft from the lessee. However, the lease may be set aside if there is evidence to show that it was made for the purpose of avoiding obligations due from the lessee.

On termination of the lease, the lessor is permitted to submit the DPOA or the IDERA for the purpose of repossessing the aircraft. The liquidator may apply to

restrain the lessor from repossessing, but such applications must be made with clear evidence that the aircraft is an asset of the lessee.

The aircraft will not be deemed to be the lessee's property.

Nigerian courts recognise the rules of priority. The liquidator/administrator cannot impose the right of any other creditor in priority over the lessor's right because the aircraft asset does not belong to the lessee and the lessee could not have validly created an interest in the aircraft. In addition, registration of the lease with the NCAA gives the lessor priority over the aircraft above any other interest holder.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

When a borrower or guarantor becomes insolvent, the main risks for a lender are potential loss or delays in recovering debts owed, and possible challenges to the validity of security arrangements.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

Generally, the rights of secured creditors are not stayed by the commencement of insolvency proceedings. However, the CAMA imposes various moratoria for different actions that may be taken at the initiation of or during administration proceedings or a scheme of arrangements. The moratorium period is six months for a scheme of arrangement, whereas an administration moratorium imposed to restrict the institution of proceedings to enforce security over company properties, repossess goods under hire purchase agreement, or exercise a landlord's right to peaceful re-entry, has no fixed period and any action taken will be subject to the consent of the administrator.

2.9.8 Liquidation of Domestic Lessees

Under Nigerian law, a domestic lessee can be liquidated by the appointment of a liquidator, or placed under administration or receivership through the appointment of an administrator or receiver respectively, in accordance with insolvency laws.

The liquidator is appointed following an application made by a special resolution of the shareholders, or

an application made by the directors or creditors of the company. An administrator may be appointed by the courts, or out of court, by holders of a floating charge or by the company's directors.

2.9.9 Ipso Facto Defaults

Defaults such as insolvency and liquidation are recognised as the basis for termination and repossession of aircraft. A lessor or mortgagee need not show performance defaults to be entitled to repossession of a leased aircraft.

2.9.10 Impact of Domestic Lessees' Winding-Up

If a domestic lessee is wound up through court or administration proceedings, this can have the following impacts.

- On the aircraft – the fate of the aircraft is largely dependent on the terms of the lease. The lessor's rights will usually include the right to terminate and repossess the aircraft if the lessee is wound up and this right will be exercised by the lessor, resulting in possession reverting to the lessor.
- On lease rentals – the lessee's obligation to pay lease rentals ceases. Any due lease payments will form part of the lessee's debt obligations.
- On the lease security deposit – the impact on the lease security deposit will depend on the terms of the lease agreement. If the deposit is agreed as payment towards lease rentals, then the lessor is entitled to apply the deposit towards any pending rent liability of the lessee.
- On the maintenance reserves – the treatment of maintenance reserves also depends on the lease agreement. If classified as reserves, they might be held in a separate account; if treated as supplemental rent, they could be affected similarly to lease rentals.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

Nigeria is a signatory to the Cape Town Convention and the Aircraft Protocol. By virtue of Section 50 (2) of the CAA 2022, the Cape Town Convention and the Aircraft Protocol are in force in Nigeria.

It is not necessary to obtain authorised entry point (AEP) codes for registering international interests.

In Nigeria, it is not a requirement for local entities to apply for AEP codes before they can make Cape Town Convention filings. Local entities can make Cape Town Convention filings directly on behalf of lessors.

2.10.2 Declarations Made Concerning Conventions

Nigeria has made the following declarations under the following Articles of the Cape Town Convention.

Under Article 39 (1), in relation to non-consensual rights or interest:

- liens in favour of workers for unpaid wages arising since the time of a declared default under a contract to finance or lease the subject object for services performed relating to that object; and
- liens in favour of repairers of an object in their possession to the extent of services performed on and value added to that object.

These have priority under Nigerian law over an interest in an object equivalent to that of the holder of a registered international interest and will have priority over a registered international interest, whether in or outside insolvency proceedings.

Under Article 40, in relation to non-consensual right or interest:

- rights of a person obtaining a court order permitting attachment of an aircraft object in partial or full satisfaction of a legal judgment;
- liens or other rights of a state entity relating to taxes or other unpaid charges;
- liens of a salvor for unpaid charges in respect of salvage services provided to an aircraft object when it is waterborne;
- liens of a person providing towage services to an aircraft object when it is waterborne in respect of unpaid charges; and
- liens of a bailee of an aircraft object in respect of unpaid charges for the bailment of said aircraft object.

These are registrable under the Cape Town Convention as regards any category of object as though the right or interest were an international interest, and will be regulated accordingly.

Article 53 stipulates that the Federal High Court is the relevant court for the purposes of Article 1 and Chapter XII of the Convention.

Under Article 54 (2), a declaration that any remedies available to the creditor under the Cape Town Convention that are not expressed under the relevant provision thereof to require application to the court, may be exercised without court action and without leave of the court.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

The provision of the CAA 2006 (and 2022) incorporated the Cape Town Convention and the Aircraft Protocol into Nigerian law. Section 50 (2) of the CAA 2022 provides that from the commencement of the Act, the provisions of the Cape Town Convention and the Aircraft Protocol will have the force of law in Nigeria subject to the provisions of the Constitution of the Federal Republic of Nigeria. Incorporation into local law of an international convention such as the Cape Town Convention is a constitutional requirement necessary to make the convention enforceable.

An IDERA (as with a DPOA) can be submitted over an internal transaction and can be recorded, like any other interest, in the aircraft register.

2.10.4 Enforcement of Conventions

In most cases involving the Cape Town Convention and the Aircraft Protocol, the issue revolves around the request by a lessor/mortgagee seeking to deregister and export the aircraft. The Federal High Court (which is the court with jurisdiction) rarely hears actions in relation to the other aspects of the Cape Town Convention and the Aircraft Protocol.

2.10.5 Other Conventions

Nigeria is a signatory to the Geneva Convention on the International Recognition of Rights in Aircraft (1948), having ratified this on 10 June 2002. Section 50 (1) of the CAA 2022 has incorporated the provisions of this convention into law in line with Nigerian constitutional requirements.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

Foreign lenders can provide financing and borrowers can use loan proceeds to purchase aircraft.

3.1.2 Effect of Exchange Controls or Government Consents

There are no specific exchange controls or government consents that are peculiar to the aviation sector, and applicable exchange controls or government consents on financing or repatriation of proceeds will apply to an aviation-related transaction. It should be noted that foreign investors are allowed to take out their earnings and investment-related funds without facing significant obstacles, according to the provisions of Section 24 of the Nigeria Investment Promotion Commission Act.

3.1.3 Granting of Security to Foreign Lenders

Nigeria is a signatory to the Cape Town Convention, which allows for the creation of international interests in aircraft equipment, including granting security to foreign lenders. Thus, borrowers can use aircraft as collateral to secure loans from foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Downstream, upstream and cross-stream guarantees are permitted in favour of lenders in Nigeria. Although there is no specific registration requirement for guarantees under Nigerian law, Section 197 of the CAMA does require the registration of charges, which may include guarantees. Failure to register a charge within 90 days of its creation may render it void against liquidators and creditors.

3.1.5 Lenders' Share in Security Over Domestic SPVs

A lender can take a share in security over a domestic special-purpose vehicle (SPV) that owns a financed aircraft. This involves using ownership shares of the SPV as collateral for the financing provided. A pledge of shares is a recognised method of security in Nigeria and its registration has been provided for under Section 197 of the CAMA.

3.1.6 Negative Pledges

Negative pledges are recognised under Nigerian law and it is advisable for a lender to register the negative pledge with the Corporate Affairs Commission to prevent future security interests that could undermine the existing security.

3.1.7 Intercreditor Arrangements

There are no laws in Nigeria with any material restrictions or requirements on inter-creditor arrangements.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent (facility/syndicate agent) is recognised and utilised in syndicated loan arrangements in Nigeria.

3.1.9 Debt Subordination

Contractual subordination among creditors is legally recognised in Nigeria, enabling the modification of priority orders, the waiver of rights or the subordination of security interests. However, its enforceability in insolvency proceedings may be limited, owing to bankruptcy laws treating unsecured creditors equally and granting secured creditors the right to enforce their security even during liquidation.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of all or part of an outstanding debt under an English or New York law-governed loan is generally permissible and recognised under Nigerian law. However, the terms of the loan agreement and any applicable legal requirements as to notice need to be considered.

3.1.11 Usury/Interest Limitation Laws

Interest rate limits are typically governed by various laws and regulations, including Sections 15 and 16 of the Moneylenders Laws, the Central Bank of Nigeria Act 2007, and other relevant financial regulations. These laws aim to protect borrowers from unfair lending practices and ensure that interest rates remain reasonable.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

In a domestic aviation finance transaction, typical forms of security and recourse will include aircraft mortgages, charges and guarantees.

3.2.2 Types of Security Not Available

Due to their nature, it may be challenging or not feasible to take certain types of security over aircraft or related collateral, such as security solely on warranties and insurances. Although traditional forms of security often focus on tangible assets such as the aircraft itself, taking securities solely over warranties and insurances might be complex, owing to their intangible nature.

3.2.3 Trust/Trustee Concepts

The concept of a trust and a security trustee role are recognised in Nigeria and are quite popular in structured finance in Nigeria. A parallel debt structure can be used, creating separate obligations between borrower and lenders and achieving similar security outcomes.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

A borrower can assign to a security trustee its rights to the aircraft or under an aircraft lease (including rights related to insurances), pursuant to a security assignment or mortgage. This assignment allows the security trustee to hold and enforce those rights on behalf of the lender(s) in the event of default.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

A lessor may assign the rights and benefits only without also assigning the attendant obligations under an aircraft lease. This type of arrangement is known as an “assignment of rights” or “assignment of benefits”. However, it is essential to ensure that the assignment does not conflict with the terms of the lease agreement and that any required consent is obtained from the relevant parties.

3.2.6 Choice of Foreign Law

Security assignments or guarantees can be governed by English or New York law.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

There are no unique formalities necessary for the creation and perfection of a security assignment outside the recognised requirements for such agreements – for example, that the assignment must be in writing, clearly identify the collateral and state the intention to create a security interest. The security assignment must also be registered with the NCAA. Failure to comply with these formalities might render the security assignment unenforceable against third parties. Where such an agreement is to be tendered before a Nigerian court, it is necessary for it to be translated (if in a language other than English) and certified/notarised.

3.2.8 Domestic Law Security Instruments

It is advisable to consider taking a domestic law security instrument to cover any additional requirements under Nigerian law, if an English or New York law-governed security assignment is taken in respect of an aircraft registered domestically in Nigeria. Domestic law security instruments and local law filings are required for Cape Town Convention filings. The cost for such filings varies and is set out in the schedule of fees and charges issued by the NCAA.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

An English or New York law-governed security assignment or a domestic law security instrument may be registered domestically. It is recommended to consider domestic registration to maximise the protection of the security interest in Nigeria where the aircraft is registered.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests, including mortgages, charges and assignments over an aircraft and/or engines, is recognised under Nigerian law.

3.2.11 Effect of Changes in the Identity of Secured Parties

The change in identity of secured parties under a security assignment does not usually jeopardise security interests if the assignment is properly documented and registered with the relevant authorities.

3.2.12 “Parallel Debt” Structures

Parallel debt structures can be used in Nigeria, allowing the security trustee to have an independent right to the secured debt and enabling separate enforcement of the security.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

Becoming a secured party under a security assignment does not automatically result in residency, domicile, business presence or tax obligations. However, seeking tax advice is recommended based on the specific circumstances and Nigerian tax regulations.

3.2.14 Perfection of Domestic Law Mortgages

A domestic law mortgage can be perfected by drafting a mortgage agreement outlining the terms of the mortgage, including the amount secured, the parties involved, and the details of the aircraft or engine. Both the borrower and the lender should sign the mortgage agreement. The mortgage must be registered with the NCAA, and the necessary fees and charges for registration must be paid.

If the mortgagor is a company registered in Nigeria, the charge created over the aircraft or engine (or both) as one of the assets of the company should also be registered at the Corporate Affairs Commission by filing a Form CAC 9 (Particulars of Charge) – with additional information setting out a high-level description of the asset being charged, including details such as the manufacturer’s serial number and the NCAA registration number of the charged asset.

The costs associated with the foregoing are calculated as follows:

- stamping – 0.375% of the mortgage value;
- registration at the Corporate Affairs Commission – 0.35% of the mortgage value;
- registration with the NCAA –
 - (a) on the first NGN100,000 of the secured sum, for each complete 10,000 – NGN1,000;
 - (b) on the next NGN900,000, for each NGN100,000 or part thereof – NGN1,000; and
 - (c) thereafter, for each NGN1 million or part thereof – NGN50,000.

However, the maximum charge for registration with the NCAA is capped at NGN250,000.

Upon successful registration, the NCAA will issue a perfection certificate, confirming the mortgage’s registration. In addition, if the aircraft or engine is covered by the Cape Town Convention, the necessary international interest registration will be filed with the International Registry in compliance with the convention’s requirements.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

There are no differences in the form of security (or perfection) taken over an aircraft and spare engines in Nigeria.

3.2.16 Form and Perfection of Security Over Bank Accounts

A “fixed charge” or “fixed security interest” is commonly used to secure a bank account such as a lease receivables account. To perfect the security interest over the bank account, a security agreement is executed between the debtor and creditor, outlining terms and details. Notice is also given to the bank where the account is held, informing them of the security interest. Restrictions may also be placed on the account’s use, and registration with the Corporate Affairs Commission is required.

3.3 Liens

3.3.1 Third-Party Liens

Third parties such as repairers, airports, and customs authorities can potentially take or register liens over an aircraft or engine for unpaid fees or charges.

- Repairers’ liens cover work done on the actual secured asset for the value of the work performed, rather than the contract price. They may cover work done on other assets.
- Fleet liens, allowing third parties to detain an aircraft, have not been considered in Nigeria.

3.3.2 Timeframe to Discharge a Lien or Mortgage

There is no stipulated average timeframe to discharge a lien or mortgage over an aircraft. Where there are no contentions, a reasonable timeframe will be three months.

3.3.3 Register of Mortgages and Charges

There is no specific register of mortgages and charges maintained by the NCAA. The interests of an aircraft mortgagee or security trustee are noted in the aircraft register maintained by the NCAA. The NCAA is yet to establish the legal interest registry stipulated under the Nig.CARs.

The notation of the mortgage/charge interest on the aircraft register helps establish the priority of the mortgagee's or chargee's claim over the aircraft in case of any disputes or insolvency proceedings. It also alerts potential buyers or other interested parties about the existing security interest, which can impact their decisions regarding the aircraft.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

Statutory rights of detention and non-consensual rights can arise over an aircraft and/or on a fleet-wide basis. There is no specific law prohibiting an application on a fleet-wide basis.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

To verify if an aircraft is free of encumbrances, a potential purchaser of an aircraft in Nigeria could search the aircraft register maintained by the NCAA. The aircraft register includes information on all the interests that have been created over a specific aircraft.

A potential purchaser could also conduct a search at the Corporate Affairs Commission, the body that regulates corporate entities in Nigeria. Companies are enjoined to file notices of charges created over their assets.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

The key difference lies in the nature of the underlying assets and the mechanisms for recovery. Enforcing a security assignment is focused on the recovery of the specific collateral, which in many cases is the aircraft, whereas enforcing a loan or guarantee involves the recovery of debt and may – if the debt is of a certain amount – require application for summary judgment and, where summary judgment is given, garnishee

proceedings to attach monies belonging to the debtor or guarantor.

3.4.2 Security Trustees' Enforcement of Their Rights

A security trustee may enforce its rights under a security assignment pursuant to a notice and acknowledgement executed by the lessor and lessee.

3.4.3 Application of Foreign Laws

Domestic courts will uphold foreign law as the governing law of a finance or security document if the parties have validly chosen that law to govern their agreement. Similarly, submission to a foreign jurisdiction is respected if the parties have agreed to it in their contract. A court in Nigeria will, however, take certain factors into consideration when faced with a challenge of a suit filed in breach of a foreign jurisdiction clause. Such factors are listed in 2.1.2 Application of Foreign Laws.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Domestic courts in Nigeria recognise and enforce foreign court judgments and arbitral awards without re-examining the matter.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

To the extent that the right to take physical possession of an aircraft is one agreed by the parties to be exercisable without the lessee's or operator's consent, a secured party can take physical possession of an aircraft to enforce a security agreement.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

The Federal High Court in Nigeria is competent to determine enforcement actions under a security agreement/aircraft mortgage.

3.4.7 Summary Judgments or Other Relief

In Nigeria, a secured party can seek equitable or other injunctive relief pending final resolution of judicial proceedings. The facts necessary for the granting of such reliefs include showing that irreparable harm, that may not be compensated by monetary relief, will result if such relief is not granted. It is also important for the

applicant in such a case to provide an undertaking as to damages – that is, to show that the applicant will be willing to pay damages if in the end such an order ought not to have been made. It is not mandatory that the applicant post a bond or provide a guarantee – although a court may make an order that such a bond or guarantee be provided.

A secured party can also obtain summary judgments where the claim is for a certain sum and the facts in support of the claim are not likely to be contested.

3.4.8 Judgments in Foreign Currencies

A secured party under a security agreement or aircraft mortgage can obtain a judgment in a foreign currency in Nigeria. The sum secured by the security agreement and to be recovered in the claim should, however, be denominated in the foreign currency.

3.4.9 Taxes/Fees Payable

Fees may be applicable in connection with the enforcement of a security agreement or aircraft mortgage. These fees could include court filing fees or administrative fees.

3.4.10 Other Relevant Issues

Lenders should consider potential challenges in enforcement, such as potential insolvency proceedings by the borrower.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

Currently, there are no material court judgments that impact the purchase, sale, lease or debt finance of an aircraft registered domestically and/or involving a domestic party.

4.2 Current Legislative Proposals

The NCAA released an Advisory Circular outlining the procedure for recording an IDERA and de-registration of an aircraft under an IDERA. The NCAA will only accept and record an IDERA if:

- it is submitted in writing to the NCAA substantially in the form set out in the Protocol to the Convention on International Interest in Mobile Equipment on Matters Specific to Aircraft Equipment 2001 (the “Protocol”);
- it identifies the aircraft that is registered or to be registered in the Nigeria Civil Aircraft Register; and
- it is signed by an applicant.

Trends and Developments

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Streamsowers & Köhn (SSK) is a leading commercial law firm, which provides legal advisory services to a varied clientele that includes Nigerian and international companies and organisations, governments and government departments, and individuals. SSK operates out of offices in Lagos, Abuja and Port Harcourt. The firm's partners are recognised as leading lawyers both in local and international legal circles.

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Legislative and Regulatory Framework Shaping Aviation Financing in Nigeria

Introduction

The Nigerian aviation sector has witnessed a surge in strategic regulatory activities aimed at revitalising the sector's access to financing. Amid persistent challenges, ranging from inadequate fleet sizes to limited funding, policymakers and regulators are turning to targeted reforms to enhance the legal framework governing aviation finance.

Nigeria has significant domestic and regional air traffic and remains a pivotal market for aviation investment. Airlines operating in the country have however struggled with access to affordable financing, weak infrastructure, and currency volatility. Several local airline operators are faced with high-interest loans, short leasing tenures, and frequent regulatory hurdles that impact capital inflow. The federal government, through the Ministry of Aviation, Aerospace Development and the Nigerian Civil Aviation Authority (NCAA), has responded with a reform agenda to improve the regulatory ecosystem and stimulate investors' confidence.

Cape Town Convention and IDERA enforcement

A central element of Nigeria's aviation financing reforms is the implementation of the Cape Town Convention on International Interests in Mobile Equipment and its Aircraft Protocol (the "Cape Town Convention"), which was ratified in 2006. The Cape Town Convention provides a harmonised legal framework for protecting the rights of creditors, lessors and financiers of aircraft assets.

In a bid to reinforce compliance, the NCAA issued an Advisory Circular on Procedures for Recordation of IDERA and De-Registration of Aircraft Under an IDERA ("Advisory Circular") to ensure that IDERA filings by lessors and financiers are promptly registered and honoured. The directives emphasise:

- the mandatory registration of IDERA instruments with the NCAA immediately after lease execution;
- time-bound administrative compliance with deregistration requests made under IDERA; and
- streamlining the internal approval process to eliminate delays caused by legacy manual systems or ambiguous procedures.

These steps are crucial for reassuring creditors that, in the event of default, they can repossess and export aircraft without prolonged legal delays or enforcement obstacles.

In addition, Federal High Court Cape Town Convention Practice Direction 2024 ("Practice Directions") was also issued to assist courts in dealing with cases involving transactions made under the Cape Town Convention. Further to the issuance of the Advisory Circular and the Practice Directions, Nigeria's Cape Town Compliance Index rating improved from 49% to 70.5% in 2025. This improved rating is expected to lower the risk ratios of Nigerian operators/carriers by foreign lessors and financiers and facilitate better financing terms from international lessors and export credit agencies.

Further, strengthened IDERA enforcement would encourage lenders and lessors to offer improved financing terms, extended tenors on aircraft leases, and more favourable security arrangements. It may also enhance Nigeria's eligibility for export credit agency (ECA) funding, which typically requires compliance with the Cape Town Convention.

Dry-lease framework and the Afreximbank facility

In January 2025, the African Export-Import Bank ("Afreximbank") Dry-Lease Financing Initiative was announced. The initiative, spearheaded by Afreximbank, will provide 25 dry-leased aircraft to Nigerian airlines. Under the initiative, aircraft will be leased through a special-purpose leasing subsidiary domiciled in jurisdictions aligned with Cape Town Convention standards, and having lease agreements governed by English law or similarly recognised legal regimes.

It is expected that local carriers participating or intending to participate in the initiative will be required to adhere strictly to IDERA protocols, which demands compliance with international standards. The benefits of the initiative for Nigerian operators include the elevation of the overall standard of aircraft operations and fleet management in Nigeria.

It is expected that the initiative will introduce Nigerian carriers to a disciplined legal framework, which aligns with international standards and boosts credibility with global lessors.

NCAA and ministry-level policy actions

The NCAA has embarked on a digital transformation towards creating and maintaining an efficiency-driven regulatory body. This initiative targets two major procedural bottlenecks – licensing and aircraft registration. Manual inefficiencies in aircraft registration, operator certification and document authentication discouraged international lenders from engaging confidently with Nigerian carriers. Delays in confirming ownership, deregistering assets or verifying operator standing often resulted in higher transaction costs and extended lead times. These processes are of particular concern to aircraft financiers and lessors, as they form the backbone of legal and operational risk assessment.

To address these concerns, the NCAA launched a centralised e-portal in December 2024 – its Directorate of Air Transport Regulation (DATR) e-portal, a single-window digital portal for aircraft registration, deregistration, licensing, airworthiness reviews, and air operator certificate applications. This reform was part of the NCAA's 2024 project agenda, which also included aligning IDERA enforcement and compliance procedures with global leasing standards.

While the platform is still developing, it is a significant step towards transparency, traceability and regulatory efficiency. From a financier's perspective, the availability of online records reduces dependence on physical document trails and in-person follow-up. It also improves the process of due diligence.

These digital reforms, although not yet comprehensive, represent an important structural shift that enhances the viability of aircraft leasing transactions in Nigeria. As the NCAA continues to fine-tune its systems and build inter-agency connectivity, lessors and lessees can expect an increasingly predictable environment for regulatory compliance and risk management.

Challenges

In Nigeria, a major challenge to aircraft financing and leasing is insurance cover. International lessors are typically concerned about the capacity of the Nigerian local insurance market to adequately underwrite the risks inherent in dry-lease arrangements.

Notably, the National Insurance Commission ("NAI-COM") requires that all insurable risks occurring within Nigeria must be underwritten by local insurance companies. However, given the substantial financial exposure associated with dry leasing, local insurers typically lack the capacity to carry the full risk and therefore need to obtain reinsurance from international markets. This reliance on foreign reinsurance arrangements results in increased insurance costs, which are ultimately borne by local airline operators, thereby increasing the overall cost of leasing aircraft in Nigeria.

Further, volatility in the foreign exchange market – particularly the persistent depreciation of the naira against the US dollar – has significantly increased both the cost and unpredictability of leasing arrange-

ments for Nigerian airlines, given that most lease payments are denominated in foreign currencies such as the dollar or euro.

Despite these challenges, the Afreximbank dry-lease initiative marks a strategic shift, as it is aimed at providing local carriers with access to new aircraft, addressing short-term fleet shortages and improving alignment with global standards to attract future international partnerships.

Conclusion

The year 2025 marks a significant milestone in Nigeria's aviation financing landscape. Strengthened enforcement of the IDERA protocol, and robust policy support from both Afreximbank and the Federal Ministry of Aviation have collectively contributed to a more investor-friendly legal framework.

Nonetheless, the continued volatility of the foreign exchange market and the dependence of local insurers on international reinsurance remain key challenges. Addressing these issues will be essential to ensuring a stable and sustainable aviation financing environment in Nigeria.

PANAMA

Law and Practice

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Patton Moreno & Asvat is a leading Panamanian law firm with over four decades of experience and a strategic presence in London, ensuring prompt legal services across various time zones. The firm represents a wide range of clients in the aviation sector, including major commercial airlines, private aviation, financial institutions, lessors, mortgagees, maintenance providers and cargo operators. Specialising in comprehensive legal support, the services offered include aircraft financing, registration, regulatory permits, leasing and service providers licensing. The firm's aviation practice extends to advising on

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

Under Panamanian law the transfer of an aircraft or engine while it is located within Panamanian territory is subject to payment of transfer of movable asset tax at a rate of 7% unless the aircraft or engine is located in a tax-free zone at the time of the transfer.

1.1.2 Enforceability Against Domestic Parties

In order to be enforceable in Panama, the sale agreement must be translated into Spanish by an official translator in Panama and the signatures of the parties must be certified by a notary public and legalised according to the 1961 Hague Convention on the Apostille.

1.2 Transfer of Ownership

1.2.1 Transferring Title

The transfer of the title to an aircraft or engine is achieved when the bill of sale or the sale purchase agreement is registered at the Public Registry Office. Unless expressly excluded, the transfer includes all installed parts including, for example, the auxiliary power unit.

1.2.2 Sales Governed by English or New York Law

Panamanian law recognises the principle of freedom of the parties to subject their contractual agreements to foreign laws. The transfer of title to an aircraft or engine physically delivered in Panamanian territory may be validly subjected to English or New York law. If the bill of sale is executed outside Panama, the signatures of the parties must be certified by a notary public and legalised according to the 1961 Hague Convention on the Apostille. Thereafter, the bill of sale must be translated into Spanish by an official translator in Panama, protocolised in a notarial deed and registered with the Public Registry Office.

1.2.3 Enforceability Against Domestic Parties

If the bill of sale is executed outside Panama, the signature of the parties must be certified by a notary public and legalised according to the 1961 Hague Convention on the Apostille. Thereafter, the bill of sale

must be translated into Spanish by an official translator in Panama, protocolised in a notarial deed and registered with the Public Registry Office.

1.2.4 Registration, Filing and/or Consent From Government Entities

Formalities

The signatures in the bill of sale must be certified by a notary public and legalised according to the 1961 Hague Convention on the Apostille in the place of execution. Thereafter, these must be translated into Spanish by an official translator in Panama and filed with the Public Registry. Registration at the Public Registry may take from five to ten days.

Requirements

An appraisal certificate issued by the Civil Aeronautics Authority (AAC) is required to complete registration. Obtaining the appraisal certificate may take from 30 to 60 days.

There are no consents required as a prerequisite to the execution and delivery of the bill of sale in relation to an aircraft or engine registered in Panama.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

The transfer of an aircraft or engine located within Panamanian territory is subject to payment of transfer of movable assets tax at a rate of 7% and may be subject to payment of capital gains tax at a rate of 10% unless the transfer takes place while the aircraft or engine is within a tax-free zone. The transfer of an aircraft or engine in international waters is exempted from payment of transfer tax.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

All type of leases on aircraft, engines or parts are permitted.

2.1.2 Application of Foreign Laws

Panamanian law recognises the principle of freedom of the parties to subject their contractual agreements to foreign laws. Leases involving a domestic party

or an asset situated in Panama may be validly subjected to foreign law. If the lease is executed outside Panama, the signatures of the parties must be certified by a notary public and legalised according to the 1961 Hague Convention on the Apostille. Thereafter the lease must be translated into Spanish by an official translator in Panama, protocolised in a notarial deed and registered with the Public Registry Office.

2.1.3 Restrictions Concerning Payments in US Dollars

The US dollar is legal tender in Panama. There are no restrictions imposed on domestic lessees making rent payments to foreign lessors in US dollars.

2.1.4 Exchange Controls

There are no exchange controls in Panama.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

The execution of a lease in Panama by a domestic party or an original lease executed outside Panama being brought into Panama, either physically or electronically, is subject to payment of stamp duties in the amount of USD0.10 for each USD100.00 of the value of the lease. However, where such amount has been paid in respect of notarial paper for the deed whereby the aircraft lease has been recorded with the Public Registry, no additional amounts are required to be paid.

2.1.6 Licensing/Qualification of Lessors

Lessors do not have to be licensed or otherwise qualified in Panama to do business with a domestic lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

The lease must include the name and particulars of the parties, the description of the aircraft, the duration of the lease and the rent payable. There are no other mandatory terms required to be in a lease.

2.2.2 Tax and Withholding Gross-Up Provisions

Tax and other withholding gross-up provisions are legal, valid and binding and enforceable against the lessee. The lessor remains liable before tax authorities if the lessee fails to pay taxes imposed on lessor.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease may include parts that are installed or replaced on an aircraft or engine installed after its execution. It is advisable to execute a lease amendment or side letter to capture parts installed after execution.

2.2.4 Risk of Title Annexation

Ownership of engines that are delivered with the aircraft is assumed to be vested in the aircraft owner. If engines are owned by a third party, a statement to that effect must be expressly contained in title documents. There is no register of engines at the Public Registry. Title to engines may be registered at the Mortgage on Movable Assets Section of the Public Registry Office when a mortgage on the engines is recorded therein.

2.2.5 Recognition of the Concepts of Trust/Trustee

Trusts and the role of an owner trustee under a lease are fully recognised under Panamanian law.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The interest of the owner and/or lessor of an aircraft must be registered at the Public Registry Office and at the AAC. Registration of the bill of sale at the Public Registry Office vests title upon the owner.

2.3.2 Registration If the Owner Is Different From the Operator

Title in the name of the owner must be registered with the Public Registry Office. It is not possible to register title in the name of the operator when the operator is not the owner. The operator must obtain from the AAC a certificate of registration which will show that title is registered in the name of the owner and that lessee is the operator.

2.3.3 Aircraft/Engine-Specific Registers

Leases on aircraft are registered at the Aircraft Section of the Movable Assets Section of the Public Registry Office and are filed with the Aeronautical Registry of the AAC.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

Leases must be recorded with the Aircraft Section of the Movable Assets Section of the Public Registry Office and filed with the Aeronautical Registry of the AAC to obtain the certificate of registration of the aircraft.

Registration of the lease at the Aircraft Section of the Public Registry Office is for notice to third parties and is a prerequisite for the issuance by the AAC of the certificate of registration of the aircraft.

The execution and delivery of an aircraft's and/or an engine's lease are not subject to any consent from any government entity.

2.3.5 Requirements for a Lease to Be Valid and Registrable

There is no specific form for the lease but it must include the names and details of the parties, a full description of the aircraft, the duration, the amount of the rent and the terms agreed by the parties. The lease may be executed in any language. If executed in a foreign language, an official translation into Spanish by an official translator in Panama is required for registration purposes. The lease must be protocolised in a notarial deed and recorded with the Public Registry Office. If the lease is executed outside Panama, the signature of the parties must be certified by a notary public and the signature of the notary public must be legalised according to the 1961 Hague Convention on the Apostille. Registration at the Public Registry Office is required for notice to third parties and is a prerequisite for issuance of the certificate of registration by the AAC showing the lessor as owner and the lessee as operator.

2.3.6 Taxes/Duties Payable for Registering a Lease

Registration of the lease with the Public Registry Office is subject to payment of notarial fees, stamp tax and Public Registry Office registration fees based on the amount of the rent and the duration of the lease.

2.3.7 Registration of Aircraft in Alternative Countries

The United States of America and Colombia are the most popular jurisdictions in which to register aircraft that are habitually based in the Republic of Panama.

2.3.8 Requirements for Documents Concerning Registration

All documents to be recorded with the Public Registry Office and the AAC must be original or a certified copy. Documents in a foreign language must be translated into Spanish by an official translator in Panama. Documents executed outside Panama must be certified by notary public and the signature of the notary public must be legalised according to the 1961 Hague Convention on the Apostille.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

Payments of rent to a foreign lessor are subject to payment of income tax by way of withholding by the lessee unless an exception is granted through a tax treaty.

The lessor is severally liable for such tax and would be responsible for payment in the event that the lessee fails to make the withholding.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

Foreign lessors are not deemed to be resident, domiciled or carrying on business in Panama as a result of being a party to, or enforcing, a lease on an aircraft registered in Panama.

2.4.3 Engine Maintenance and Operations

Liability in respect of the aircraft and engine maintenance and operations is generally imposed on the lessee unless otherwise agreed in the lease agreement.

2.4.4 Damage or Loss Caused by an Asset

The owner or lessor under a lease, or a financier financing the asset on lease, is not liable under the doctrine of strict liability or any other similar domestic doctrine as a result of damage or loss caused by the assets unless there is gross negligence or wilful misconduct on the part of such owner or lessor or financier.

2.4.5 Attachment by Creditors

Creditors of a domestic lessee do not have the right to attach an aircraft leased to it and owned by a different entity. Such creditors can only attach assets owned by the domestic lessee.

2.4.6 Priority of Third Parties' Rights

Panamanian law grants a possessory lien to the person that has executed work on movable assets such as an aircraft, giving such person the right to retain the asset until it receives payment. A possessory lien is granted to the repair and maintenance provider for unpaid services performed on an aircraft, whether or not such lease/lessor is registered in the national aircraft register.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

Panamanian insurance law requires that insurances be placed with domestic insurance companies to the extent that these are available.

2.5.2 Mandatory Insurance Coverage Requirements

Panamanian aviation law requires that operators obtain insurance for the damages they may cause to third parties on the ground, crew, users and in general any damages that may be caused as a consequence of the operation of an aircraft.

2.5.3 Placement of Insurance Outside of Jurisdiction

Domestic insurance companies may take out reinsurance with foreign insurance companies provided that these are registered with the Foreign Reinsurance Companies Registry of the Insurance and Reinsurance Superintendency of Panama.

2.5.4 Enforceability of "Cut-Through" Clauses

Cut-through clauses in insurance/reinsurance documents are permitted and enforceable.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurance and reinsurance are permitted.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

There are no restrictions on a lessor's ability to (i) terminate an aircraft lease, (ii) re-export the aircraft and/or sell the aircraft following such termination except for those contained in the lease agreement. The aircraft does not need to be physically located in the Republic of Panama at the time of termination of the lease, re-exportation or sale of the aircraft.

2.6.2 Lessor Taking Possession of the Aircraft

There are no self-help remedies in the Republic of Panama. If the lessee refuses to return the aircraft, the lessor must obtain a court order.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts that are competent to decide aviation disputes. Aviation-related claims must be filed before the Panamanian civil circuit courts.

2.6.4 Summary Judgment or Other Relief

A summary judgment is not available in proceedings in Panama. Notwithstanding this, a lessor may apply to the court for cautionary measure in the form of an injunction preventing a lessee from taking certain actions relating to the asset or in the form of an attachment on the physical asset or its title.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Domestic courts will uphold:

- foreign law as the governing law of an aircraft lease as a valid choice of law and will enforce this in any action in the courts of the Republic of Panama, provided that these do not contravene the public policy of the Republic of Panama;
- the submission to a foreign jurisdiction agreed in a lease agreement; and
- a waiver of immunity by the parties as permitted by the applicable laws.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Court Judgments/Orders

Any judgment or order given by a foreign court may be enforced in the Republic of Panama by suit on the judgment, and the judgment/order will be recognised

and accepted – and therefore enforceable – by the courts of the Republic of Panama, without retrial or examination of the merits of the original action, by instituting exequatur proceedings in the courts of the Republic of Panama upon determination by such courts that:

- the courts of the judgment country would in similar circumstances recognise a final and conclusive judgment of the courts of the Republic of Panama;
- the judgment has been issued as a consequence of an action “in personam”;
- the judgment was rendered after personal service on the defendant as ordered by a judge of a competent jurisdiction;
- the cause of action upon which the judgment was based does not contravene the public policy of the Republic of Panama;
- the documents evidencing the judgment are in authentic form according to the laws of the relevant foreign country and have been duly legalised by a consul of the Republic of Panama or pursuant to the 1961 Hague Convention on the Apostille; and
- a copy of the final judgment has been translated into Spanish by a licensed translator in the Republic of Panama.

Arbitration Awards

A final conclusive judgment of a foreign arbitration award issued by a foreign arbitration tribunal rendered against a Panamanian company will generally be recognised and enforced in the courts of the Republic of Panama. Such an award may only be refused if one of the following circumstances occurs.

- At the request of the party against whom it is invoked, if the said party proves before the General Business Court of the Supreme Court of Justice one of the following:
 - (a) One of the parties to the arbitration agreement was under some incapacity under the law applicable to it, or the said agreement is not valid pursuant to the law to which the parties subjected it or, if no provision was made in this regard, pursuant to the law of the country in which the award was rendered.
 - (b) The party against whom the award is invoked was not given proper notice of the appointment

of an arbitrator or of the arbitral proceedings or was unable, for whatever reason, to present its defence.

- (c) The award refers to a dispute that was not contemplated by the arbitration agreement or that did not fall within the terms of the submission to arbitration or contains decisions that go beyond the scope of the arbitration clause or the submission to arbitration. If, however, the provisions of the award which refer to the matters submitted to arbitration can be separated from those that have not been submitted to arbitration, the former may be recognised and enforced).
- (d) The constitution of the arbitral tribunal or the arbitral proceedings did not conform to the agreement entered into between the parties or, if there is none, it did not conform to the law of the country in which the arbitration was held.
- (e) The award has not yet become binding on the parties or has been set aside or stayed by a court of the country in which it was made or pursuant to whose law it was made. If a court has been asked to set aside the award pursuant to the applicable law, the competent court to whom the application for recognition and enforcement is addressed may, if it considers it appropriate to do so, defer its decision and at the request of the party seeking recognition and enforcement it may also order the other party to provide appropriate and adequate guarantees.
- If the court finds:
 - (a) that pursuant to the Arbitration Law the subject matter of the dispute may not be resolved through arbitration; and/or
 - (b) that the recognition or enforcement of the award would be contrary to Panamanian international public policy.
- If the following documents are not provided with the enforcement petition:
 - (a) duly authenticated original or certified copy of the arbitration award;
 - (b) duly authenticated original or certified copy of the arbitration agreement; and
 - (c) official translation into Spanish if the language of the arbitration proceedings is other than Spanish.

2.6.7 Judgments in Foreign Currencies

The lessor under an aircraft lease may obtain a judgment in a foreign currency.

2.6.8 Limitations on Lessors' Actions Following Termination

Subject to what is agreed in the lease agreement, there are no limitations on a lessor's ability to recover default interest or to charge additional rent following termination of the lease for default, including where the lessee fails to return the aircraft.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

The lessor is not required to pay taxes under an aircraft lease in connection with the enforcement of such lease in Panama. Stamp tax in the amount of USD0.10 for each USD100.00 or fraction of the value of the aircraft lease must be paid for enforcement in Panama. However, where such amount has been paid in respect of notarial paper for the deed whereby the aircraft lease has been recorded with the Public Registry, no additional amounts are required to be paid.

2.6.10 Mandatory Notice Periods

There are no mandatory notice periods for the lessor's termination of the lease. Termination notice periods are generally regulated in the lease.

2.6.11 Lessees' Entitlement to Claim Immunity

The lessee is not entitled to claim sovereign immunity from any suit or legal proceedings under the laws of the Republic of Panama.

2.6.12 Enforcement of Foreign Arbitral Decisions

Panama has adopted the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

Please refer to **2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards** for further discussion of the recognition and enforcement of foreign arbitral awards.

2.6.13 Other Relevant Issues

There are no other relevant issues that a lessor should be aware of in relation to the enforcement of rights in the Republic of Panama.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Panamanian laws recognise the concepts of contractual assignment and novation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

A lease assignment and assumption agreement governed by New York or English law will be held valid by domestic courts to the extent that such laws are not contrary to the public policy of the Republic of Panama. The consent of the lessee will be required if provided in the lease. It is advisable to obtain the consent of the lessee to facilitate registration with the Public Registry. There are no mandatory terms required to be included in such agreement. The assignment and assumption agreement must be recorded with the Public Registry Office, which will require for registration the complete identification of the parties and the aircraft and a certificate of existence of the assignee if this is not already registered at the Public Registry.

2.7.3 Enforceability of Lease Assignments/Novations

Aircraft lease assignment and assumption/novation agreements must be translated into Spanish by an official translator in Panama, notarised and legalised according to the 1961 Hague Convention on the Apostille (if executed outside Panama) and recorded with the Public Registry Office.

2.7.4 Filing/Registration of Lease Assignments/Novations

Aircraft and/or engine lease assignment and assumption/novation agreements must be registered with the Public Registry Office and filed with the AAC. No governmental consents are required for such registration.

The assignment and assumption/novation agreement must be translated into Spanish by an official translator in Panama, protocolised into a notarial deed and recorded with the Public Registry Office. Registration may take from five to fifteen days.

Once recorded with the Public Registry a copy of the aircraft lease assignment and assumption/novation agreement must be filed with the AAC with an applica-

tion for a new certificate of registration of the aircraft showing the assignee as owner.

There are no government applications or consents required as a prerequisite to the execution and delivery of an aircraft and/or engine lease assignment and assumption/novation in relation to an aircraft registered domestically.

2.7.5 Taxes/Duties Payable on Assignment/Novation

Stamp tax in the amount of USD0.10 for each USD100.00 of the value of the assignment and assumption/novation agreement must be paid for enforcement in Panama. However, where such amounts have been paid in respect of the notarial paper of the deed whereby the assignment and assumption/novation agreement was registered with the Public Registry Office, no additional amounts must be paid.

2.7.6 Recognition of Transfer of Ownership Interests

The laws of the Republic of Panama will recognise the transfer of the ownership interest of the entity owning an aircraft with the legal title remaining with that entity.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

Owners, operators and holders of deregistration powers of attorney and any third persons authorised by these may request the deregistration of an aircraft in the Republic of Panama. A petition must be filed with the AAC to deregister the aircraft. If the petition is filed by the owner lessor, the AAC will request evidence of termination of the lease.

2.8.2 Lessee's/Operator's Consent

An owner, mortgagee or lessor may apply for the deregistration of the aircraft without the lessee's or operator's consent. If lessee or operator refuse to deliver the aircraft, the owner, mortgagee or lessor must file judicial proceedings to obtain a court order.

2.8.3 Required Documentation

The owner, mortgagee or lessor must provide the deregistration power of attorney and/or irrevocable

deregistration and export request authorisation (IDERA).

2.8.4 Duration of Deregistration Process

The deregistration process may take from two to four weeks. If the lessee or operator refuse to deliver the aircraft, the deregistration process may take from six to twelve months.

2.8.5 Aviation Authority's Assurances

The AAC does not provide advance assurances to aircraft owners, mortgagees or lessors for the prompt deregistration of aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

There are no significant costs/fees/taxes chargeable in respect of the deregistration of aircraft. The cost of deregistration is USD100.00. The cost of the airworthiness certificate for export is USD1,000.00. However, if the lessee refuses to deliver the aircraft owner, lessor or mortgagee must initiate judicial proceedings before Panamanian civil circuit courts to obtain a court order and must bear the costs of such proceedings.

2.8.7 Deregistration Power of Attorney

Deregistration powers of attorney should be recognised. These must be translated into Spanish by an official translator in Panama, notarised and if issued outside Panama legalised according to the 1961 Hague Convention on the Apostille. Registration with the Public Registry Office is not mandatory.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

There are no additional documents required for the enforceability of the deregistration power of attorney.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

Deregistration powers of attorney may be governed by domestic or foreign laws.

2.8.10 Revocation of a Deregistration Power of Attorney

Regulations in the Civil Code of Panama provide that powers of attorney are revocable. Panamanian maritime laws recognise the validity of irrevocable powers

of attorney for the enforcement of a ship mortgage through the private sale of a vessel. There are no provisions under aviation laws of Panama recognising the irrevocability of powers of attorney. Panama is a signatory of the Cape Town Convention and Protocol whereby IDERAs are permitted. The recognition of the irrevocability of an IDERA under the Cape Town Convention remains to be tested.

2.8.11 Owner's/Lessor's Consent

The consent of the lessee is not required to export the aircraft. However, if the lessee refuses to deliver the aircraft, the owner, mortgagee or lessor must obtain a court order. The owner, mortgagee or lessor must obtain an IDERA and a deregistration power of attorney to increase the likelihood that it will be able to export the aircraft. The aircraft does not need to be in Panama at the time of deregistration and/or export.

2.8.12 Aircraft Export Permits/Licences

The ACC does not issue export permits/licenses.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

The AAC does not charge costs/fees/taxes in respect of the export of an aircraft.

2.8.14 Practical Issues Related to Deregistration of Aircraft

There are no other significant practical issues that an aircraft owner or mortgagee or lessor should be aware of in respect of the deregistration of an aircraft in the Republic of Panama.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

Law 12 of 2016 (the "Insolvency Law"), which establishes the insolvency proceedings regime and related provisions, regulates restructurings, reorganisations, insolvencies and liquidations in the Republic of Panama.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

The Insolvency Law establishes and regulates two types of proceedings, reorganisation and liquidation, both of which may be voluntary or involuntary.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

The Insolvency Law contains provisions on cross-border insolvency, based on the UNCITRAL Model Law on Cross-Border Insolvency.

These provisions are applicable to cases in which:

- a foreign court or a foreign representative requests assistance in the Republic of Panama in connection with a foreign proceeding;
- assistance is requested in a foreign state in connection with a proceeding conducted under the Insolvency Law;
- a foreign proceeding and a bankruptcy insolvency proceeding in the Republic of Panama are being processed simultaneously with respect to the same debtor; and
- creditors or other interested parties, located in a foreign state, have an interest in requesting the commencement of a proceeding or in participating in a proceeding in the Republic of Panama, which is being processed in accordance with the Insolvency Law.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

Generally, a power of attorney would be deemed terminated when so stated in the document itself by affixing a term or if the grantor revokes it. A liquidation proceeding would not cause a power of attorney to be deemed void or terminated.

2.9.5 Other Effects of a Lessee's Insolvency

During a reorganisation proceeding, the lease would remain in place allowing the parties to renegotiate its terms. During the financial protection period, the lessor may not initiate any executory proceedings save for a default caused by the reorganisation itself and the aircraft would only be deemed as the property of its registered owner.

The liquidator/administrator may review and establish the priority of creditors during the process.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The main risk would be, firstly, that the assets are not sufficient to cover the repayment of the credit, making it impossible to recover, and, secondly, that the credit, once subjected to the insolvency process, is not recognised or is rated at a level of priority that makes it impossible to recover.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

The Insolvency Law establishes a financial protection period granted to the debtor who submits to the process, during which time its liquidation may not be requested or declared, nor may executive proceedings, executions of any kind, restitution of assets or foreclosures be initiated against it.

This period starts from the date of the order decreeing the opening of the reorganisation process until the confirmation of the reorganisation agreement.

2.9.8 Liquidation of Domestic Lessees

Panama's Insolvency Law establishes that a domestic lessee may undergo a reorganisation proceeding or a court-ordered liquidation. This liquidation is the process by which the sale or realisation of the debtor's assets is carried out, with a view to the distribution of the proceeds among the debtor's creditors.

2.9.9 Ipso Facto Defaults

The Insolvency Law contains provisions allowing the unilateral termination due to ipso facto defaults. An ipso facto default clause agreed by the parties in a lease agreement would be recognised and enforceable in Panama.

2.9.10 Impact of Domestic Lessees' Winding-Up

Upon the judicial winding up or liquidation of the domestic lessee, the court would order the return of the aircraft to its registered owner, while the amounts due as lease would become part of the assets of the insolvency proceedings. The provisions set forth in the lease agreement would regulate the handling of the security deposit and any maintenance reserves.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The Convention on International Interest in Mobile Equipment (the "Convention") and the related Protocol on Matters Specific to Aircraft Equipment (the "Protocol") have been adopted and are in force in the Republic of Panama. Panamanian law does not require local entities to apply authorised entry point codes in Panama.

2.10.2 Declarations Made Concerning Conventions The Convention

In respect of Article 13 (1)(a), (b) and (c) of the Convention, the words "speedy relief" shall be taken to mean seven working days and, in respect of Article 13 (1)(d), the same words shall be taken to mean 20 working days.

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

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

The Republic of Panama declares that the rights or interests covered by this declaration shall prevail over an international interest registered before the date of the deposit of its instrument of ratification in respect of the Convention and the Protocol.

Likewise, it declares that none of the provisions of the Convention shall affect the right of the Panamanian State, a State entity, an intergovernmental organisation or a provider of public services to arrest or detain an object under the laws of the Republic of Panama for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object.

Finally, the Panamanian State states that these declarations do not pose an unacceptable risk to the holders of registered rights.

As to Article 50 of the Convention, the Convention and the Protocol shall not apply to any transaction which is an internal transaction in relation to the Republic of Panama with regard to all those types of objects falling within the sphere of application of the Convention or the Protocol.

As to Article 53 of the Convention, in accordance with the internal laws of the Republic of Panama, the relevant courts are as follows:

- ordinary courts;
- administrative courts;
- the AAC;
- those advisory bodies exercising supervisory functions in respect of financial institutions and insurance companies (superintendencies); and
- arbitral tribunals,

subject to the powers vested in them by the internal laws of the Republic of Panama.

Pursuant to Article 54 (2) of the Convention, any remedies available to the creditor under any provision of the Convention and the Protocol which are not there expressed to require application to the court may be exercised without leave of the court.

The Protocol

In respect of the Protocol the Republic of Panama has made the following declarations.

- As to Article XXX(1) of the Protocol, it will apply Articles VIII, XII and XIII of the Protocol.

- As to Article XXX(2) of the Protocol, it will apply Article X of the Protocol.

- As to Article XXX(3) of the Protocol:

- (a) it will apply the entirety of Alternative A of Article XI of the Protocol to all types of insolvency proceeding, as defined in the Convention; and
- (b) the waiting period under Article XI shall not exceed 60 days.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Article XIII of the Protocol applies in the Republic of Panama. IDERAS are submitted with the AAC.

2.10.4 Enforcement of Conventions

We are not aware of any precedents before the courts of Panama in relation to parties enforcing the Convention or Protocol.

2.10.5 Other Conventions

Panama is a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

There are no restrictions on foreign lenders financing an aircraft or on borrowers using the loan proceedings under the laws of the Republic of Panama.

3.1.2 Effect of Exchange Controls or Government Consents

There are no exchange controls or government consents that would be material to any financing or repatriation of realisation proceeds under a loan, guarantee or security document in the Republic of Panama.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Downstream, upstream and/or cross-stream guarantees in favour of lenders are permitted under Panama-

nian law. These guarantees are not subject to registration. No consideration or corporate benefit is required.

3.1.5 Lenders' Share in Security Over Domestic SPVs

It is advisable for lenders to take security over domestic or foreign special purpose vehicles that own the financed aircraft. A pledge of shares is recognised under Panamanian law.

3.1.6 Negative Pledges

Negative pledges are recognised under Panamanian law.

3.1.7 Intercreditor Arrangements

There are no material restrictions or requirements imposed on intercreditor arrangements.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent under a syndicated loan are recognised under Panamanian law.

3.1.9 Debt Subordination

Subordination agreements between lenders are permissible and recognised subject to priorities determined by operation of the law.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of all or part of an outstanding debt under English- or New York law-governed loan is permissible and would be recognised under Panamanian law.

3.1.11 Usury/Interest Limitation Laws

There are no usury or interest limitation laws under the laws of the Republic of Panama.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

The typical form of securities and recourse granted in aviation finance are aircraft mortgages, pledges of shares, guarantees issued by parent companies, assignment of insurances and rights in general.

3.2.2 Types of Security Not Available

There are no types of security that cannot be taken over an aircraft or related collateral.

3.2.3 Trust/Trustee Concepts

The concept of a trust and the role of a security trustee are recognised under Panamanian laws.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

A borrower may assign to a security trustee, pursuant to a security assignment or a mortgage, its rights to the aircraft under an aircraft lease.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It is possible to assign only the rights and benefits, without also assigning the attendant obligations of the lessor, under an aircraft lease.

3.2.6 Choice of Foreign Law

Security assignments and guarantees may be governed by English or New York law.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

Foreign law-governed security assignments are not subject to registration in Panama. In case of enforcement in Panama, the security assignment must be translated into Spanish by an official translator in Panama, notarised and legalised according to the 1961 Hague Convention on the Apostille.

3.2.8 Domestic Law Security Instruments

In addition to English- or New York law-governed security assignment in respect of an aircraft, financiers must take an aircraft mortgage. Registration of the aircraft mortgage with the Public Registry Office is required for validity and the creation of the lien on the aircraft. The cost of registration of the mortgage is USD100.00 plus USD2.50 for each USD1,000.00 or fraction thereof of the amount secured by the mortgage with a cap of USD51,250.00.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

English or New York law governed security assignments cannot be registered domestically. Security in

the form of a mortgage over the aircraft must be registered with the Public Registry Office.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of a security interest over an aircraft or engines should be recognised in Panama. The transfer of the security in the form of a mortgagee must be recorded with the Public Registry Office.

3.2.11 Effect of Changes in the Identity of Secured Parties

If the identity of the security agent that is registered in Panama as the lender changes, this must be recorded with the Public Registry. If the identity of the secured parties changes without changing the identity of the security agent that is registered in Panama, there is no need for registration of the change and the interest of the secured parties will not be jeopardised.

3.2.12 “Parallel Debt” Structures

“Parallel debt” structures may be used domestically.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment will not be deemed to be resident, domiciled, carrying on business or subject to any taxes as a result of it being a party to – or the enforcement of – such security assignment.

3.2.14 Perfection of Domestic Law Mortgages

A domestic law mortgage is perfected through its execution by the parties, its translation into Spanish by an official translator in Panama if executed in a foreign language, protocolisation in a notarial deed and registration with the Public Registry Office. If executed outside Panama, the signature of the parties must be certified by a notary public and the signature of the notary public must be legalised according to the 196 Hague Convention on the Apostille.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

There is no difference between the form of security, or perfection thereof, taken over an aircraft and that taken over spare parts; both are governed by the law on mortgages on movable assets.

3.2.16 Form and Perfection of Security Over Bank Accounts

Security over bank accounts is typically taken in the form of a pledge on the account whereby the bank acts as the depository of the funds.

3.3 Liens

3.3.1 Third-Party Liens

A possessory lien is granted to repair and maintenance providers for unpaid services performed on an aircraft. This lien covers only the aircraft that receives the services and is valid for the work actually done. The service provider may retain the aircraft until it receives payment.

Airport and navigation fees and amounts due in respect of salaries and other contributions owed to the flight crew create a lien over the aircraft regardless of who is the owner or operator.

3.3.2 Timeframe to Discharge a Lien or Mortgage

The discharge of a mortgage must be executed by the mortgagee and registered with the Public Registry Office. Registration may take from five to fifteen days provided that the aircraft and the parties are up to date in payment of all fees due to the AAC and the Ministry of Economy and Finance.

3.3.3 Register of Mortgages and Charges

Mortgages on aircraft are registered at the Aircraft Section, Movable Assets Section of the Public Registry Office and filed with the Aeronautics Registry of the AAC. Mortgages on engines are registered at the Mortgage on Movable Assets Section of the Public Registry Office. There is no register for charges. Registration of mortgages at the Public Registry Office creates a preferred lien over the aircraft and/or engine.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

An aircraft may be detained for failure to comply with legal requirements or when the aircraft is used in illegal activities, or in the case of war, national catastrophe or suspension of constitutional rights. There are no provisions in respect of statutory rights of detention or non-consensual preferential liens on a fleet-wide basis.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser may search the records of the Aircraft Section, Movable Assets Section of the Public Registry Office to verify if the aircraft is free of encumbrances.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

The enforcement of a security assignment is not a significantly different process from the enforcement of loans or guarantees.

3.4.2 Security Trustees' Enforcement of Their Rights

A security trustee may enforce its rights under the security assignment pursuant to a notice and acknowledgement executed by the lessor and lessee.

3.4.3 Application of Foreign Laws

Domestic courts will uphold foreign law as the governing law of a finance or security document to the extent that such laws are not contrary to public policy in Panama. Domestic courts will recognise the submission to a foreign jurisdiction.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

See 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

A secured party may not take physical possession of the aircraft to enforce a security agreement/aircraft mortgage without the lessee's or operator's consent. In the absence of consent from the lessee or operator, the secured party must obtain a court order to take possession of the aircraft.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

Enforcement actions under a security agreement/aircraft mortgage must be filed before the civil circuit courts of Panama.

3.4.7 Summary Judgments or Other Relief

Summary and/or executory proceedings are available to secured parties, which may also request an attachment on the aircraft or other assets belonging to the debtor. For the attachment, the court may request the posting of security in the amount of 30–40% of the claimed amount.

3.4.8 Judgments in Foreign Currencies

A secured party under a security agreement/aircraft mortgage may obtain a judgment in a foreign currency.

3.4.9 Taxes/Fees Payable

Secured parties are not required to pay taxes in connection with the enforcement of a security agreement/aircraft mortgage. Stamp duties in the amount of USD0.10 for each USD100.00 of the value of the security agreement/aircraft mortgage are required for enforcement. Notarial paper fees paid in respect of the aircraft mortgage are deducted from the stamp duties payable for enforcement of the mortgage.

3.4.10 Other Relevant Issues

There are no other relevant issues that a lender should be aware of in relation to the enforcement of its rights in Panama.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are no other material issues and/or any material court judgments that are relevant to the purchase, sale, lease or debt financing of an aircraft registered in Panama and/or involving a domestic party.

4.2 Current Legislative Proposals

There are no known current proposals before the legislature relating to the foregoing items that may alter these or that are worth noting.

PHILIPPINES



Law and Practice

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Tan Hassani and Counsels is a Manila-based law firm with a focus on high-value commercial transactions and an unmatched aviation practice, having handled a wide variety of cross-border transactions throughout the years, from small turboprops and helicopters to business and commercial jets. The firm has also assisted in several key supplies of aircraft to the Philippine government, and was instrumental in setting up the maintenance, repair and overhaul of an original equipment manufacturer in the Philip-

pines. Other high-value transactions include counselling the winning bidder in a USD2.5 billion design and build national railway system for the Philippine government, and an USD8 billion renewable energy investment into several offshore wind farms. The firm acts as retained counsel in the Philippines for a wide variety of businesses and investors from Australia, Austria, China, France, Germany, Japan, Korea, Taiwan, Singapore, Switzerland, the US and the UK.

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

Sale of Aircraft and Engine

Generally, the situs or location of the movable property is taken into consideration in determining whether a transaction is taxable. If the aircraft is located in the Philippines when the sale is consummated, the proceeds may be considered as income derived within the Philippines by a foreign aircraft owner, and therefore be subject to income tax. If a transaction occurs in multiple stages, income may be considered as having been sourced within the Philippines if any particular stage occurring in the Philippines is so integral to the overall transaction that the business activity would not have been accomplished without it.

Moreover, any person or entity who sells properties such as an aircraft or engine in the course of trade or business in the Philippines is liable for VAT. However, certain aircraft sale transactions may fall under a VAT-exempt category.

The physical location of the aircraft at the time of sale is critical, even if the seller, such as a foreign aircraft owner, is a non-resident of the Philippines.

An aircraft engine sales agreement does not attract documentary stamp tax.

Sale of Ownership in an Entity

The sale of an ownership interest (such as shares of stock) in an entity that owns the aircraft or engine accrues capital gains tax and documentary stamp tax. If the seller is a resident of a country that has a tax treaty with the Philippines, this may potentially reduce or eliminate the capital gains tax.

1.1.2 Enforceability Against Domestic Parties

The Philippine government is formalistic when it comes to documents executed outside the Philippines. While notarisation or legalisation (or lack thereof) does not generally affect the validity of a sales agreement, it is advisable for a sales agreement of an aircraft or engine executed outside the Philippines to be apostilled or legalised, in order to be enforceable in the Philippines. If any of the documents are not in English, a translation should be provided, which should be apostilled or legalised as a certified true copy.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Transferring the title of an aircraft will require the execution of a document conveying ownership (ie, a bill of sale), which will generally transfer ownership over the whole aircraft, including installed parts. However, the parties may enter into a more comprehensive sale and purchase agreement containing the terms and conditions of the sale, including whether or not to include installed parts. It is advisable for the new owner to lodge the bill of sale with the Civil Aviation Authority of the Philippines (CAAP) so that the aircraft's certificate of registration can be updated to reflect the new owner.

If ownership interests (eg, shares) in the entity owning the aircraft are acquired by another entity, there is no change in aircraft ownership: the aircraft will still be owned by the same entity as registered owner, regardless of any change in its ownership. The entity itself has a separate and distinct legal personality from the ownership interest.

1.2.2 Sales Governed by English or New York Law

The transfer of title to an aircraft or engine physically delivered in the Philippines will be recognised, even if such transfer of title is governed by English or New York law.

The Philippines courts will recognise the parties' choice of law as provided in the bill of sale so long as it is not contrary to law, public policy or public order.

The bill of sale should be in English and notarised. If executed outside the Philippines, it should be apostilled or legalised in order to be enforceable in the Philippines.

1.2.3 Enforceability Against Domestic Parties

While the lack of translation, notarisation or legalisation does not affect the validity of the sale, it is advisable for documents executed outside the Philippines to be apostilled or legalised for enforceability in the Philippines.

1.2.4 Registration, Filing and/or Consent From Government Entities

The bill of sale (and its supporting documents) should be lodged with the Philippine aviation authority. If the bill of sale and supporting documents were executed outside the Philippines, they should be apostilled or legalised in order to be accepted by government agencies. The estimated period is about three to four weeks.

Generally, no government applications or consents are required as a prerequisite to the execution and delivery of a bill of sale in relation to an aircraft or engine registered in the Philippines. However, while the bill of sale itself is generally not affected, if the aircraft or the engine was acquired through or with a special tax status, certain consents may be required

from the relevant government entity prior to the delivery of the aircraft or engine.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

Generally, for foreign sellers, if the bill of sale is executed outside the Philippine jurisdiction and the aircraft is outside the Philippine territory, a sale will not be subject to income tax since it is considered as income from outside the Philippines.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

Operating/wet/finance leases are generally accepted and recognised in the Philippines. Leases concerning only aircraft engines or parts are common and not prohibited; hence, they can be registered.

2.1.2 Application of Foreign Laws

A lease involving a domestic party or asset situated in the Philippines can be governed by a foreign law. The High Court of the Philippines has recognised the validity of the choice of law by the parties.

2.1.3 Restrictions Concerning Payments in US Dollars

There are no material restrictions on domestic lessees making payments in US dollars. However, it would be prudent to review the payment process with the domestic bank, which would normally require proof of the transaction.

2.1.4 Exchange Controls

There are generally no exchange controls in the Philippines that could prevent rent payments under a lease, nor any repatriation of a realisation of proceeds. However, for foreign loans, the Bangko Sentral ng Pilipinas (ie, the central bank of the Philippines) has regulations if the borrower wishes to purchase foreign exchange from Philippine banks for loan payments. In a more recent update, there has been a further relaxing of the requirements set out in such regulations.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

There is no documentary stamp tax due on account of executing a lease agreement for personal property such as an aircraft or engine, whether physically or electronically.

However, the rental payments received by a non-resident foreign lessor from a domestic lessee for the lease of an aircraft or engine are subject to a final withholding tax of 7.5% of the gross amount of the income.

2.1.6 Licensing/Qualification of Lessors

As a general rule, foreign lessors are required to be licensed in order to do business with a domestic lessee. However, there are exceptions to this rule, which should be taken into account when structuring the lease. Nonetheless, even if a foreign lessor is not licensed, this does not affect the validity of the lease, but rather the remedies available to the lessor.

A significant update in Philippine laws happened in 2022 when foreign ownership restrictions were lifted regarding the ownership of Philippine air operators and the recognition of foreign owners of aircrafts. In 2024, the Civil Aeronautics Board of the Philippines recognised foreign-owned Philippine air operators and allowed them to apply for and hold a licence to operate public air transport services. In 2025, the CAAP followed suit and issued the implementing regulations now recognising foreign-owned Philippine air operators and foreign-owned aircrafts. To implement these legislative updates, the CAAP also updated the format of an aircraft's certificate of registration to distinguish between the identity of the aircraft operator (which must be a Philippine registered company but may have foreign shareholders) and the identity of the aircraft owner (who may be a foreigner).

There is now greater security in favour of foreign lessors or foreign owners of aircraft that are being leased and operated in the Philippines. In structuring the lease, therefore, if a foreign lessor is neither registered nor licensed in the Philippines, its ownership of the aircraft is now expressly recognised and even indicated in the aircraft certificate of registration itself.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

There are no mandatory terms that are required to be included in a lease agreement governed by English or New York law that would not typically already be included in a Philippine law-governed lease agreement. The parties are free to stipulate the terms and conditions of their lease agreement, including their choice of law, provided that such terms and conditions are not contrary to law, morals, public policy or public order.

2.2.2 Tax and Withholding Gross-Up Provisions

The parties are free to stipulate in their contracts which party shall shoulder the payment of taxes. Hence, the parties may include a gross-up provision, and such provision would be valid.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease can have provisions covering parts that are installed or replaced after its execution. The proper language of the provisions should be clear and leave no doubt that such installed or replaced parts are covered by the lease. If the current lease terms are insufficient, the parties may also insert an addendum into the original lease agreement.

It is advisable to register any such addendum with the CAAP, in order to bind third parties.

2.2.4 Risk of Title Annexation

If the owner of the airframe is different from the owner of the engine, there is a risk of title annexation on the engine. It is advisable for the respective owners to register their interests in their properties with the CAAP, as such registration will serve as notice to third persons and reduce the risk of title annexation.

If the owner of the engine is also the owner of the airframe, the risk of title annexation applies equally to the engine and to the airframe.

2.2.5 Recognition of the Concepts of Trust/Trustee

The concept of a trust and the role of an owner trustee under a lease are recognised in the Philippines. The Philippines Civil Code expressly includes provisions

on the establishment of a trust. Previously, aircraft in the Philippines could only be operated by a Philippine entity (such as a company or a trust), which must be considered a “Philippine national”. However, as discussed in **2.1.6 Licensing/Qualification of Lessors**, foreign owners and foreign-owned air operators are now recognised in the Philippines.

2.3 Lease Registration

2.3.1 Notation of Owner’s/Lessor’s Interests on Aircraft Register

The interest of the legal or beneficial owner, or a lessor of an aircraft, may be registered with the CAAP. Such registration will serve as a notice to all persons of the interest in the aircraft of the legal or beneficial owner or of the lessor. Due to the updated regulations issued in 2025 by the CAAP, a foreign aircraft owner is now expressly indicated and identified in the aircraft’s certificate of registration. This is not merely a notation of interest, but rather an express recognition of the foreign aircraft owner, which was done only tangentially in the past.

2.3.2 Registration If the Owner Is Different From the Operator

An aircraft can be registered in the Philippines in the name of the aircraft operator. The CAAP’s registry is an operator registry, and the aircraft operator will declare whether the aircraft is owned or leased. An aircraft’s certificate of registration is not issued directly in the name of the owner if the owner is not also the operator, but the CAAP’s updated regulations now provide for express recognition and identification of the foreign owner in the certificate of registration itself (see **2.1.6 Licensing/Qualification of Lessors**).

2.3.3 Aircraft/Engine-Specific Registers

Generally, the CAAP serves as the national registration for aircrafts in the Philippines, including liens, mortgages and other interests in aircraft or aircraft engines. The CAAP has sole authority to register aircraft and liens, mortgages or other interests in aircraft or aircraft engines.

However, aircraft engines may be covered by the Personal Property Security Act (PPSA). Notice of security interests and lien on aircraft engines may be regis-

tered with the Electronic Personal property Security Registry (PPSR).

2.3.4 Registration of Leases With the Domestic Aircraft Registry

The lease and a lessor’s interest may be registered with the CAAP. Failure to register will not affect the validity of the lease, but such lease shall not be enforceable against persons who do not have notice of the existence of such lease, and the aircraft shall not be operated in the Philippines without the CAAP certificate of registration and certificate of airworthiness.

The lease agreement shall be notarised in order to be registered with the CAAP. If executed outside the Philippines, it shall be apostilled or legalised in order to be registrable.

No government applications or consents are required before the execution and delivery of an aircraft and/or engine lease in relation to an aircraft registered in the Philippines. However, the lessee is advised to prepare for the importation requirements.

2.3.5 Requirements for a Lease to Be Valid and Registrable

The lease has to be in writing and notarised. If executed outside the Philippines, the lease agreement should be apostilled or legalised. If written in a language other than English, an English translation shall also be included.

2.3.6 Taxes/Duties Payable for Registering a Lease

No taxes or duties are payable for registering a lease with the CAAP. However, the CAAP charges a minimal fee to register and record the lease.

2.3.7 Registration of Aircraft in Alternative Countries

Aircraft habitually based in the Philippines are mostly registered in the British Virgin Islands, the Cayman Islands (or similar jurisdictions) and Ireland.

2.3.8 Requirements for Documents Concerning Registration

The original wet signed document must be submitted for the registration of the lease. It shall be notarised

or, if executed outside the Philippines, apostilled or legalised.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

Generally, the income of non-resident foreign entities is taxable only if it is derived from sources within the Philippines. If a transaction occurs in multiple stages, income may be considered as having been sourced within the Philippines if any particular stage occurring in the Philippines is so integral to the overall transaction that the business activity would not have been accomplished without it.

Rentals, charters and other fees derived by a non-resident foreign lessor of aircraft, machinery and other equipment shall be subject to a final withholding tax of 7.5% of the gross amount of the income.

The payor (ie, the domestic lessee) serves as the withholding agent and is responsible for the withholding and payment of tax. In case of failure to withhold the tax, the deficient tax shall be collected from the payor/withholding agent (not the foreign lessor).

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

With the proper transaction structuring, a foreign lessor need not be deemed a resident, domiciled or carrying on business as a result of its being party to a lease (or on its enforcement).

2.4.3 Engine Maintenance and Operations

Merely being a party to the lease will not subject the foreign lessor to any liability in respect of aircraft or engine maintenance and operations. However, the parties may freely stipulate who shall be liable in respect of aircraft or engine maintenance and operations.

2.4.4 Damage or Loss Caused by an Asset

The foreign aircraft or engine owner or lessor is not liable under the doctrine of strict liability merely because it is the owner or lessor. Nonetheless, insurance for third-party liability is normally required by the owner or lessor.

2.4.5 Attachment by Creditors

Creditors of a domestic lessee cannot attach the leased aircraft, as only properties owned by the domestic lessee can be attached to satisfy creditors' claims. Therefore, it is imperative for the owner to immediately register its title to the aircraft in order to notify third parties that the domestic lessee does not own the aircraft and should not be made to answer for the latter's obligations. Fortunately, due to the CAAP's 2025 regulations (see 2.1.6 Licensing/Qualification of Lessors), aircraft owners are already expressly identified in an aircraft's certificate of registration, separate and distinct from the identity of the aircraft's actual operator.

2.4.6 Priority of Third Parties' Rights

Taxes, duties and fees due to the Philippine government shall take priority over a lessor's rights under an aircraft or engine lease, including taxes due under the Philippine tax and customs code, and any liens imposed by the CAAP Director-General.

The Philippine rules on the concurrence and preference of credits over specific movable property such as an aircraft or engine will apply regardless of whether or not the lease is registered with the CAAP.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

Under the Philippine Civil Aviation Regulations (PCAR), an aircraft shall not be operated unless it has valid insurance covering the aircraft hull, each person, freight and mail onboard the aircraft, and third-party liability, as may be prescribed by the CAAP.

While there is no requirement for the insurance to be taken with a domestic insurance company, Philippine insurance law states that authority to do business is required in order for an insurance company to transact.

The Insurance Commissioner may allow a foreign insurance company to transact insurance business in the Philippines if there is a written power of attorney designating a Philippine resident as its general agent on whom any notice, summons and processes may be served, and consenting that service upon such

general agent shall be admitted and held as valid as if served upon the foreign company at its home office.

2.5.2 Mandatory Insurance Coverage Requirements

There are no strict mandatory insurance coverage requirements. The PCAR only requires that insurance is taken out to cover the aircraft hull, each person, freight and mail onboard the aircraft, and third-party liability, as prescribed by the CAAP. However, air operators that provide public air transport services are required to have not only hull insurance, but also passenger, pilot and third-party liability insurance.

2.5.3 Placement of Insurance Outside of Jurisdiction

Insurance companies doing insurance business in the Philippines may cede all or part of any risks situated in the Philippines by way of reinsurance directly to any foreign insurer that is not authorised to do business in the Philippines if such foreign insurer is represented by a resident agent duly registered with the Insurance Commissioner.

2.5.4 Enforceability of “Cut-Through” Clauses

There is no prohibition on “cut-through” clauses under the Insurance Code of the Philippines. Therefore, cut-through insurance can be enforceable.

2.5.5 Assignment of Insurance/Reinsurance

There is no prohibition under the Insurance Code of the Philippines on the assignment of insurance or reinsurance.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors’ Abilities

Generally, restrictions on a lessor’s ability to terminate an aircraft lease, re-export the aircraft and/or sell the aircraft following such termination shall be determined by the terms and conditions of the lease agreement entered into by the parties.

The aircraft location during any of the aforementioned actions will depend on what is provided in the lease agreement.

The lease agreement has the force of law between the parties. As long as it does not contain provisions

that are contrary to law, public policy or public order, the courts will uphold the validity of such lease agreement.

For deregistration, the aircraft does not need to physically be in the Philippines, but the process will entail additional time and cost for the CAAP to ensure that the aircraft markings are removed prior to deregistration.

2.6.2 Lessor Taking Possession of the Aircraft

Generally, a court order is required if the lessee does not voluntarily give up possession. However, if the lease agreement includes a provision whereby the lessor may take physical possession of the aircraft while the lease agreement is still effective (eg, under a power of attorney), the lessor can take such possession without a court order.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts designated to decide aviation disputes. Court jurisdiction is defined by law rather than the subject matter.

2.6.4 Summary Judgment or Other Relief

Before Philippine courts, the lessor may move for a summary judgment, which will be issued only if there is no genuine issue as to any material fact requiring the presentation of evidence, except as to the amount of damages.

Other lessor remedies are:

- a preliminary injunction requiring the other party to refrain from a particular act or acts (eg, continued use of the aircraft); or
- a preliminary mandatory injunction to require the performance of a particular act or acts (eg, delivery of the aircraft).

The application for an injunction will require the posting of a bond and the conduct of hearings.

The lessor may also make use of replevin to recover possession of the aircraft during the pendency of the proceedings, subject to the posting of a bond equivalent to twice the fair market value of the aircraft.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

As long as the choice of law of the parties is not contrary to law, morals, public policy or public order, domestic courts will uphold and recognise such foreign laws as the governing law of an aircraft lease, as well as the submission to a foreign jurisdiction to try and resolve disputes and the waiver of immunity by the parties.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

A party may commence an action for the recognition of a foreign judgment with a domestic court, and it can be recognised and enforced without re-examination of the matter as it enjoys a presumption of validity.

For foreign arbitral awards made in a state that is a party to the New York Convention or that extends reciprocity and comity to awards made in the Philippines, the lessor may apply for a Recognition and Enforcement of Foreign Arbitral Award at any time after receipt of the foreign arbitral award. Courts may hold hearings if deemed proper.

If the foreign arbitral award was made in a state that is not a party to the New York Convention, the court may treat the award as a foreign judgment.

2.6.7 Judgments in Foreign Currencies

Generally, monetary obligations shall be settled in the Philippine currency. However, parties may agree that the obligation will be settled in another currency at the time of payment, so a judgment may be based on the currency stipulated in the lease.

2.6.8 Limitations on Lessors' Actions Following Termination

Any limitations on a lessor's ability to recover default interest (or the compounding thereof) or to charge additional rent following termination of the lease for default, including where the lessee fails to return the aircraft, should be expressly provided for in the lease agreement in order to be held as valid and enforceable.

The lease has the force of law between the parties, and the courts will respect and uphold a lease as valid

if it does not contain provisions that are contrary to law, morals, public policy or public order. However, Philippine courts may reduce interest and other penalty clauses if they find them unconscionable.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

No taxes arise from actions to enforce aircraft leases. However, the lessor must pay filing fees to the court, with the amount depending on the relief sought or the value of the property involved in the case.

Moreover, the Philippine High Court has held that only a minimal filing fee shall be paid for the recognition of a foreign judgment, as the subject matter of the action is the foreign judgment itself and not the parties' claims, which have been decided in another country and should not be relitigated anew. The same rule applies to actions for the recognition of foreign arbitral awards under the New York Convention.

2.6.10 Mandatory Notice Periods

The parties must comply with the notice period for termination in the lease agreement, regardless of whether it is an aircraft operated domestically or if it is leased by a domestic operator. The agreement has the force of law between the parties and should be complied with by both parties in good faith.

2.6.11 Lessees' Entitlement to Claim Immunity

Generally, lessees are not entitled to claim immunity, which is available only for the Philippine and foreign governments. Nonetheless, immunity can be waived.

2.6.12 Enforcement of Foreign Arbitral Decisions

Since the Philippines has adopted the New York Convention, any party to a foreign arbitral award may file an action to recognise and enforce such award supported by:

- an authentic copy of the arbitration agreement;
- an authentic copy of the arbitral award; and
- if applicable, a translation of these documents into English.

2.6.13 Other Relevant Issues

An action for the recognition and enforcement of a foreign arbitral award must be brought within ten years

from the time the right of action accrues; otherwise, it will be barred by prescription.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

The Philippines recognises the concept of contractual assignment and novation found in the Philippine Civil Code.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

The parties are free to enter into a novation agreement pursuant to New York or English law. Whether the lessee's consent will be required, or whether there are mandatory terms for such assignment, will depend on the governing law.

The parties are free to stipulate their governing choice of law, so long as the terms and conditions of the lease are not contrary to law, morals, public policy or public order.

2.7.3 Enforceability of Lease Assignments/Novations

While not affecting validity, lease assignments and assumptions/novations involving an aircraft should be in English, and it is advisable for them to be notarised. If executed outside the Philippines, they should be apostilled or legalised for purposes of enforcement against a domestic party.

2.7.4 Filing/Registration of Lease Assignments/Novations

An aircraft and/or engine lease assignment and assumption/novation can be registered with the CAAP to be binding on third parties; otherwise, they shall be valid only between the parties and their successors and assignees.

To register assignment or novation, the documents must be in English and notarised; if executed outside the Philippines, they must be apostilled or legalised. Estimated completion time is about three to four weeks.

Government applications or consents are not required before the execution and delivery of an aircraft and/

or engine lease assignment and assumption/novation in relation to an aircraft registered domestically. However, while the assignment and assumption/novation themselves are generally not affected, if the aircraft or the engine was acquired through or with a special tax status, certain consents may be required from the relevant government entity prior to the delivery of the aircraft or engine.

2.7.5 Taxes/Duties Payable on Assignment/Novation

There is no documentary stamp tax for executing a lease agreement for personal property such as an aircraft or engine, whether physically or electronically, nor for assigning the original lease agreement.

2.7.6 Recognition of Transfer of Ownership Interests

Even if the entity ownership changes, there is no change in the ownership of the aircraft. The entity owning the aircraft is separate and distinct from any of its ownership interests (eg, shareholders).

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

Deregistration can be done by the lessee. If a deregistration power of attorney is executed by the lessee in favour of the lessor, then the lessor may apply for the deregistration of an aircraft.

If there is any annotation on the certificate of registration of the aircraft, the applicant shall settle or clear all liens or encumbrances prior to deregistration; no aircraft registered with the CAAP shall be deregistered until all liens and encumbrances annotated on the certificate of registration have been cancelled.

An application for deregistration shall be filed at the Aircraft Registration Section, which will then forward the application to the legal department for review. Once reviewed by the legal department, it will then be forwarded to the Director-General for approval.

In 2025, the CAAP issued a regulation updating the format of the deregistration certificate. In the updated format, there is now an express distinction between the identity of the operator and that of the owner. This

provides greater clarity and, thus, greater protection to the aircraft owner.

2.8.2 Lessee's/Operator's Consent

An aircraft owner, mortgagee or lessor may apply for deregistration of the aircraft if the lessee or the operator executed a deregistration power of attorney to that effect.

2.8.3 Required Documentation

The following are required in order to effect aircraft deregistration:

- the notarised application;
- the original certificate of registration;
- the original certificate of airworthiness;
- proof of payment of the CAAP prescribed fees;
- CAAP Accounting Clearance of the current aircraft owner and aircraft operator;
- the notarised bill of sale (if due to the sale of the aircraft) or termination of lease (if due to the termination of an aircraft lease); and
- other documents the CAAP may deem necessary.

2.8.4 Duration of Deregistration Process

The period for deregistration may depend on whether there is co-operation from the lessee.

If the lessee co-operates, the process may be faster. The length of the process will depend on how fast the parties can prepare the necessary documents for submission. Normally, it will take three to four weeks.

If the lessee does not co-operate, the deregistration may take longer. Difficulties may be encountered in particular if the documents for the deregistration are executed outside the Philippines and must be apostilled or legalised.

2.8.5 Aviation Authority's Assurances

The CAAP does not provide advance assurances on aircraft deregistration.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

The deregistration fee is currently PHP750, and the reissuance of the certificate of registration and the

recording fee for the cancellation of annotation costs PHP400, exclusive of VAT.

2.8.7 Deregistration Power of Attorney

The CAAP may recognise a deregistration power of attorney, which must be in English and notarised. If executed outside the Philippines, it must be apostilled or legalised. However, the CAAP retains discretion on its recognition on a case-by-case basis, and may require additional proof of authority to file.

Advance lodging of the deregistration power of attorney is not required in order to be enforceable against a domestic party. Normally, the deregistration power of attorney is annotated on the certificate of registration of the aircraft.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

The deregistration power of attorney should be issued on the authority of, and accompanied by, a corporate authorisation, which must be in English and notarised. If executed outside the Philippines, it should be apostilled or legalised.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

There is no need for the deregistration power of attorney to be governed by the laws of the Philippines. The choice of law of the parties will be held as valid by the court so long as such choice is not contrary to law, morals, public policy or public order.

2.8.10 Revocation of a Deregistration Power of Attorney

Generally, the irrevocable power of attorney cannot be revoked. Under Philippine laws, an agency cannot be revoked if a bilateral contract depends on it or if it is the means of fulfilling an obligation.

The power of attorney is coupled with the interest of the lessor over the aircraft. Since the enforcement of the rights and obligations under the aircraft lease depends on the power of attorney, such may not be revoked.

2.8.11 Owner's/Lessor's Consent

Generally, self-help is not available in the Philippines. If a deregistration power of attorney has been granted in favour of the owner, mortgagee or lessor of the aircraft, they may export such aircraft without the lessee's consent, although this would be subject to actual possession of the aircraft.

During the negotiation of the lease or mortgage agreement, the owner, mortgagee or lessor may request that a deregistration power of attorney be issued in their favour so that they can export the aircraft without need for the lessee's consent. The language of the deregistration power of attorney should be all-encompassing and broad enough to cover all applicable government agencies likely to be affected by an application for export.

Subject to additional administrative requirements, the aircraft is not required to physically be in the Philippines during the deregistration process. However, any aircraft that is already the subject of a deregistration application shall not be permitted to be flown nor be given approval for flight.

2.8.12 Aircraft Export Permits/Licences

An aircraft must obtain an airworthiness approval for export by filing an application prescribed by the CAAP.

The airworthiness approval for export cannot be issued in advance as the aircraft must still meet the airworthiness requirement for a standard certificate of airworthiness. Used aircraft should have undergone an annual inspection, which should have been performed and properly documented within 30 days before the date of the application for airworthiness approval for export.

There is no specific timeline to receive an airworthiness approval for export, although in practice it takes about one to two weeks.

An aircraft that is not airworthy can still be exported (eg, disassembled and crated), but it will not be issued an export certificate of airworthiness.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

No significant export tax or any other customs duties need to be paid to export an aircraft.

2.8.14 Practical Issues Related to Deregistration of Aircraft

Issues may arise if the lessee or operator does not co-operate, as the execution of the necessary documents for the aircraft deregistration might not be easy. However, so long as the deregistration documents are complete, there should not be any issue (but proof of removal of registration marks is one of the requirements for deregistration).

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

Insolvency proceedings in the Philippines are governed by the Financial Rehabilitation and Insolvency Act of 2010 (FRIA), which provides for the rehabilitation and liquidation of a debtor undergoing a financial condition wherein it is generally unable to pay its liabilities as they fall due in the ordinary course of business or has liabilities greater than its assets.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership Court-Supervised Rehabilitation

In voluntary proceedings, an insolvent debtor voluntarily initiates the rehabilitation by filing a rehabilitation petition with the courts.

Involuntary proceedings may be used by any creditor of the insolvent corporation with a claim of – or the aggregate of whose claim is – at least PHP1 million or at least 25% of the subscribed capital stock or partners' contributions, whichever is higher.

Pre-Negotiated Rehabilitation

By itself or jointly with any of the creditors, an insolvent debtor may file a verified petition with the court for the approval of a pre-negotiated rehabilitation plan that has been endorsed or approved by creditors holding at least two thirds of the total liabilities of the debtor, including secured creditors holding more

than 50% of the total secured claims of the debtor and unsecured creditors holding more than 50% of the total unsecured claims of the debtor.

Out-of-Court Rehabilitation

This involves an informal restructuring agreement or rehabilitation plan that meets the following requirements:

- the debtor must agree to the out-of-court or informal restructuring/workout agreement or rehabilitation plan;
- it must be approved by creditors representing at least 67% of the secured obligations of the debtor;
- it must be approved by creditors representing at least 75% of the unsecured obligations of the debtor; and
- it must be approved by creditors holding at least 85% of the total liabilities, secured and unsecured, of the debtor.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

The FRIA specifically provides for the adoption of the UNCITRAL Model Law on Cross-Border Insolvency (“UNCITRAL Model”), which shall apply if:

- assistance is sought in a Philippine court by a foreign court or representative in connection with a foreign proceeding;
- assistance is sought in a foreign state in connection with a proceeding governed by the FRIA and by the UNCITRAL Model;
- a foreign proceeding and a proceeding governed by the FRIA and the UNCITRAL Model are taking place concurrently; or
- creditors in a foreign state have an interest in requesting the commencement of or participating in a court-supervised rehabilitation, pre-negotiated rehabilitation or out-of-court rehabilitation.

The “co-operation” and “co-ordination” principle under the UNCITRAL Model is also adopted under the FRIA. This principle places obligations on courts and insolvency representatives in different states to communicate and co-operate to the maximum extent possible.

2.9.4 Effect of Lessee’s Insolvency on a Deregistration Power of Attorney

The deregistration power of attorney will still be valid despite the lessee’s insolvency, regardless of whether or not it is irrevocable. The aircraft is only leased to the insolvent lessee; the lessor is still the owner of the aircraft.

Generally, the liquidation of the lessee would terminate the power of attorney at the point in time it is declared dissolved as an entity, unless it is validly constituted as being coupled with interest.

2.9.5 Other Effects of a Lessee’s Insolvency

Contracts will not be automatically set aside during insolvency proceedings. However, once a liquidation order is issued, the lessee’s juridical existence will be dissolved and all its contracts shall be deemed terminated and/or breached, unless the liquidator declares otherwise and the contracting party agrees, within 90 days from the date of assumption of office.

The aircraft will not be deemed part of the lessee’s property. The lessor will not be prevented from repossessing the aircraft upon the termination of the lease: as the aircraft owner, the lessor is entitled to recover the aircraft from the lessee upon termination of the lease agreement.

The FRIA expressly provides that the preference of credits under the Philippine Civil Code shall be observed. Therefore, duties, taxes and fees due to the state shall take priority over a lessor’s rights, including taxes due under the Philippine tax and customs code, and any liens imposed by the CAAP Director-General.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

Generally, if a borrower, a guarantor or an entity providing security becomes insolvent, lenders run the risk of not being able to fully recover the amount lent. There may also be a delay in the payments as the debtor needs to first satisfy the claims by third parties that are preferred over the claims of the lender.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

The Commencement Order of the rehabilitation proceedings shall include a stay or suspension order, which shall:

- suspend all actions or proceedings, in court or otherwise, for the enforcement of claims against the debtor;
- suspend all actions to enforce any judgment, attachment or other provisional remedies against the debtor;
- prohibit the debtor from selling, encumbering, transferring or disposing in any manner any of its properties, except in the ordinary course of business; and
- prohibit the debtor from making any payment of its liabilities outstanding as of the commencement date, except as may be provided therein.

2.9.8 Liquidation of Domestic Lessees Voluntary Liquidation

An insolvent debtor (or lessee) may apply for a liquidation by filing a petition for liquidation with the court, establishing its insolvency.

Involuntary Liquidation

This may be used by three or more creditors (or lessors) whose claims in aggregate are at least PHP1 million or at least 25% of the subscribed capital stock of the debtor (or lessee), whichever is higher.

An insolvent domestic lessee may be placed under administration or receivership in the circumstances listed in **2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership**.

2.9.9 Ipso Facto Defaults

Ipso facto defaults, or the termination of a contract by reason of a party's insolvency, are recognised in the Philippines, and are usually stipulated in contracts.

There is no need for the debtor to be in default in the performance of their obligation. If the lease agreement provides that the contract will be terminated once the lessee is deemed insolvent, then the lessor may take possession of the aircraft. However, this assumes that

the lessee co-operates, as there is no self-help in the Philippines (otherwise, the lessor should proceed with the dispute resolution mechanism in the lease).

2.9.10 Impact of Domestic Lessees' Winding-Up

If the domestic lessee is wound-up, then the lease contract shall be terminated and the aircraft must be returned to the lessor. All other matters pertaining to rentals, security deposits and maintenance reserves would be decided by the court, taking into account the unique circumstances of the lessee's case.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

At the time of writing, the Philippines has not ratified the Convention on International Interests in Mobile Equipment nor the related Protocol on Matters specific to Aircraft Equipment.

2.10.2 Declarations Made Concerning Conventions See 2.10.1 Conventions in Force.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment See 2.10.1 Conventions in Force.

2.10.4 Enforcement of Conventions

Philippine courts have no experience in enforcing the Convention on International Interests in Mobile Equipment, as the Philippines has not ratified said Convention.

2.10.5 Other Conventions

The Philippines is a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft. However, it is not a party to the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

There are no express statutory restrictions on foreign lenders financing an aircraft in the Philippines, nor on borrowers using the loan proceeds. However, due to the doctrine of "doing business" in the Philippines,

great care must be taken to properly structure the transaction such that the foreign lender is not seen to be doing business in the Philippines without a licence.

3.1.2 Effect of Exchange Controls or Government Consents

There are generally no exchange controls in the Philippines that could prevent rent payments under a guarantee or security. However, for foreign loans, the Bangko Sentral ng Pilipinas (ie, the central bank of the Philippines) has regulations if the borrower wishes to purchase foreign exchange from Philippine banks for loan payments. In a more recent update, there has been a further relaxing of the requirements set out in such regulations.

3.1.3 Granting of Security to Foreign Lenders

There is no restriction in the Philippines on granting security to foreign lenders. Borrowers may provide security under the PPSA for personal or movable property, or under Republic Act No 4882 for real property.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Downstream, upstream and/or cross-stream guarantees in favour of the lenders are recognised in the Philippines. However, care should be taken to review the corporate documents of the entities involved to ensure that issuing a guarantee does not violate their charter or constitutive documents.

3.1.5 Lenders' Share in Security Over Domestic SPVs

The lender may take a share security over a domestic special purpose vehicle that will operate the financed aircraft.

3.1.6 Negative Pledges

Negative pledges are recognised in the Philippines.

3.1.7 Intercreditor Arrangements

No restrictions or requirements are imposed on intercreditor arrangements in the Philippines. However, Philippine law provides for the priority of creditors in certain situations.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent (such as the facility agent) under a syndicated loan are recognised in the Philippines.

3.1.9 Debt Subordination

The Philippine Civil Code provides for the claims that must be preferred over others. The FRIA also provides that, in cases of liquidation in rehabilitation plans, the priority established under the Civil Code on the concurrence and preference of credits shall be followed.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of all or part of an outstanding debt governed by English or New York law is permissible and recognised in the Philippines. Parties are free to agree on terms and conditions that are not contrary to law, morals, public policy or public order.

3.1.11 Usury/Interest Limitation Laws

Philippine usury law is currently suspended, and the lender and the borrower can agree on any interest that may be charged on the loan. However, courts may strike down interest rates that are iniquitous or unconscionable.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

If an aircraft is financed, it generally means that the lessor is still the owner of the aircraft, even though it will be operated by the lessee. The ownership of the lessor is usually annotated on the certificate of registration of the aircraft, to notify the public of the identity of the lessor. A corporate guarantee is also usually taken out, to ensure the timely payment of the rent.

3.2.2 Types of Security Not Available

The Civil Aviation Authority Act does not expressly provide for types of security that cannot be taken over an aircraft or related collateral.

3.2.3 Trust/Trustee Concepts

The concept of trust and the role of a security trustee are recognised in the Philippines. The Philippine Civil Code expressly includes provisions on the establishment of a trust. However, as a practical matter, trust

arrangements in the Philippines are not as sophisticated as in other countries.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

A borrower can assign its rights to the aircraft or under an aircraft lease pursuant to a security assignment or a mortgage. It is advisable to register such assignment with the CAAP and to annotate it in the certificate of registration of the aircraft.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

When the lessor assigns their rights over the leased aircraft to an assignee, the lessor still holds ownership over the leased aircraft. The lessor remains as the lessor and, as such, is still required to comply with the obligations of the lessor as provided for in the aircraft lease.

3.2.6 Choice of Foreign Law

The parties are free to stipulate their choice of law that will govern the security assignment, so long as the choice of law and the terms and conditions of the security assignment are not against law, morals, public order or public policy.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

The security assignment shall be in writing and notarised. If executed outside the Philippines, it must be apostilled or legalised in order to be enforceable in the Philippines. If written in any language other than English, the security assignment should also be accompanied by an English translation.

The security assignment shall then be registered with the CAAP and annotated in the certificate of registration of the aircraft in order to bind third persons.

3.2.8 Domestic Law Security Instruments

There is no domestic law security instrument that a financier should take in addition to a security agreement that is governed by English or New York Law.

The Philippines has not ratified the Cape Town Convention.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

A security assignment governed by English or New York law and a domestic law security instrument may be registered with the CAAP.

Any of the documents related to the security instrument that are executed outside the Philippines must be apostilled or legalised in order to be registered with the CAAP, and must be annotated in the certificate of registration of the aircraft in order to bind third persons.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests over an aircraft and/or engines is recognised in the Philippines. It is advisable to register such transfer with the CAAP, and with the PPSR for engines.

3.2.11 Effect of Changes in the Identity of Secured Parties

Subrogation of a third person in the rights of a creditor is either legal or conventional. Legal subrogation takes place without the agreement of the parties but by operation of law.

However, in conventional subrogation, the consent of the original creditor, the original debtor and the third person who is subrogated to the rights of the original creditor must be obtained. In effect, the original obligation will be extinguished and a new obligation shall be made between the person subrogated of the rights of the original creditor and the original debtor.

The original creditor can assign their rights over the security agreement to a third person without the consent of the debtor. The original security will not be extinguished or modified.

Nevertheless, in both subrogation and assignment, the security interest will not be jeopardised.

3.2.12 “Parallel Debt” Structures

There is no express prohibition on the use of “parallel debt” structures in the Philippines. They can be used so that the security trustee has an independent right

to the secured debt. The concept of security trustee is recognised.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

The secured party under a security assignment will not automatically be deemed to be resident, domiciled or carrying on business in the Philippines by reason of such security assignment alone. One of the exceptions to the doctrine of “doing business” is the isolated transaction rule.

However, if the secured party receives income by reason of the security assignment, such income may be subject to income tax. Income derived from sources within the Philippines is taxable as income of a non-resident foreign corporation (subject to any applicable tax treaty).

3.2.14 Perfection of Domestic Law Mortgages

A security interest over an aircraft may be perfected by the registration of such interest with the CAAP and annotated in the aircraft’s certificate of registration. However, for its engine, which may be covered by the PPSA, it may be perfected by registration at the PPSR or upon possession by the secured creditor.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

The mortgage registration for an aircraft is with the CAAP, while that for a spare engine may be with the PPSR.

3.2.16 Form and Perfection of Security Over Bank Accounts

Security interest through a security agreement over deposit accounts can be taken in accordance with the PPSA. A security agreement must be contained in a written contract signed by the parties, and must identify the collateral and the secured obligation. It may consist of one or more writings that, taken together, establish the intent of the parties to create a security interest.

On the other hand, a control agreement is an agreement in writing between the grantor and the secured creditor, which perfects the security interests over intangible assets. Such security must still be regis-

tered in the registry in order to be implemented under the PPSA.

3.3 Liens

3.3.1 Third-Party Liens

A third party can register a lien over an aircraft or engine to answer for the owner-lessor’s obligations. The lien can be registered with the CAAP for aircrafts or with the PPSR for engines, to serve as notice to third parties. The lien can cover the value of the work done on the aircraft and other assets. The Philippine Civil Code covers credits for the making, repair, safe-keeping or preservation of personal property.

A fleet lien may be imposed by the CAAP Director-General, who has the power to impose liens on aircraft, machinery and any other assets of persons, corporations and partnerships who are in default, have failed to perform their obligations or have failed to pay fines and other penalties. On the other hand, third parties other than the CAAP Director-General may impose liens on an entire fleet if there is an agreement. However, third parties may not be able to detain the aircraft, as it will be sold and the proceeds of the sale shall be applied to the satisfaction of the obligation.

Depending on the nature of the security, the third party may foreclose on or attach or levy the aircraft.

3.3.2 Timeframe to Discharge a Lien or Mortgage

There is no specific timeframe provided for the discharge of a lien or mortgage over an aircraft. Normally, the CAAP will take about two to three weeks to remove an annotation, counted from the date all requirements are met.

3.3.3 Register of Mortgages and Charges

Mortgages and charges related to aircraft are registered with the CAAP, which maintains a registry for security over aircrafts. Aircraft engines may be registered in the PPSR. Such registration will serve as a notice to third parties of the existence of such mortgage or charge.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

Statutory rights of detention or non-consensual preferential liens can arise over an aircraft and/or on a “fleet-

wide” basis. The CAAP Director-General shall have the power to impose liens on aircraft and machinery in the following circumstances:

- if the charges and other fees are not paid in full on the due date, or if any part of the charges or the late payment penalty thereto remain unpaid; and
- failure to pay administrative fines arising from violation of any rules and regulations promulgated by the CAAP.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser can verify that an aircraft is free of encumbrances by inquiring with the CAAP and checking the database of aircraft. The potential purchaser may also check the PPSR.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

A secured loan involves having encumbered property to answer for the loan in case of non-payment. In the case of an unsecured loan, the creditor only relies on the principal debtor or the guarantor or surety's commitment to pay.

Thus, in a security assignment, the creditor may proceed against the encumbered property, while in an unsecured loan the creditor may file an action against the debtor and the guarantor or surety.

3.4.2 Security Trustees' Enforcement of Their Rights

The parties are free to decide on the terms and conditions of their security agreement, so long as they are not contrary to law, morals, public policy or public order. The applicable governing law will therefore be relevant. The security trustee can enforce its rights pursuant to an agreed notice and acknowledgment by the lessor and the lessee.

3.4.3 Application of Foreign Laws

The parties are free to stipulate their choice of governing law and jurisdiction, so long as the choice of law and the terms and conditions are not contrary to law, morals, public order or public policy.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

A party may commence an action for recognition of a foreign judgment with a domestic court without re-examination of the matter as it enjoys a presumption of validity.

For foreign arbitral awards made in a state that is a party to the New York Convention or that extends reciprocity and comity to awards made in the Philippines, the lessor may apply for a Recognition and Enforcement of Foreign Arbitral Award at any time after receipt of the foreign arbitral award. Courts may hold hearings if deemed proper.

If the foreign arbitral award was made in a state that is not a party to the New York Convention, the court may treat the award as a foreign judgment.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

The Philippine High Court has declared that a creditor cannot immediately take possession of the object as it will constitute pactum commissorium, which is against good morals and public policy. Even if the parties agree, it may be deemed null and void. While the PPSA has allowed a creditor to take possession of secured collateral, to a certain extent, it has limited application to aircraft, which are governed by a different law. Therefore, taking possession of an aircraft to enforce a security is prohibited regardless of whether or not the lessee or operator consented.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

Philippine courts are competent to decide enforcement actions. The jurisdiction of the appropriate level trial court will be determined by the amount claimed in the action.

3.4.7 Summary Judgments or Other Relief

See 2.6.4 Summary Judgment or Other Relief.

3.4.8 Judgments in Foreign Currencies

See 2.6.7 Judgments in Foreign Currencies.

3.4.9 Taxes/Fees Payable

There are no taxes on the enforcement of a security agreement or aircraft mortgage. However, court filing fees are required, the amount of which will be based on the relief sought or the property value involved.

3.4.10 Other Relevant Issues

In the case of a mortgage, an action to enforce must be done within ten years from the time the mortgagor defaults in the payment; otherwise, it will be barred by prescription and the mortgagee will lose their rights under the mortgage.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

The material issues and court judgments are those that pertain to the doctrine of doing business in the Philippines by a foreign aircraft owner, seller or lessor. While they are not specific to aircraft transactions, the overall structure of an aircraft transaction – whether it be by sale, lease or finance – should always take care to ensure that the aircraft owner, seller or lessor does not fall into “doing business” in the Philippines without a licence. An aircraft owner, seller or lessor should take full advantage of all possible exceptions in structuring the deal.

4.2 Current Legislative Proposals

There are no current proposals before the legislature relating to the foregoing items.

RWANDA

Law and Practice

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

Upon execution of an aircraft or engine sale agreement, the following taxes and fees will be payable.

- VAT at the rate of 18% is payable as a consequence of the execution of a sale agreement of an aircraft or an engine located in Rwanda at the time of transfer of title. VAT is invoiced by the seller to the buyer and is due by the seller to the Rwanda Revenue Authority.
- Registration or re-registration (applicable in the event of a change of ownership of an aircraft already registered in Rwanda) in the Rwanda aircraft register (the “Aircraft Register”) is subject to a fee ranging from USD250 to USD5,000.

1.1.2 Enforceability Against Domestic Parties

Because a change in ownership is registered in the Aircraft Register (see 1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement), a sale agreement does not need to be translated, certified, notarised or legalised to be enforceable against a domestic party.

However, all documents submitted to the Rwanda Civil Aviation Authority (RCAA) must be certified (ie, notarised) copied, and translated into English. In addition, a (partial) translation could be required by the Rwandan courts if the agreement is not written in Kinyarwanda.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Formalities Applicable to the Transferring Title

Transfer of ownership of an aircraft or engine registered in Rwanda is valid if the sale agreement meets the following criteria:

- it is in writing;
- it relates to an aircraft or engine which the seller has the power to dispose of; and
- it enables the aircraft or engine to be identified.

As the transfer of ownership is made in accordance with the terms of the sale agreement, it is advisable to explicitly state that the transfer extends to all installed parts, including the Auxiliary Power Unit (APU).

Registration of the Transfer

Registration of the transfer of ownership in the Aircraft Register is the only means of establishing a priority of a right in an aircraft.

Sale of the Ownership Interest in an Entity

The sale of the ownership interest in an entity that owns an aircraft or engine will not be effectively recognised as a sale of the aircraft or engine itself, provided that entity remains the owner of the aircraft or engine.

1.2.2 Sales Governed by English or New York Law

The transfer of title to an aircraft or engine physically delivered in Rwanda will be recognised if the bill of sale is governed by English or New York Law.

To be recognised in Rwanda, the bill of sale must however include the following information:

- name of the manufacturer;
- manufacturer’s serial number (MSN); and
- model designation necessary and sufficient to identify the aircraft.

1.2.3 Enforceability Against Domestic Parties

A bill of sale does not need to be translated, certified, notarised or legalised to be enforceable against a domestic party.

1.2.4 Registration, Filing and/or Consent From Government Entities

The person who becomes the owner of an aircraft in Rwanda must register it with the RCAA. The following applies to the registration process.

- The new owner must be either a citizen or a bona fide resident of Rwanda (or an East African Community partner state), a Rwandan legal entity or the government of Rwanda.
- The aircraft cannot be registered under the laws of any foreign country.
- The new owner must file an application to the RCAA including proof of ownership (eg, bill of sale).

Re-Registration Process

The person who becomes the owner of an aircraft already registered in Rwanda must inform the RCAA in writing within five days after becoming the owner. The re-registration process is identical to the registration process.

No Consent From Government Entities

Government consent is not required as a prerequisite to the execution and delivery of a bill of sale in relation to an aircraft or engine registered in Rwanda.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

Transfer of Ownership of the Aircraft

Value added tax at the rate of 18% is payable as a consequence of the execution of a sale agreement of an aircraft or an engine located in Rwanda, even in transit, at the time of transfer of title. In addition, a fee ranging from USD250 to USD5,000 applies to the re-registration of the aircraft.

Transfer of the Ownership Interest in an Entity That Owns an Aircraft

The sale of the ownership interest in an entity that owns an aircraft or engine will not be effectively recognised as a sale of the aircraft or engine itself, provided that entity remains the owner of the aircraft or engine. No tax or duty will therefore be due.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

All types of operating/wet/finance leases or leases concerning only engines or parts are permissible and recognised under Rwandan law.

2.1.2 Application of Foreign Laws

A lease involving either a domestic party or an asset situated in Rwanda can be governed by a foreign law.

2.1.3 Restrictions Concerning Payments in US Dollars

Under Regulation 42 of 2022 governing foreign exchange operations and Directive 0520/2023-00041 on transaction in foreign currencies by non-licensed

persons (as amended to date) issued by the National Bank of Rwanda (BNR), there are no restrictions imposed on payments made in foreign currency for goods and services exported or imported.

What is prohibited is transacting in foreign currency on the Rwandan market without authorisation, in such cases – ie, if payments are to be made in a foreign currency, the payor must apply to the BNR for authorisation to transact in a foreign currency, unless it has already been authorised to do so (such an authorisation is not general – ie, it is granted for a specific transaction or operation).

However, all transfers of funds, regardless of the currency, to non-residents and by Rwandan residents to or from a foreign country must be made through authorised intermediaries (eg, all banks licensed by the BNR).

2.1.4 Exchange Controls

There are no foreign exchange controls that could prevent rent payments under a lease, or any repatriation of realisation proceeds if the lease is enforced by a foreign lessor.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

There are no taxes or fees payable for executing a lease physically in Rwanda and/or regarding a domestic party or as a consequence of an original or copy of a lease being brought into Rwanda either physically or electronically.

2.1.6 Licensing/Qualification of Lessors

The lessor does not have to be licensed or otherwise qualified in Rwanda to do business with a Rwandan lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

There are no specific mandatory terms required to be in a lease that would not typically already be included in a lease governed by English or New York law.

Mandatory terms required to be in a lease include:

- the official names and addresses of the parties;
- the duration of the lease;
- detailed information on each aircraft involved in the agreement (make, model, series and registration numbers);
- an explanation of the type of operations that will be conducted by the lessee; and
- an explanation of which party has the responsibility and authority for operational control, maintenance, insurance, etc.

2.2.2 Tax and Withholding Gross-Up Provisions

Tax and withholding gross-up provisions are permissible and enforceable.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease can cover parts that are installed or replaced on an aircraft or engine after its execution. All that is required is that this is clearly stated in the lease agreement.

2.2.4 Risk of Title Annexation

There is a risk of title annexation in respect of aircraft engines installed on an airframe if the aircraft engines are not clearly indicated as separate parts from the aircraft itself.

2.2.5 Recognition of the Concepts of Trust/Trustee

The concept of a trust and the role of an owner trustee under a lease are recognised under Rwandan law.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

Interests of the owner or the lessor of an aircraft are not noted in the Aircraft Register. They can be noted either in the national system for recording interest in any aircraft or aircraft engine register in Rwanda (the "National Register for Interests in Aircraft") or in the International Registry pursuant to the Cape Town Convention (the "International Registry").

In practice, it is advisable to register the interests in the National Register for Interests in Aircraft. However, if the owner or the lessor so wishes, RCAA can be used as a conduit for transmitting the required information to the International Registry. Registration of

interests establishes the priority of right or interest in an aircraft or an aircraft engine.

2.3.2 Registration If the Owner Is Different From the Operator

An operator can register an interest only if they are an owner whereas an owner does not also have to be an operator to register an interest.

2.3.3 Aircraft/Engine-Specific Registers

Leased aircraft are registered in the Aircraft Register. However, the lease agreement and the lessor's interests are registered in the National Register for Interests in Aircraft and/or in the International Registry.

2.3.4 Registration of Leases With the Domestic Aircraft Registry Registration of Leases

A lease, and a lessor's interest therein, can be registered and will be registered in the National Register for Interests in Aircraft and/or in the International Registry.

The parties must provide the RCAA with at least:

- a complete certified copy of the lease agreement; and
- an operator analysis showing how the lease agreement conforms with the Rwanda Civil Aviation Regulations (RCAR). Depending on the type of lease other documents must also be submitted.

Estimated Period for Completion

Once the required documentation has been submitted, the RCAA will issue its decision within two to 45 working days, depending on the type of lease.

Consequence of the Registration

Registration of the lease establishes the priority of interest in the aircraft or engine.

Prior Authorisation From Government Entities

All lease agreements must be submitted to the Flight Safety Services (FSS) for approval. Approval is a prerequisite to the execution and delivery of an aircraft in Rwanda.

2.3.5 Requirements for a Lease to Be Valid and Registrable

The lease needs to be certified to be valid and registrable. If the lease is not in English, an English translation will be required.

2.3.6 Taxes/Duties Payable for Registering a Lease

The registration of a lease is subject to a fee ranging from USD500 to USD10,000 for the registration of an interest in an aircraft or a fee of USD3,000 for the registration of an interest in an engine or any other components.

2.3.7 Registration of Aircraft in Alternative Countries

There is currently one aircraft registered in Turkey which is habitually based in Rwanda.

2.3.8 Requirements for Documents Concerning Registration

The RCAA requires that all documents submitted to it be certified (ie, notarised) copies. While it is not always mandatory, it is strongly recommended to provide an English translation of documents submitted to the RCAA.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A foreign lessor will not be required to pay any taxes as it is not operating in Rwanda. The lessee is solely responsible for paying all relevant taxes and withholding applicable taxes in accordance with the tax legislation.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor will not be deemed to be resident, domiciled or carrying on business in Rwanda as a result of being a party to, or enforcing, a lease.

2.4.3 Engine Maintenance and Operations

If all obligations relating to operation, maintenance and insurance of an aircraft or engine rely on the aircraft operator (ie, the lessee) as per the lease agreement, there is generally no liability imposed on a foreign lessor in that respect.

2.4.4 Damage or Loss Caused by an Asset

If all obligations relating to operation, maintenance and insurance of an aircraft rely on the aircraft operator (ie, the lessee) as per the lease agreement, there is generally no liability imposed on a foreign lessor as a result of damage or loss caused by the aircraft.

2.4.5 Attachment by Creditors

Creditors of a domestic lessee generally have no rights under Rwandan law to attach an aircraft leased to it as the lessee is not the legal/registered owner of the aircraft.

2.4.6 Priority of Third Parties' Rights

Rwanda declared under Article 39 (1) of the Cape Town Convention that:

- liens in favour of workers for unpaid wages arising since the time of a declared default declared by an employer under a contract to finance or lease the subject object; and
- liens in favour of repairers of an object in their possession to the extent of service performed on and value added to that object,

will have priority under its law over an interest in an object equivalent to that of the holder of a registered international interest and will have priority over a registered international interest, whether in or outside insolvency proceedings.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

According to the law governing the organisation of insurance business, a foreign insurer may be authorised by the BNR to cover a risk in the territory of Rwanda where:

- no Rwandan insurer is able to cover that risk; or
- the class of insurance required is not found in Rwanda.

In all other cases, it is mandatory that either all or part of the insurances be placed with Rwandan insurance companies.

2.5.2 Mandatory Insurance Coverage Requirements

No licensee will operate a domestic or an international air service unless, for every accident or incident related to the operation of that service, it has:

- liability insurance covering risks of injury to or death of passengers, damage to or loss of luggage and cargo; and
- insurance covering third-party liability risks.

2.5.3 Placement of Insurance Outside of Jurisdiction

Foreign reinsurers are required by the BNR to establish a representative office in Rwanda and to obtain authorisation before starting operations.

2.5.4 Enforceability of “Cut-Through” Clauses

Cut-through clauses that are in line with insolvency laws and regulations are enforceable in Rwanda.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurance and reinsurance are generally permitted in Rwanda.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors’ Abilities

There are no restrictions on the lessor’s abilities to:

- terminate an aircraft lease;
- re-export the aircraft; and/or
- sell the aircraft, provided that the operation is compliant with:
 - (a) the terms of the lease; and
 - (b) requirements for irrevocable deregistration and export authorisation.

2.6.2 Lessor Taking Possession of the Aircraft

In the event of default, the lessor may take physical possession of the aircraft provided that the lessee has at any time so agreed – ie, if it is clearly stated in the lease agreement. The lessor may alternatively apply for a court order authorising it to take possession of the aircraft.

2.6.3 Specific Courts for Aviation Disputes

There is no specific court for aviation disputes in Rwanda. These disputes are referred to the commer-

cial courts unless the parties have agreed to arbitration.

2.6.4 Summary Judgment or Other Relief

A lessor can obtain an interim order pending final resolution of judicial proceedings if the matter is urgent. The order is issued between four and 17 days from the date of the registration of the application.

2.6.5 Domestic Courts’ Approach to Foreign Laws and Judgments

Parties are generally free to choose a foreign law as the governing law of an aircraft lease and to submit any disputes arising out of the lease to a foreign jurisdiction. The Rwandan courts will generally uphold the parties’ choice.

2.6.6 Domestic Courts’ Recognition of Foreign Judgments/Awards

Recognition and Enforcement of Foreign Judgments

Subject to specific international agreements, foreign judgments are only enforceable in Rwanda after they have been granted exequatur. As a rule, a foreign judgment will be granted exequatur provided that:

- the judgment is not contrary to Rwandan public policy;
- the judgment has acquired res judicata in accordance with the laws of the country of origin;
- the applicant provides a copy of the judgment that fulfils all the conditions necessary for its authenticity in accordance with the laws of the country of origin; and
- the rights of defence have been respected.

Recognition and Enforcement of Foreign Awards

Rwanda recognises and enforces foreign arbitral awards on the basis of reciprocity and therefore only recognises awards issued in countries that themselves recognise awards issued in Rwanda, which is the case for all countries party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).

2.6.7 Judgments in Foreign Currencies

A lessor can obtain a judgment in a foreign currency, as the judgment should refer to the currency agreed upon by parties in the lease agreement.

2.6.8 Limitations on Lessors' Actions Following Termination

Damages for breach of the contract may be provided for in the contract, but only at a reasonable amount based on the actual loss or potential loss that could occur in the case of a breach of the contract.

A clause fixing excessive damages will be deemed contrary to public policy and therefore will not be enforced by Rwandan courts.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

The lessor will not be required to pay taxes or fees in a significant amount (ie, non-nominal) in connection with the enforcement of a lease in Rwanda.

2.6.10 Mandatory Notice Periods

In principle, the lessor will be required to comply with a mandatory notice period of at least ten working days. However, it is highly advisable to give the lessee a reasonable notice period depending on the specific circumstances of the case.

2.6.11 Lessees' Entitlement to Claim Immunity

The lessee is in principle not entitled to claim sovereign or other immunity from suit. In any event, this immunity can be waived.

2.6.12 Enforcement of Foreign Arbitral Decisions

Rwanda has adopted the New York Convention. Rwanda recognises and enforces foreign arbitral awards on the basis of reciprocity, and therefore only recognises awards issued in countries that themselves recognise awards issued in Rwanda, which is the case for all countries party to the New York Convention.

2.6.13 Other Relevant Issues

There are no other relevant issues that a lessor should be aware of in relation to the enforcement of its rights.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

The concepts of contractual assignment and novation are generally recognised in Rwanda.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Assuming that a lessor transferring its rights under an aircraft lease is assigning or novating its rights under the lease to a new lessor pursuant to a New York or English law-governed assignment and assumption agreement or novation agreement, the agreement will be held valid by Rwandan courts provided that:

- the lessee has been given notice in writing;
- the notice identifies the associated rights; and
- the new lessor has consented in writing.

There are no mandatory terms that Rwandan law requires to be included in the agreement. The agreement must only be in writing and enable the associated rights to be identified.

2.7.3 Enforceability of Lease Assignments/Novations

It is not required that an aircraft and/or engine lease assignment and assumption/novation be translated, certified, notarised or legalised to be enforceable against a domestic party.

However, if the case goes to court, a (partial) translation will be required if the agreement is not written in Kinyarwanda.

2.7.4 Filing/Registration of Lease Assignments/Novations

Filing or Registration of Lease Assignment/Novations

A lease assignment or novation can be registered. If so, it will be registered in the National Register for Interests in Aircraft and/or the International Registry.

The parties must, inter alia, provide the RCAA with a complete certified copy of the lease assignment or novation agreement.

Estimated Period for Completion

Once the required documentation has been submitted, the RCAA should issue its decision within a few weeks.

Consequence of the Registration

Registration establishes the priority of interest in the aircraft or engine.

Prior Authorisation From Government Entities

All lease assignment or novation agreements must be submitted to the FSS for approval. This approval is a prerequisite to the execution and delivery of an aircraft in Rwanda.

2.7.5 Taxes/Duties Payable on Assignment/Novation

Provided that the operation does not entail any transfer of ownership, there are no taxes or duties payable in respect of the assignment or novation agreement, or as a consequence of an original or copy of it being brought into Rwanda physically or electronically.

2.7.6 Recognition of Transfer of Ownership Interests

Assuming that the ownership interest of the entity owning an aircraft is transferred with the legal title to the asset remaining with that entity, the transfer will not be effectively recognised as a transfer of ownership of the aircraft itself. Therefore, it is not required to notify the RCAA.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

The RCAA can deregister an aircraft in the following circumstances.

- Upon application by the registered owner (or the lessor) for purposes of registering the aircraft in another state or for any other purpose.
- Upon the destruction of the aircraft or its permanent withdrawal from use.

To achieve this registration, the registered owner or lessor is required to:

- return the certificate of aircraft registration to the RCAA;

- settle any liens or encumbrances attached to the aircraft; and
- remove all nationality and registration marks assigned to the aircraft.

The RCAA may refuse to deregister the aircraft if the deregistration is inexpedient or not in the public interest.

2.8.2 Lessee's/Operator's Consent

The aircraft owner, mortgagee or lessor can in principle apply for deregistration without the lessee's or operator's consent.

2.8.3 Required Documentation

To deregister an aircraft, the registered owner or lessor is required to:

- return the certificate of aircraft registration to the RCAA;
- settle any liens or encumbrances attached to the aircraft; and
- remove all nationality and registration marks assigned to the aircraft.

2.8.4 Duration of Deregistration Process

Relevant regulations do not provide a specific timeframe for the deregistration process.

2.8.5 Aviation Authority's Assurances

The authority does not give any advance assurance as to the prompt deregistration of the aircraft. Deregistration must be carried out in line with the relevant procedures specified by regulations.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

As a general rule, deregistration fees apply only to the deregistration of unmanned aircraft systems (UAS). In the authors' experience, no fees are charged for the deregistration of an aircraft.

2.8.7 Deregistration Power of Attorney

A deregistration power of attorney will be recognised by the RCAA. This power of attorney must: (i) identify the person authorised to make the application; (ii) be in English; and (iii) be certified.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

In the case of a corporate body, the following additional documents are required.

- A certified copy of the certificate of incorporation.
- A certified copy of a document identifying the names of the directors of the company owning or leasing the aircraft and their specimen signatures giving authority to deregister the aircraft.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A deregistration power of attorney does not have to be governed by Rwandan law.

2.8.10 Revocation of a Deregistration Power of Attorney

In principle, the grantor (ie, the lessor) should be able to revoke a deregistration power of attorney even if it is expressed to be irrevocable.

2.8.11 Owner's/Lessor's Consent

The aircraft owner, mortgagee or lessor can in principle export the aircraft without the lessee's or operator's written consent. However, the aircraft owner, mortgagee or lessor must give reasonable prior notice (at least ten working days) in writing to the lessee or operator.

To increase the likelihood that it will be able to export the aircraft without the lessee's consent, the owner, mortgagee or lessor may want to include a specific clause to this effect in the lease or mortgage (as applicable).

2.8.12 Aircraft Export Permits/Licences

An application for an export certificate must be made in a form prescribed by the RCAA at least 14 days before the intended date of export of the aircraft out of Rwanda.

The RCAA will issue an export certificate within a few weeks upon submission of the required documentation.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

Fees ranging from approximately USD500 to USD3,500 are charged in respect of the export of an aircraft.

2.8.14 Practical Issues Related to Deregistration of Aircraft

Proof of removal of registration marks from the aircraft must be made before deregistration is granted.

In addition, the RCAA may refuse to deregister the aircraft if the deregistration is inexpedient or not in the public interest.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

The relevant statutory provisions for insolvency of a lessee domiciled in Rwanda are the following:

- Law 075 of 2021 of 06/12/2021 relating to insolvency (the "Rwanda Insolvency Act");
- Law 34 of 2013 of 24/05/2013 on security interests in movable property; and
- Ministerial Order No 01/CAB.M/019 of 06/02/2019 amending Ministerial Order No 04/CAB.M/08 of 24/07/2018 establishing civil aviation regulations.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Under the Rwanda Insolvency Act, insolvency proceedings start when the lessee is unable to pay its debts when they fall due in the normal course of business, or when its assets are less than its liabilities plus its stated capital.

The following persons may file an application with the commercial courts to start insolvency proceedings:

- the creditor (ie, the lessor);
- the debtor (ie, the lessee);
- the directors or shareholders of one of them;
- the Registrar General; or
- the regulatory authority.

Insolvency proceedings will usually be followed by either:

- judicial reorganisation proceedings, when there is a reasonable prospect for rescuing the company and it is clear that the company will likely meet its future financial obligations as they become due and payable; or
- judicial liquidation proceedings when it is clear that the company is unable to pay its debts.

It is also possible to immediately file for judicial reorganisation or judicial liquidation.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings Cross-Border Insolvency Regime

The Rwanda Insolvency Act establishes a cross-border insolvency regime, which applies notably when:

- assistance is sought in Rwanda in connection with a foreign proceeding;
- foreign and domestic proceedings in respect of the same debtor are taking place concurrently; or
- where foreign creditors have interest in initiating, or participating in, insolvency proceedings in Rwanda.

In these circumstances, a foreign authority, representative or creditor may apply to initiate, or to participate in, insolvency proceedings in Rwanda.

Co-Ordination Principles

The Rwanda Insolvency Act states that co-operation “may be implemented by any appropriate means”, and therefore does not prevent the parties from adopting certain co-ordination principles such as the American Law Institute and International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases 2001, and the INSOL International (International Association of Restructuring, Insolvency and Bankruptcy Professionals).

Recognition of Foreign Proceedings

A foreign representative may apply to the competent court in Rwanda for recognition of a foreign proceeding in which it has been appointed. In doing so, the foreign representative must provide the competent court with the required documentation, including a

certified copy of the decision commencing foreign proceedings and appointing the foreign representative.

Once an application for recognition of the foreign proceedings is made, it will cause an automatic stay over the debtor’s property.

2.9.4 Effect of Lessee’s Insolvency on a Deregistration Power of Attorney

Assuming that a lessee has granted a deregistration power of attorney or an irrevocable deregistration and export request authorisation (IDERA) to a lessor, owner or mortgagee of an aircraft, the power of attorney should not be void or terminated as a consequence of the liquidation of the lessee.

2.9.5 Other Effects of a Lessee’s Insolvency

Assuming that a lessee has possession of the aircraft and is put into liquidation or administration or similar process, the following applies.

- The liquidator may decide to terminate the lease agreement.
- The lessor will not be prevented or delayed from repossessing the aircraft, in accordance with the relevant provisions of the Cape Town Convention, which Rwanda has ratified.
- The aircraft will not be deemed to be part of the lessee’s property.
- The liquidator will not impose the rights of other creditors in priority to those of the lessor. However, it is important that the lessor diligently requests the return of the aircraft.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The main risks for a lender would be the inability to obtain payment from the borrower if the borrower becomes insolvent.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings Moratorium/Stay

As a rule, the rights of secured creditors are not stayed by the commencement of insolvency proceedings. However, where the debtor shows the intention to submit a reorganisation plan along with the applica-

tion for insolvency proceedings, all claims including secured claims and rights of retention are stayed effective from the date of application.

Duration

The debtor must submit a reorganisation plan to the court within a period not exceeding three months from the date of initiating the proceedings. The period of stay cannot exceed six months (including the three months allowed for submitting the reorganisation plan).

2.9.8 Liquidation of Domestic Lessees

In accordance with the Rwanda Insolvency Act, a company is put into liquidation by the appointment of a liquidator, who must be an insolvency practitioner. The liquidator is appointed following an application made by a special resolution of the shareholders, an application made by the directors or any other person if the company's incorporation document so requires or permits, or an order made directly by the court.

There are three main stages in a company's liquidation:

- appointment of a liquidator, by the company itself ("voluntary liquidation") or by the court ("compulsory liquidation");
- collection and realisation of the company's assets; and
- payment to the creditors, with respect to their legal priority.

2.9.9 Ipso Facto Defaults

Performance defaults should be required to repossess an aircraft during a lessee insolvency proceeding.

2.9.10 Impact of Domestic Lessees' Winding-Up

If a domestic lessee is wound up by a court or administration proceedings, the following generally occurs.

- The aircraft may be repossessed by the lessor if the lease is terminated for default of payments or if the liquidator decides not to continue the lease.
- The lease rentals will be due and must be claimed to the liquidator – if the lease rentals cannot be paid, the lessor may terminate the lease agreement.

- The lease security deposit and maintenance will be returned to the lessor upon termination of the lease agreement.
- The maintenance reserves (whether classified as reserves or supplemental rent) held by the lessor and not used, should be returned to the lessee, unless the lease agreement provides otherwise.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

Rwanda ratified the Convention on International Interests in Mobile Equipment (the "Convention") and the related Protocol on Matters specific to Aircraft Equipment (the "Protocol") in 2010.

Registration of interests establishes the priority of right or interest in an aircraft. In practice, the Aircraft Register is used as a conduit for transmitting the required information to the International Registry.

2.10.2 Declarations Made Concerning Conventions

Rwanda has made the following declarations under the Convention.

Article 39 (1)

The following have priority under its law over an interest in an object equivalent to that of the holder of a registered international interest and will have priority over a registered international interest, whether in or outside insolvency proceedings:

- liens in favour of workers for unpaid wages arising since the time of a declared default declared by an employer under a contract to finance or lease the subject object; and
- liens in favour of repairers of an object in their possession to the extent of service performed on and value added to that object.

Article 40

The following will be registerable under the Convention as regards any category of object as if the right or interest were an international interest and will be regulated accordingly:

- rights of a person obtaining a court order permitting attachment of an aircraft object in partial or full satisfaction of a legal judgment;

- liens or other rights of a state entity relating to taxes or other unpaid charges of any type whatsoever (which is not covered by the declaration under Article 39 (1)(a) of the Convention); and
- any other non-consensual right or interest which is not covered by the declaration under Article 39 (1) (a) of the Convention.

Other Declarations

In addition, Rwanda has declared that:

- under Article 52 the Convention will apply to all its territorial units;
- under Article 53 the Commercial Court and the Commercial High Court are the relevant court(s) for the purposes of Article 1 and Chapter XII of the Convention; and
- under Article 54 (2) any remedies available to the creditor under the Convention which are not expressed under the relevant provision thereof to require application to the court may be exercised without leave of the court or other court action.

Rwanda has also made declarations under Articles XXIX and XXX(1), (2), and (3) of the Protocol.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Article XIII of the Protocol applies in Rwanda. An IDERA can be submitted to the Aircraft Register. It must be in the form shown in RCATS 35.125.

2.10.4 Enforcement of Conventions

The authors are not aware of any case law regarding the enforcement of the Convention or the Protocol.

2.10.5 Other Conventions

Rwanda has not ratified the 1948 Geneva Convention on the International Recognition of Rights in Aircraft on 17 May 1971, nor the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

Foreign lenders and borrowers are subject to Rwandan law. As a general rule, there are no restrictions on foreign lenders financing an aircraft locally or on borrowers using the loan proceeds.

3.1.2 Effect of Exchange Controls or Government Consents

Specific Exchange Controls or Government Consents

There are no specific exchange controls or government consents that would be material to any financing or repatriation of realisation proceeds under a loan, guarantee or security document.

General Exchange Controls

Nonetheless, the general exchange control framework will apply to the financing or repatriation of any realisation proceeds (eg, using an authorised bank, see 2.1.3. Restrictions Concerning Payments in US Dollars).

Prior Government Consents

In addition, prior to any financing or repatriation of the proceeds, the realisation itself will require government consents in the case of a security document (eg, obtaining a certificate from the Office of the Registrar General (ORG) authorising the possession of the collateral).

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders, which must comply with the general requirements for securities under Rwandan law.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Downstream, upstream and cross-stream guarantees are permitted in favour of lenders when made in accordance with Rwandan contract law.

3.1.5 Lenders' Share in Security Over Domestic SPVs

It is possible for a lender to take share security over a domestic special purpose vehicle that owns the

financed aircraft. A pledge of shares is recognised under Rwandan law.

3.1.6 Negative Pledges

Negative pledges are recognised under Rwandan law as enforceable contractual obligations when made in accordance with Rwandan contract law.

3.1.7 Intercreditor Arrangements

There are no material restrictions or requirements imposed on intercreditor arrangements.

3.1.8 Syndicated Loans

The concept and role of agent and agency under a syndicated loan is recognised in Rwanda.

3.1.9 Debt Subordination

Contractual or structural debt subordination are recognised in Rwanda if they comply with Rwandan contract and company law.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of all or part of an outstanding debt under an English or New York-governed loan is permissible and recognised under Rwandan law, to the extent the transfer or assignment is not precluded by the contract, does not materially change the obligations of the debtor, and does not violate Rwandan law or public order.

3.1.11 Usury/Interest Limitation Laws

There are no usury or interest limitation laws as such in Rwanda. However, there are other consumer, competition, and banking-related obligations regarding rates and fees, such as publication, disclosure and display obligations.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

The typical form of security and recourse granted in an aviation finance transaction in Rwanda is a mortgage.

3.2.2 Types of Security Not Available

There are no types of security that cannot be taken over an aircraft or related collateral.

3.2.3 Trust/Trustee Concepts

The concept of a trust and the role of a security trustee are recognised in Rwanda.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

A borrower can assign its rights to the aircraft or under an aircraft lease (including in relation to insurances) to a security trustee pursuant to a security assignment or a mortgage.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It is possible to assign the rights and benefits of the lessor under an aircraft lease only, without also assigning its attendant obligations.

3.2.6 Choice of Foreign Law

A security assignment or a guarantee can be governed by English or New York law and does not necessarily have to be governed by Rwandan law to be fully enforceable, as long as it does not violate Rwandan public policy.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments Registration

To perfect the security assignment, it should be registered in the National Register for Interests in Aircraft Registry and/or, if applicable, in the International Registry.

Other Formalities

It is not required that the security assignment is translated, certified, notarised or legalised to be enforceable against a domestic party.

However, if the case goes to court, a translation will be required if the assignment is not written in Kinyarwanda.

3.2.8 Domestic Law Security Instruments

If an English or New York law-governed security assignment were to be taken in respect of an aircraft registered domestically, an additional domestic law security instrument would not be required. Domestic law security instruments or local law filings are not required in order to make Cape Town filings. In the

event of a domestic law security instrument and local law filings, the average costs of execution would be subject to a fee ranging from USD500 to USD10,000 for the registration of an interest in an aircraft or a fee of USD3,000 for the registration of an interest in an engine or any other components.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

An English or New York law-governed security assignment or a domestic law security instrument can be registered in Rwanda.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security over an aircraft and/or an engine is recognised in Rwanda.

3.2.11 Effect of Changes in the Identity of Secured Parties

If the identity of the secured parties under a security assignment changes after its execution, the security interest will not be jeopardised, although the appropriate filings and registrations must be made.

3.2.12 “Parallel Debt” Structures

The authors are not aware of parallel debt structures in aviation financing in Rwanda. The role of security trustee is recognised in Rwanda and, as such, parallel debt structures are not per se necessary (see 3.2.3 Trust/Trustee Concepts).

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment would generally not be deemed to be resident, domiciled, carrying on business or subject to any taxes, solely as a result of its being a party to, or its enforcement of, such a security assignment.

3.2.14 Perfection of Domestic Law Mortgages

A domestic law mortgage over an aircraft or engine can be perfected by registration in the National Register for Interests in Aircraft.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

There are no differences between the forms of security or perfection taken over an aircraft and those taken over spare engines.

3.2.16 Form and Perfection of Security Over Bank Accounts

The form of security typically used to take security over a bank account would be a pledge over the bank account. The pledge can be perfected by registration with the securities registry of the Office of the Registrar General (ORG).

3.3 Liens

3.3.1 Third-Party Liens Permissible Third-Party Liens

As per Rwanda’s declaration under Article 39 (1)(a) of the Convention, a third party can take and register a lien over an aircraft or engine for certain non-consensual liens. Unpaid airport fees, navigation charges, customs duties and repairers’ costs are all permissible non-consensual liens.

Remedies in Enforcing the Lien

To enforce their lien, third parties can seize and detain the aircraft until the due amount gets paid in full.

If airport fees or navigation charges are not paid, the RCAA will initiate court proceedings to attach any aircraft operated or owned by the debtor.

In contrast, a repairer can, without a court order, retain physical possession of an aircraft or engine until it has been paid for its services.

3.3.2 Timeframe to Discharge a Lien or Mortgage

The discharge of a lien or mortgage over an aircraft may take two to three months.

3.3.3 Register of Mortgages and Charges

The interests of an aircraft mortgagee or security trustee can be registered in the National Register for Interests in Aircraft. Registration establishes the priority of interest in the aircraft or engine. These interests cannot be noted or registered in the Aircraft Register.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

Statutory rights of detention and non-consensual preferential liens can arise over an aircraft and/or on a “fleet-wide” basis.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A third party, such as a potential purchaser of an aircraft, may access the content of the National Register for Interests in Aircraft by filing a request with the RCAA.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

There are no relevant differences in enforcing a security assignment as opposed to a loan or a guarantee in Rwanda.

3.4.2 Security Trustees' Enforcement of Their Rights

If, under a security assignment, security is granted to a security trustee by a lessor in respect of its rights under an aircraft lease, that security trustee can enforce its rights under the security assignment pursuant to a notice and acknowledgement executed by that lessor and the relevant lessee respectively in connection with the security assignment.

3.4.3 Application of Foreign Laws

Rwandan courts will generally uphold a foreign law as the governing law of a finance or security document, and the submission to a foreign jurisdiction.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Rwandan courts will recognise and enforce a final judgment of a foreign court or an arbitral award without reviewing the merits of the matter.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

A secured party can take physical possession of the aircraft in execution of a security or lease agreement without further consent required from the lessee.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

The commercial courts are competent to decide enforcement action in commercial aviation matters.

3.4.7 Summary Judgments or Other Relief

A secured party can obtain an interim order pending final resolution of judicial proceedings if the matter is urgent. The order is generally issued between four and 17 days from the date of the registration of the application.

The court may order the secured party to post a bond or provide a guarantee if it decides that the circumstances so require.

3.4.8 Judgments in Foreign Currencies

A secured party under a security agreement or aircraft mortgage can obtain a judgment in a foreign currency.

3.4.9 Taxes/Fees Payable

There are no taxes or fees required from the secured party in connection with the enforcement of a security agreement or aircraft mortgage.

3.4.10 Other Relevant Issues

There are no relevant or notable issues in relation to the enforcement of its rights.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

Rwanda has recently implemented Article 83 bis of the Chicago Convention on International Civil Aviation of 1944 in its domestic legislation. As a result, the RCAA can now enter into agreements with the relevant foreign aviation authorities for the transfer of certain oversight responsibilities from the state of registry to the state of the operator.

4.2 Current Legislative Proposals

There are no known developments in the pipeline at the time of writing.

Trends and Developments

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Liedekerke Great Lakes is a business law firm located in Kigali in Rwanda and is the second subsidiary of Liedekerke in Central Africa. It is a premium Belgian full-service business law firm with offices in Brussels, London, Kinshasa and Kigali. It has a strong advisory practice based on sector expertise and an in-depth knowledge of Belgian/European law, Rwandan law, Burundian law and Congolese/OHADA

law. Drawing on over 40 years of experience working on Africa-related matters and the expertise of more than 130 lawyers, the firm offers unparalleled experience and support in Rwanda and Burundi. It advises clients on all aspects of cross-border and domestic transactions (corporate, data protection, employment, finance, international dispute resolution, IP/IT, real estate, regulatory and transport).

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Rwanda Aims at Becoming a Key Player in the Aviation Sector in Africa

The Republic of Rwanda is a landlocked country situated in the heart of Africa, the world's second largest and second most populous continent. With a modest land mass of 26,338 km² and an estimated population of 14.5 million, it is the most densely populated country in Africa, and current projections estimate that the population will reach around 21 million in 2050. It is hardly surprising, then, that Rwanda is highly import-dependent.

Rwanda has long understood that improving the quality and reliability of transport infrastructure is key to economic development. However, it has to cope with a challenging geography: the country's topography is very hilly, earning it the nickname "land of a thousand hills", and the nearest seaports (Mombasa in Kenya and Dar Es Salaam in Tanzania) are 1,500 km and two days away by road. As a result, travel, whether within Rwanda or to and from neighbouring countries, is often long and costly.

Over recent decades, Rwanda has significantly increased the capacity of its domestic road network through infrastructure construction, rehabilitation, upgrading and maintenance.

Rwanda is now poised to improve regional and international connectivity with the aim of facilitating international trade and reducing transport costs. In doing so, the Rwandan government is pursuing two avenues.

First, the government has been planning for years to connect Kigali (the nation's capital) to the Indian Ocean and the nearest seaports by extending two existing railroads: the so-called "Northern Corridor" connecting Kigali to Mombasa, via Kampala (Uganda) and Nairobi (Kenya), and the "Central Corridor" connecting Kigali with Dar Es Salaam. However, both projects are still under discussion and no official schedule has been announced.

Second, the government has embarked on the construction of the new Bugesera International Airport situated 40 km south of Kigali. This USD2 billion project lies at the heart of Rwanda's current develop-

ment strategy, and could also be part of the solution to Africa's lack of connectivity.

With railway extension projects somewhat stalled, Rwanda will have to rely above all on its new airport to pursue further economic development. The country also intends to take advantage of a number of continental initiatives and to expand the activities of its national airline, RwandAir, in order to become a key player in the aviation sector in Africa.

The Bugesera International Airport in a Nutshell

Launched in 2017, the initial project called for the construction of a relatively small airport to complement the existing Kigali International Airport and develop RwandAir's activities. At the time, the project was entirely overseen by Aviation Travel and Logistics Holdings Limited (ATL), a public holding company set up in 2015 to manage aviation activities such as travel, logistics, freights and cargo handling.

In 2018, Qatar Airways, which was negotiating with RwandAir to acquire a stake in the Rwandan company, expressed its interest in the project because of Rwanda's central location in Africa. Aiming to make the new airport its first hub in Africa, Qatar Airways offered to make a significant investment in the project, subject to the implementation of a more ambitious design and the construction of a bigger airport with greater capacity.

In 2019, negotiations between the parties came to fruition. ATL and Qatar Airways agreed to finance the construction and run the future airport jointly through their new joint venture company, Bugesera Airport Company (BAC).

According to the new design, the facility will boast a 130,000 m² main terminal building with a capacity of eight million passengers a year for the first ten years. It will later be expanded to a capacity of 14 million passengers a year, making it one of the largest airports on the continent.

The first phase of construction, which included works on the main horizontal infrastructure such as runways, drainage concrete works, earthwork platforms, aircraft parking and internal service roads, has been complet-

ed by a Portuguese company called Mota Engil. The next phase mainly concerns vertical works (vertical building constructions, testing and commissioning), and is expected to begin in July 2025. This phase is expected to be completed by the end of 2027–2028.

The facility will also feature a dedicated cargo terminal, capable of accommodating 150,000 tonnes of cargo a year.

A Remedy to Africa's Lack of Connectivity

Rwanda's ambitions with this project extend far beyond its borders. The construction of the new airport not only aims to strengthen connections between Rwanda and the rest of the world, but also to strengthen connections between African countries, which are currently insufficient.

Despite boasting 20% of the world's land area and 17% of the world's population, Africa captures less than 4% of the global air market. This discrepancy is mainly due to high operating costs and the lack of connections between African countries, which means that passengers often have to travel via Europe or the Middle East when flying between two African countries. As a result, flight tickets are often very expensive, and even prohibitive for many.

To tackle this problem, the African Union (AU) is counting on two flagship projects on its Agenda 2063: the Single Aircraft Transport Market (SAATM) and the African Continental Free Trade Area (AfCFTA). With its new airport, Rwanda is positioning itself as a key player in the changes to come.

SAATM

In 1999, 44 African countries signed the Yamoussoukro Decision, the main objective of which is to liberalise air transport in Africa. In 2015, after more than 15 years without any tangible progress, the Assembly of Head of State and Government of the AU reaffirmed its commitment to realise the objectives of the Yamoussoukro Decision. Among them, 11 African countries, including Rwanda, called for the immediate implementation of the Yamoussoukro Decision towards the establishment of a single African air transport market by 2017.

In 2018, the AU eventually launched the Single Aircraft Transport Market (SAATM). The SAATM aims to create a single, unified air transport market in Africa to better connect African countries with each other, which in turn will play a pivotal role in enhancing social, political and economic integration across the continent. According to a 2014 survey of the International Air Transport Association (IATA), if just 12 key Africa countries opened their markets and increased connectivity, an extra 155,000 jobs and USD1.3 billion in annual GDP would be created in those countries.

To date, 35 countries, including Rwanda, have signed up to the SAATM.

AfCFTA

In March 2018, 44 AU member states signed the African Continental Free Trade Area Agreement (the "AfCFTA Agreement") in Kigali, Rwanda. The purpose of this agreement is to create a single market for goods and services across Africa, to allow the free movement of people and investment, and to create a continental customs union. The AfCFTA Agreement entered into force on 30 May 2019.

In October 2022, the AfCFTA successfully launched the Guided Trade Initiative (GTI), which establishes preferential trade among eight member states (Cameroon, Egypt, Ghana, Kenya, Mauritius, Rwanda, Tanzania and Tunisia) for 96 identified commodities, including ceramic tiles, tea, coffee, processed meat products, corn, sugar and pasta. The first shipments under the GTI to benefit from AfCFTA Certificate of Origin included Rwanda's instant coffee and Kenya's batteries destined for Ghana.

So far, the AfCFTA Agreement has been signed by 54 countries and ratified by 46 countries, including Rwanda. However, fully implementing the AfCFTA Agreement will not be an easy task as all parties will need to agree on reducing tariffs and harmonise national legislation to support trade facilitation.

Rwanda's pivotal role

With its strategic location in the heart of Africa and its new airport, Rwanda can rapidly become a true air transport hub and help Africa solve its connectivity issues. And that is no mean feat for a continent where

air transport is sometimes the only way to get from one place to another.

It is no surprise, then, that Rwanda is at the forefront of AU initiatives aimed at boosting connections and trade between African countries. It knows that it is well equipped to be a catalyst for change, but also that its own development depends on it.

Nor is it a coincidence that Qatar Airways has decided to join forces with the Rwandan government and RwandAir to make Kigali its African hub.

RwandAir

For several years, Qatar Airways has been in talks with the Rwandan government, with a view to acquiring a 49% stake in the state-owned airline RwandAir. According to recent statements by both parties, negotiations are expected to conclude soon.

This deal will allow Qatar Airways to expand its global reach to the African continent, with new destinations such as Bujumbura, Libreville and Douala.

For its part, RwandAir plans to double its fleet in the coming years, from the 13 aircraft it operates today (three long-haul aircraft, nine short-haul aircraft and one freighter).

The airline recently added an Airbus A330-200 to its fleet and launched direct flights between London and Kigali in November 2022 and between Paris and Kigali in June 2023 in response to growing customer demand. It also intends to develop cargo services, and has already acquired its first dedicated freighter, a B737-800 (SF), in late 2022.

Revamped legal framework

Rwanda has recently updated its legal framework to better regulate its flourishing aviation industry. Among the recent changes are the following:

- in 2024, Law No 007/2019 of 13/04/2019 establishing Rwanda civil aviation authority, was amended by Law No 024/2024 of 26/01/2024 amending Law No 007/2019 of 13/04/2019 establishing Rwanda civil aviation authority;
- Law No 20/2018 of 29/04/2018 establishing regulations governing civil aviation was amended by law No 059/2024 of 20/06/2024 amending Law No 20/2018 of 29/04/2018 establishing regulations governing civil aviation; and
- Ministerial Order, Rwanda Civil Aviation Special Regulations No RSR/01/2024 of 15 November 2024, amending Ministerial Order No 01/CAB.M/019 of 06/02/2019 amending Ministerial Order No 04/CAB.M/08 of 28/07/2028 establishing civil aviation regulations, was adopted.

A Future Key Player in the Aviation Sector in Africa?

The future of aviation in Rwanda seems bright. Rwanda has already joined forces with Qatar Airways, a major stakeholder in the industry, to build a first-class international airport and expand RwandAir's activities and reach.

Rwanda will also continue to advocate for greater integration and trade on the African continent, and can already boast a modern, investor-friendly legal framework.

These positive factors, alongside Rwanda's central location, will undoubtedly contribute to increasing Rwanda's strategic role in the aviation sector in Africa.

SENEGAL



Law and Practice

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John W Fooks & Co is a full-service corporate, commercial law firm with offices in Madagascar, Mauritius and Senegal, providing support to business and industry across French-speaking Africa. The firm's multilingual legal team, comprising six resident partners and 20 associates, is the only legal practice in the region with a combination of Napoleonic and English law expertise – making the firm the obvious choice when it comes to international transactions in francophone Africa. Its particular strengths are in assisting

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

The execution of an aircraft or engine sale agreement could potentially be subject to the payment of VAT (rate 18%) and registration fees.

1.1.2 Enforceability Against Domestic Parties

Under Senegalese law, a lease agreement or other type of agreement is subject to the prior approval of the director of the *Agence Nationale de l'Aviation Civile et de la Météorologie* or ANACIM (National Agency of Civil Aviation and Meteorology, ie, the authority responsible for civil aviation in Senegal), before being signed by the parties concerned. As the official language in Senegal is French, it would be advisable for a sale agreement to be translated into French, then certified, notarised or legalised to be enforceable against a domestic party.

It should be noted that the ANACIM may accept the submission of documents in English.

1.2 Transfer of Ownership

1.2.1 Transferring Title

The transfer of title is constituted by a sale agreement (ie, it must be evidenced in writing) and is only effective against third parties that are registered in the Aircraft Register (*registre d'immatriculation*). It is understood that title does not extend to include installed parts, such as an auxiliary power unit (APU), unless expressly agreed between the parties.

In general, the sale of the ownership interest in an entity that owns an aircraft or engine does not itself constitute a sale of the aircraft or engine, since this does not change the direct ownership of the aircraft; that is, the registered owner of the aircraft remains unchanged.

1.2.2 Sales Governed by English or New York Law

The bill of sale may be governed by a foreign law (eg, English or New York law).

Without being exhaustive, the bill of sale must include information about the aircraft, and the name and signature of the parties, accompanied by a filed SN-SEC-AIR-FORM-46 form.

1.2.3 Enforceability Against Domestic Parties

As the official language of Senegal is French, it would be advisable for the bill of sale to be translated into French.

The bill of sale should also be notarised or legalised in order to be enforceable against a domestic party.

1.2.4 Registration, Filing and/or Consent From Government Entities

The letter of the law is not entirely clear. However, the understanding is that registration with the ANACIM is required.

As this is a commercial act, the bill of sale is subject to the payment of VAT and the contract must also be registered with the tax authorities.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

The registration of the bill of sale with the tax authorities is subject to the payment of registration fees.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

Operating/wet/finance leases and leases concerning only engines or parts are permissible. Senegal adheres to the Cape Town Convention and Protocol (see 2.10.1 Conventions in Force) and to international good practice.

2.1.2 Application of Foreign Laws

A lease involving either a domestic party or an asset situated in Senegal may be governed by foreign law. In matters of contract, it is the law of the parties that governs, subject to compliance with the mandatory rules laid down by the local laws in force.

2.1.3 Restrictions Concerning Payments in US Dollars

There are no known material restrictions imposed on domestic lessees making rental payments to foreign lessors in US dollars. It is understood that this should be mutually agreed by the parties under the lease agreement, subject to compliance with exchange control requirements and payment offshore.

2.1.4 Exchange Controls

Pursuant to the West African Economic and Monetary Union (WAEMU) regulation of the external financial relations of the member states of WAEMU, transfers and/or receipt of funds outside of WAEMU member states can only be carried out through the central bank, the administration or an approved intermediary or manual exchange-licensed agent.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

There are no taxes/duties payable for executing a lease physically in Senegal by or to a domestic party, or as a consequence of an original or copy of a lease being brought into Senegal, either physically or electronically.

2.1.6 Licensing/Qualification of Lessors

Under local law, a lessor does not have to be licensed or otherwise qualified to do business with a domestic lessee. However, in order to use a foreign-registered aircraft, prior authorisation should be obtained from the Civil Aviation Authority.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

Under the letter of the law of Senegal, the lease agreement must at least include:

- the effective date and expiry date of the lease agreement;
- the names of the parties to the lease agreement;
- a description of the aircraft, including its make, manufacturer, model designation and serial number; and
- a clause indicating the person responsible for the continuing airworthiness for the duration of the lease.

2.2.2 Tax and Withholding Gross-Up Provisions

Tax and other withholding gross-up provisions are permissible and enforceable in Senegal.

2.2.3 Parts Installed or Replaced After a Lease's Execution

The letter of the law does not, in particular, state whether the lease may cover parts that are installed or replaced on an aircraft or engine after its execution and which steps should be taken to ensure that those parts are captured under the lease. In practice, the lease may cover the whole aircraft or just a component of the aircraft.

2.2.4 Risk of Title Annexation

The letter of the law does not provide for the concept of title annexation.

Engines can be registered in a system for the registration of documents affecting title to, or ownership of, any civil aircraft to be considered as separate assets from the aircraft.

2.2.5 Recognition of the Concepts of Trust/Trustee

Under the Organisation for the Harmonisation of Business Law in Africa (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*, or OHADA) Uniform Act organising securities (the "Uniform Act on Securities"), there is the concept of fiduciary transfer of money (*transfert fiduciaire de somme d'argent*), under which a sum of money represents the agreement whereby a settlor transfers funds as security for the performance of an obligation. These funds must be entered into a blocked account opened in the name of the creditor in the books of an approved finance company.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

While the letter of the law is silent on whether the interests of the owner (legal or beneficial) or a lessor of any aircraft can be noted in the Aircraft Register, the understanding is that their interests may be noted. All interests taken in an aircraft or as part of an aircraft registered in Senegal are registered in the local registry. Registration allows the beneficiary's interest to be enforceable against third parties.

2.3.2 Registration If the Owner Is Different From the Operator

Under Senegalese law, the aircraft should be registered in the name of the owner. In the case of a lease, the name and address of the operator can be added to the registration certificate.

2.3.3 Aircraft/Engine-Specific Registers

The lease of the aircraft or engines by the owner is subject to the submission of an application to the Civil Aviation Authority in order to be registered in the Aircraft Register.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

The registration of leases is supposedly optional. However, in practice, registration seems to be mandatory. In addition, when the term of the lease is longer than 12 months, the aircraft should be registered in the Aircraft Register. The law is silent when it comes to the consequences of failing to do so.

The lease agreement and other types of agreement are subject to the prior approval of the director of the Civil Aviation Authority before being signed by the parties concerned, if the aircraft is to be integrated into the fleet of an air transport company holding a Senegalese air-operating permit.

Without being exhaustive, the lease agreement must include at least the following:

- the effective date;
- the expiry date and terms and conditions for termination of the lease agreement;
- the names of the parties to the lease agreement;
- a description of the aircraft; and
- a clause indicating the person responsible for the aircraft's continuing airworthiness for the duration of the lease.

The registration of a lease is made upon presentation of the original deed or a certified copy thereof; subject to the payment of fees, the application is made in a form prescribed by the Civil Aviation Authority.

2.3.5 Requirements for a Lease to Be Valid and Registrable

As the official language of Senegal is French, it would be advisable for the lease to be translated into French. However, in practice, the ANACIM allows for the filing of documents in English. Certification or authentication is only required if the legislation of the country governing the lease agreement requires it.

2.3.6 Taxes/Duties Payable for Registering a Lease

The registration of the lease with the tax authorities is subject to the payment of a registration fee.

2.3.7 Registration of Aircraft in Alternative Countries

As Senegal is a member state of WAEMU, any natural or legal person with Senegalese nationality will be entitled to register its aircraft in another member state.

2.3.8 Requirements for Documents Concerning Registration

See 2.3.5 Requirements for a Lease to Be Valid and Registrable.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

Profits from businesses operated in Senegal are taxable under the General Tax Code. Therefore, if the lessor is incorporated in Senegal, it will be subject to the payment of income tax.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor would not be deemed to be resident or domiciled in Senegal as a result of its being a party to, or its enforcement of, a lease.

2.4.3 Engine Maintenance and Operations

In the case of a foreign aircraft leased by a Senegalese operator, the state in which the aircraft is registered is responsible for approving maintenance organisations to carry out maintenance work on the aircraft and for accepting the Maintenance Control Manual describing the aircraft's continuing airworthiness-management procedures.

In the case of the lease of a Senegalese aircraft by a foreign operator, the ANACIM accepts the Mainte-

nance Control Manual describing the aircraft's continuing airworthiness-management procedures and will take into account any comments from the state of operation; any maintenance organisation required to carry out work on the aircraft must be approved/validated by the Civil Aviation Authority.

Furthermore, in the case of an aircraft registered in Senegal and operated under a leasing agreement by an operator whose principal place of business is in another contracting state, the state of Senegal may transfer to the contracting state all or part of the functions and duties with respect to the leased aircraft, in its capacity as the state of registry. The state of Senegal will be relieved of all liability in respect of the functions and duties transferred.

The registration of a lease or charter with the ANACIM remains an optional operation. However, it is in the interest of the owner (eg, a lessor) of the aircraft to have this operation registered, since registration in the Aircraft Register releases the owner from liability to third parties.

2.4.4 Damage or Loss Caused by an Asset

See 2.4.3 Engine Maintenance and Operations.

2.4.5 Attachment by Creditors

Seizure in a private interest is carried out for the benefit of a creditor of either the owner or the holder of an interest in the aircraft.

2.4.6 Priority of Third Parties' Rights

Under local law, creditors with mortgages on aircraft can exercise their right of pursuit against whatever hands the aircraft passes through to be registered and paid in the order of its registration. The debtor against which the mortgage is taken must be registered in the Aircraft Register as the owner of the aircraft. If this is not the case, it is necessary to transfer the aircraft to the debtor prior to the registration of the mortgage.

The Civil Aviation Authority will inform the applicant by email or by letter in the event of non-compliance.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

Under the letter of the law, every aircraft operator is required to maintain an insurance policy; however, it does not specify whether the insurance should be placed with domestic insurance companies.

2.5.2 Mandatory Insurance Coverage Requirements

Under the letter of the law, the aircraft operator is required to maintain an insurance policy covering civil liability for accidents or damage to passengers, flight crew, baggage, cargo, mail and third parties on the surface, in accordance with the provisions of international conventions.

2.5.3 Placement of Insurance Outside of Jurisdiction

The letter of the law is silent on whether reinsurances can be placed outside the jurisdiction of Senegal up to 100% coverage. However, in practice, the authors understand that reinsurances can be provided in full by a reinsurance company outside of the jurisdiction of Senegal.

2.5.4 Enforceability of "Cut-Through" Clauses

The letter of the law is silent on whether "cut-through" clauses in the insurance/reinsurance documents are enforceable. The prevailing view is that this is allowed in practice.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurances/reinsurances are permitted.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

There are no known restrictions on a lessor's ability to:

- terminate an aircraft lease;
- re-export the aircraft; and/or
- sell the aircraft following that termination.

For a lease registered with the Aircraft Register, an application for deregistration of the lease must be made.

The letter of the law does not specify whether the aircraft needs to be physically located in Senegal at the time of any such action(s).

2.6.2 Lessor Taking Possession of the Aircraft

The lessee's consent or a court order is required to take possession of the aircraft.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts for aviation disputes in Senegal; the general courts are competent to decide these disputes. It should be noted that two major matters of which the Senegalese courts are aware, are the liquidation of the national company Air Afrique and the company Groupe Air Sénégal SA.

2.6.4 Summary Judgment or Other Relief

No issues are foreseen for a lessor to obtain a summary judgment or equitable or other injunctive relief pending final resolution of judicial proceedings to enforce an aircraft lease. The lessor has only to file an application called a "référé" with the competent commercial court. The procedure will take one to three months (there is also the possibility to appeal against a judgment of the commercial court).

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Domestic courts could potentially uphold:

- a foreign law as the governing law of an aircraft lease;
- the submission to a foreign jurisdiction; and
- a waiver of immunity by the parties to that lease.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

In order for a foreign judgment (either a foreign court judgment or an arbitral award) to be enforceable in Senegal, an exequatur order must be issued by a domestic court without re-examination of the matter. For a judgment relating to the enforcement of an international interest (registered in the International Registry in Cape Town), an exequatur will not be required.

2.6.7 Judgments in Foreign Currencies

The letter of the law is silent on whether a lessor under an aircraft lease can obtain a judgment in a foreign

country. Generally, a judgment is left to the discretion of the judge. An equivalent amount in foreign currency may be granted in local currency. This is more common in local practice.

2.6.8 Limitations on Lessors' Actions Following Termination

The letter of the law is silent on this point. However, it is understood that there are no limitations.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

A lessor under an aircraft lease is not required to pay taxes or fees in a significant (ie, non-nominal) amount in connection with the enforcement of an aircraft lease in Senegal.

2.6.10 Mandatory Notice Periods

The lessor should comply with the notice periods for termination of the aircraft lease that are established in the lease agreement.

2.6.11 Lessees' Entitlement to Claim Immunity

The lessee cannot claim any sovereign or other immunity from suit, except in the case of the Republic of Senegal or any of its entities.

The following may not be subject to precautionary seizure:

- aircraft assigned exclusively to a state service, in particular military, customs or police services, including the public postal service, and all other exemptions provided for by the laws and regulations;
- aircraft actually in service on a regular public transport route and essential reserve aircraft; and
- any other aircraft assigned to transport persons or goods for remuneration when it is ready to leave for that transport, except in the case of a debt contracted for the journey it is to make, a claim arising during the journey or a claim relating to sums owed by the owner by reason of the acquisition of this aircraft or of training or maintenance contracts connected with its operation, in which cases the bond may prevent seizure.

However, the aforementioned provisions will not apply to the seizure by the owner of its aircraft by an unlawful

act or in the case of non-payment of the route fee as provided for in Article 101 of the Civil Aviation Code.

2.6.12 Enforcement of Foreign Arbitral Decisions

Senegal has adopted the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).

2.6.13 Other Relevant Issues

There are no other relevant issues that a lessor should be aware of in relation to the enforcement of its rights.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Senegal has recognised the concepts of contractual assignment and novation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Agreements governed by New York or English law would be held valid by a Senegalese court. The consent of the lessee depends on the governing law of the lease agreement and the assignment or novation agreement. Under Senegalese law, consent is required in such circumstances. There are no known mandatory terms that Senegal requires to be included in such an agreement or deed.

2.7.3 Enforceability of Lease Assignments/Novations

It would be advisable for an aircraft and/or engine lease assignment and assumption/novation to be translated into French and notarised or legalised, in order to be enforceable against a domestic party. It is worth noting that the ANACIM may accept the filing of documents in English.

2.7.4 Filing/Registration of Lease Assignments/Novations

The lease assignment must be evidenced in writing and is only effective against third parties by registration with the Aircraft Register. The application on the registration must be made in a form prescribed by the ANACIM. The letter of the law is silent when it comes to the estimated period for completion.

See 2.3.4 Registration of Leases With the Domestic Aircraft Registry.

2.7.5 Taxes/Duties Payable on Assignment/Novation

Any such assignment and assumption/novation agreement could potentially be subject to a registration fee with the tax authority.

2.7.6 Recognition of Transfer of Ownership Interests

Transfer of ownership interests would not be considered per se as a transfer of ownership of the aircraft.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

In Senegal, only the following people can deregister an aircraft:

- the managing director of the ANACIM; and
- the owner (if the applicant is not the owner, they should provide proof of the mandate).

In order to achieve this deregistration, (i) the application must be made in a form prescribed by the ANACIM; and (ii) the applicant must pay the prescribed fees.

2.8.2 Lessee's/Operator's Consent

The consent of the lessee or operator is required for deregistration of the aircraft.

2.8.3 Required Documentation

The owner has to provide the following documents to deregister the aircraft:

- an application made on a form prescribed by the ANACIM;
- the original certificate of registration;
- a certificate of airworthiness;
- an aircraft station licence; and
- a noise certificate, if applicable.

2.8.4 Duration of Deregistration Process

The letter of the law is silent on how long the deregistration process can take.

2.8.5 Aviation Authority's Assurances

It is not known whether the authority provides advance assurances to an aircraft owner, mortgagee or lessor as to the prompt deregistration of the aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

The deregistration of an aircraft is subject to payment of the following fees:

- for an aircraft under 2.25 tonnes, the fees are XOF200,000 (approximately USD356);
- for an aircraft from 2.25 to under 5.7 tonnes, the fees are XOF500,000 (approximately USD890);
- for an aircraft from 5.7 to under 20 tonnes, the fees are XOF1 million (approximately USD1,780); and
- for an aircraft over 20 tonnes, the fees are XOF2 million (approximately USD3,559).

2.8.7 Deregistration Power of Attorney

A deregistration power of attorney (DPOA) is recognised in Senegal. It would be advisable for a DPOA to be translated into French and notarised or legalised to make it enforceable against a domestic party.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

No additional documents are required to enforce a deregistration power of attorney.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A deregistration power of attorney is governed by Senegalese law.

2.8.10 Revocation of a Deregistration Power of Attorney

It would be difficult to revoke an irrevocable power of attorney in practice.

2.8.11 Owner's/Lessor's Consent

It would be advisable to get the lessee's consent in order for an aircraft owner, mortgagee or lessor to export an aircraft, and to get the owner's or lessor's consent for a mortgagee to export the aircraft. The letter of the law does not stipulate whether the asset needs to be located in Senegal at the time of deregistration and/or export, or whether an owner, mortgagee

or lessor, at the time of negotiating the lease or mortgage (as applicable), can take any steps to increase the likelihood that it will be able to export the aircraft without the lessee's consent.

2.8.12 Aircraft Export Permits/Licences

Aircraft export permits/licences are issued in Senegal. The owner of an aircraft or its representative must submit an application for a certificate in a form prescribed by the ANACIM with the following documents:

- airframe;
- engine and propeller logbooks and clearance certificates;
- logbooks; and
- export certificate of airworthiness.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

The letter of the law is silent on any costs/fees/taxes that are charged in respect of the export of an aircraft.

2.8.14 Practical Issues Related to Deregistration of Aircraft

There are no known significant practical issues that an aircraft owner or mortgagee or lessor should be aware of in respect of the deregistration of an aircraft.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

A lessee domiciled in Senegal should acknowledge the following pertinent laws and statutory regimes.

Senegal is a member of the regional organisations WAEMU and OHADA, and some regulations of those organisations are applicable on a principal or accessory basis, in compliance with national legislation on leases. The types of lease contracts used in Senegal and within WAEMU are *affrètement*, location and *crédit bail*.

These contracts are governed by:

- the OHADA Uniform Act on General Commercial Law (adopted in 2010);

- Regulation No 01/2007/CM/UEMOA, adopting the WAEMU Civil Aviation Code;
- Law No 63-62 of 10 July 1963 on the General Code of Obligations (General Theory of Obligations);
- Law No 2012-02 of 3 January 2012 on Leasing (the reference law on local leasing); and
- Law No 2015-10 on the Civil Aviation Code.

Crédit bail is subject to the prior approval of the ANACIM and must be registered in the trade and credit register. The rights and obligations of the parties (the lessor and the lessee) are generally defined in the lease agreement, and particularly by the regulations in force.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

The relevant rules or laws applicable to the types of voluntary and involuntary restructurings, reorganisations, insolvencies and receivership relating to a lessee domiciled in Senegal are protective seizures (i) by an administrative authority (ANACIM) in the case of violation of the regulations of civil aviation; or (ii) by a judge, following a petition filed by a private individual to claim rights against the tenant (eg, debts) and insolvency proceedings (the lessee as a company may be subject in the case of financial difficulties to a judgment of judicial reorganisation or liquidation if the lessee is completely bankrupt). The bankruptcy of the lessee will lead to the withdrawal of its approval. The decision to restructure or reorganise belongs to the partners of the lessee's company, as this is an internal management decision of the company.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

As indicated in 2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations, the OHADA Uniform Act on insolvency proceedings (the "Uniform Act on Insolvency") regulates all matters relating to insolvency law in all OHADA member states. Its purpose is:

- to organise pre-insolvency procedures of conciliation, preventative settlement and rehabilitative proceedings of reorganisation and asset liquidation

so as to preserve the economic activities and employment of debtor companies, quickly rehabilitate healthy companies and liquidate distressed ones in such a way that the debtors' assets will be maximised for the purpose of increasing receivables to be recovered by creditors, and establish a specific order of payment to secured or unsecured collateral securities;

- to define the rules applicable to judicial administrators; and
- to set proprietary and professional sanctions as well as criminal proceedings related to the default of the debtor, applicable to the debtor company's top executives and individuals involved in the insolvency proceedings management.

Nevertheless, if the international leasing agreement so provides or the liquidator deems it relevant, the liquidator may apply all the good practices applicable in this matter, in particular from adopting co-ordination principles (most notably, the American Law Institute and International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases 2001, and the INSOL International (International Association of Restructuring, Insolvency and Bankruptcy Professionals) Global Principles for Multi-Creditor Workouts 2000), and implement the UNCITRAL Model Law on Cross-Border Insolvency or any other relevant international principles or rules.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

Irrevocable powers of attorney regarding the assets that make up the estate of the insolvent party will not survive its insolvency. However, taking into account that the aircraft is not owned by the lessee/insolvent, the aircraft is not part of the insolvency estate, and for that reason the DPOA will survive. If the amounts regarding the lease are not paid, the lessor may invoke an event of default to terminate the agreement, requesting the repossession and deregistration of the aircraft through a DPOA.

2.9.5 Other Effects of a Lessee's Insolvency

In Senegal, the declaration of the insolvency of a lessee does not automatically suspend a lease agreement. Under Article 14 of Regulation No 07/2002/CM/WAEMU relating to the licensing of air carriers within

WAEMU, “[a]n air carrier against which insolvency proceedings have been instituted shall not be authorised by the Civil Aviation Authority to retain its licence if there is no concrete possibility of satisfactory financial restructuring within a reasonable timeframe”. Furthermore, Senegal has adhered to the Cape Town Convention and Protocol and has the option to choose one of the alternatives provided under Article XI of the Protocol.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The main risk for a lender is the lack of sufficient assets to provide for the payments due to creditors, including the lender, as a result of insolvency. If the lender does not have a guarantee of its own (eg, a mortgage), it will be deemed as any other common creditor that should be paid equally in accordance with the debtor’s existing assets.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

A moratorium can be imposed in connection with insolvency proceedings in accordance with the provisions of the Uniform Act on Insolvency.

Moreover, Article 54 of Law No 2012-02 of 3 January 2012 on leasing in Senegal provides as follows.

“[I]n the event of preventive settlement, legal redress or liquidation of the lessee’s assets, the leased asset shall escape all proceedings by the lessee’s creditors, whether unsecured or secured, regardless of their legal status and rank, and whether considered individually or as a whole in the context of collective legal proceedings.

“The liquidator (expert) in charge of the liquidation may, within 60 days of the date of their appointment, choose to continue the leasing contract under the agreed conditions, or to terminate it.

“At the end of this 60-day period, and if no decision is received by the lessor, the leasing contract under the agreed conditions is returned to the lessor.

“If the liquidator, after having been informed by the lessor, decides to continue the execution of the con-

tract until its term and if, at the time of its occurrence, the purchase option has not been exercised, the contract shall be deemed to have been terminated by operation of law; the asset shall then be immediately returned to the lessor.

“Without prejudice to the foregoing, the lessor shall be entitled to claim the rentals and all other sums resulting from the leasing agreement, payable until the goods are returned.”

In addition, a two-year moratorium on the payment of rents may be granted to the lessee in accordance with the provisions of Articles 9 and 75 et seq of the Uniform Act on Insolvency.

2.9.8 Liquidation of Domestic Lessees

The methods by which a domestic lessee can be liquidated or placed in administration or receivership are conciliation, preventative settlement, legal redress and liquidation of property. All these procedures are provided for and organised by the Uniform Act on Insolvency.

In the case of provisional administration, this is pronounced by a judge in summary proceedings when the normal functioning of the company is rendered impossible, either because of the management, executive or administrative bodies, or because of the partners. The legal regime is organised by Articles 160-1 to 160-8 of the OHADA Uniform Act on Commercial Companies and Economic Interest Groups.

2.9.9 Ipso Facto Defaults

Performance defaults are also required in order to repossess an aircraft during a lessee insolvency proceeding. For more information, see 2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings.

2.9.10 Impact of Domestic Lessees’ Winding-Up

See 2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The Convention on International Interests in Mobile Equipment (the “Cape Town Convention”) and

the related Protocol on Matters Specific to Aircraft Equipment (the "Protocol") are in force in Senegal. The authorised entry point codes are not required for registering international interests. In Senegal, only the ANACIM is authorised to register international interests. It is up to the lessor to carry out the formalities of registration of the interests in Cape Town and, if the aircraft is registered in Senegal, the lessor will carry out the formalities of registration in the local register in Senegal.

The fees to be paid are defined by Decree No 2019-1120, fixing the basis and rate of fees and products due for services rendered by the ANACIM – for more information, see **2.8.6 Costs, Fees and Taxes Relating to Deregistration**. There are no fixed deadlines for the processing of applications, but it does not take long to register in practice. Filing of documents in English is allowed.

2.10.2 Declarations Made Concerning Conventions

It was under the 1944 Chicago Convention and the Cape Town Convention and Protocol that Senegal drew inspiration for its 2015 Civil Aviation Code. Any act or legal fact concerning an aircraft registered in Senegal must be registered in the Aircraft Register (eg, the leasing or charter of an aircraft or a component of an aircraft, transfer of ownership of an aircraft, and registration and deletion of a mortgage).

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Article XIII of the Protocol is applied domestically. An irrevocable deregistration and export request authorisation (IDERA) is attached to the interests-registration form. This allows the ANACIM to prevent the aircraft from leaving Senegal.

2.10.4 Enforcement of Conventions

Senegalese courts have little experience with the application of the Cape Town Convention or Protocol because the parties to the international leasing contract insert a clause conferring jurisdiction on the courts of foreign countries.

2.10.5 Other Conventions

Senegal is a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft

and the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

There are no particular restrictions on foreign lenders financing an aircraft locally, or on borrowers using the loan proceeds.

3.1.2 Effect of Exchange Controls or Government Consents

There are no exchange controls or government consents required in respect of financing or repatriation of realisation proceeds under a loan, guarantee or security document. Payment or debt repayment operations abroad are freely carried and are subject to certain restrictions set out in the foreign exchange regulations.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders in accordance with the provisions of the Uniform Act on Securities.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Downstream, upstream and/or cross-stream guarantees are permitted under OHADA law. The registration is normally done in the Companies Registry (RCCM), except as otherwise specifically provided for aircraft (ie, the Aircraft Register within the ANACIM).

3.1.5 Lenders' Share in Security Over Domestic SPVs

It is not advisable for a lender to take share security over a domestic special-purpose vehicle (SPV) that owns the financed aircraft. A pledge of shares is permitted, however.

3.1.6 Negative Pledges

A negative pledge is not recognised under OHADA law. However, the parties are free to organise one under the lease agreement.

3.1.7 Intercreditor Arrangements

Under local law, there are no material restrictions or requirements imposed on intercreditor arrangements.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent under a syndicated loan have been recognised by the reform of the Uniform Act on Securities since 2010.

3.1.9 Debt Subordination

The method of debt subordination is permissible and recognised for debts contracted by the liquidator at the time of liquidation of the bankrupt company. The Uniform Act on Insolvency gives the liquidator the possibility to reimburse the debts of the commitments the liquidator had to make during the liquidation of a bankrupt company.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer/assignment of debts under foreign laws is permitted. However, the air transport licence (eg, held by the lessee) is neither assignable nor transferable.

The contracts for the assignment of receivables are registered in Senegal with the tax authorities at 1% of the contract amount.

3.1.11 Usury/Interest Limitation Laws

The legal interest rate is set each year by the Minister of Finance and Budget. For the year 2024, this rate has been set at 5.0336%, as per Order No 002349 MFB/DGSF/DMC/DER/an dated 2 February 2024. (In 2022, the rate was 4%.)

3.2 Security

3.2.1 Typical Forms of Security and Recourse

The typical forms of security and recourse that would be granted in an aviation finance transaction domestically are mortgages and guarantees in accordance with the Uniform Act on Securities and national law.

3.2.2 Types of Security Not Available

It is not possible to set up pledges over aircraft or related movable assets such as engines, as they are only subject to mortgages.

3.2.3 Trust/Trustee Concepts

The concept of a trust and the role of a security trustee are recognised under OHADA law.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

The law is silent on the assignment of rights to an aircraft by a borrower to a security trustee; however, it is believed this is impossible because of the risk of conflict of interest. However, the borrower is permitted to assign its rights over the aircraft or under an aircraft lease to a third party, pursuant to a security assignment or a mortgage.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It is possible for someone to assign a credit that they own, including the credits that a lessor is entitled to under an aircraft lease, such as the rents resulting from that agreement. However, during the term of the leasing contract, the lessor may only transfer all or part of its rights under the lease agreement to another undertaking engaged in lease or debt-collection activities. The lessor is obliged to notify the lessee of the transaction by a deed with a definite date. The transferee is obliged to respect the contract concluded by the transferor.

The lessee may not assign its contractual right of use and may not sublet the leased asset without the written consent of the lessor.

The assignor will guarantee the lessor the performance by the assignee of its duties as provided in the law and stipulated in the lease agreement.

The duration of the sublease agreement may not exceed the duration of the lease agreement.

3.2.6 Choice of Foreign Law

Security assignments or guarantees governed by English or New York law are permitted and enforceable. The parties are free to choose the law governing their contract.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

It is a requirement to have a written contract or document, including in particular the designation of the secured claims and the assigned claims with their accessions and future claims; their individualisation and identification must be made possible in the assignment deed. The registration of such an assignment is also advisable in order to be enforceable. Taking into account that, under Senegalese law, rights may be fully enforced against parties via judicial proceedings and that, according to the Senegalese Civil Procedure Code, all documents filed with the courts, if demanded by the judge, should be translated into French, in such a circumstance it is necessary to file a translation of those documents duly certified by a translator registered in the list of experts.

3.2.8 Domestic Law Security Instruments

Assignments of security interests governed by English or New York law over an aircraft registered in Senegal are permitted, especially where the lease is international and the lessor is a foreigner not domiciled in Senegal. The ANACIM does not currently transfer any registration to the Cape Town International Registry. Therefore, it is the responsibility of the parties or the lessor to deposit their international guarantee in Cape Town. If the aircraft is registered in Senegal, it is up to the parties or the lessor to make the same registration locally. The execution of the guarantees carried on the international register of the Cape in Senegal is simple – it will only be necessary to bring an official act delivered by Cape Town to the ANACIM and, if the document is in conformity, the Civil Aviation Authority will proceed to the execution of the international guarantee. For guarantees registered on the national register, it will be necessary to look for an enforceable title delivered by a judge.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

Senegal does not have a register for the registration of assignments of security interests made under the rules of a foreign law. Therefore, no registration will be made in Senegal. Furthermore, if the assignments of interests concern an aircraft registered in Senegal, an entry must be made in the local register.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of such security interests is not recognised. However, if the parties' leasing agreement so provides, there will be no problem.

3.2.11 Effect of Changes in the Identity of Secured Parties

The regime of assignment of securities is not recognised by Senegalese law (for more details, refer to the [Cape Town Convention](#)).

3.2.12 “Parallel Debt” Structures

The concept of “parallel debt” can be used by domestic structures. However, this legal regime is not organised, so parties may refer to New York law.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment would not be deemed to be resident or domiciled in Senegal and would only be subject to taxes if it received any income in Senegal.

3.2.14 Perfection of Domestic Law Mortgages

It is necessary to file a domestic law mortgage over an aircraft or engine with the Aircraft Register to produce legal effects.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

There are no differences between the form of security (or perfection) taken over an aircraft and that taken over spare engines.

3.2.16 Form and Perfection of Security Over Bank Accounts

The security used to take security over a bank account is an on-first-demand bank guarantee, by which the bank, at the request of its beneficiary, should immediately make payment of the secured amount or a pledge account.

3.3 Liens

3.3.1 Third-Party Liens

A third party can take or register a lien over an aircraft and its accessories. Under Article 57 of the Civil Aviation Code, third parties can hold liens over:

- the legal costs incurred in order to achieve the sale of the aircraft and the distribution of its price in the common interest of the creditors;
- the remuneration due for the salvage of the aircraft;
- the indispensable expenses incurred for its preservation;
- claims resulting from the contract of employment of the members of the flight crew and other persons assigned to the onboard service but with regard to pledges for a period of six months at the most; and
- the fees due for the use of devices and aids to air navigation and landing.

The aforementioned liens are on the aircraft or on the insurance indemnity provided for in Article 50 of the Civil Aviation Code. The liens follow the aircraft through whosoever's hands it passes.

These privileges relate only to maintenance work and costs performed on the aircraft. However, they cannot cover the value of work done on other assets.

The rights of recourse of a third-party lien holder are the same as those of a creditor.

In the event of the sale in Senegal of an aircraft encumbered in a state party to the Convention on the International Recognition of Rights in Aircraft signed in Geneva on 19 June 1948, the rights provided for in Article 1 of that convention and encumbering the aircraft may only be exercised without prejudice to the recognised rights of the victims of damage caused to the surface by virtue of Article 7 of the Convention.

3.3.2 Timeframe to Discharge a Lien or Mortgage

The liens expire three months after the event that gave rise to them, unless the creditor has previously entered its claim in the registers, after having had the amount acknowledged amicably, or, failing that, after having brought legal proceedings in respect of it.

In addition, liens are extinguished, independently of the normal methods of extinguishing liens:

- by the sale of the aircraft in court in the manner provided for by decree; and

- in the case of a voluntary transfer duly entered in the register of registrations, at the latest one month after publication of the transfer in a legal gazette of the seller's domicile, unless, before the expiry of this period, the creditor notifies its claim to the purchaser at the domicile elected by it in the publications.

The registration preserves the mortgage for ten years from the date of its entry in the registers. Its effect ceases if the registration is not renewed before the expiry of this period.

The mortgage guarantees, in the same rank as the capital, three years of interest in addition to the current year.

Creditors with mortgages on aircraft may exercise their right to follow through whosoever's hands they pass in order to be registered and paid according to the order of their registration and after the preferential creditors, subject to the exceptions provided for by the local regulations in force.

3.3.3 Register of Mortgages and Charges

A register for the registration of mortgages exists in Senegal. Registration in this register confers on the mortgagee a rank according to their order of registration, which allows them to be given priority over subsequent mortgagees and other unsecured creditors.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

A mortgage registration can be ordered by a court on an aircraft and its accessories (on a "fleet-wide" basis).

The precautionary arrest of aircraft may be ordered following a decision of the ANACIM, the police or customs, but not as a result of liens.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

Verification of an aircraft's freedom from encumbrances can be found in the register of mortgages held by the director general of the ANACIM.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

There are no relevant differences between enforcing a security assignment and enforcing a loan or guarantee.

3.4.2 Security Trustees' Enforcement of Their Rights

It would be permitted for a third party (a security trustee, etc) to enforce its rights under a security assignment, by which a security is granted to it by a lessor in respect of its rights under an aircraft lease, pursuant to a notice and acknowledgement executed by the lessor and the lessee respectively in connection with that security assignment.

3.4.3 Application of Foreign Laws

The courts in Senegal will uphold a foreign law as the governing law of a finance or security document, and the submission to a foreign jurisdiction. A Senegalese court will also recognise a foreign law as the governing law after an exequatur order by a Senegalese court.

As regards the enforcement of international guarantees registered in the Cape Town International Register, their application in Senegal does not require the intervention of a judge (to obtain the exequatur). Guarantees are automatically enforced by the ANACIM if the creditor has an official document delivered by the Cape Town International Register.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Senegalese courts will accept and enforce a final judgment of a foreign court or an arbitral award without re-examination of the matter, if the decision is in accordance with the prescriptions of the law.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

It would be possible for a secured party to take physical possession of an aircraft to enforce a security agreement/aircraft mortgage without the lessee's or operator's consent.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

The courts are competent to judge cases relating to a security agreement/aircraft mortgage if the registration is made in Senegal. However, in practice, it is very rare for a Senegalese court to judge such cases. The creditor may bring an official document delivered by the Cape Town International Register as proof.

3.4.7 Summary Judgments or Other Relief

It is possible for a secured party to obtain a summary judgment pending a final resolution of judicial proceedings to enforce a security agreement/aircraft mortgage. However, this is only possible if there is urgency and there is no possibility for the counterparty to challenge the request of the lessor.

3.4.8 Judgments in Foreign Currencies

It is not possible for a secured party under a security agreement/aircraft mortgage to obtain a judgment in a foreign currency unless it is a decision by a court abroad. However, the claimant may state in the application the foreign currency equivalent in XOF that the claimant wishes to obtain.

3.4.9 Taxes/Fees Payable

In order to enforce its claims, the secured party is liable to pay court fees. These fees are nominal in Senegalese courts. There is no tax to be paid.

3.4.10 Other Relevant Issues

There are no other relevant issues of which a lender should be aware in relation to the enforcement of its rights.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are no other issues or court judgments that are relevant to these matters.

4.2 Current Legislative Proposals

No current proposals before the legislature are worthy of mention in respect of aviation finance and leasing.

SERBIA

Law and Practice

Contributed by:

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Dražković Popović & Partners (D2P) is a leading full-service business law firm that provides legal services in both Serbia and Montenegro. The firm was founded in January 2013. Its partners are locally and internationally educated and qualified and it specialises in specific industry sectors to provide expert advice to the most demanding clients in relation to the most complex transactions. The firm is a trusted partner in navigating the complexities of aircraft purchase and sale, leasing and debt finance transactions. With a team of seasoned aviation lawyers,

it provides comprehensive legal support tailored to the specific needs of regional aviation businesses, operators, lessors and financiers. The firm handles the needs of foreign and domestic clients in all commercially relevant areas of law, including: general corporate counselling; financial consulting; aviation finance and leasing; commercial agreements; dispute resolution; competition issues; data protection; employment; ESG; energy; tax; capital markets; public private partnerships; M&A; real estate; and intellectual property.

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D2P LAW

1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

Upon the execution of a sale and purchase agreement, the seller has to pay the absolute rights transfer tax. The tax rate levied is 2.5% of the purchase price.

1.1.2 Enforceability Against Domestic Parties

From the Serbian law perspective, a sale and purchase agreement needs to be notarised to be enforceable against the domestic party. However, a translation of the sale and purchase agreement is only necessary if it is to be used before the authorities in Serbia including, but not limited to, the courts. If a sale and purchase agreement is to be governed by a foreign law, its validity will be assessed from the perspective of the governing law.

1.2 Transfer of Ownership

1.2.1 Transferring Title

A duly executed sale and purchase agreement under Serbian law will present the basis for the transfer of title to an aircraft from one party to another. The transfer will be perfected through its entry in the aircraft register. If the sale and purchase agreement were to concern the sale of the entire aircraft the agreement would automatically entail the sale of all of its integral parts including engines. The sale and purchase agreement may also have the sale and purchase of an individual part of an aircraft, eg, the engine, as its subject.

In addition, the sale of ownership interest in an entity that owns an aircraft or engine will not effectively be recognised as a sale of the aircraft or engine itself as long as the sold entity remains the owner.

1.2.2 Sales Governed by English or New York Law

Serbian law will in principle recognise the transfer of title to an aircraft that is registered in a foreign register if the transfer of title was governed by English or New York law.

1.2.3 Enforceability Against Domestic Parties

A bill of sale, governed by the foreign law, does not need to be translated, certified, notarised or legalised

in order for it to be enforceable against the domestic party. However, translation of the bill of sale is necessary if it were to be used before the authorities in Serbia including, but not limited to, the courts.

1.2.4 Registration, Filing and/or Consent From Government Entities

If a bill of sale were to be registered in the Serbian Aircraft Register the following steps will have to be taken.

Firstly, an aircraft can be registered in the Serbian Aircraft Register if it is not registered with a foreign aircraft register and one of the following conditions is met:

- the aircraft owner (in whole or in part) is Serbia, a legal entity or entrepreneur registered in Serbia;
- the aircraft owner (in whole or in part) is a citizen of Serbia, with a permanent residence in Serbia or abroad, if the home airport of the aircraft is in Serbia;
- the aircraft operator is a legal entity, entrepreneur or natural person whose corporate seat or permanent residence is in Serbia; or
- the aircraft owner or operator is a foreign natural or legal entity and consent has been obtained from the Ministry of Construction, Transport and Infrastructure.

The process of registering an aircraft with the Aircraft Register consists of:

- applying to the Commercial Court in Belgrade for a resolution on the registration of aircraft. The following documentation is needed: a bill of sale; excerpts from the relevant registers; and any other document that could be requested by the judge based at their own discretion; and
- filling out an application form and submitting it to the Civil Aviation Directorate along with the court resolution.

There is no legally prescribed timeframe but the total process is expected to take approximately one month.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

See 1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

All types of operating/wet/finance leases or leases concerning only engines or parts are generally permissible and recognised.

2.1.2 Application of Foreign Laws

Contractual obligations between the parties to the lease agreement may be governed by a foreign law. However, issues of ownership over the aircraft and other proprietary rights are governed by the law of the land in which the aircraft is registered. While the contractual obligations (such as the ones stemming from the lease agreement) can be governed by a foreign law, particular potential disputes that could stem from the lease agreement could be governed by Serbian law, if the aircraft is registered in Serbia (disputes concerning insolvency proceedings over the lessee, disputes over ownership over the aircraft and the like).

2.1.3 Restrictions Concerning Payments in US Dollars

Rent payments may be made in US dollars.

2.1.4 Exchange Controls

There are no specific exchange control rules that will prevent rent payments under a lease or any repatriation of realisation proceeds.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

The registration of the lease of an aircraft is optional. However, if it is registered, the registration of the lessee with the Aircraft Register will cost between RSD4,210 (approximately EUR36) and RSD16,750 (approximately EUR140), depending on the category the aircraft is in.

2.1.6 Licensing/Qualification of Lessors

The lessor does not have to be licensed or otherwise qualified in Serbia to do business with a domestic lessee.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

No mandatory terms have to be in a lease governed by English or New York law.

2.2.2 Tax and Withholding Gross-Up Provisions

Tax and other withholding gross-up provisions are permissible and enforceable.

2.2.3 Parts Installed or Replaced After a Lease's Execution

The concluded lease can cover parts that are installed or replaced on an aircraft or engine after its execution.

2.2.4 Risk of Title Annexation

There is no specific risk of title annexation in respect of aircraft engines installed on an airframe.

2.2.5 Recognition of the Concepts of Trust/Trustee

The concept of trust/trustee of an owner is not recognised under Serbian law.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

An aircraft lease may be registered in the Aircraft Register. This is optional but advisable as the lease becomes a matter of public record once it is registered.

2.3.2 Registration If the Owner Is Different From the Operator

The Aircraft Register contains information regarding both the owner and the operator of the aircraft. Both the owner and the operator of the aircraft may therefore be registered.

2.3.3 Aircraft/Engine-Specific Registers

Lease information is registered in the Aircraft Register. There is no separate engine-specific register in Serbia.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

Registration of the lease with the Aircraft Register is optional but preferable. This is because if the lease is registered with the Aircraft Register third parties will be considered to be familiar with the existence of the lease.

The registration of the lease of an aircraft may be initiated by the lessor or the lessee by submitting the request for the registration of the lease to the Aircraft Register along with the:

- lease agreement;
- airworthiness certificate;
- corporate documentation; and
- court decision on registration of the aircraft.

If the lessee is a foreign person/entity, the consent of the competent ministry is required. Additional documentation may be requested by the Aircraft Register.

The estimated period for completion is one month.

2.3.5 Requirements for a Lease to Be Valid and Registrable

A lease needs to be concluded in the form specified in its governing law. There are no additional requirements under Serbian law. If the lease agreement were to be presented to the Serbian authorities, a certified translation of the agreement would be needed.

2.3.6 Taxes/Duties Payable for Registering a Lease

See 2.1.5. Taxes/Duties Payable for Physical Execution of a Lease.

2.3.7 Registration of Aircraft in Alternative Countries

There are no popular alternative countries in which aircraft habitually based in Serbia are typically registered.

2.3.8 Requirements for Documents Concerning Registration

All documents submitted to the authorities, including, but not limited to, the bill of sale or the lease agreement have to be provided in the original or a certified copy and accompanied by the certified translation.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A foreign lessor has to pay income tax on the income it gains through its permanent business unit in the territory of Serbia, unless otherwise stipulated in a tax treaty.

In other words, unless a foreign lessor has a permanent establishment in Serbia, it is not required to pay income tax.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor may not be considered to be resident, domiciled, carrying on business or subject to any taxes as a result of its being a party to, or its enforcement of, the lease.

2.4.3 Engine Maintenance and Operations

Generally speaking, liabilities in respect of aircraft or engine maintenance and operations may not be imposed on a foreign lessor under a lease as a result of it being a party to the lease.

2.4.4 Damage or Loss Caused by an Asset

A lessee is liable for the damage that is caused to the property or health of third persons by the aircraft.

2.4.5 Attachment by Creditors

Creditors of a lessee could not attach an aircraft leased to it but owned by a different entity.

2.4.6 Priority of Third Parties' Rights

In very limited circumstances, it is possible that some third-party rights will take priority over a lessor's rights under an aircraft lease through the legal concept of "right of retention". This is where the third party retains the aircraft as a guarantee of payment owed, eg, repair and maintenance costs, warehousing, depositary costs, etc.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

There are no mandatory Serbian regulations which dictate insurance must be placed with a domestic insurance company.

2.5.2 Mandatory Insurance Coverage Requirements

Current insurance limitations are aligned with the Montreal Convention, which amount up to:

- 100,000 SDR for injury and death;
- 4,150 SDR per passenger for delay;
- 1,000 SDR for baggage; and
- 17 SDR for cargo.

2.5.3 Placement of Insurance Outside of Jurisdiction

Reinsurance of an aircraft abroad is not regulated under Serbian law. However, from a general legal perspective, one might conclude that the practice will not be against the applicable regulation.

2.5.4 Enforceability of “Cut-Through” Clauses

“Cut-through” clauses are not valid in Serbia because of the limitations imposed by the mandatory foreign exchange (FX) rules which are set out in Serbian legislation.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurance/reinsurance are allowed.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors’ Abilities

There are no specific restrictions on a lessor’s ability to terminate an aircraft lease, re-export the aircraft and/or sell the aircraft following termination of the lease under Serbian law.

In addition, it is not mandatory for an aircraft to be physically located in Serbia for either of these operations.

2.6.2 Lessor Taking Possession of the Aircraft

A lessor will have to have obtained a court order to take possession of the aircraft from the lessee.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts for aviation disputes. If an aviation-related dispute were to arise and if the Serbian courts had the competence to decide the dispute, it would be adjudicated by the competent commercial court.

2.6.4 Summary Judgment or Other Relief

A lessor may request an interim injunction before the final resolution of the judicial proceedings. As a result of the interim injunction, the aircraft could be taken away from the lessee until the proceedings are completed.

In order for the court to grant an interim injunction, the lessor will have to prove both the existence of its claim and that it would incur damage if the interim injunction were not granted by the court. In practice, it usually takes approximately one month for a court to decide on the request.

2.6.5 Domestic Courts’ Approach to Foreign Laws and Judgments

Serbian courts in general uphold:

- a foreign law as the governing law of an aircraft lease;
- submission to a foreign jurisdiction; and
- a waiver of immunity by the parties to the lease.

2.6.6 Domestic Courts’ Recognition of Foreign Judgments/Awards

Serbian courts recognise and enforce a final judgment of a foreign court or an arbitral award without re-examining the matter if the procedural prerequisites for enforcement of the judgment/award are met.

2.6.7 Judgments in Foreign Currencies

A lessor under an aircraft lease may obtain a judgment in a foreign currency. However, the enforcement of this judgment will have to be made in local currency in Serbia.

2.6.8 Limitations on Lessors’ Actions Following Termination

There are no statutory limitations on a lessor’s ability to recover default interest. A lessor may charge additional rent following the termination of the lease for default if this course of action is in line with the governing law and the concluded agreement.

2.6.9 Lessor’s Requirement to Pay Taxes/Fees

A lessor under an aircraft lease does not have to pay taxes or fees in a significant (ie, non-nominal) amount

in connection with the recognition and enforcement of the lease in Serbia.

2.6.10 Mandatory Notice Periods

If Serbian courts were to deliberate in a case that involves the application of Serbian law, the judge might potentially declare the mandatory notice period null and void if it is too short or if it creates an imbalance between the parties.

2.6.11 Lessees' Entitlement to Claim Immunity

Under Serbian law, the lessee does not have any legal instrument with which it will be entitled to claim sovereign or other immunity from suit in the sense that the legal instrument will prevent it from being a party to the judicial or arbitral proceedings.

2.6.12 Enforcement of Foreign Arbitral Decisions

Serbia has adopted the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and Serbian courts recognise and enforce foreign arbitral decisions. Grounds for refusal of the recognition of foreign arbitral award correspond to those listed in Article V of the New York Convention and are not country specific.

2.6.13 Other Relevant Issues

There are no other relevant issues that a lessor should be aware of in relation to the enforcement of their rights.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Serbia recognises the concepts of contractual assignment and novation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Under Serbian law (assuming that a lessor transferring its rights under an aircraft lease is assigning or novating its rights under the lease to a new lessor), the lessor will have to notify the lessee of the assignment. In this respect, the lessee does not have to give consent. If the lessee intends to assign its rights to the other entity, it will need to notify the lessor of its intention and obtain the lessor's consent. There are

no mandatory jurisdiction-specific clauses that have to be included in the assignment.

2.7.3 Enforceability of Lease Assignments/Novations

It is not necessary for an aircraft and/or engine lease assignment and assumption/novation to be translated, certified, notarised or legalised to be enforceable against a domestic party. However, the translation of the assignment agreement is necessary if it were to be used before the authorities in Serbia including, but not limited to, the courts.

2.7.4 Filing/Registration of Lease Assignments/Novations

Registration of the lease in the Aircraft Register is not mandatory. However, if the lease is registered in the Aircraft Register, any assignment of the rights and obligations under the lease should also be registered in the Aircraft Register. The procedure for registering the assignment of the lease is relatively simple and involves submitting the assignment agreement and notifying the relevant authorities of the conducted assignment. No government applications or consents are required as a prerequisite to the execution and delivery of an aircraft and/or engine lease assignment and assumption/novation.

2.7.5 Taxes/Duties Payable on Assignment/Novation

The registration fee for the assignment in the Aircraft Registry is RSD4,210 (approximately EUR36).

2.7.6 Recognition of Transfer of Ownership Interests

The sole change of the ownership interest of the entity owning an aircraft will not warrant notification in the Aircraft Register.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

An owner or an operator of an aircraft may submit a deregistration request of an aircraft.

If the deregistration request is submitted by an operator, a certified written statement of consent by an owner must be submitted along with the deletion request. If the deregistration request is submitted by an owner,

a certified written statement of consent of an operator must be submitted along with the deletion request.

The Registrar removes the aircraft from the Aircraft Register ex officio if the aircraft is destroyed, permanently unusable, missing or completely unavailable or whose airworthiness certificate is not valid for more than ten years.

Once the Registrar decides on the deregistration request it issues the deletion resolution along with a confirmation of the deletion and, if the aircraft is airworthy, the Civil Aviation Directorate will issue an export airworthiness certificate. This is the basis on which the aircraft may be registered with another aircraft register.

2.8.2 Lessee's/Operator's Consent

An aircraft owner may only apply for the deregistration of the aircraft with the prior consent of the lessee.

2.8.3 Required Documentation

In order for an aircraft to be deregistered from the Aircraft Register, an owner or an operator will have to provide a:

- deregistration request; and
- statement of consent from the other party (owner/operator).

2.8.4 Duration of Deregistration Process

There is no statutory deadline on the duration of the deregistration process. However, one can expect the process to take several business days to complete.

2.8.5 Aviation Authority's Assurances

The aviation authority is not authorised to issue advance assurances to an aircraft owner, mortgagee or lessor as to the prompt deregistration of the aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

The fee for deregistration of an aircraft is RSD5,020 (approximately EUR43).

2.8.7 Deregistration Power of Attorney

A deregistration power of attorney does not constitute a necessary legal document under Serbian law (and

Serbia is not a signatory to the Cape Town Convention). However, in practice, it is usually issued along with the lease. A deregistration power of attorney does not need to be translated, certified, notarised or legalised to be enforceable against a domestic party. However, the translation of the subject document is necessary if it were to be used before the authorities in Serbia including, but not limited to, the courts.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

As a deregistration power of attorney is not mandatory/necessary by itself no additional documents are required in order to determine its validity.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A deregistration power of attorney may be governed by a foreign law but is most commonly governed by Serbian law in practice.

2.8.10 Revocation of a Deregistration Power of Attorney

As a deregistration power of attorney is not statutorily regulated, there is no regulation on the possibility of revoking the deregistration power of attorney. It may therefore be revoked at any time like any other power of attorney.

2.8.11 Owner's/Lessor's Consent

The lessee's consent will be necessary for the aircraft to be exported. A mortgagee is not entitled to export the aircraft under Serbian law.

An asset does not need to be located in Serbia at the time of deregistration and/or export.

2.8.12 Aircraft Export Permits/Licences

Upon request, the Aircraft Register will issue the deletion resolution, along with confirmation of the deregistration. In practice, it takes several business days to obtain the necessary documents. When it is issued, the confirmation of the deregistration (ie, export certificate) is valid for an unlimited period of time. It can therefore be obtained at any time before the termination of the lease. In practice, as the confirmation of deregistration contains the exact time of the deregistration from the Aircraft Register, it is usually obtained

in advance so that it will be possible to commence with the procedure of registration of an aircraft in another foreign register.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

If the aircraft is registered in the Aircraft Register, before the aircraft is exported, the deregistration of the aircraft must take place. In this scenario the following fees apply.

- The fee for the resolution on deletion amounts to RSD5,020 (approximately EUR43).
- The fee for the export airworthiness certificate (required for the foreign registry where the aircraft will be registered) amounts to RSD4,210 (approximately EUR36).

2.8.14 Practical Issues Related to Deregistration of Aircraft

There are no significant practical difficulties involved in deregistration as such. However, it is worth highlighting that deregistration from the Aircraft Register and registration with another aircraft register must be punctually co-ordinated. In other words, the exact date and time of deregistration must coincide with the registration in a new register so that any potential time difference between two registrations is avoided.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

Serbia recognises two types of reorganisation, restructuring, insolvency and liquidation proceedings.

- Corporate liquidation, which is regulated by the Company Law (*Zakon o privrednim društvima*, Official Gazette of RS Nos 36/2011, 99/2011, 83/2014, 5/2015, 44/2018, 95/2018, 91/2019 and 109/2021).
- Insolvency proceedings, which are regulated under the Law on Insolvency (*Zakon o stečaju*, Official Gazette of RS Nos 104/2009, 99/2011, 71/2012, 83/2014, 113/2017, 44/2018, 95/2018 and 44/2025).

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Serbia recognises two types of voluntary and involuntary restructurings, reorganisations, insolvencies and receivership proceedings (see 2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Organisations, Insolvencies and Liquidations).

- Corporate liquidation: proceedings that may be initiated if the company is solvent and wants to terminate itself. This procedure is initiated by the company before the Business Register and the creditors are called upon to register their claims. From an operational perspective, the company appoints the liquidation administrator who represents the company in the corporate liquidation proceedings. When the company provides evidence that it has settled all creditor claims, it may request the deletion of the company (liquidation) from the Business Register.
- Insolvency proceedings: these may be initiated if:
 - (a) the company has extended monetary difficulties;
 - (b) there is a danger that the company will become insolvent;
 - (c) the company is over indebted; or
 - (d) the company does not act in line with the reorganisation plan.

The insolvency proceedings are court proceedings in which the appointed insolvency administrator represents the insolvency debtor. Insolvency proceedings may lead to the reorganisation of the company or dissolution of its assets and subsequent liquidation.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

In the case of parallel insolvency proceedings before the Serbian courts and the courts of foreign jurisdiction, Serbian courts are statutorily obliged to co-operate with the foreign courts. This co-operation may entail the:

- appointment of the person that will take actions in line with the court's instructions,
- exchange of data;

- co-ordination of managing the assets of the debtor;
- conclusion of the agreement on co-ordination between the courts; and
- co-ordination of the proceedings.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

A deregistration power of attorney is not regulated under Serbian law. However, from a general legal perspective, even if it is issued, the opening of insolvency proceedings will not have any effect on it.

2.9.5 Other Effects of a Lessee's Insolvency

When insolvency proceedings are opened, an insolvency administrator is appointed. It is the insolvency administrator who, from that point onwards, manages the debtor. At the moment when the insolvency is opened the insolvency administrator is entitled to choose which contracts will remain in force and which will be terminated (including the existing leases). If, for any reason, the lease is continued as of the moment of opening the insolvency proceedings, the insolvent estate will continue to be a party to the lease agreement and will have to settle the rent.

If the lease agreement is terminated, the lessor is entitled to issue a request for the removal of the aircraft from the estate of the lessee and hand the aircraft over to the lessor.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The main risk for a lender if a borrower, a guarantor or an entity providing security becomes insolvent is that it will not be able to collect its receivable.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

A moratorium is imposed at the opening of the insolvency proceedings and lasts for the duration of the proceedings. It encompasses all the obligations of the insolvency debtor apart from the obligations undertaken by the insolvent estate.

2.9.8 Liquidation of Domestic Lessees

A lessee may be liquidated or placed in administration or receivership either at its own request or at the

request of a third party (liquidator or a creditor) in Serbia.

2.9.9 Ipso Facto Defaults

Ipso facto default clauses are valid under Serbian law and often appear in practice. If the clause is activated, the lessor is entitled to issue a request for the removal of the aircraft from the estate of the lessee and the handover of the aircraft to the lessor.

2.9.10 Impact of Domestic Lessees' Winding-Up

If a domestic lessee is liquidated by a Serbian court ruling, the following generally occurs.

- The aircraft may only be repossessed if the lessor fails to take action in order to remove the aircraft from the insolvent estate.
- The lessor must register its debt to the insolvency administrator for rentals and other costs (if any) that became owed before the insolvency proceedings were opened.
- The lease security deposit will remain with the lessee as long as the lease is in force.
- The maintenance reserves paid to the lessor (whether classified as reserves or supplemental rent) will remain with the lessor as long as the lease is in force.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The Cape Town Convention is not recognised in Serbia.

2.10.2 Declarations Made Concerning Conventions

See 2.10.1 Conventions in Force.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

See 2.10.1 Conventions in Force.

2.10.4 Enforcement of Conventions

See 2.10.1 Conventions in Force.

2.10.5 Other Conventions

Serbia has ratified the 1948 Geneva Convention on the International Recognition of Rights in Aircraft. However, it has not ratified the 1933 Rome Conven-

tion on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

In line with Serbian regulations, only banks are entitled to issue financial loans. Borrowers are entitled to use the loan in line with agreed loan terms.

3.1.2 Effect of Exchange Controls or Government Consents

In particular cases envisaged under the FX rules, the National Bank of Serbia should be notified of the financing or repatriation of realisation proceeds under a loan, guarantee or security document.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders subject to certain FX restrictions.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Downstream, upstream and/or cross-stream guarantees are permitted in favour of lenders when they are made in line with the FX rules. In specific cases envisaged under these rules, the National Bank of Serbia should be notified of the guarantees being issued.

3.1.5 Lenders' Share in Security Over Domestic SPVs

Whether a lender should take share security over a domestic special purpose vehicle that owns the financed aircraft is a business decision. However, generally speaking, the action will be advised. A pledge of shares is recognised under Serbian law.

3.1.6 Negative Pledges

Negative pledges are recognised under Serbian law.

3.1.7 Intercreditor Arrangements

Intercreditor arrangements may be made. However, these arrangements are only effective between the creditors who concluded the arrangements.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent (such as the facility agent) under a syndicated loan is recognised in Serbia.

3.1.9 Debt Subordination

All valid debt subordination methods are permissible and recognised.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

It is possible to transfer or assign all or part of an outstanding debt under an English or New York law-governed loan.

3.1.11 Usury/Interest Limitation Laws

There is no specific limit as to the amount of contractual interest that may be envisaged. However, the court is entitled to reduce the amount of interest upon a party's request if it assesses it is exceedingly high. The assessment is performed on a case-by-case basis.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

Typical forms of security and recourse granted in an aviation finance transaction in Serbia include promissory notes, pledges and bank guarantees.

3.2.2 Types of Security Not Available

All security types under the law may be taken over an aircraft or related collateral such as engines, warranties or insurances.

3.2.3 Trust/Trustee Concepts

The concept of a security trustee exists under Serbian law. However, the trustee should be registered as a security trustee in the relevant register.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

The assignment of rights and obligations under the lease of aircraft is possible. However, any change on the side of the lessor will have to be reflected in the lease agreement (ie, the lease agreement should be annexed to reflect the change). If the lease agreement is registered with the Aircraft Register, the data in the Aircraft Register will need to be changed.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It is possible to assign the rights and benefits only without also assigning the attendant obligations of the lessor under an aircraft lease under Serbian law.

3.2.6 Choice of Foreign Law

A security assignment or a guarantee may be governed by English or New York law under Serbian law.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

As securities present ancillary obligations in relation to the main contract, they can be assigned to the other party solely through the assignment of the entire agreement that they provide security for. If the security is registered with the Aircraft Register in Serbia, the Aircraft Register should be notified of the assignment. If the Aircraft Register is notified of the assignment, a translation of the assignment agreement will be mandatory.

3.2.8 Domestic Law Security Instruments

If an English or New York law-governed security assignment is taken in respect of an aircraft registered domestically it will be advisable that the security is transferred to the domestic Aircraft Register.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

There is no Serbian regulation that explicitly prohibits an aircraft, used in Serbia, from being encumbered by a security established in the foreign country in line with the foreign law. The security on an aircraft that is registered in a foreign country can be “transferred” to the domestic Aircraft Register by registering the aircraft itself.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests is generally recognised under Serbian law.

3.2.11 Effect of Changes in the Identity of Secured Parties

If there are any changes in the identity of the secured parties the change should be reflected in the contractual documentation.

3.2.12 “Parallel Debt” Structures

“Parallel debt” structures are not recognised under Serbian law.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment will not be considered to be resident, domiciled, carrying on business or subject to any taxes as a result of its being a party to, or its enforcement of, the security assignment.

3.2.14 Perfection of Domestic Law Mortgages

A domestic law mortgage over an aircraft is perfected by registering it with the Aircraft Register.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

Security taken over the spare engines is perfected through registration in the Pledge Register held by the Business Registers Agency.

3.2.16 Form and Perfection of Security Over Bank Accounts

Security of the pledge over bank accounts is perfected through registration in the Pledge Register which is held by the Business Registers Agency.

3.3 Liens

3.3.1 Third-Party Liens

A third-party lien in relation to unpaid airport fees, navigation charges, customs duties, etc is not registered.

In the case of repairers’ costs and similar liens, the creditor will be, under very limited conditions, entitled to the right of retention of the aircraft until the debt owed is settled.

A fleet lien is not envisaged under Serbian law.

The right of retention is a statutory right and no specific legal action is required in that regard.

3.3.2 Timeframe to Discharge a Lien or Mortgage

The discharge of a lien or mortgage can be made within a day.

3.3.3 Register of Mortgages and Charges

Serbia does not have a separate register of mortgages. Mortgages on aircraft will be inscribed in the Aircraft Register. The inscription of the mortgage in the relevant register is a necessary prerequisite for the perfection of the mortgage. Serbia does not have a register of charges.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

There are no statutory rights or non-consensual preferential liens on a “fleet-wide” basis.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser of an aircraft should search the Aircraft Register to verify that an aircraft is free of mortgages.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

There are no significant differences in enforcing a security assignment as opposed to a loan or a guarantee.

3.4.2 Security Trustees' Enforcement of Their Rights

A security trustee who is registered in the relevant register may enforce its rights under an aircraft lease.

3.4.3 Application of Foreign Laws

In principle, Serbian courts will uphold:

- a foreign law as the governing law of a finance or security document; and
- the submission to a foreign jurisdiction.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Serbian courts will, if other procedural criteria for enforcement of the foreign arbitral award are met, recognise and enforce a foreign arbitral award without re-examination of the merits of the dispute.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

The secured party cannot take physical possession of the aircraft to enforce a security agreement/aircraft mortgage without the lessee's or operator's consent.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

Serbian courts have competence to decide enforcement actions under a security agreement/aircraft mortgage.

3.4.7 Summary Judgments or Other Relief

It is possible for a secured party to obtain an interim injunction, which will present a form of security. In order for the court to render an interim injunction, the lessor will have to prove to the court it has a claim and this will be damaged if the interim injunction were not enacted. The issuance of bonds or similar guarantees in connection with the interim injunction will not be necessary.

3.4.8 Judgments in Foreign Currencies

A secured party under a security agreement/aircraft mortgage may obtain a judgment in a foreign currency.

3.4.9 Taxes/Fees Payable

A secured party will not have to pay taxes or fees in a non-nominal amount in connection with the enforcement of a security agreement/aircraft mortgage.

3.4.10 Other Relevant Issues

There are no other relevant issues a lender should be aware of in relation to the enforcement of its rights.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are no other material issues and/or any material court judgments that are relevant to the purchase, sale, lease or debt finance of an aircraft registered domestically and/or involving a Serbian party.

4.2 Current Legislative Proposals

There are currently no proposals before the legislature in relation to the issues covered in this guide.

SPAIN



Law and Practice

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Lopez-Ibor Abogados has a dedicated aviation finance team that is recognised nationally and internationally for its wealth of experience and strong track record in this field. The department was set up by the firm's founding partner, Alfonso López-Ibor, who has more than 30 years of experience in the aeronautical sector. The Madrid-based team consists of five highly experienced professionals. This dedicated team is probably larger than the average transport

team in other law firms. The team provides advice on the leasing and maintenance of aircraft and aviation engines, the sale and financing of various types of aeronautical equipment, as well as on establishing guarantees like mortgages and pledges and their registration. All of our services are provided within an international and multidisciplinary context, ensuring comprehensive solutions to complex aviation finance matters.

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LOPEZ-IBOR DPM

1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

The analysis of taxes should be tailored to each transaction, taking into consideration the specifics of Spanish tax law, relevant double taxation treaties, and the location of delivery. When an aircraft is sold and made available, or delivered to the buyer, within Spanish territory – inclusive of Spanish airspace and territorial waters – it generally falls under the purview of Spanish VAT (21%), given certain conditions.

However, there are circumstances in which the sale of aircraft can be tax-exempt. The bill of sale may be considered evidence of delivery of the aircraft and/or engine in Spain for the purposes of VAT. A judgment of the European Court of Justice (ECJ) dated 12 July 2012 (A OY Case; C-33/11) has determined that the exemption provided under article 148 B) of Directive (EU) 2006/112 for airlines involved in international air navigation also applies to owners or lessors of aircraft leased to those airlines. Therefore, there is an inconsistency between current Spanish tax law and European law as interpreted by the ECJ; as a result, any attempt to charge VAT by the Spanish tax authorities will be reversed by the ECJ. In these circumstances, the VAT risk has to be characterised as very low.

The execution of a bill of sale in Spain does not attract Spanish stamp duty.

1.1.2 Enforceability Against Domestic Parties

A bill of sale and other related documents must be translated into Spanish by an official translator (*traductor-intérprete jurado*) in order to be filed with the Spanish Register of Goods and Chattels (*Registro de Bienes Muebles*) and the Civil Aircraft Registry (*Registro de Matrícula de Aeronaves*), as well as to comply with requirements for presentations in Spanish law courts during legal disputes.

However, it is noteworthy that the enforceability of a sale agreement against a domestic party is contingent solely upon its execution by the involved parties,

not upon its translation, certification, notarisation, or legalisation.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Spanish law requires the existence of a valid title and delivery of the asset to the buyer, and this extends to all parts detailed in the sale agreement. The Spanish registers currently recognise the bill of sale as a valid document proving the transfer of a title provided it has such effect according to the governing law of the bill of sale of the country of registration of the aircraft or engine or the *lex situs* of the engine. Additionally, Article 1463 of the Spanish Civil Code also permits replacing the physical delivery of the aircraft or engine by the mere consent or agreement of the purchaser and the seller (*traditio ficta*), if the aircraft or engine cannot be put at the disposal of the buyer at the time of the closing of the sale.

The sale of the ownership in an entity that owns an aircraft or engine means that the purchaser will be the new owner of such aircraft or engine.

1.2.2 Sales Governed by English or New York Law

See 1.2.1 Transferring Title.

1.2.3 Enforceability Against Domestic Parties

See 1.2.1 Transferring Title.

1.2.4 Registration, Filing and/or Consent From Government Entities

There are no government applications or consents required as a prerequisite to the execution and delivery of a bill of sale in relation to an aircraft or engine registered in Spain.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

See 1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

There are no types of operating/wet/finance leases or leases concerning only engines or parts not permissible nor recognised. However, a lessor engaging in finance leasing must hold a banking licence in Spain.

2.1.2 Application of Foreign Laws

A lease involving either a domestic party or an asset situated in Spain can be governed by a foreign law, pursuant to Article 3 of the Regulation (EC) No 595/2008 of 16 June 2008 (Rome I).

2.1.3 Restrictions Concerning Payments in US Dollars

There are no exchange controls in Spain and transfer of money is free to OECD and EU countries and most other third countries subject to applicable sanctions dictated by the Spanish authorities, the European Union or the United Nations. However, local banks may scrutinise payments to and from a very limited number of countries, such as Iran, Russia, Lebanon, and Syria under the provisions of Law 19/2003 of 4 July 2003 on the legal regime governing the movement of capital and foreign economic transactions and on certain measures to prevent money laundering.

2.1.4 Exchange Controls

There are no particular exchange controls that could prevent rent payments under a lease or any repatriation of realisation proceeds.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

Generally, lease payments are tax-exempt when they relate to aircraft that are operated for international commercial flights. However, specific circumstances surrounding the lease should be considered individually. See **1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement**.

2.1.6 Licensing/Qualification of Lessors

A lessor does not have to be licensed or otherwise qualified in Spain to do business with a domestic lessee (however, an exception is given in **2.1.1 Non-Permissible Leases**).

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

Mandatory terms such as parties, rent or term are usually included in the leases governed by English or New York law.

2.2.2 Tax and Withholding Gross-Up Provisions

Gross-up provisions can be enforced as contractual provisions between the parties but cannot be opposed to third parties or to the Spanish authorities.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease agreement can be modified under the principle of freedom of contract to cover subsequent additions to the aircraft such as replaced parts and spare parts.

2.2.4 Risk of Title Annexation

Engines are movable properties under Spanish law and are generally considered separate or detachable parts of aircraft. Engines may, and usually are, purchased, leased and disposed of separately from the airframe, and can be removed from the airframe without detriment to either the airframe or the engines themselves.

2.2.5 Recognition of the Concepts of Trust/Trustee

Spain is not a party to the Hague Convention on Trusts 1986. The concepts of "trust" and "trustee" are unknown under Spanish law and not recognised by the Spanish property registers but usually accepted by the Movable Asset Registry and the Aircraft Registry.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The interest of the owner or a lessor of an aircraft may be noted in the relevant Spanish register.

In Spain there are two registers:

- The Aircraft Register is an operator and administrative register that provides a Spanish registration mark to an aircraft, granting it Spanish nationality under the Chicago Convention (1944).

- The Movable Assets Register is a register of title ownership and encumbrances/liens that provides evidence regarding the status of ownership and liens over the relevant aircraft/engine, upon which third parties can rely.

2.3.2 Registration If the Owner Is Different From the Operator

The Aircraft Register is an operator register; therefore, the aircraft is registered domestically in the name of the operator as the lessee or owner.

The actual ownership of the aircraft will be reflected in the Movable Assets Register as it is the register of title ownership.

2.3.3 Aircraft/Engine-Specific Registers

There is no specific register for leases concerning aircraft or engines.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

The leases must be recorded both in the Movable Assets Register and the Spanish Aircraft Register. There are no leases subject to consent from the Spanish government.

To obtain provisional registration marks, the lessee must file the necessary documents with the Aircraft Register. Subsequently, to acquire definitive markings, the lease must be recorded with the Spanish Register of Goods and Chattels and then with the Aircraft Register. The process of recording a lease typically takes four to eight weeks.

2.3.5 Requirements for a Lease to Be Valid and Registrable

The signatures on the lease must be attested by a notary and apostilled in accordance with the Hague Convention of 1961 or certified by a Spanish consul in the country where the lessor is domiciled. See **1.1.2 Enforceability Against Domestic Parties**.

2.3.6 Taxes/Duties Payable for Registering a Lease

In Spain, the registration of a lease is not subject to the payment of specific taxes. However, there are certain costs associated with the registration of the lease

contract, such as administrative fees, registrar's fees, notary fees and translation fees.

2.3.7 Registration of Aircraft in Alternative Countries

A popular alternative country where Spanish-based aircraft are sometimes registered is Ireland, as it has favourable tax regimes and regulations for aircraft registration and is known for attracting aircraft registrations from different parts of the world. Regulation (EC) 1008/2008 allows an EU air carrier to be registered not only in the country that granted the operating license but in the register of another EU country. However, this is subject to certain limitations; eg, the Spanish Civil Aviation Authority may insist that registration in such EU country be cancelled or may only allow it for a specific period of time.

2.3.8 Requirements for Documents Concerning Registration

The Spanish Aircraft Register only requests copies since documents are filed by electronic means. Documents need to be translated and notarised and/or authenticated. Also, the Aircraft Register requests proof of previous submission and registration in the Movable Asset Registry where original copies of the relevant documents must be submitted, given that both registries work and operate in co-ordination in this area.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

Foreign lessors are not required to pay any income or capital gains or other taxes upon leasing an aircraft or engine to a domestic lessee.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

Foreign lessors will not be deemed to be resident, domiciled or carrying on any commercial activity or business in Spain or subject to any tax in Spain solely as a result of the execution, delivery and performance of the lease.

2.4.3 Engine Maintenance and Operations

The liabilities regarding aircraft or engine maintenance and operations rely on the lessee but each situation should be analysed on a case-by-case basis, as the

relevant lease may contain clauses that are prejudicial to the lessors.

2.4.4 Damage or Loss Caused by an Asset

The general rule of Spanish law is liability by fault or negligence (*culpa o negligencia*). However, the Law on Air Navigation (Law 48/1960) is based on strict liability, which arises even if the liable party has acted with all proper due diligence, but in such an event the amount of recoverable damages is limited by the Law on Air Navigation in accordance with the weight of the aircraft.

The Law on Air Navigation and the Montreal Convention of 28 May 1999 state that the lessee is liable for damages caused during a flight.

Although Spanish law only refers expressly to the aircraft operator and any other party as being directly responsible for injury, the lessor may also be considered vicariously liable (*responsabilidad subsidiaria*), either due to the broad application of the rules of the Civil Code (Article 1908 CC: “the owner is responsible for damages caused by machines which have not been serviced with due diligence”) or the application of the analogy criteria of the Convention of Rome of 7 October 1952. The Rome Convention is applicable to international flights.

2.4.5 Attachment by Creditors

An aircraft is the property of the owner, not the lessee.

2.4.6 Priority of Third Parties' Rights

No third party is entitled to seize an aircraft or engine due to debts incurred by the lessee, except where the seizure is declared in line with administrative, tax, labour, or social security rules.

A mortgage beneficiary's right will take priority over a lessor's right.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

Insurances can be placed with Spanish insurance companies and EU or European Economic Space (EEA) insurance companies.

2.5.2 Mandatory Insurance Coverage Requirements

Insurances must comply with the requirements set forth by European Regulation (EC) No 785/2004 of 21 April 2004, as amended by the European Regulation (EU) No 285/2010 of 6 April 2010 and the Regulation (EU) 2020/1118 of 27 April 2020 and, at national level, Articles 126 et seq. and the Third Final Provision of the Air Navigation Law 48/1960 of 21 July 1960 (*Ley sobre Navegación Aérea*).

2.5.3 Placement of Insurance Outside of Jurisdiction

Reinsurances can be placed outside Spain up to 100% coverage since the Spanish insurer does not need to retain a minimum percentage of coverage.

2.5.4 Enforceability of “Cut-Through” Clauses

Regarding reinsurances, cut-through clauses are not permitted by virtue of Article 78 of the Law on Insurance Contracts (*Ley del Contrato de Seguro*), which prohibits direct claims by the insured against the reinsurer. Therefore, these clauses are unenforceable in Spain if the insurance contract is governed by Spanish law.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurances/reinsurances are permitted.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

If the lessor seeks to repossess an aircraft before the expiration of the lease, and the lessee consents, the parties must sign a lease termination agreement that authorises the lessor to appear as the legal holder of the aircraft before the Spanish Air Safety Agency and the Aircraft Registry. This agreement (i) must bear the notarised signatures of the parties (and be apostilled if applicable) and (ii) be submitted to the Spanish Aircraft Matriculation Registry, if deregistration of the aircraft is required.

If the lessee does not consent, the lessor, aiming to deregister the aircraft, can enforce an irrevocable deregistration and export request authorisation (IDERA) if it is properly recorded with the Spanish Aircraft Register. Following an event of default the lessor

can enforce such IDERA after sending notice to the lessee. Deregistration via enforcement of the IDERA takes around two to three business days if the IDERA is properly recorded in Spain. If there is no IDERA in place, the only remedy will be court action. “Self-help” remedies are severely restricted under Spanish law.

If the aircraft is exported to a non-EU country, customs clearance through a DUA (*Documento Único Administrativo*), form submission is necessary. DUA clearance is granted as a matter of course except in a contested repossession, where the troubled lessee has been declared insolvent. The aircraft does not need to be physically in Spain at the time of termination of the lease, re-export or sale of the aircraft after such termination. However, the sale of the aircraft could be construed under the Spanish tax law as the lessor being established in Spain for tax purposes and therefore subject to local corporate tax.

2.6.2 Lessor Taking Possession of the Aircraft

A lessor/owner is not entitled to repossess/foreclose by taking physical possession of the relevant aircraft without the consent of the lessee.

If the lessor/owner/lender is seeking to repossess the aircraft following the occurrence of an event of default, it is required to pursue its claim through judicial proceedings. In such a case, the lessor/owner/lender would have to formally declare an event of default by serving official notice to the lessee, and if the lessee fails to redeliver the aircraft and/or spare parts, the lessor/owner/lender would have to start a declaratory action and at the same time apply for interim relief in the form of a provisional measure to arrest the aircraft. The lessor/owner/lender would be required to post a substantial bank guarantee with the Spanish court to indemnify any damage caused to the lessee. The amount of the guarantee is fixed by the court, and the judge has full discretion in this respect. The amount would be based on the judge’s subjective estimate of the likely damages for the lessee.

A Spanish court would base its decision in respect of an injunction or an interim order regarding the repossession of the aircraft on two requirements:

- the lessor/owner/lender submitted to the court a document evidencing the existence of its claim against the lessee; in other words, it must show that it has good legal right to take action against the lessee (*fumus boni iuris*); in this case such evidence would be the lease together with the notices of default, grounding notices and termination; and
- a risk exists, termed *periculum in mora*, that any delay in passing a judgment could seriously disadvantage the lessor/owner/lender; the lessee may have dissipated all or a large part of its assets before the lessor/owner/lender is able to obtain a final judgment on its claim; this risk is always difficult to prove, and it depends very much on the subjective criteria of the relevant court.

2.6.3 Specific Courts for Aviation Disputes

Aviation disputes follow an effective summary procedure, processed by the civil courts.

2.6.4 Summary Judgment or Other Relief

Under Spanish law, there is an effective summary procedure for certain types of documents and agreements, such as court judgments and notarial deeds (Article 517 et seq. of the Spanish Civil Procedure Law). Consequently, this process would only be available if the agreement had been notarised by a public notary. Lease agreements are seldom notarised due to the cost of notaries’ fees. This procedure is advisable only when enforcing liquid claims, which are uncommon in the claims of a lessor/owner/lender, where the amount of the claim is subject to a further calculation of the debt being enforced as well as to potential counterclaims by the lessee.

2.6.5 Domestic Courts’ Approach to Foreign Laws and Judgments

See 2.1.2 Application of Foreign Laws.

2.6.6 Domestic Courts’ Recognition of Foreign Judgments/Awards

Spanish courts recognise and enforce final judgments of foreign courts or an arbitral award.

EU Court Judgments

Any judgment issued by an EU court or tribunal in favour of a lessor can be enforced in Spain in accordance with the provisions of Regulation (EC) 1215/2012

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

A judgment issued in a member state must be recognised in the other member states without any special procedure being required.

If the parties, regardless of their domicile, have agreed that a court or the courts of a member state will have jurisdiction to settle any disputes that have arisen or that may arise in connection with a particular legal relationship, the court or those courts must have jurisdiction, and this jurisdiction must be exclusive unless the parties have agreed otherwise.

Non-EU Court Judgments

For non-EU court judgments, local courts will apply Law 29/2015 of 30 July on international judicial co-operation regarding civil and commercial matters. To recognise and/or enforce a non-EU court judgment/resolution in favour of a lessor, the lessor must bring exequatur proceedings.

Any judgment/resolution issued by an EU or non-EU court will not be recognised in Spain in certain circumstances such as if the recognition is manifestly contrary to Spanish public policy or if the judgment was issued in default of appearance or the judgment is irreconcilable with a judgment given in a dispute between the same parties in Spain, among others.

Arbitral Award

A foreign arbitral award (eg, a US award) would be recognised and enforced in Spain if it satisfies the requirements of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; ie, the judgment must not be contrary to Spanish public policy, the subject matter must be capable of being settled by arbitration under the laws of Spain, proper notice of the appointment of the arbitrator or of the arbitration proceedings must have been served upon the defendant, etc.

According to Article 46 of the Spanish Arbitration Law, the procedure for recognition of a foreign arbitral award is the same as that established for foreign judgments by the Spanish Civil Procedure Law of 1881. The timing for enforcement may take several months

(three to nine months), depending on the backlog of work of the court of competent jurisdiction. The application has to be addressed to the high court of justice (*Tribunal Superior de Justicia*) of the region where the defendant is domiciled. The office of the public prosecution must give a written opinion on the application for recognition. If the high court of justice grants the recognition of the award, its enforcement will be carried out by the court of first instance where the defendant is domiciled.

Aside from the above, the grounds for annulment of an award are very restricted under Spanish law.

2.6.7 Judgments in Foreign Currencies

The judgment may be expressed in a foreign currency but for enforcement purposes it has to be converted into euros, with the conversion date being the date of the Spanish enforcement order.

2.6.8 Limitations on Lessors' Actions Following Termination

A Spanish court may find the default interest rate (or the way it is calculated) rather excessive taking into account limitations on usury. A Spanish court has the power to mitigate (or grant relief on) any clause in a contract which may be considered as being punitive.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

The lessor does not need to pay taxes in connection with the enforcement of the lease. The lessor only needs to pay lawyers' fees, court agent fees, or register fees.

2.6.10 Mandatory Notice Periods

There is no mandatory notice period under Spanish law.

However, it is common practice to serve a notice of default using a notarial or burofax service before actually sending the notice of termination.

2.6.11 Lessees' Entitlement to Claim Immunity

The lessee is not entitled to claim sovereign or any other immunity from legal action or proceedings in Spain. However, pursuant to Article 132 of the Air Navigation Law of 1960, the attachment of an aircraft of a Spanish airline may not interrupt the public service

operated by it. This legal provision may be applicable to the lessee to the extent that the aircraft is operated in certain domestic scheduled services where a public service obligation has been imposed.

In relation to the above, there are not known to be any judgments of the Spanish courts or judicial statements which clarify the scope of “public service” or “interruption” for this purpose. Council Regulation (EU) No 1008/2008 of 24 September 2008 provides for the rules under which any member state may impose on an air carrier a public service obligation in respect of scheduled air services to an airport serving a peripheral or development region in its territory or on a less frequented route to any regional airport in its territory, any such route being considered vital for the economic development of the region in which the airport is located, to the extent necessary to ensure on that route the minimum provision of scheduled air services satisfying certain requirements of continuity, regularity, capacity and pricing.

It is possible that a Spanish court might (i) adopt a similarly restrictive interpretation of “public service” in relation to the provisions described above, and/or (ii) deem that the repossession of a single aircraft by a lessor in the rightful exercise of contractual rights did not constitute “interruption” for this purpose. However, it is not possible to give a definitive view on this matter due to the lack of precedent in Spanish courts.

Waiver of this immunity would not be permitted as it is based on mandatory law protecting the public interest.

2.6.12 Enforcement of Foreign Arbitral Decisions

Spain has adopted the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

A foreign arbitral award (eg, a US award) would be recognised and enforced in Spain if it satisfies the requirements of such Convention.

2.6.13 Other Relevant Issues

There are no other relevant issues that a lessor should be aware of in relation to the enforcement of its rights.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Concepts of contractual assignment and novation are recognised in Spain under Articles 1203 and 1526 of the Spanish Civil Code.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Assuming that a lessor transferring its rights under an aircraft lease is assigning or novating its rights under such lease to a new lessor pursuant to a New York or English law-governed assignment and assumption agreement or novation agreement, the agreements governed by English or New York law would be held valid by a Spanish court. Under Spanish law, the consent of the lessee is necessary.

2.7.3 Enforceability of Lease Assignments/Novations

For enforcement purposes, the lease assignment and assumption/novation can be enforced without the lease being translated, certified, notarised or legalised. However, a Spanish judge will request translated copies of both the lease assignment and assumption/novation and the lease. For recordation purposes, lease assignment and assumption/novation will need to be translated by a certified translator, certified, notarised or legalised.

2.7.4 Filing/Registration of Lease Assignments/Novations

See 2.3.4 Registration of Leases With the Domestic Aircraft Registry.

2.7.5 Taxes/Duties Payable on Assignment/Novation

As an assignment and assumption/novation agreement is between business operators, it is exempted from Spanish stamp duty (or other tax) according to Article 7.5 of Law ITP and AJD (*Ley del Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados*).

Under the assignment and assumption/novation agreement, there would be no VAT payment by the lessee. Rent renewed by the new lessor would be exempted from the Spanish withholding tax provid-

ed that the Spanish lessee operates an international route representing more than 50% of the total distance flown by the Spanish lessee's fleet (Article 14.1 (g) of Law IRNR (*Ley del Impuesto sobre la Renta de No Residentes*)).

2.7.6 Recognition of Transfer of Ownership Interests

Such transfer would constitute a sale and would need to be recorded in Spain in certain circumstances.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

There are certain situations where an aircraft can be deregistered in Spain (Article 31, Royal Decree 384/2015); for example, the loss of the aircraft, or its registration in a foreign country.

In order to deregister and export the aircraft, the consent of the lessee is required, except where an IDERA is duly recorded in the Spanish Aircraft Register. This means that the lessee must apply for the deregistration of the aircraft upon the expiry of the term of the lease or upon the execution of an early termination agreement.

2.8.2 Lessee's/Operator's Consent

An aircraft owner, mortgagee or lessor cannot apply for the deregistration of the aircraft without the lessee's or operator's consent, except in the case of a duly recorded IDERA.

2.8.3 Required Documentation

The enforcement of the IDERA requires:

- a copy of the IDERA enforcement document that must be registered in the Aircraft Register; and
- a notice addressed to the defaulting party sent by an authenticated mode of communication.

The exportation of the aircraft outside the EU also has to be cleared through Spanish customs.

2.8.4 Duration of Deregistration Process

In amicable situations, it is quite possible to process the deregistration of an aircraft and obtain an export certificate of airworthiness in around two weeks. However, in adversarial situations, the delays can

be considerable, particularly if the Spanish operator has been declared insolvent or if it is necessary to take legal action in the Spanish courts. Deregistration through the enforcement of the IDERA takes around two to three business days.

2.8.5 Aviation Authority's Assurances

The aviation authority does not provide advance assurances to an aircraft owner, mortgagee or lessor as to the prompt deregistration of the aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

The aviation authority fees payable for 2024 are as follows:

The maximum take-off weight of the aircraft is shown in kg, while the fee for deregistration of the aircraft is shown in euros:

- less than 2,000 kg – EUR77.79;
- 2,000–5,700 kg – EUR116.68;
- 5,701–15,000 kg – EUR155.55;
- 15,001–50,000 kg – EUR194.48; and
- 50,001 kg or more– EUR233.34.

2.8.7 Deregistration Power of Attorney

Deregistration power of attorney (DPOA) is not recognised locally for deregistration purposes whereas an IDERA is effective in Spain. The Spanish Aircraft Register is an operator register and, as a consequence, the DPOA must be granted by the lessee and not the lessor. However, this is a minor issue because the Spanish register will not remove an aircraft on the basis of a DPOA even if granted by a lessee. In summary, a DPOA has limited value in this jurisdiction.

In any case, the DPOA should be notarised. There is no need to register or file it with any register or government entity.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

No additional documents are required to enforce a DPOA; however, it must be notarised, as it is issued in the form of a public deed.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A DPOA can be governed by a foreign law, but it would need to meet certain formal requirements, such as notarisation by a notary public and provision of the Apostille per the Hague Convention of 5 October 1961. However, such a power of attorney may not provide sufficient assurance and security in the event of a default.

2.8.10 Revocation of a Deregistration Power of Attorney

Under Spanish law, a power of attorney can be irrevocable if this has been expressly agreed by the principal and provided that there is an underlying contractual reason for such irrevocability. However, enforceability of the power of attorney against the lessee would require Spanish court action, since the application of “self-help” remedies is very restricted under Spanish law.

2.8.11 Owner’s/Lessor’s Consent

Unless an IDERA is duly recorded with the Spanish Aircraft Register, an aircraft owner, mortgagee or lessor cannot export an aircraft without the lessee’s consent.

2.8.12 Aircraft Export Permits/Licences

The Spanish Air Authorities will issue the Export Certificate of Airworthiness about 15 days after the redelivery of the aircraft. An Export Certificate of Airworthiness is not necessary if the country of new registration is a member country of the European Aviation Safety Agency (EASA).

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

The costs/fees for exporting an aircraft are minimal.

2.8.14 Practical Issues Related to Deregistration of Aircraft

There are no significant practical issues that an aircraft owner or mortgagee or lessor should be aware of in respect of the deregistration of aircraft in Spain.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

In Spain, any aspect affecting a contract in which one of the parties (either the lessor or the lessee) is facing insolvency will be regulated by the Royal Legislative Decree 1/2020 of 5 May 2020, which approves the Revised Version of the Insolvency Law (*Texto Refundido de la Ley Concursal* or *TRLR*).

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

From the moment a company becomes insolvent, it will have to apply for one of the two procedures regulated in the *TRLR*:

- Pre-insolvency proceedings (*preconcurso*): When a company is facing current, imminent (expected insolvency within three months) or probable insolvency (expected insolvency within the next two years), it may issue a make a formal communication announcing the commencement of negotiations with its creditors, or the intention to initiate them (the “Communication”), with the aim of formulating a restructuring plan to mitigate the insolvency situation (the “Restructuring Plan”).
- Insolvency proceedings: When a company is facing actual or imminent insolvency, it may file for insolvency proceedings, which are organised into two phases:
 - (a) A “common phase” (*fase común*): The debtor is placed under court protection to determine its assets and liabilities and to identify potential pathways for reaching an agreement with creditors, or determine if the company is no longer financially viable due to consistent lack of profitability or insurmountable debt levels that significantly outweigh assets. In the latter scenario, the company may need to be liquidated.
 - (b) This is followed by a second phase, either the “agreement phase” (*fase de convenio*) if the debtor is deemed financially viable, or the “liquidation phase” (*fase de liquidación*) if the company is not deemed financially viable.

Insolvency proceedings may be requested by the insolvent company itself (voluntary insolvency proceedings) or by a creditor (mandatory insolvency proceedings). In the latter case, the corporate directors are usually removed and replaced by the insolvency administrator, who is always appointed by the court regardless of whether the insolvency proceedings are voluntary or necessary.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

As an EU member country, the regulation contained in TRLC will be applied without prejudice to the provisions of Regulation (EU) 2015/848 of the Parliament and of the Council of 20 May 2015 on insolvency proceedings.

The TRLC prescribes the application of Spanish insolvency law to insolvency proceedings initiated in Spain, based on jurisdictional rules that grant Spanish courts authority when the debtor's centre of main interests is located within Spain.

Should the debtor possess assets or rights overseas, it is permissible to seek the initiation of territorial proceedings in the relevant foreign country. In such cases, the proceedings declared in Spain are considered the primary proceedings.

Likewise, the TRLC establishes the requirements for a foreign resolution declaring insolvency proceedings to be recognised in Spain, necessitating adherence to the exequatur procedure regulated in Law 29/2015 of 30 July 2015 on international legal co-operation in civil matters. This stipulates that the foreign resolution must meet the following criteria:

- that the resolution refers to collective proceedings based on the insolvency of the debtor, by virtue of which its assets and activities are subject to the control or supervision of a foreign court or authority for the purposes of its reorganisation or liquidation;
- the judgment is final;
- the jurisdiction of the court or authority that opened the insolvency proceedings is based on any of the criteria contained in this law or on a reasonable connection of an equivalent nature, and

mainly that the proceeding is initiated as a result of the debtor's insolvency and not for other reasons;

- the decision has not been rendered in the debtor's absence or, if it was, it was preceded by a proper delivery or notification of a summons or equivalent document, allowing sufficient time for opposition; and
- the decision is not contrary to Spanish public order.

Regarding co-ordination principles, since they do not have the status of a law, Spanish judges could apply them as a way of facilitating the co-ordination of procedures, but without any obligation to do so or any consequences for non-compliance.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

From the date the court declares insolvency proceedings, any powers of attorney granted by the lessee that allow the management of property will be invalid. This is because the insolvency administrator will now be responsible for managing the lessee's assets and authorising any transactions that affect them.

If the lessee, in addition to facing insolvency proceedings, is undergoing liquidation, the powers of attorney that allow the management of property will be revoked. This is because the insolvency administrator will now have exclusive control over the lessee's assets and will be responsible for authorising any transactions that affect them.

There is a risk that the IDERA would be re-characterised under Spanish law as a deregistration power of attorney, in which case the IDERA would not survive the declaration of insolvency of the relevant lessee. Spain has not made any declaration in respect of Article XI of the Cape Town Treaty (Remedies on Insolvency), which means that decisions on repossession and deregistration will be in the hands of the Spanish receiver and the insolvency judge.

2.9.5 Other Effects of a Lessee's Insolvency

All lease contracts are considered successive tract contracts, which means that these contracts can be terminated once the insolvency proceedings have been declared both for prior breaches (eg, non-pay-

ment of rent) and for breaches subsequent to the insolvency proceedings.

- The liquidation of the insolvent company will entail the termination of all contracts, including the lease.
- When the liquidation phase of the insolvent company is initiated, the receiver will be solely responsible for returning the aircraft. This should be done immediately, as any delay will unnecessarily increase the liabilities of the insolvent company.
- In no case shall the leased aircraft be considered the property of the insolvent lessee.
- Any claims in favour of the lessor from the lease will be contingent on the outcome of the insolvent company's liquidation process. Rental payments that remained unpaid prior to the initiation of the insolvency proceedings will be treated as ordinary claims, meaning they do not have any priority in terms of collection. However, unpaid rents arising after the insolvency proceedings began will be classified as claims against the estate, which hold preference over other insolvency claims, barring those with special privileged status. Such special privileges grant priority over any other claims on the property for which the privilege has been conferred (eg, mortgages).

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

In the event of the lessee's insolvency, the main risk for the lender is the delay that the insolvency proceedings may entail for the effective repossession of the aircraft. The ensuing damages would include unpaid rent, lost profits, and potential harm to the aircraft. The claims arising from these defaults would be subject to the outcome of the insolvency proceedings, in which the probability of recovering any amount, even partial, is very low.

Despite this, the insolvency administration tends to be efficient in returning the aircraft when it does not see the viability of the insolvent company. This expeditious return helps to prevent an escalation of liabilities. During the common phase, the lease agreement remains in effect, which means that the lease rent is payable from the insolvent estate's funds. Termination of the lease agreement must be agreed with the lessor and

approved by the Spanish judge upon application by the insolvency administrator.

Ultimately, the speed with which the aircraft is repossessed will depend on a number of factors, including whether the insolvent company considers that the maintenance of the aircraft lease is necessary for the continuity of its business.

In the event of insolvency of a guarantor, the lender would potentially not be able to recover any amounts due from the guarantor, as these claims would also be subject to the outcome of the insolvency proceedings.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

- **Protection During the Pre-Insolvency Proceedings:** From the moment the communication is issued, the insolvent company is protected against its creditors for a period of three months, extendable for a maximum of three additional months (the "Protection Period"), during which:
 - (a) Foreclosures against necessary assets may not be initiated and those initiated shall be suspended. Likewise, the insolvent company may ask the court at any time to extend this suspension on foreclosure to other assets or rights as and when required for the successful completion of the negotiations.
 - (b) For contracts with outstanding mutual obligations, any clauses calling for suspension (such as a lease contract), alteration, resolution, or early termination will not be considered activated solely because the insolvent company has made the communication or requested suspension of executions. However, these actions (suspension, modification, resolution or early termination) can be initiated if requested by the creditor under circumstances not previously mentioned, unless the contract pertains to necessary assets. In this case, such actions cannot be initiated until the protection provided by the communication has ceased. However, the counterparty retains the right to contest the classification of necessary assets if they believe this status is unwarranted.

- (c) No application filed by a creditor (*concurso necesario*) for insolvency proceedings will be processed.

If, after the protection period has elapsed, the insolvent company has not been able to approve a restructuring plan, it will be obliged to file for insolvency proceedings within the following month.

- **Protection During the Insolvency Proceedings:** When a company is facing actual or imminent insolvency, it may file for insolvency proceedings, which may or may not be preceded by pre-insolvency proceedings. From the moment the court issues the order declaring the insolvency proceedings, the insolvent company will be protected against its creditors as follows:

- (a) Foreclosures may not be initiated against the assets and rights of the insolvent company, and those already initiated will be suspended, with the following two exceptions: (i) liens for labour-related claims or public claims made prior to the insolvency proceedings on assets not necessary for the continuity of the activity of the insolvent company (“non-necessary assets”); and (ii) the enforcement of security interests on non-necessary assets prior to obtaining the declaration of the court on such nature or on any assets, necessary or not necessary, if an agreement proposal that does not affect such foreclosure is approved.
- (b) The limitation set forth in the preceding paragraph shall also apply to (i) actions for rescission of the sale and purchase of real estate properties for failure to pay the deferred price; (ii) actions to recover property sold in instalments or financed with reservation of title by means of contracts recorded in the Registry of Goods and Chattels (*Registro de Bienes Muebles*); and (iii) actions to recover property leased by means of contracts recorded in the Property or Registry of Goods and Chattels or formalised in a document that entails execution.
- (c) The accrual of legal or contractual interest is suspended.
- (d) The offsetting of claims is prohibited except for those that existed prior to the insolvency

proceedings and those derived from the same legal relationship. This could lead to the insolvency administrator requesting the return of security deposits in the hands of the lessor, as under Spanish law the title to deposits remains with the lessee.

- (e) The right of claim to withhold the assets and rights of the insolvent company are suspended.
- (f) Clauses that establish the counterparty’s right to suspend, modify, terminate or extinguish a contract due to the declaration of insolvency proceedings or the opening of the liquidation phase shall be deemed not to have been included.
- (g) The declaration of insolvency, by itself, will not affect the validity of the contracts with reciprocal obligations pending fulfilment by both the insolvent company and the other party. Both parties will have to fulfil the agreed-upon services, with obligations incumbent on the insolvent company classified as claims against the estate. However, these contracts may be terminated if there’s a breach of contract following the declaration of insolvency.
- (h) Only successive contracts may be terminated for non-compliance prior to the declaration of insolvency proceedings.
- (i) If the right to terminate the contract for breach has been exercised, the court may order the contract to be upheld in the interest of the insolvency proceedings, including the payment of the amounts due. Likewise, even if there is no cause for termination, the termination of the contract may be agreed in the interest of the insolvency proceedings.
- (j) Likewise, in the interest of the insolvency proceedings, the court may agree to the rehabilitation of financing contracts, contracts for the acquisition of movable or real estate property with deferred consideration or price and urban leasing contracts.

2.9.8 Liquidation of Domestic Lessees

The judge will always appoint an insolvency administrator (receiver) for the resolution of the insolvency proceedings. This insolvency administrator will supervise all the actions of the corporate directors (intervention of powers), or will directly replace those

that are removed (suspension of powers). The latter usually occurs when the insolvency proceedings are requested by a creditor.

2.9.9 *Ipsa Facto Defaults*

Ipsa facto clauses – clauses that allow a party to terminate upon the occurrence of certain events of default such as a counterparty's insolvency or restructuring – are not enforceable under Spanish law. As a result, such contractual clauses providing for the automatic termination of an aircraft lease based solely on the existence of a court declaration of insolvency are not enforceable under Spanish law.

This means that the aircraft lease agreement may remain in effect if the receivers decide to continue the flight operations of the troubled airline ("cherry pick"). In such cases, the lease rentals become an obligation of the insolvency estate as it is a necessary cost for the continuation of the business; ie, they will be given preference over the claims of common and preferred creditors.

2.9.10 *Impact of Domestic Lessees' Winding-Up*

If a domestic lessee is wound up by a court or administration proceeding, this would impact the aircraft, lease rentals, lease security deposit and maintenance reserves as follows.

The Aircraft

The liquidation will entail the termination of all contracts, including the lease of the aircraft, the repossession of which should be immediate.

Lease Rentals

Any claim derived from the contract will be contingent on the outcome of the insolvent company's liquidation process. Rental payments that remained unpaid prior to the initiation of the insolvency proceedings will be treated as ordinary claims, meaning they do not have any priority in terms of collection. However, unpaid rents arising after the insolvency proceedings began will be classified as claims against the estate, which hold preference over other insolvency claims, barring those with special privileged status. Such special privileges grant priority over any other claims on the property for which the privilege has been conferred (eg, mortgages). In Spain, it is common for receivers

to swiftly agree to return the aircraft to the lessor in order to prevent further rental accruals that would be payable from the insolvency estate.

Lease Security Deposit

The lessor should be able to apply the deposits to the collection of unpaid rent or other claims derived from the liquidation of the lease. However, it is possible that the insolvency administration may seek the return of the deposit in respect of rents accrued before the declaration of insolvency, in which case, it should file an incidental lawsuit to determine the claims and obligations of the parties derived from the termination of the lease and the consequent application of the deposit to the liquidation of the claims in favour of the lessor.

Maintenance Reserves

The lessor should be entitled to proper settlement of accounts in respect of maintenance of reserves assumed by the lessee in the lease that were pending fulfilment at the time of termination of the lease, but not later ones. Set-off of maintenance reserves against other obligations not fulfilled by the lessee (eg, non-payment of rents) will not be permitted unless the lease expressly permits it.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

Spain acceded to the Cape Town Convention on 20 June 2013. The instrument of accession was published in the Spanish State Gazette on 4 October 2013. The Aircraft Protocol entered into effect for Spain on 1 March 2016 and was published in the Spanish State Gazette on 1 February 2016. For all legal purposes, the Cape Town Convention has been legally effective for aircraft matters since 1 March 2016.

Pursuant to Article XIX of the Protocol, Spain designated the Spanish Register of Goods and Chattels as the authorising entry point for registration of security interests over aircraft in the International Registry. The Spanish Register of Goods and Chattels will provide the party seeking registration with a unique authorisation code (authorising entry point code, or AEP code), which must be included in the information submitted to the International Registry to register an interest. Since 10 April, AEP codes are provided within one business hour from their request and will be valid for

five business days at a price of EUR47.25 per code (AEP codes are required for International Register filing purposes; the Spanish Register of Goods and Chattels must subsequently be informed of their effective use within five business days of their issuance, otherwise they will charge an additional EUR47.25).

2.10.2 Declarations Made Concerning Conventions

The declarations that Spain has made under the Convention or the Protocol are the following:

- Article 39 (1)(a) of the Convention: priority of non-consensual rights or interests over registered international interests;
- Article 39 (1)(b) of the Convention: priority of amounts owed to public bodies relating to the provision of public services;
- Article 40 of the Convention: court orders permitting attachment of aircraft objects and tax liens shall be registrable under the Convention;
- Article 53 of the Convention: competence of Spanish courts;
- Article 54.2 of the Convention: prohibition of self-help remedies, except for IDERA;
- Article XIX of the Protocol: The Registry of Goods and Chattels is designated as an “authorising entry point”;
- Article XXX (I) of the Protocol: applicability of IDERA instrument in Spain; and
- Article XXIX of the Protocol: applicability of the Convention and Protocol to Gibraltar, which is limited to the latter government’s internal competencies.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Article XIII of the Protocol does apply domestically. The IDERA must be submitted in the Aircraft Register and subsequently the Registry will proceed to record it. If it is submitted on its own, the IDERA must be notarised, but if submitted along with other transaction documents, the Spanish Aircraft Register will accept a signed IDERA without notarisation.

2.10.4 Enforcement of Conventions

So far, there has not been any intervention of Spanish courts enforcing the Convention or the Protocol.

2.10.5 Other Conventions

The Kingdom of Spain is a party to the 1933 Rome Convention but not the 1948 Geneva Convention.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

There are no restrictions on foreign lenders financing an aircraft locally or on borrowers using the loan proceeds.

3.1.2 Effect of Exchange Controls or Government Consents

See 2.1.3 Restrictions Concerning Payments in US Dollars.

3.1.3 Granting of Security to Foreign Lenders

Borrowers in Spain may grant security to foreign lenders. As a general rule, under Spanish law it is necessary that the person (borrower) who creates any security (mortgage or pledge) be the owner of the asset. The security must be created to guarantee a pre-existing valid and enforceable obligation.

Any security/mortgage created under US law or the laws of a third country cannot be enforced over a Spanish-registered aircraft, unless the security or mortgage has been recorded in the Register of Goods and Chattels. Security registration in the Register of Goods and Chattels requires the prior recording of the ownership title (and fulfilling reciprocity requirements) and will attract around 1% stamp duty on the amounts secured by the mortgage. The Register of Goods and Chattels will also require that the security/mortgage conform to Spanish law, which will involve a redrafting of the document.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Intragroup guarantees (downstream, upstream and/or cross-stream guarantees) are permitted under Spanish law.

3.1.5 Lenders' Share in Security Over Domestic SPVs

It is not usual in aircraft finance transactions to take security over the shares of a domestic SPV set up to own the financed aircraft. Lenders usually prefer to take security directly over the specific asset.

Pledges over shares are recognised in Spain pursuant to Articles 1857, 1863 and 1865 et seq of the Spanish Civil Code.

3.1.6 Negative Pledges

Although there is no specific legal provision referring to the negative pledge in Spain, it is possible for the parties to include negative pledge clauses. A negative pledge is considered a contractual obligation and does not establish a property right (*jus in rem*).

3.1.7 Intercreditor Arrangements

Inter-creditor arrangements are commonly entered into when different classes of creditors are involved, especially in syndicated finance. Contractual subordination of debt by inter-creditor agreements where senior and junior creditors agree on the priority of payment is only enforceable between the parties.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent are recognised in Spanish law under the mandate contract rules provided in the Civil Code. However, bank agency contracts are not specifically regulated by ad hoc legislation.

The security interest must be granted in favour of all the secured parties and be duly accepted by all of them. However, lenders under a syndicated loan usually appoint one lender/creditor to be the agent of the whole syndicate and stipulate its rights and obligations contractually. The effect of this is that the agent is the title holder of the security for the purposes of registration and enforcement.

3.1.9 Debt Subordination

The parties may contractually agree to subordinate a debt in relation to other existing debts (contractual subordination).

Also, a lender may lend to several companies at different levels in a group (structural subordination).

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

The transfer or assignment of all or part of an outstanding debt under an English or New York law-governed loan is permissible and recognised in Spain.

3.1.11 Usury/Interest Limitation Laws

Spanish law has a general prohibition on usury that is provided in the Law of 23 July 1908 on the nullity of usurious loan contracts. Whether a situation is deemed usurious hinges on two factors: the interest rate being significantly above the market rate, or the debtor agreeing to the interest rate under circumstances of financial distress.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

Given the formalities and costs associated with establishing Spanish security, such as a Spanish law aircraft mortgage, it is uncommon for such security to be granted in aviation finance transactions. Since Spain's accession to the Cape Town Convention (1980), most lessors and banks deem the creation of international interests sufficient for protection.

3.2.2 Types of Security Not Available

All types of security creating property rights (*jus in rem*) can be taken over an aircraft and engines. With respect to warranties and insurances, contractual assignment in Spain does not create a definitive form of security that is enforceable against third parties.

3.2.3 Trust/Trustee Concepts

See 2.2.5 Recognition of the Concepts of Trust/Trustee.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

A borrower may assign its rights to the aircraft or under a lease (including in relation to insurances) pursuant to an aircraft mortgage or security assignment. See 3.2.2 Types of Security Not Available.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It is possible to assign the claims that a lessor is entitled to under an aircraft lease, such as the rents resulting from such an agreement, but it is not permitted to assign only the rights and benefits without also assigning the corresponding obligations of the lessor, given that when a party assigns its contractual position it also assigns its rights, benefits, duties and obligations.

3.2.6 Choice of Foreign Law

Under Spanish law, a security assignment of a lease may not establish a definitive security, or the creation of a *jus in rem*. To serve this purpose, a security assignment must be revised as a pledge of rights and formalised as a Spanish public deed. A security assignment under New York/English law will only function in terms of contract law, establishing only personal rights (*jus in personam*) between the parties involved.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

A security assignment would have to be redrafted as a pledge of rights and formalised as a Spanish public deed.

3.2.8 Domestic Law Security Instruments

Cape Town filings provide more efficient and more economic protection than the Spanish local filings. In this respect, just AEP codes are needed. Domestic law security is subject to stamp duty (around 1% of the value of the aircraft). Moreover, Spanish notary translators and registers charge considerable fees, which depend on the value of the aircraft.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

A security assignment would have to be redrafted as a pledge of rights and formalised as a Spanish public deed.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

The transfer of security interests over an aircraft and/or engines is recognised and permitted.

3.2.11 Effect of Changes in the Identity of Secured Parties

Should the identity of a secured party change, the security interests are not jeopardised as long as this change is duly documented.

3.2.12 “Parallel Debt” Structures

Spanish law does not envisage purely parallel debt structures where “parallel obligations” which mirror the obligations of the underlying debt owed by such borrower are created in favour of the security trustee for the same amount and payable at the same time as the underlying debt.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment would not be deemed to be resident or domiciled in Spain.

As to fees/taxes, only notarial fees and registration charges apply (if the pledge is in respect of future rights and is recorded in the Register of Goods and Chattels).

Recording a security assignment (as a re-characterised Spanish mortgage) incurs a 1% stamp duty assessed on the amount of the payment obligation (loan) secured plus an amount of interest that cannot exceed the amount of interest accrued during a period of five years. If re-characterised as a pledge of rights without delivery of possession, no Spain stamp duty would apply. There are also considerable notarial fees and registration charges. Enforcing a security assignment entails user fees payable to the Spanish court system, capped at EUR6,000.

3.2.14 Perfection of Domestic Law Mortgages

To enforce a domestic law mortgage over an aircraft or engine, it must be recorded in the Register of Goods and Chattels. This process requires granting a notarial deed, a 1% stamp duty on the value of the asset, and registration. The security is perfected upon registration. Spanish registers will meticulously verify the security document's compliance with Spanish law.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

There are no differences between the form of security (or perfection) taken over an aircraft and that taken over spare engines.

3.2.16 Form and Perfection of Security Over Bank Accounts

Under a pledge agreement, a pledge can be created over the credit rights derived from a bank account. In this case, the perfection of security is achieved via the notarial deed of pledge and the transfer of credit rights to the secured party.

3.3 Liens

3.3.1 Third-Party Liens

Under Spanish law, unpaid airport landing and parking charges would not create a legal lien over the aircraft. However, the lessor might be prevented by local airports from flying the aircraft if outstanding airport fees remain. This would occur when there has been a change of operator while the aircraft is grounded at a Spanish airport. Consequently, the airport has a retention right under administrative law.

Strictly speaking, air navigation, landing and parking charges are Spanish user fees (*tasas*), enforceable through tax procedures, including aircraft seizure and sale via public auction, but the aircraft owner may regain possession of the aircraft by taking court action, considering that liability for landing and parking fees generally lies with the operator.

In the case of repairer's charges, Spanish law would consider that a workshop is entitled to a retention right over the aircraft by virtue of Article 1600 of the Civil Code.

Furthermore, under Article 32.2 of the Worker's Statute, claims for unpaid salaries of a Spanish company rank higher than the claims of any other creditors in respect of "goods made by the employees while they are still legally owned or in the possession of the employer". However, the Spanish courts have interpreted this broadly in the past, so this risk cannot be completely ruled out.

3.3.2 Timeframe to Discharge a Lien or Mortgage

To discharge a mortgage under Spanish law, a deed of release must be granted before a local notary, a clearance regarding the stamp duty exemption obtained, and the discharge recorded in the Register of Goods and Chattels. The entire process typically takes around one to two months.

3.3.3 Register of Mortgages and Charges

The Register of Goods and Chattels is the register of mortgages and charges. The primary effect of registration in this Register is to confer evidence and priority concerning ownership status and liens over the aircraft. Under Spanish law, an aircraft mortgage is perfected upon its registration in this register.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

Certain statutory liens, which arise by operation of law, allow for the arrest of an aircraft, although their nature and impact can be contentious.

Liens on a fleet-wide basis do not exist since the principle is that a lien, security, attachment or retention right must be created over a specific object.

Article 133 of Spanish Air Navigation Law states that certain debts should be considered preferential debts over the aircraft (eg, taxes due over the previous and current year; unpaid wages; and costs and expenses incurred in giving assistance to, or rescuing, the aircraft).

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser of an aircraft should request a search in the Register of Goods and Chattels to verify that an aircraft is free of encumbrances, liens and mortgages.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

Generally, security assignments, loans or guarantees can only be enforced by pursuing the appropriate court action.

3.4.2 Security Trustees' Enforcement of Their Rights

If the enforcement of the security is to be undertaken by the security trustee, the security trustee must be so authorised through a notarised and apostilled (or legalised) power of attorney; ie, the security assignment alone will not suffice for this purpose. Enforcement always requires court action; "self-help" is not allowed. The Spanish courts would recognise contractual effects (not creating a true security) to the relationships between the lessor, security trustee and the counterparty.

3.4.3 Application of Foreign Laws

A choice of a foreign law to govern a finance or security document will be upheld as a valid choice of law by the Spanish law courts subject and pursuant to Article 3 of Regulation (EU) No 595/2008 of 17 June 2008 (Rome I).

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

A foreign arbitral award (eg, a US award) would be recognised and enforced in Spain.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

"Self-help" is not allowed under Spanish law. Therefore, if a Spanish lessee does not co-operate during the repossession, a secured party would have to seek court assistance to enforce its rights.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

Enforcement actions under a security agreement/aircraft mortgage will be processed through the Spanish court system.

3.4.7 Summary Judgments or Other Relief

A secured party can obtain a summary judgment, equitable or other injunctive relief pending final resolution of judicial proceedings to enforce a security agreement/aircraft mortgage, but this is only possible if the relevant security document has been duly notarised before a local notary, or if the conditions for injunctive relief are met (see 2.6.2 Lessor Taking Possession of the Aircraft).

3.4.8 Judgments in Foreign Currencies

The judgment may be expressed in a foreign currency; however, for enforcement purposes it has to be converted into euros. The conversion is dated at the time of the Spanish enforcement order.

3.4.9 Taxes/Fees Payable

The secured party has to pay court fees, court agent fees, lawyers' fees in order to enforce its claim with a court. Enforcement does not attract Spanish taxes.

Court fees are determined in accordance with an official schedule, and lawyer fees are based on the *ad valorem* guidelines of the local bar associations.

3.4.10 Other Relevant Issues

There are no other relevant issues.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

There are no other relevant issues.

4.2 Current Legislative Proposals

The Council of Ministers has given the green light to a draft law updating the existing laws that regulate air navigation and air safety, which will be sent to the Spanish Parliament for processing and approval.

THAILAND



Law and Practice

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Tilleke & Gibbins is a South-East Asian regional law firm with more than 250 lawyers and consultants. It was established in Bangkok in 1890 and now operates seven offices across six jurisdictions in South-East Asia, including Cambodia, Indonesia, Laos, Myanmar, Thailand and Vietnam, with a global reach through the Lex Mundi and Multilaw legal networks. Its cross-disciplinary aviation team serves airlines, aircraft lessors and lessees, insurers, banks, air cargo

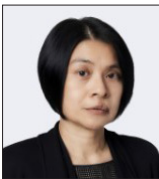
firms and other aviation-related companies in South-East Asia, one of the world's fastest-growing aviation markets. The practice covers aircraft leasing and financing, aircraft leasing disputes and repossessions, civil aviation regulations, air carrier liability, air carrier insurance claims and disputes, commercial and labour disputes involving the aviation industry and aircraft acquisitions and sales.

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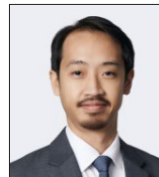
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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

Apart from the general tax regime (which can include income tax, VAT, stamp duty and import duties), an aircraft or engine sales agreement is not subject to a specific tax or stamp duty under Thai law.

1.1.2 Enforceability Against Domestic Parties

There is no specific requirement that an aircraft or engine sales agreement be translated, certified, notarised or legalised to be enforceable against a domestic party under Thai law. However, in the event of enforcement, certified Thai translations of the whole or any material part of the aircraft or engine sales agreement and any relevant agreements/documents may be required. These must be attached to the originals when they are submitted as evidence to a Thai court if applicable.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Thai law does not specifically provide for the transfer of title to an aircraft, engine or other installed parts, including the APU. The transfer will therefore be subject to general legal provisions regarding the transfer of ownership of movable property. Unless agreed or otherwise specified by the parties, the ownership of the property is generally transferred to the buyer from the moment the contract of sale is entered into.

Under Thai law, the sale of the ownership interest in the entity that owns an aircraft or engine will not effectively be recognised as a sale of the aircraft or engine itself.

1.2.2 Sales Governed by English or New York Law

Thai law recognises the contracting parties' right to specify a foreign law to govern the bill of sale, to the extent that the law is not contrary to public order in Thailand or good morals. However, the party seeking to enforce the foreign law must prove that to the satisfaction of the Thai court. If they do not, Thai law will apply. In any event, the bill of sale and relevant agreements/documents and the transfer of title, must be legal, valid, binding and enforceable under Thai law and be in the forms prescribed by English law or New York law (as the case may be) and/or Thai law if they are to be legally enforced in Thailand.

Although the aircraft sale is not subject to specific formalities specified by Thai law, the contracting parties need, at a minimum, to ensure that the bill of sale is in writing and signed by the party liable, or that part performance or consideration is given and it does not contradict public order in Thailand or good morals.

1.2.3 Enforceability Against Domestic Parties

There is no specific requirement that a bill of sale be translated, certified, notarised or legalised to be enforceable against a domestic party under Thai law. However, in the event of enforcement, certified Thai translations of the whole or any material part of the bill of sale and any relevant agreements/documents may have to be submitted and attached to the originals when they are submitted as evidence to a Thai court.

1.2.4 Registration, Filing and/or Consent From Government Entities

A bill of sale is not required to be registered or filed with any government entity to become effective under Thai law.

There is no prerequisite that a bill of sale be delivered in relation to an aircraft in Thailand under Thai law.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

Apart from the general tax regime (which can include income tax, VAT, stamp duty and import duties), a bill of sale is not subject to a specific tax or stamp duty under Thai law.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

Subject to complying with the applicable laws, operating, wet and finance leases will be recognised and permissible, if, and to the extent that they are not contrary to Thai law or public order in Thailand or good morals. However, for wet leases, an air operator has to obtain permission from the Civil Aviation Authority of Thailand (CAAT). The air operator will have to submit an application in line with the Notification of CAAT regarding Criteria for the Use of Aircraft under the Wet Lease and Use of Aircraft under the Code Share Agreement by Air Operator. In granting permission, the CAAT will rely primarily on the criteria set out in the Notification.

2.1.2 Application of Foreign Laws

The parties may agree for a lease to be governed by a foreign law. However, according to Thailand's Act on Conflict of Laws BE 2481 (1938), the foreign law will only be applied to the extent that it does not contradict public order in Thailand or good morals. In addition, the party seeking to enforce the foreign law must prove that to the satisfaction of the Thai court. If they do not, Thai law will apply. In any event, the lease and relevant agreements/documents must be legal, valid, binding and enforceable under the foreign law and/or Thai law if they are to be legally enforced in Thailand. They must also be in the forms prescribed by

the foreign law and/or Thai law to be legally enforced in Thailand.

In relation to property or assets, please note Sections 9 and 16 of the Act on Conflict of Laws.

Section 9 states: "Unless otherwise provided by this Act or other laws of [Thailand], the formal validity of a juristic act shall be governed by the law of the country where the act is made. However, the law of the country where a property is situated governs the form required for the validity of a contract, document or other juristic act relating to immovable property."

Section 16 states: "Movable and immovable property is governed by the law of the place where the property is situated. However, in the case of exportation of movable property, the law of nationality of its owner shall govern from the time of exportation."

2.1.3 Restrictions Concerning Payments in US Dollars

No material restrictions are imposed on domestic lessees making rent payments to foreign lessors in US dollars. However, the domestic lessees must comply with, inter alia, the Thai exchange control, tax and anti-money laundering laws/regulations. The domestic lessees must also be able to provide documentary evidence for the transfer to the authorised juristic person or licensed financial institution.

2.1.4 Exchange Controls

Exchange controls in Thailand are primarily governed by the Exchange Control Act BE 2485 (1942) (as amended) and Ministerial Regulation No 13. Outward remittances for rent payments under, and according to, a valid lease are permitted, provided that proper documentary evidence for the payment is submitted to the authorised juristic person or licensed financial institution.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

A lease agreement for movable property (eg, an aircraft) is not subject to stamp duty. However, where the lease of an aircraft is regarded as a hire purchase agreement, it will be subject to stamp duty at a rate of Thai baht that is equivalent to 0.1% (ie, THB1 for

every THB1,000 or fraction thereof) of the total value, regardless of whether the agreement is in electronic or physical form.

Each executed physical copy, duplicate or counterpart of an instrument (if any) will be subject to stamp duty of THB1 if the duty with which the original is chargeable does not exceed THB5. Alternatively, it will be THB5 if the duty with which the original is chargeable exceeds THB5, except where the party liable to pay the duty is a co-operative society.

2.1.6 Licensing/Qualification of Lessors

Under Thai law, the lessor does not have to be licensed or otherwise qualified in Thailand to lease an aircraft from abroad to a lessee in Thailand. However, a lease of property is considered a service business, which is a restricted business to foreigners, under List 3 (21) of the Foreign Business Act BE 2542 (1999) (FBA). Therefore if any part of the lease activity carried out by a foreign lessor occurs in Thailand, the foreign lessor will be subject to the FBA and will have to obtain a foreign business licence from the FBA before they can carry out the business activity with a domestic lessee in Thailand.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

A lease of property under Thai law, is a contract whereby the lessor agrees to let the lessee have the use or benefit of the property for a limited period and the lessee agrees to pay rent in return. Apart from that, there is currently no law that specifically requires particular terms to be included in a lease agreement for movable property.

2.2.2 Tax and Withholding Gross-Up Provisions

Freedom of contract is an underlying principle of Thai law. It enables the intention of the parties to the contract to be recognised. The parties may therefore agree to tax and other withholding gross-up provisions and the provisions will be permissible and enforceable to the extent they are not contrary to public order in Thailand or good morals.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease may cover installed or replaced parts on an aircraft or engine after its execution, provided that terms to this effect are included in the lease agreement.

2.2.4 Risk of Title Annexation

There could be a risk of title annexation in respect of aircraft engines installed on an airframe. Under Thai law, if several movable properties belonging to different persons are joined to become component parts or are indivisible, those different persons become co-owners of the composite property and each co-owner's share will be in proportion to the value of their respective component part.

Notwithstanding this, if one of the component parts is regarded as a principal part, the owner of the principal part will become the sole owner of the entire composite property and they will be liable to pay the value of other parts respectively held by each of them to the other owners.

In addition, an express provision in the lease agreement that aircraft engines not be annexed as part of the airframe upon installation and having a nameplate fixed on each engine with a statement that the engine belongs to the owner/lessor and leased to the lessee will help mitigate the risk of title annexation.

2.2.5 Recognition of the Concepts of Trust/Trustee

Thai law does not recognise the common law concepts of liens, trust, charge, hypothecation or a security interest created under it, except in the context of the Trust for Transactions in Capital Market Act BE 2550 (2007). This Act provides for a trust to be created for the benefit of transactions carried out in the capital market. A trust and the role of an owner trustee under a lease are generally not recognised under Thai law therefore.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

Thai law does not specifically require the registration of an aircraft lease or provide provision for this. To operate a leased aircraft lawfully in Thailand, the

lessee (who must be a Thai national), as the operator, must generally register the aircraft in line with the Air Navigation Act BE 2497 (1954) and obtain a registration certificate (Sections 30 and 31 of the Air Navigation Act). The registration certificate is not a document of title in respect of the aircraft. If an aircraft owner is not the operator of the aircraft, the names and addresses of both the aircraft owner and aircraft operator may then practically be stated in the registration certificate. The operator's rights in respect of the aircraft and the possession and use thereof (eg, as lessee in line with a lease agreement) might also be indicated in the registration certificate.

If a foreign aircraft registered with a state party to the Convention on International Civil Aviation is used by a Thai air operator for its operation under a lease agreement and Thailand has an agreement with the registry in that state to transfer the responsibility of the registry in that state to Thailand in line with the Convention on International Civil Aviation, the foreign aircraft is considered a registered aircraft under Thai law. Accordingly, specific licences or operations (eg, airworthiness certificate, personnel licence, air navigation of aircraft of the air operator, etc) will be subject to Thai law.

2.3.2 Registration If the Owner Is Different From the Operator

See 2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register.

2.3.3 Aircraft/Engine-Specific Registers

See 2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register. Under Thai law, there is no specific register for leases concerning aircraft or engines.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

See 2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register.

Leases are not subject to consent from any government entity under Thai law. Aircraft or engine leases do not have to be registered or filed with any government entity to become effective.

There is no prerequisite under Thai law for the execution and delivery of an aircraft or engine lease in relation to an aircraft in Thailand.

2.3.5 Requirements for a Lease to Be Valid and Registrable

There is no specific requirement under Thai law that an aircraft or engine lease be in a specific form, translated, certified, notarised or legalised to be valid and enforceable against a domestic party. However, in the event of enforcement, certified Thai translations of the whole or any material part of the aircraft or engine lease and any relevant agreements/documents may have to be submitted and attached to the originals when they are submitted as evidence to a Thai court.

2.3.6 Taxes/Duties Payable for Registering a Lease

There is no registration of an aircraft or engine lease under Thai law. There are therefore no taxes/duties payable.

2.3.7 Registration of Aircraft in Alternative Countries

There are no common alternative countries to register Thailand-based aircraft in. Thailand-based aircraft are registered in Thailand.

2.3.8 Requirements for Documents Concerning Registration

All documents required and submitted to the officials should normally be certified as true copies of the original documents by the authorised director(s) or representative(s) of the company, with the company's seal affixed, or as stipulated in the company's affidavit, if the registrant is a juristic person, unless specified otherwise by the officials.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A foreign lessor could be subject to the following taxes upon leasing an aircraft or engine to a domestic or Thai lessee.

- Income tax: rental income paid from Thailand to a foreign company not carrying on business in Thailand is subject to income tax and the Thai taxpayer has to withhold the income tax at the rate of 15%, unless the exemption or a lower rate of withholding

tax is applicable under a double tax agreement (if any).

- Customs duty: the importation of an aircraft of an unladen weight exceeding 15,000 kilograms (Harmonised Code No 8802.400) is exempt from customs duty.
- VAT on importation of leased property: the importation of an aircraft into Thailand is subject to VAT, which is currently imposed at the rate of 7%. The principal base for VAT computation is the aggregate of the value (CIF price) of the imported property or goods, customs duty, excise tax (if any) and other fees or surcharges applicable to the items imported. The VAT is payable by the importer upon the payment of import duty. If the importer is a VAT registrant, the VAT payable can be set off against the importer's VAT liability or a refund can be claimed.
- VAT on rental payment: a lease of an aircraft is considered a provision of service performed in a foreign country and being used in Thailand. The lease is therefore subject to 7% VAT under Section 83/6 (2) of the Thai Revenue Code. The lessee, as a payer of rental income, is liable to self-assess and remit 7% VAT to the Revenue Department on or before the seventh day of the month following the month of payment. If the lessee is a VAT registrant, this VAT can be used to set off the lessee's VAT liability or a refund can be claimed.
- Stamp duty: an aircraft lease agreement is not subject to stamp duty. If the agreement is considered a hire purchase agreement, ad valorem stamp duty will be applicable.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

Subject to the terms of the lease and other relevant facts or circumstances, it is unlikely that a foreign lessor will be considered to be resident, domiciled or carrying on business in Thailand by reason only of its execution or enforcement of an aircraft lease.

For tax, see 2.4.1 Tax Requirements for a Foreign Lessor.

2.4.3 Engine Maintenance and Operations

Subject to the terms of the lease and other relevant facts or circumstances, it is unlikely that a foreign les-

sor will be subject to liabilities in respect of aircraft or engine maintenance and operations imposed on it by reason only of its execution of an aircraft lease. There is, at present, no specific law governing the obligation of the parties on the maintenance and operations of the aircraft or engine.

However, under the Civil and Commercial Code of Thailand (CCC), a lessor is generally liable for any defect arising during the lease period and the lessor must make all necessary repairs other than those required by laws or custom to be carried out by the lessee. If a lessee has incurred any expenses for the preservation of the leased property, the lessor will have to reimburse the lessee for all necessary and reasonable expenses, except expenses for ordinary maintenance and minor repairs. The parties to a lease agreement may contractually agree otherwise on these, as is typically the case in an aircraft lease.

2.4.4 Damage or Loss Caused by an Asset

Subject to the terms of the lease and other relevant facts or circumstances, it is unlikely that a foreign aircraft or engine owner or lessor, or financier, will be liable under the doctrine of strict liability as a result of damage or loss caused by the asset. The doctrine of strict liability is technically a common law principle. The lessor will more likely be liable under Thai tort law (eg, for wrongful acts).

2.4.5 Attachment by Creditors

Subject to the terms of the lease and other relevant facts or circumstances, it is unlikely that creditors of a domestic lessee could attach an aircraft leased to it but owned by a different entity. In the case of unpaid governmental fees for the operation prescribed by law, the aircraft might be prohibited from flying in Thailand. However, it will probably not be attached or retained by the governmental entity, which is the creditor in this case. The responsible authority can just refrain from issuing a permit for the aircraft to fly.

2.4.6 Priority of Third Parties' Rights

The obligations of a lessee under an aircraft or engine lease rank at least equally (*pari passu*) in respect of priority with all other unsecured obligations of the lessee under Thai law. The exception to this is specific classes of creditors. These classes of creditors

are entitled to the mandatorily and generally applicable statutory preferential rights, general or special and therefore have preference over other unsecured creditors under the laws of Thailand (particularly under Sections 251 to 289 of the CCC and Section 130 of the Thai Bankruptcy Act).

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

It is not mandatory for insurance to be placed with a domestic insurance company.

2.5.2 Mandatory Insurance Coverage Requirements

Under the Thai aviation law and the relevant regulations, an aviation business operator must provide insurance that covers damages to the life, body and property of passengers and third parties. The minimum coverage is as follows:

- for passengers, 128,821 SDRs per person, per flight;
- for baggage, 1,288 SDRs per person, per flight;
- for goods, 22 SDRs per kilogram; and
- for third parties, from 0.75 million SDRs to 700 million SDRs, depending on the Maximum Takeoff Mass (MTOM) in kilograms.

For the combined single limit insurance, the minimum coverage for each aircraft will be calculated from:

- for passengers, 128,821 SDRs multiplied by the maximum number of passengers carried on the aircraft;
- for baggage, 1,288 SDRs multiplied by the maximum number of passengers carried on the aircraft;
- for goods, 22 SDRs multiplied by the weight of goods, in kilograms, carried on the aircraft; and
- for third parties, from 0.75 million SDRs to 700 million SDRs, depending on the MTOM in kilograms.

2.5.3 Placement of Insurance Outside of Jurisdiction

Reinsurance of up to 100% coverage can be placed outside Thailand. However, it is also reported that the Office of the Insurance Commission (OIC) (the regulatory body for the insurance industry in Thailand) has

issued a circular letter to all licensed insurance companies in the country seeking co-operation to maintain a particular portion of domestic coverage. Although this does not have the force of law, insurance companies will generally follow the OIC's request.

2.5.4 Enforceability of "Cut-Through" Clauses

Thai law does not specifically prohibit the inclusion of "cut-through" clauses in insurance or reinsurance documents. However, in order to be valid and enforceable, "cut-through" clauses that are included need to comply with the requirements regarding third-party contract rights, as specified in the CCC. According to the CCC, the parties to a contract can agree to perform debt to a third party. However, the third party must notify its intention to the debtor (ie, the reinsurer) that it will take the benefits relating to the contract.

2.5.5 Assignment of Insurance/Reinsurance

Thai law does not specifically impose any prohibitions on the assignment of insurance or reinsurance. The assignment of insurance or reinsurance can be made by complying with the conditions specified in the CCC, which state that:

- an assignment must be made in writing; and
- a written notification regarding the assignment must be sent to the debtor or written consent from the debtor must be obtained.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

There are no restrictions on a lessor's ability to terminate a lease, re-export the aircraft and/or sell the aircraft following termination.

The lessor can terminate the lease in line with the lease agreement.

Alternatively the lessor can re-export the aircraft but will have to comply with the regulations of the CAAT.

In addition, the lessor can sell the aircraft after termination if there are not any restrictions provided in the lease agreement.

The aircraft does not need to be physically located in Thailand at the time of termination and sale.

2.6.2 Lessor Taking Possession of the Aircraft

A court order must be obtained for the lessor to take physical possession of the aircraft without the lessee's consent.

2.6.3 Specific Courts for Aviation Disputes

The Intellectual Property and International Trade Court (IP&IT Court) has jurisdiction to decide aviation disputes where the lessor is a foreign party, the lessee is Thai and the aircraft is delivered from a foreign country to Thailand.

All of these types of cases have been submitted to and considered by the IP&IT Court.

2.6.4 Summary Judgment or Other Relief

Under Thai law, interim relief pending final judgment can be obtained. A lessor must apply to the court to obtain emergency relief. If the court considers the case to be an emergency, it will conduct an ex parte hearing on the filing date. The court will decide on the interim relief requested and will only hear from the lessor. The evidential burden to obtain an emergency injunction in Thailand is very high. In practice, it is challenging to obtain these types of injunctions.

A lessor can also seek non-emergency injunctive relief, where the lessee will have an opportunity to challenge the lessor's request. In this situation, the court will hear from both parties. The evidential burden to obtain relief here is lower.

A lessor cannot obtain summary judgment or equitable relief. A full trial must be conducted before a final judgment is issued and the concept of equitable relief is not recognised under Thai law.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Under Thai law, foreign law can apply as long as it is not contrary to public order in Thailand or good morals. The foreign law must also be proven to the satisfaction of the Thai courts.

The IP&IT Court has jurisdiction to consider cross-border aviation lease disputes. If the initiating party submits a claim to the IP&IT Court, it will accept and consider the case even in instances where the lease

agreement specified that the case must be exclusively submitted to the foreign court.

However, if the initiating party submits a claim to a foreign court, the IP&IT Court will consider the foreign court order or judgment as evidence only. Foreign court orders or judgments are not enforceable in Thailand.

Domestic courts will generally uphold a waiver of immunity.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

A domestic court in Thailand will not enforce a foreign court judgment. The foreign court judgment is recognised as evidence only.

However, a foreign arbitral award is recognised and enforceable without the merits of the case being re-examined.

2.6.7 Judgments in Foreign Currencies

If the request for monetary damage in the complaint is in a foreign currency, the Thai court will award it as requested.

2.6.8 Limitations on Lessors' Actions Following Termination

There are no limitations on a lessor recovering default interest under the Thai statutory rate and additional rent following termination of the lease. The Thai court may enforce the default interest provided in the lease agreement but if the court considers the rate specified in the lease to be a penalty then the Thai court may use its discretion to reduce the default interest.

However, the Thai court may only award additional rent following termination of the lease if the actual loss is proven.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

Legal fees and court filing fees will be the main fees required.

2.6.10 Mandatory Notice Periods

The notice period specified in the lease agreement must be complied with by the lessor. However, if the

rent is due monthly and the notice period specified is less than 15 days, it is recommended that the lessor provide 15 days' notice before termination, which is the notice period specified under Thai law.

2.6.11 Lessees' Entitlement to Claim Immunity

A lessee is generally not entitled to claim sovereign or other immunity in a lease enforcement action.

2.6.12 Enforcement of Foreign Arbitral Decisions

Thailand is a party to the New York Convention. Foreign arbitral awards are generally recognised and enforced by the Thai courts as long as the award does not contravene public policy or public order in Thailand.

2.6.13 Other Relevant Issues

Lessors should be aware of CAAT Regulation No 44, which was announced in the Royal Thai Government Gazette on 15 December 2023. Under Clause 12 of the Regulation, the Director-General of the CAAT has the authority to deregister an aircraft without the lessee's consent on any of the following grounds.

- If the registration certificate is invalid in line with Section 32 of the Air Navigation Act.
- If the aircraft is registered by the lessee and the possessory right to the aircraft in line with the lease agreement has expired because:
 - (a) the lease agreement has expired due to the lease term;
 - (b) the lease agreement has been terminated by the lessor or the lessee as specified in the lease agreement;
 - (c) the lessor and lessee agree to terminate the lease agreement; or
 - (d) the lessor notifies the termination of the lease agreement and submits an irrevocable deregistration power of attorney together with an application requesting the exportation of the aircraft.
- If a final court judgment orders cancellation or revocation of the registration certificate.

After receiving the deregistration certificate, applicants must:

- remove the Thai registration mark from the aircraft;

- reprogramme the Emergency Locator Transmitter; and
- return the registration certificate, airworthiness certificate and noise certificate within 30 days of the date of receipt of the deregistration certificate.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Thailand recognises the concepts of contractual assignment and novation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Thailand is a freedom of contract jurisdiction and the assignment or novation of rights pursuant to a New York or English law-governed assignment and assumption agreement or novation/deed will be considered valid by a Thai court, to the extent that the provisions are not contrary to public order in Thailand, or good morals and are also not unfair. In any event, in addition to complying with these foreign law requirements, the assignment and assumption agreement or novation/deed and the creation or perfection thereof should also be carried out in line with, and, in the forms prescribed by Thai law. Accordingly, under Thai law, the consent of, or notice to, the debtor with respect to the assignment/novation in writing will also be required.

Assigning or Transferring Claims

Under Thai law, with respect to assignment (or transfer of claims), a claim may generally be assigned or transferred, unless its nature does not admit of it or it is not subject to judicial attachment, or if the parties have declared a contrary intention. However, this declaration of intention, cannot be set up against a third party acting in good faith. An assignment/transfer of the rights or obligations performable to a specific creditor will be valid only if made in writing. The assignment/transfer cannot be set up against the debtor or any third persons, unless notice of this has been given in writing to the debtor, or the debtor has consented to the assignment/transfer in writing.

If the debtor has only received a notice of assignment/transfer, they may set up against the assignee/transferee any defence that the debtor has had against the

assignor/transferor before the notice was received. If the debtor has a claim not yet due at the time of the notice against the assignor/transferor, the debtor can set off the claim, provided that it would become due no later than the claim assigned/transferred.

An assignment/transfer of an obligation performable to order can be set up against the debtor or other third persons only if the assignment/transfer is endorsed on the instrument and the instrument itself is delivered to the assignee/transferee.

Novation

When the parties concerned have concluded a contract changing the essential elements of an obligation, this obligation is extinguished by novation. If a conditional obligation is made unconditional, a condition is added to an unconditional obligation or a condition is changed, it is regarded as a change of an essential element of the obligation. A novation by a change of the creditor is also governed by the provisions of the laws concerning the assignment. A novation by a change of the debtor may be affected by a contract between the creditor and the new debtor. However, this novation cannot be performed against the will of the original debtor. If the obligation resulting from a novation does not come into existence (or is annulled) because of an illegality or because of some reason unknown to the parties, the original obligation is not extinguished.

2.7.3 Enforceability of Lease Assignments/Novations

There is no specific requirement under Thai law that an aircraft or engine lease assignment and assumption/novation must be translated, certified, notarised or legalised to be enforceable against a domestic party. However, in the event of enforcement, certified Thai translations of the whole or any material part of the aircraft or engine lease assignment and assumption/novation and any relevant agreements or documents may have to be submitted and attached to the originals thereof when they are submitted as evidence to a Thai court.

2.7.4 Filing/Registration of Lease Assignments/Novations

It is not specifically required for an aircraft or engine lease assignment and assumption/novation to be registered or filed in the domestic aircraft registry under Thai law. Consent from any government entity is also not required. However, a registration certificate of an aircraft becomes ineffective when there is a change in the possessory right in the aircraft under Section 32 of the Air Navigation Act. Accordingly, where there is a change in the possessory right in the aircraft (ie, where there is a lease assignment and/or assumption/novation affecting the possessory right), the person who has the possessory right must seek permission for registration from the Minister of Transport as well as apply for registration of the aircraft.

A person flying an aircraft that is not registered under Section 30 of the Air Navigation Act will be liable to imprisonment for a term not exceeding one year or a fine not exceeding THB40,000, or both, under Section 68 of the Air Navigation Act.

While an aircraft or engine lease assignment and assumption/novation is not specifically required under Thai law, for registration of an aircraft, a natural or juristic person, who applies for aircraft registration needs to hold Thai nationality.

Partnerships and Limited Companies

A partnership, limited company or public limited company will be registered under Thai law and the principal place of business of the partnership or company will be situated in Thailand.

- In the case of an ordinary partnership, all partners will hold Thai nationality.
- In the case of a limited partnership, all partners who jointly have unlimited liability will hold Thai nationality and at least 51% of the capital of the partnership will belong to natural persons who hold Thai nationality.
- In the case of a limited company or public limited company, the company will not have bearer shares on issue, a majority of its directors will hold Thai nationality and at least 51% of all of the shares will belong to any one or any combination of the following persons:

- (a) natural persons who hold Thai nationality;
- (b) ministries, sub-ministries or government departments;
- (c) limited companies or public limited companies, of which ministries, sub-ministries or government departments hold at least 51% of all of the shares;
- (d) limited companies or public limited companies, of which natural persons holding Thai nationality hold at least 51% of all of the shares; and
- (e) other juristic persons as specified in the Ministerial Regulations.

Associations

An association will be registered under the law of Thailand. The principal place of business of the association will be situated in Thailand and the regulations of the association have to have been approved by the Civil Aviation Board.

Registrations and Changes of Information

An application for registration and the aircraft registration must be made in line with applications, guidance or other documents as prescribed in the Ministerial Regulations enacted by virtue of the Air Navigation Act. The period of completion is dependent upon whether the applicant has all of the documents required in order as well as the discretion of the Transport Minister.

If there is a change of information on the registration certificate, including a change in ownership of an aircraft, an application must be filed with the CAAT for the reissuance of the registration certificate within 30 days from the date of the change. An application for the reissuance of a certificate of registration can generally only be accepted if the applicant is the holder of the registration certificate.

Government applications or consents are not required as a prerequisite to the execution and delivery of an aircraft and/or engine lease assignment and assumption/novation in relation to an aircraft registered domestically.

2.7.5 Taxes/Duties Payable on Assignment/Novation

An aircraft or engine lease assignment and assumption/novation under Thai law is not subject to stamp duty.

2.7.6 Recognition of Transfer of Ownership Interests

If the ownership interest of an entity owning an asset is transferred, the legal title to the asset, including aircraft, will remain with that entity. As Thailand has an operatory registry, documents evidencing the transfer of title of the aircraft to the owner, such as a bill of sale, will be used to determine the ownership of the aircraft.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

The lessor, owner, lessee and authorised person specified in the lease agreement or any person(s) with a possessory right can request deregistration of an aircraft. See 2.6.13 Other Relevant Issues.

2.8.2 Lessee's/Operator's Consent

An aircraft owner, mortgagee or lessor can apply to the CAAT for deregistration without the lessee's or operator's consent.

2.8.3 Required Documentation

The documents required for deregistration are as follows.

- A lease agreement.
- Evidence confirming the identity of the person applying for deregistration. For example, if the applicant is a legal entity (called a juristic person in Thailand), the corporate documents such as the incorporation certificate are required.
- A termination notice together with supporting evidence showing that the lessee is in default.
- An irrevocable deregistration power of attorney.
- An application for re-exportation.
- A power of attorney showing the person who submits the deregistration application is authorised by the applicant.

2.8.4 Duration of Deregistration Process

Without the lessee's consent, deregistration can take approximately three to six months (if not longer).

2.8.5 Aviation Authority's Assurances

In general, the CAAT confirms that the CAAT regulations will be followed and the case will be considered without delay.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

There are no significant costs, fees or taxes chargeable in respect of deregistration, other than legal fees.

2.8.7 Deregistration Power of Attorney

A deregistration power of attorney (DPOA) is recognised but only when submitted under CAAT Regulation No 44. There is no required form. It is not necessary to have the DPOA certified, notarised, legalised or translated. However, it is recommended that the DPOA be irrevocable and the applicant submit the original DPOA to the CAAT.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

Additional documents required to enforce a DPOA include:

- a lease agreement;
- evidence confirming the identity of the person applying for deregistration. For example, if the applicant is a legal entity (called a juristic person in Thailand), corporate documents such as the incorporation certificate are required;
- a termination notice together with supporting evidence showing that the lessee is in default;
- an application for re-exportation; and
- a power of attorney showing the person who submits the deregistration application is authorised by the applicant.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A DPOA does not have to be governed by the laws of Thailand but must comply with the national laws of where it is made. However, with that in mind, a DPOA that does follow Thai law can help avoid any challenge raised by the CAAT or the lessee.

2.8.10 Revocation of a Deregistration Power of Attorney

In theory, under Thai law, a DPOA expressed to be irrevocable can be revoked at any time. However, due to CAAT Regulation No 44 Clause 12 (2)(d), an irrevocable DPOA is recognised by the CAAT. See 2.6.13 Other Relevant Issues.

2.8.11 Owner's/Lessor's Consent

An applicant who requests deregistration and re-export of the aircraft without the lessee's consent must comply with CAAT Regulation No 44 Clause 12 (2)(d).

If the owner, the mortgagee or the lessor can prove to the CAAT that it has the right to request deregistration then it can apply for the aircraft to be re-exported without the lessee's consent.

In order for the owner, the mortgagee or the lessor to re-export the aircraft without the lessee's consent, the applicant must comply with CAAT Regulation No 44 Clause 12 (2)(d).

The aircraft must be located in Thailand when the applicant requests deregistration and re-export of the aircraft.

2.8.12 Aircraft Export Permits/Licences

Aircraft export permits/licences are issued in Thailand. The flight permit for re-export of the aircraft is issued by the CAAT. After deregistration of the aircraft, the applicant can request the aircraft be re-exported. The applicant can alternatively request deregistration and re-export of the aircraft at the same time according to CAAT Regulation No 44 Clause 12 (2)(d).

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

To export the aircraft, the lessor must ensure that any outstanding aircraft parking fees, maintenance fees and other official fees to the airport authority are paid.

2.8.14 Practical Issues Related to Deregistration of Aircraft

The removal of registration marks from an aircraft is only made after deregistration is granted. In addition, an owner, lessor or mortgagee should expect to pay

the debtor's outstanding debts to government creditors in order to export the aircraft.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

Under the Thai Bankruptcy Act BE 2483 (as amended), there are two types of insolvency proceedings in Thailand: bankruptcy and business rehabilitation. Both bankruptcy and business rehabilitation proceedings are under the jurisdiction of the Central Bankruptcy Court. Whether a lessee files for bankruptcy or business rehabilitation will have a significant effect on the lessor's ability to repossess the aircraft.

Bankruptcy

If the lessee files for bankruptcy in Thailand, the lessor can still seek the deregistration and repossession of the aircraft. The lessor has this option regardless of whether the lessee is under absolute receivership in a bankruptcy. However, the lessor cannot file a lawsuit against the lessee for debts owed. The lessor has to submit a debt repayment application to the official receiver under the bankruptcy proceedings. The debt repayment application must be filed within two months of the date of the publication of an order placing the lessee in absolute receivership. However, if the lessor is located outside Thailand, the official receiver may grant an extension of time for a period not exceeding two months.

Business Rehabilitation

If the lessee files for rehabilitation in the Central Bankruptcy Court, it will be more challenging for the lessor to repossess the aircraft. Rehabilitation proceedings aim to resolve the debtor's financial difficulties by allowing it to continue engaging in its business, while helping creditors be repaid. To allow the debtor to continue engaging in its business, the Bankruptcy Act gives the debtor relief from creditors by providing for an "automatic stay". The "automatic stay" is imposed when the court accepts the debtor's rehabilitation petition and prevents, among other things, creditors from pursuing claims against the debtor and restricting a creditor's right to enforce security.

The Bankruptcy Act states that when the automatic stay is effective, an owner of leased property which is "essential for the operation of a debtor's business" cannot recover the property when it is in the debtor's possession or another person relying on the debtor's rights (eg, a sublessee). However, if the lease agreement has expired, the lessor can recover its property.

When the debtor is an airline, the leased aircraft is likely to be considered essential for the operation of the debtor's business. If the aircraft is not airworthy and the debtor has insufficient assets to properly maintain the aircraft, a lessor could argue that the leased aircraft is not essential to the debtor's business.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

See 2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

If the lessee files for bankruptcy in another jurisdiction, the foreign action will have no legal effect on the deregistration or repossession in Thailand. Thailand is not a party to any international treaty on insolvency or on the enforcement of recognition of foreign judgments. Thai laws also do not specifically provide for direct enforcement of a foreign judgment. A foreign court action may be used as evidence in Thailand, but that is all.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

Although the lessee is in the process of liquidation, the DPOA still stands. However, under the Bankruptcy Act, if the lessee is declared to be under receivership, they are prohibited from undertaking any act relating to its business, except if ordered by or with the approval of the court, the official receiver or a creditor's meeting.

2.9.5 Other Effects of a Lessee's Insolvency

If a lessee in possession of an aircraft is put into liquidation or administration:

- the aircraft will not be considered as the lessee's asset. However, the lease agreement can be reviewed by the official receiver;
- the repossession of the aircraft can be delayed on the termination of the lease as the termination can be reviewed and challenged by the official receiver;
- as mentioned in the first item, the aircraft will not be considered as the lessee's asset and the official receiver must comply with the lease agreement; and
- the liquidator/administrator will not impose the rights of any other creditors in priority to the lessor's. However, the secured creditor naturally has rights over the asset, which are secured by the debtor before the receivership order and so do not need to file a debt repayment application.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The unsecured assets of the lender will be managed by the official receiver. These assets will generally be sold at a public auction and money received by the official receiver will be distributed to all creditors who have submitted their debt repayment application on a pro rata basis.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

The Bankruptcy Court can place an "automatic stay" (ie, a moratorium) if the lessee files a business reorganisation petition with the court and the term of the lease agreement has not yet expired. In this case, the lessor cannot repossess the aircraft from the day the court accepts the business reorganisation petition until the expiry of the time to implement the business plan or the day on which the business plan is successfully accomplished. The "automatic stay" is lifted on the day the court dismisses the debtor's petition, rejects the case, or the day the debtor is placed into absolute receivership.

If a repossession action has been taken before the "automatic stay", the "automatic stay" causes the repossession action to be suspended, unless otherwise ordered by the Bankruptcy Court which received the debtor's rehabilitation petition. The repossession case can also resume after the day on which the Bankruptcy Court orders the business reorganisation

and the party responsible for the rent defaults on payment under the lease agreement twice consecutively or commits a material breach of the agreement.

2.9.8 Liquidation of Domestic Lessees

There are several ways in which a domestic lessee can be liquidated or placed into administration or receivership. These are as follows.

- The creditor of the lessee submits a complaint requesting the court declare the lessee bankrupt.
- A lessee who has more liabilities than assets can request the court declare the lessee bankrupt.
- The lessee files a business reorganisation petition with the court.

2.9.9 Ipso Facto Defaults

To repossess an aircraft during the insolvency of a lessee, the "automatic stay" must be lifted and the conditions stated in in 2.9.8 Liquidation of Domestic Lessees must be met.

2.9.10 Impact of Domestic Lessees' Winding-Up

The impact of the winding-up of a domestic lessee is as follows.

- Aircraft: because the aircraft is not the lessee's asset, it will not be sold at a public auction.
- Lease rentals: the lessor has to submit a debt repayment application to the official receiver requesting the outstanding debts, which includes rent.
- Lease security deposit (please see the second point above).
- Maintenance reserves (please see the second point above).

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

Thailand has not ratified or acceded to the Convention on International Interests in Mobile Equipment (the "Convention") or the related Protocol on Matters Specific to Aircraft Equipment (the "Protocol").

2.10.2 Declarations Made Concerning Conventions

Thailand ratified the Chicago Convention in 1947, the Geneva Convention in 1967 and the Montreal Convention in 2017.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

The Protocol does not apply in Thailand.

2.10.4 Enforcement of Conventions

The Convention and Protocol are not enforceable in Thai courts.

2.10.5 Other Conventions

Thailand ratified the 1948 Geneva Convention on the International Recognition of Rights in Aircraft in 1967. However, Thailand is not a party to the 1933 Rome Convention.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

Subject to complying with the applicable laws, there are no restrictions on foreign lenders financing an aircraft locally or borrowers using the loan proceeds.

3.1.2 Effect of Exchange Controls or Government Consents

Thailand has a comprehensive exchange control regime that regulates foreign exchange transactions, including outward remittances of Thai or foreign currency. Authorised juristic persons such as commercial banks in Thailand are allowed to approve specific foreign exchange transactions. Other foreign exchange transactions meanwhile can only be carried out with the approval of the Bank of Thailand.

With respect to necessary foreign currency remittances to repay a foreign loan or make payments under a guarantee or security document (net of applicable Thai withholding tax), the party seeking to remit the funds must, each and every time they make an application for outward remittance, submit documentary evidence with respect to the remittance (such as the relevant invoice, a copy of the relevant loan or other relevant agreement and any other relevant documents or instruments).

3.1.3 Granting of Security to Foreign Lenders

Subject to complying with the applicable laws, borrowers are permitted to grant security to foreign lenders to secure a valid primary obligation.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Subject to complying with the applicable laws, downstream, upstream and cross-stream guarantees by Thai companies or individuals as security for a valid primary obligation of a third-party debtor in favour of lenders are permitted. There are no consideration, corporate benefit or registration requirements for these guarantees to be valid under Thai law.

3.1.5 Lenders' Share in Security Over Domestic SPVs

A pledge of shares of a domestic/Thai special purpose vehicle that owns the financed aircraft under Thai law is recognised and advisable.

3.1.6 Negative Pledges

The provisions relating to a negative pledge are recognised and acceptable under Thai law, if, and to the extent, they are not against Thai laws or public order in Thailand or good morals.

3.1.7 Intercreditor Arrangements

Subject to complying with the applicable laws, there are no material restrictions or requirements imposed on intercreditor arrangements.

3.1.8 Syndicated Loans

The concept of agency and therefore the role of an agent (such as the facility agent) under a syndicated loan are recognised under Thai law.

3.1.9 Debt Subordination

Provisions or arrangements setting out subordination of any rights of a person to any rights of another person under an agreement are only binding and enforceable on those parties under Thai law. They are only binding and enforceable to the extent, and, upon the conditions as may be agreed upon by the parties concerned. However, they may not create preferential rights nor bind or try to enforce them against a third party.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

Subject to complying with the applicable laws, the transfer or assignment of all or part of an outstanding debt under a valid English or New York law-governed loan is recognised and permissible under Thai law.

3.1.11 Usury/Interest Limitation Laws

There are usury or interest limitation laws in Thailand. Principally, with respect to a loan transaction, interest will not exceed 15% per annum. However, the maximum interest rate chargeable by the international financial institutions which Thailand is a member of, or banks or financial institutions registered and located in foreign countries will not exceed 20% per annum.

If the applicable interest rate under the relevant agreement/document exceeds the maximum interest rate permissible under Thai law, the whole interest charged is void and unenforceable and only the principal amount will be recoverable.

If the interest has been paid, it was in violation of the law. As a result, the borrower cannot claim restitution. The lender must also apply the amount paid as interest in violation of the law towards repaying the principal and in this event, all interest accrued but unpaid may not be recoverable by the lender and/or the persons purportedly entitled to it under the terms of the agreement/document. The laws governing the maximum interest rate extends the scope of interest to benefits in lieu of interest.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

The typical forms of security traditionally recognised under Thai law include:

- mortgage of immovable property (such as land, buildings and structures on the land and condominium units) or certain types of movable property (such as machinery and vessels);
- pledge of movable property (including shares); and
- business security under the Business Security Act BE 2558.

The Business Security Act BE 2558 makes provision for the recognition of a security interest created by

a business security agreement. A business security agreement is an agreement whereby a contracting party (the security provider) has placed a property with the other contracting party (the security receiver) as security against debt repayment with no need for the property to be delivered to the security receiver. The creation of a business security is recognised as security interest under Thai law, which then will provide the security receiver with preferential rights over that asset in the case of bankruptcy.

The Business Security Act BE 2558 requires security receivers to be eligible persons which are defined in the Business Security Act BE 2558 and its ministerial regulations, which currently include, inter alia, Thai commercial banks and foreign banks providing a loan with Thai commercial banks. Otherwise, at present, foreign banks and foreign entities are not eligible security receivers as provided under the Business Security Act BE 2558 and its ministerial regulations.

A security provider may place its own property as security against debt repayment payable by a third person. A business security agreement must be made in writing and registered with the business security registration officer. However, Thai law does not presently facilitate the mortgaging of aircraft and registration or perfection of a mortgage over an aircraft under Thai law may therefore not currently be achievable or practicable. In specific circumstances, assignment of income/proceeds or insurance may be used.

In addition, guarantee and assignment are available forms of contract that could be used to create a contractual security arrangement under Thai law (in other words, “quasi security”). These contractual security arrangements will be enforceable between the parties but they will not create any priority over other creditors under Thai law. Debts that are secured by contractual security arrangements will be treated as unsecured debts. Claims against the guarantor under guarantee and the assignor under an assignment will rank at least *pari passu* with the claims of all other unsecured creditors of the guarantor or assignor.

3.2.2 Types of Security Not Available

At present a mortgage over an aircraft is not permissible in Thailand under Thai law.

3.2.3 Trust/Trustee Concepts

Thai law does not principally recognise the common law concepts of liens, trust, charge, hypothecation or a security interest created thereunder, except in the context of the Trust for Transactions in Capital Market Act BE 2550 (2007), which provides for a trust to be created for the benefit of transactions in the capital market. The typical alternative structures that could be used include parallel debt or the appointment of a security agent instead of a security trustee.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

Subject to complying with the applicable laws, a borrower may assign its rights under an aircraft lease (including in relation to insurances) to any person, including the security agent/trustee under Thai law.

In relation to mortgages, Thai law does not currently provide for the mortgaging of aircraft.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

Assigning the rights and benefits without assigning the attendant obligations of a lessor is permissible under Thai law.

3.2.6 Choice of Foreign Law

A security assignment or a guarantee can be expressed to be principally governed by English or New York law. However, attention should also be paid to Sections 9 and 16 of the Act on Conflict of Laws BE 2481 (1938).

- Section 9 states: “Unless otherwise provided by this Act or other laws of [Thailand], the formal validity of a juristic act shall be governed by the law of the country where the act is made. However, the law of the country where a property is situated governs the form required for the validity of a contract, document or other juristic act relating to immovable property.”
- Section 16 states: “Movable and immovable property is governed by the law of the place where the property is situated. However, in the case of exportation of movable property, the law of nationality of its owner shall govern from the time of exportation.”

Therefore, in addition to complying with the English or New York law requirements, the security assignment or guarantee and creation/perfection thereof, should be carried out in line with and in the forms prescribed by Thai law as well.

In addition, under Thai law and in any proceedings taken in Thailand for the enforcement of the security assignment or guarantee, the choice of English or New York law, as the case may be, to govern the security assignment or guarantee is a valid choice of law. The Thai courts will observe and give effect to the choice of English or New York law (as the case may be) as the governing law of the security assignment or guarantee, in so far as the English or New York law is established and proven to the satisfaction of the Thai court, and in the discretion of the Thai court, not considered contrary to public order in Thailand or good morals in any way.

If the foreign law is not proven to the satisfaction of the Thai courts, Thai law will apply. In any event, the security assignment or guarantee and any other relevant agreements/documents must be legal, valid, binding and enforceable under, and be in the forms prescribed by, English or New York law, as the case may be, and/or Thai law if they are to be legally enforced in Thailand.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

Under Thai law, with respect to an assignment, a claim may be assigned or transferred, unless its nature does not allow this, it is not subject to judicial attachment or the parties have declared a contrary intention. However, the declaration of intention, cannot be set up against a third person acting in good faith. An assignment or transfer of the rights or obligations performable to a specific creditor is only valid if it is made in writing. The assignment or transfer cannot be set up against the debtor or any third persons unless notice has been given in writing to the debtor or the debtor has consented to the assignment/transfer in writing.

If the debtor has only received a notice of assignment or transfer, they may submit any defence that they have against the assignor or transferor before the notice was received against the assignee or transfer-

ee. If the debtor has a claim not yet due at the time of the notice against the assignor/transferor, the debtor can set off the claim, provided that it will become due not later than the claim assigned/transferred.

An assignment or transfer of an obligation performable to order can be set up against the debtor or other third persons only if the assignment or transfer is endorsed on the instrument and the instrument itself is delivered to the assignee or transferee. A novation by a change of the creditor is also governed by the provisions of the laws concerning the assignment. A novation by a change of the debtor may be effected by a contract between the creditor and the new debtor. However, the novation cannot be done against the will of the original debtor.

There is no specific requirement under Thai law that a security assignment be translated, certified, notarised or legalised to be enforceable against a domestic party. However, in the event of enforcement, certified Thai translations of the whole or any material part of the relevant agreements or documents may have to be submitted and attached to the originals thereof when they are submitted as evidence to a Thai court.

3.2.8 Domestic Law Security Instruments

See 3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments. Thailand has not ratified or acceded to the Convention or the Protocol.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

There is no specific requirement under Thai law for an assignment to be registered with any local authority.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

Subject to complying with the applicable laws, the transfer of security interests over an aircraft or engines is recognised in Thailand.

3.2.11 Effect of Changes in the Identity of Secured Parties

Depending on the change and the type of security or security interest, the security interests could be jeopardised.

3.2.12 “Parallel Debt” Structures

See 3.2.3 Trust/Trustee Concepts.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

Subject to the terms of the lease and other relevant facts or circumstances, it is unlikely that a secured party under a security assignment will be considered to be resident, domiciled or carrying on business in Thailand by reason only of its execution or enforcement of a security assignment.

3.2.14 Perfection of Domestic Law Mortgages

Thai law does not provide for the mortgaging of aircraft at present and registration or perfection of a mortgage over an aircraft under Thai law may therefore not currently be achievable or practicable.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

Subject to complying with the applicable laws, a pledge of spare engines might be practically feasible.

3.2.16 Form and Perfection of Security Over Bank Accounts

Subject to complying with the applicable laws, assignment of a bank account and sometimes a pledge of a bank account will typically be used. In addition, a security interest over a bank account created under and according to the Business Security Act BE 2558 will also be recognised.

3.3 Liens

3.3.1 Third-Party Liens

Thai law does not recognise the common law concept of a lien or a security interest created under it. However, under Thai law, the right of retention and preferential rights, general or special, are recognised and provided for. The right of retention permits the lawful possessor of a property belonging to another party who has an obligation in their favour in relation to the property possessed to retain the whole of the property until the obligation is fully performed.

Under the CCC, the right of retention only covers the obligation or value of the work done in relation to the asset or property that is in their possession.

Thai law does not recognise the concept of a fleet lien. A third party can only have the right of retention over an asset that they possess.

3.3.2 Timeframe to Discharge a Lien or Mortgage

The right of retention permits the lawful possessor of a property to retain the whole of the property until the debt or obligation in relation to the property possessed is fully paid or performed. Thai law does not provide for the mortgaging of aircraft at present and so registration or perfection of a mortgage over an aircraft under Thai law may therefore not currently be achievable or practicable.

3.3.3 Register of Mortgages and Charges

Thai law does not currently provide for the mortgaging of aircraft and accordingly, registration or perfection of a mortgage over an aircraft under Thai law may not currently be achievable or practicable. Subject to complying with the applicable laws, a security interest over an aircraft under, and according to, the Business Security Act BE 2558 could probably be created and recognised.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

See 3.3.1 Third-Party Liens.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

An aircraft cannot be mortgaged or pledged under Thai law at present. However, an aircraft can be registered as a business security under the Business Security Act BE 2558. In this event, a purchaser can verify the business security with the Department of Business Development.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

The concept of security assignment is not recognised under Thai law. However, assignment of an account receivable in project finance may be considered a novation and applicable under Thai law, if a written assignment agreement is made between an assignor and assignee with consent from, or notification, to a debtor.

Enforcement can only be made through a court. However, unlike enforcing a loan, the right to enforce a guarantee is subject to particular requirements under the CCC, such as:

- the timing of the demand notice;
- the duration of the debt;
- the maximum amount secured; and
- so on.

In order for the guarantee agreement to be enforceable, it must also be made in writing and be signed by the guarantor. Particular specific incidents may result in a guarantee being discharged, such as the creditor granting the debtor an extension of time for payment.

3.4.2 Security Trustees' Enforcement of Their Rights

As the concept of a security trustee is not recognised under Thai law, enforcement of the rights under the security assignment requires litigation in the Thai courts.

3.4.3 Application of Foreign Laws

Whenever the governing law is foreign law, the foreign law can apply in so far as it is not contrary to public order in Thailand or public policy. If the Thai court establishes that foreign law applies, the party relying on the foreign law has to prove the foreign law is applicable to the satisfaction of the Thai court. If they do not, Thai law will apply.

There has been no instance of the Thai court dismissing a case based on a choice of forum clause designating a foreign court. Indeed, case precedents show that the Thai court has discretion to exercise jurisdiction contrary to the clause when the Thai court has jurisdiction over the dispute.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Thailand is not a party to any conventions on enforcing foreign judgments. Thai courts do not enforce foreign judgments but will accept foreign judgments as evidence in a new trial. Even if the foreign judgment is based on the merits, the claimant must present all the key witnesses and testimony in the new trial before the Thai court.

A foreign arbitral award can be enforced after the Thai court has recognised and enforced the award in line with the procedures of a normal lawsuit by filing an application for enforcement of a foreign arbitral award. In response to the application, the Thai court will look at procedural and due process matters related to the foreign arbitral proceeding and not the underlying merits.

The Thai court will therefore usually grant an order to enforce the award unless it finds one of the grounds for setting aside an arbitral award as prescribed in Section 43 of the Arbitration Act BE 2545, which states similar conditions as set out in the UNCITRAL Model Law on International Commercial Arbitration. In addition, in line with Section 44 of the Act, the Thai court will refuse to enforce an arbitral award if it finds that an award dealing with a dispute cannot be settled by arbitration or if the enforcement would be against public order in Thailand or public policy.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

A secured party will need the lessee's or operator's consent.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

The common civil courts generally have authority to try to adjudicate civil cases concerning enforcement of a security agreement.

3.4.7 Summary Judgments or Other Relief

There is no summary judgment procedure of the type of case found in Thai civil procedure law. The Thai court normally requires the entire case to be tried in court before rendering its judgment regarding the enforcement of any agreements, including security agreements.

3.4.8 Judgments in Foreign Currencies

In rendering a judgment, the Thai court may, at its discretion, enter a judgment in a foreign currency (if requested in the complaint), even if the obligations of the debtor are originally expressed in a foreign currency.

3.4.9 Taxes/Fees Payable

If there is interest on a loan paid to a creditor, the creditor is generally liable to income tax.

The fees for enforcement of a court judgment typically range from 1% to 3% of the amount seized or attached or the value of the asset attached.

3.4.10 Other Relevant Issues

The litigation process in Thailand can be lengthy. In some cases, the market value of an aircraft may decrease below the repayments owed on the aircraft due to the length of enforcement time.

In addition, a debtor may not have or be able to access technical aircraft documentation, as there is no central authority in Thailand for keeping these records. A proper records management system should therefore be set among, or between, the parties involved.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

Foreign entities are not eligible to register aircraft in Thailand under Thai law. A non-Thai lessor cannot therefore register an aircraft. In practice, this means that a Thai lessee-operator must register the aircraft.

4.2 Current Legislative Proposals

A replacement to Thailand's primary law governing aviation (the Air Navigation Act BE 2497 (1954)) has been discussed for a few years. It is uncertain if, or when, the new version of the Air Navigation Act will become law. The Air Navigation Act was last amended on 24 May 2019.

VIETNAM



Law and Practice

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Tilleke & Gibbins is a South-East Asian regional law firm with more than 250 lawyers and consultants. The firm was established in Bangkok in 1890 and now operates seven offices across six jurisdictions in South-East Asia, including Cambodia, Indonesia, Laos, Myanmar, Thailand and Vietnam, with a global reach through the Lex Mundi, Multilaw and Drew Network Asia (DNA) legal networks. The firm's cross-disciplinary aviation team serves airlines, aircraft les-

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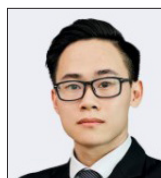
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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

The execution of an aircraft or engine sale agreement is not subject to any specific tax or stamp duty under Vietnamese law. However, it is subject to the general tax regime, which may include income tax and VAT.

1.1.2 Enforceability Against Domestic Parties

Vietnamese laws do not have any specific regulations that require an aircraft or engine sales agreement to be translated, certified, notarised or legalised to be enforceable against a domestic party. Nevertheless, taking these steps would be advisable for dispute enforcement purposes.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Ownership of an aircraft encompasses rights to aircraft hulls, aircraft engines, aircraft propellers, aircraft radio equipment and other equipment used on board aircraft, irrespective of whether these components are currently installed on the aircraft or have been temporarily removed under Vietnamese law. However, Vietnam does not have a separate legal framework or registration system for individual aircraft components such as engines or spare parts. All existing registration procedures are conducted at aircraft level, with only basic information (eg, the engine's number and designation) recorded in the ownership registry.

As Vietnamese law does not specifically provide for the transfer of title to an aircraft, engine or other installed parts, including the auxiliary power unit (APU), the transfer is subject to general legal provisions regarding the transfer of ownership of movable property. Unless agreed or specified otherwise by the parties, the ownership of the property is generally transferred to the buyer from the moment the contract of sale is entered into. However, if the entity that holds the title remains the same, the sale of an ownership interest will not be effectively recognised as a sale of the aircraft or engine itself.

1.2.2 Sales Governed by English or New York Law

Vietnamese law generally allows the contracting parties to choose foreign laws and jurisdictions, such as English or New York law, to govern the bill of sale as long as the application of the chosen law or its consequences do not conflict with fundamental principles of Vietnamese law (ie, public policy).

In addition, the laws do not specifically stipulate any substantive requirements for a bill of sale to be recognised as a valid contract, aside from it needing to be written and signed by the competent representative(s) of each party.

1.2.3 Enforceability Against Domestic Parties

Vietnamese law does not have any specific regulations that require a bill of sale to be translated, certified, notarised or legalised to be enforceable against a domestic party. To register the new owner of the aircraft with the Civil Aviation Authority of Vietnam

(CAAV), a certified true copy or photocopy enclosed with the original bill of sale (for verification purposes) must accompany the application submitted to CAAV.

1.2.4 Registration, Filing and/or Consent From Government Entities

Vietnamese law does not necessitate the registration, filing or procurement of government consent for a bill of sale. However, for the registration of a new aircraft owner, a certified true copy or photocopy enclosed with the original bill of sale (for verification purposes) must be submitted to CAAV. Within three working days of receipt of a complete registration application, CAAV will issue an ownership registration certificate in favour of the new owner.

The execution and delivery of a bill of sale related to an aircraft or engine registered in Vietnam does not require any prior government applications or consents.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

Executing and/or delivering a bill of sale under Vietnamese law is not subject to any specific tax or stamp duty. However, it is subject to the general tax regime, which may include income tax and VAT.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

Subject to complying with the applicable laws, operating/wet/finance leases are permissible and recognised in Vietnam. However, an aircraft lease between a domestic party and an offshore entity is subject to the approval of CAAV.

2.1.2 Application of Foreign Laws

Vietnamese law recognises and enforces the choice of foreign law. However, the chosen foreign law will not be applicable if the:

- application of the law or the consequence thereof are inconsistent with the fundamental principles of Vietnamese law; or

- contents of the foreign law are not identifiable regardless of the application of necessary measures prescribed by procedural law.

If the chosen foreign law is considered inapplicable, Vietnamese law will apply instead.

In addition, judgments rendered by foreign courts are generally challenging to have recognised and enforced in Vietnam, although there is a legal basis for this recognition. In particular, the courts recognise and enforce judgments:

- rendered by courts of countries with which Vietnam has signed treaties on the recognition and enforcement of court judgments; or
- on a reciprocal basis.

Vietnam has only signed a limited number of treaties on the recognition and enforcement of civil and commercial court judgments, primarily with countries from the former Soviet bloc. The recognition and enforcement of foreign court judgments from most countries (including the US or the UK) therefore needs to rely on the basis of reciprocity, which remains without precedent.

On the other hand, although Vietnam has been a member of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) since 1995 and the selection of foreign arbitration may seem more practical and preferable, the recognition of foreign arbitration awards in Vietnam can be a challenging and burdensome process.

2.1.3 Restrictions Concerning Payments in US Dollars

No material restrictions are imposed on domestic lessees making rent payments to foreign lessors in US dollars so long as the domestic lessees fully comply with, inter alia, foreign exchange control rules, tax and anti-money laundering laws/regulations and who can present documentary evidence of the rent payments to the relevant authorities if requested to do so.

2.1.4 Exchange Controls

Rent payments under a lease or repatriation of realisation proceeds between a domestic lessee and an offshore lessor can generally be freely conducted.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

An aircraft lease is exempt from VAT and special consumption tax but is subject to import duty at the rate of 0%.

A lessor will be considered to have income derived in Vietnam through leasing an aircraft to a domestic lessee. The lessor is therefore liable to pay foreign contractor tax in relation to any payment made by the lessee, which includes VAT and income tax.

2.1.6 Licensing/Qualification of Lessors

Vietnamese law does not specify any requirements in terms of licences and qualifications for a lessor to lease an aircraft from abroad to a lessee in Vietnam. In addition, under Vietnam's Commitments on the Accession to the WTO in the field of Services, there is no restriction on cross-border aircraft leasing (CPC 83104) conducted by an offshore entity from WTO members.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

There are no compulsory requirements when it comes to specific terms of aircraft leases governed by English or New York law.

Regardless, before granting approval for aircraft leasing (which is different from approval of a lease agreement), CAAV will consider the:

- form of lease;
- legal status of the parties to the aircraft lease contract;
- lease term;
- quantity, type and age of the aircraft;
- nationality of the aircraft;
- certificates related to the aircraft;
- agreement on purchase of civil liability insurance for passengers, baggage and cargo and for third parties on the ground; and

- the organisation responsible for operating and maintaining the aircraft according to the aircraft operator certificate (AOC).

It is therefore advisable to ensure that the lease contract/agreement and/or its ancillary documents submitted to CAAV contain clear information on these matters whenever possible.

2.2.2 Tax and Withholding Gross-Up Provisions

Provided that tax and other withholding gross-up provisions do not conflict with the fundamental principles of Vietnamese law, the parties involved may freely agree to have these provisions, which would be both valid and enforceable under Vietnamese law.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease can cover parts that are installed or replaced on an aircraft or engine after its execution, provided that they are reflected or included in the lease agreement, its ancillary documents or a separate agreement (ie, for wet lease arrangements).

It is also possible to cover the aircraft and its engine and parts (whether or not any of them may be subsequently installed or replaced on the airframe or on any other airframe) as the lease object.

2.2.4 Risk of Title Annexation

While Vietnamese law is silent on the registration of ownership rights for standalone aircraft engines, Article XIV(3) of the Protocol to the Cape Town Convention, which Vietnam is a contracting party to, provides that ownership or any other right or interest in an aircraft engine should not be affected by its installation or removal from an aircraft. However, the direct application of Article XIV(3) of the Protocol has yet to be tested in practice.

2.2.5 Recognition of the Concepts of Trust/Trustee

Vietnamese law does not recognise the concept of a trust or the role of an owner trustee under a lease.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

The Aircraft Register of Vietnam records information on:

- registration or deregistration of aircraft (regarding the nationality of the aircraft);
- rights toward the aircraft (such as ownership and possession rights);
- security enforcement over the aircraft (ie, mortgage); and
- other information relating to Vietnamese nationality (or temporary Vietnamese nationality) of the aircraft.

An aircraft is registered with specific information on the foreign owner and lessor and the registration certificate of Vietnamese nationality aircraft, upon being granted, will record the names and addresses of the aircraft owner, lessor and aircraft operator/lessee/domestic airline.

It is possible to note the interests of other parties (such as the mortgagee) on the Aircraft Register.

2.3.2 Registration If the Owner Is Different From the Operator

A reference to “registration of aircraft” under Vietnamese law is understood as “registering the nationality of the aircraft”. The aircraft can be registered domestically in the name of the owner if the owner is not also the operator.

2.3.3 Aircraft/Engine-Specific Registers

Approval of the aircraft leasing (not the approval of the lease agreement) from CAAV is generally required before the lessee operates a leased aircraft in Vietnam. In contrast, engine leases are generally not subject to a separate approval process by CAAV in practice.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

Within five working days from the receipt of a complete registration dossier (normally submitted by the domestic airline/operator), CAAV will either approve or reject the aircraft lease. If rejected, a clear written explanation will be provided. The laws do not outline

any consequences for failing to secure CAAV approval for the aircraft lease.

Vietnamese law does not require the execution and delivery of an aircraft or engine lease in relation to an aircraft registered in Vietnam.

2.3.5 Requirements for a Lease to Be Valid and Registrable

There are no specific forms required for the lease other than it must be in writing. Strictly speaking, a foreign language lease must be translated into Vietnamese and it must be certified as a true translation by a Vietnamese notary public. In practice, CAAV may exercise some flexibility in accepting an original signed copy of the lease in English.

2.3.6 Taxes/Duties Payable for Registering a Lease

The fee for CAAV's appraisal and approval of an aircraft lease is VND5 million (approximately USD200).

2.3.7 Registration of Aircraft in Alternative Countries

There are no common alternative countries for registering Vietnam-based aircraft. Vietnam-based aircraft are registered in Vietnam.

2.3.8 Requirements for Documents Concerning Registration

Apart from the lease agreement and a properly filled request form, no specific formality requirements are prescribed by law for other documents concerning lease approval. However, documents that are issued in a foreign country or in a foreign language should generally be translated, certified, notarised or legalised before submission.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

The lessor will be considered to have income derived in Vietnam through leasing the aircraft to the domestic lessee. The lessor will therefore be liable to pay foreign contractor tax in relation to any payment made by the lessee, which includes VAT and corporate income tax (CIT). As the aircraft lease is exempt from VAT, the lessor only pays CIT, which will be withheld by the lessee.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

If a foreign lessor does not have a permanent establishment in Vietnam (leasing an aircraft to a domestic airline does not itself create a Vietnamese permanent establishment) before it enters into a lease, the lessor will not be considered resident, domiciled or carrying on business in Vietnam by reason only of its execution or enforcement of an aircraft lease.

2.4.3 Engine Maintenance and Operations

Under a wet lease arrangement (where the foreign lessor provides the aircraft and the crew), the foreign lessor must ensure compliance with safety standards for the aircraft and engine maintenance and operation. Meanwhile, the liabilities in respect of the aircraft or engine maintenance and operations will be imposed on the domestic lessee under a dry lease arrangement (where the foreign lessor only provides the aircraft).

2.4.4 Damage or Loss Caused by an Asset

Subject to the terms of the lease and other relevant facts or circumstances, it is unlikely that a foreign aircraft or engine owner, lessor or financier, could be liable under the doctrine of strict liability. While the doctrine of strict liability is technically a common law principle, from a Vietnamese law perspective, the aircraft operator will be held accountable for damage or loss caused by the asset.

2.4.5 Attachment by Creditors

Subject to the terms of the lease and other relevant facts or circumstances, it is unlikely that creditors of a domestic lessee could attach an aircraft leased to it but owned by a different entity.

2.4.6 Priority of Third Parties' Rights

Vietnamese law generally recognises third parties' rights that will take priority over a lessor's rights under an aircraft or engine lease, provided that the rights are duly registered (See 3.2.14 **Perfection of Domestic Law Mortgages**). However, even with a registered mortgage, enforcement concerning spare engines may be complicated if they are subsequently installed on an airframe and the lessee does not co-operate with their removal.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

All insurances should generally be placed with domestic insurance companies. However, the lessee may also place part of the insurances (for risks relating to international commercial aviation with the insurances covering any or all of the following: the goods being transported; the vehicle transporting the goods; and any liability arising therefrom) with international insurance companies on a cross-border basis.

2.5.2 Mandatory Insurance Coverage Requirements

A domestic lessee as an aircraft operator has to maintain compulsory civil liability insurance for:

- passengers;
- baggage and cargo; and
- third parties on the ground.

For flight crew members who are on duty, the lessee (acting as their employer under Vietnamese labour law) has to purchase accident insurance for them.

2.5.3 Placement of Insurance Outside of Jurisdiction

Vietnamese law does not specify a specific threshold for reinsurances placed outside of the jurisdiction. This means 100% coverage will be feasible. The exception to this is reinsurances made under the insured's instructions. In this case the coverage can only be up to 90%.

2.5.4 Enforceability of "Cut-Through" Clauses

Vietnamese law does not explicitly prohibit the inclusion of "cut-through" clauses in insurance or reinsurance documents. However, "cut-through" clauses must comply with the contractual rights of third parties in order to be valid and enforceable.

2.5.5 Assignment of Insurance/Reinsurance

Vietnamese law permits the assignment of insurances/reinsurances. Unless the assignments are in line with the terms in the insurance policy/agreement or international customs, the written consent of the insurer must be obtained first.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

There are no restrictions on a lessor's ability to terminate a lease or sell the aircraft following termination. A lessor can terminate a lease in line with the lease agreement and they can also sell the aircraft after termination if no restrictions are stated in the lease agreement.

There is a restriction on a lessor's ability to re-export the aircraft if it is not the holder of the irrevocable deregistration and export request authorisation (IDERA) (which is obtained in line with the Convention on International Interests in Mobile Equipment and the related Protocol on Matters specific to Aircraft Equipment). If the IDERA has been registered with CAAV, only the authorised party under the IDERA is entitled to apply to deregister and export the aircraft.

A foreign lessor without a legal presence and tax code in Vietnam wishing to re-export the aircraft must appoint a qualified local customs agent to declare re-export clearance with the relevant customs authority on their behalf. The aircraft does not need to be physically located in Vietnam at the time of termination and sale.

2.6.2 Lessor Taking Possession of the Aircraft

A court order is required for the lessor to take physical possession of the aircraft without the consent of the lessee or operator.

2.6.3 Specific Courts for Aviation Disputes

No specific courts have competence to decide aviation disputes. The general provincial level People's Courts will handle aviation disputes if the case involves a foreign element. Vietnam has also declared provincial level People's Courts as the applicable court under the Cape Town Convention.

Aviation dispute cases have been submitted to, and considered by, the provincial level People's Courts.

2.6.4 Summary Judgment or Other Relief

A lessor can only obtain injunctive relief pending final judgment in emergency circumstances relating to enforcing an aircraft lease. The lessor must file an application with the court during the settlement of a

lawsuit. The statutory timeframe for the court to review and grant injunctive relief (if this request for injunctive relief is acceptable) is about three to five working days in total.

A lessor cannot obtain summary judgment or equitable relief. A full trial must be conducted before a final judgment is issued and the concept of equitable relief is not recognised under Vietnamese law.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Vietnamese courts generally uphold foreign law as the governing law of an aircraft lease. The courts will request the parties or the relevant authorities stipulate the foreign law within six months. If there is no response, the Vietnamese courts will apply Vietnamese law to settle the case.

The Vietnamese courts generally uphold submissions to a foreign jurisdiction. However, if the initiating party submits a claim to a foreign court, the Vietnamese courts will only consider the foreign court order or judgment as evidence. Foreign court orders or judgments must be recognised by Vietnamese courts first in order to have legal effect in Vietnam.

The Vietnamese courts will generally uphold a waiver of immunity.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Foreign judgments rendered by foreign courts are generally difficult to have recognised and enforced in Vietnam, even though there is a legal basis for recognition. The courts recognise and enforce judgments:

- rendered by courts of countries with which Vietnam has signed treaties on the recognition and enforcement of court judgments; or
- on a reciprocal basis.

Vietnam has only signed a limited number of treaties on the recognition and enforcement of civil and commercial court judgments, primarily with countries from the former Soviet bloc. The recognition and enforcement of foreign court judgements from most countries (including the US or the UK) therefore needs to

rely on the basis of reciprocity, which remains without precedent.

Vietnam enforces foreign arbitral awards via the 1958 New York Convention. The provisions of the Convention have been incorporated into Vietnam's Civil Procedure Code. Nonetheless, the process may be burdensome.

Vietnam's Civil Procedure Code requires the Vietnamese courts, when considering recognition requests, not to re-try a case which a foreign court or arbitral institute has rendered a judgment or award on.

2.6.7 Judgments in Foreign Currencies

A lessor under an aircraft lease can pursue monetary claims in a foreign currency in principle and a Vietnamese court can award/recognise as requested.

2.6.8 Limitations on Lessors' Actions Following Termination

There are no limitations on a lessor recovering default interest (unless the aircraft lease is governed by Vietnamese law, in which case the applicable statutory ceiling rate is 20% per annum) and additional rent following termination of the lease (unless the aircraft lease is governed by Vietnamese law; in this case liquidated damages will not be recognised).

In general, if the parties do not specify the applicable interest rate under the lease agreement, the lessor may claim interest at the average interest rate applicable to overdue debts in the market at the time of payment for the delayed period.

However, the Vietnamese courts may only award additional rent following termination of the lease if it is proven that it is linked to a direct and actual loss.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

The main fees connected with the enforcement of an aircraft lease will be court filing fees, enforcement fees and legal fees.

2.6.10 Mandatory Notice Periods

Vietnamese law does not stipulate whether a lessor must comply with mandatory notice periods if it terminates an aircraft lease (regardless of its terms) that:

- relates to an aircraft operated domestically; or
- is leased by a domestic operator.

2.6.11 Lessees' Entitlement to Claim Immunity

A lessee is generally not entitled to claim sovereign or other immunity from a suit or a lease enforcement action. The entitlement to sovereign or other immunity from a suit can generally be waived.

2.6.12 Enforcement of Foreign Arbitral Decisions

Vietnam has adopted the 1958 New York Convention and its provisions have been incorporated into Vietnam's Civil Procedure Code. The Vietnamese courts therefore recognise and enforce final arbitral decisions via this route, provided that the decision does not fall within any grounds for non-recognition under Vietnamese law.

2.6.13 Other Relevant Issues

The Vietnamese courts do not generally grant liquidated damage claims. In addition to seeking injunctive relief in a lawsuit before the court, a lessor can seek to arrest an aircraft without a lawsuit in line with the ordinance on procedures for arrest of aircraft.

For foreign documents to be submitted to the Vietnamese courts, they must be duly notarised/legalised and translated into Vietnamese. Hostile aircraft repossession in Vietnam is still possible although it may take several years from deregistration of the aircraft using the relevant mechanisms in the Cape Town Convention.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Vietnamese law recognises the general concept of contractual assignment. Contractual novation is technically a common law concept and is not common in Vietnam.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

In principle, a New York or English law-governed assignment and assumption agreement or novation agreement or deed can be held valid to the extent that the agreement or deed does not contradict fundamental principles of Vietnamese law (ie, public policy). In

addition, Vietnamese laws do not specifically provide any mandatory terms that have to be included in the novation agreement or deed.

Where a lessor is transferring its contractual rights and obligations under the aircraft lease by way of assignment, it is likely that the consent of the lessee will be required in respect of a Vietnamese law-governed lease.

2.7.3 Enforceability of Lease Assignments/Novations

Vietnamese law does not have any specific regulations that require an aircraft or engine lease assignment or assumption/novation to be translated, certified, notarised or legalised to be enforceable against a domestic party.

Nevertheless, it is recommended that this agreement or deed is translated, certified, notarised or legalised to minimise potential challenges from CAAV should any registration procedure issues concerning the assignment or novation arise.

2.7.4 Filing/Registration of Lease Assignments/Novations

Although a copy of the original aircraft lease should have been submitted to CAAV for the approval on the lease, Vietnamese law does not provide any specific filing procedures to:

- record an assignment and assumption or novation of the lease which results in a change to the lessor information; or
- amend existing registration certificates where necessary (nor are there consequences for a failure to do so).

Vietnamese law does not require the execution and delivery of an aircraft or engine lease assignment and assumption or novation in relation to an aircraft registered in Vietnam.

2.7.5 Taxes/Duties Payable on Assignment/Novation

An aircraft lease assignment or novation may be subject to the general tax regime, which can include income tax and VAT under Vietnamese law.

2.7.6 Recognition of Transfer of Ownership Interests

The transfer of an ownership interest or beneficial interest in the trust will not effectively be recognised as a sale of the aircraft itself. If the legal title to the aircraft remained with the same entity, there would be no intention to assign the lease.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

The aircraft owner, the applicant for registration of the aircraft and the authorised party under the IDERA can apply for deregistration of an aircraft in Vietnam.

The normal steps to deregister an aircraft are as follows.

- The applicant submits the application for deregistration of an aircraft to CAAV.
- Within five working days of the date of receipt of the required application, CAAV will issue the deregistration certificate of Vietnamese nationality. This process also involves recalling the registration certificate of Vietnamese nationality or the registration certificate of temporary Vietnamese nationality, except in cases where these certificates were lost or destroyed along with the aircraft.
- If the application is incomplete, CAAV will provide a guideline document within two working days of receiving the application to assist the applicant in finalising it.
- In case of refusal, CAAV must respond to the applicant in writing and clearly state the reason.

2.8.2 Lessee's/Operator's Consent

In principle, the aircraft owner, mortgagee or lessor can apply for the deregistration of an aircraft without the lessee's consent. However, if the applicant for deregistration is the authorised party of the IDERA, they must provide written consent to deregister and export the aircraft from individuals with higher priority registered international interests or documents proving that higher priority registered international interests have been satisfied.

2.8.3 Required Documentation

The owner, mortgagee or lessor will have to provide the following documents to deregister the aircraft:

- a pro forma application under Decree No 68/2015/ND-CP; and
- documents proving the legal status of the applicant (eg, a business registration certificate).

An applicant that is the authorised party of the IDERA must also provide written consent to deregister and export the aircraft from individuals with higher priority registered international interests or documents proving that higher priority registered international interests have been satisfied.

An applicant that is the mortgagee according to the authorisation in the IDERA must provide documents proving that it has sent a written notification of the deregistration application of the aircraft to people with registered international interests, the aircraft's owner and the applicant for nationality registration of the aircraft at least ten days before the application is submitted.

2.8.4 Duration of Deregistration Process

The statutory timeframe for the deregistration process is five working days from receipt of a valid application.

2.8.5 Aviation Authority's Assurances

CAAV does not provide advance assurances to an aircraft owner, mortgagee or lessor as to the prompt deregistration of the aircraft. The deregistration process will follow the statutory timeframe.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

An application for deregistration of an aircraft is free of charge.

2.8.7 Deregistration Power of Attorney

A deregistration power of attorney may be recognised in Vietnam provided it satisfies the requirements of an authorisation agreement under Vietnamese law. However, if there is an IDERA registered at CAAV, only the authorised party under that IDERA (and not the authorised party under the deregistration power of attorney) is entitled to deregister and export the aircraft. The Convention on International Interests in Mobile Equipment and the related Protocol on Matters specific to Aircraft Equipment took effect in Vietnam on 1 January 2015.

Accordingly, as of 1 January 2015, an IDERA is always registered with CAAV to protect the right of the IDERA holder in the deregistration and export of the aircraft.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

A deregistration power of attorney may be recognised in Vietnam provided it satisfies the requirements of an authorisation agreement under Vietnamese law. If it does, additional documents, such as the corporate documents of the grantor could be required. However, if there is an IDERA registered at CAAV, only the authorised party under that IDERA (not the authorised party under the deregistration power of attorney) is entitled to deregister and export the aircraft.

The Convention on International Interests in Mobile Equipment and the related Protocol on Matters specific to Aircraft Equipment took effect in Vietnam on 1 January 2015. Accordingly, as of 1 January 2015, an IDERA is always registered with CAAV to protect the right of the IDERA holder in the deregistration and export of the aircraft.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A deregistration power of attorney can be made in line with foreign laws. However, it may only be recognised in Vietnam if it satisfies the requirements for an authorisation agreement under Vietnamese law.

2.8.10 Revocation of a Deregistration Power of Attorney

The grantor of a power of attorney is generally able to revoke it under Vietnamese law.

2.8.11 Owner's/Lessor's Consent

If a lessee is an applicant for deregistration of an aircraft, the aircraft owner or lessor who is not an authorised party under the IDERA must obtain the lessee's written consent to export the aircraft. A mortgagee (who is an authorised party under the IDERA) can export the aircraft without the consent of the owner or lessor.

An owner, mortgagee or lessor can increase the likelihood that it will be able to export the aircraft without the lessee's consent by arranging for the registration

of the IDERA and exercising the rights vested under the IDERA to deregister and/or export the aircraft with the lessee. There is no requirement that an aircraft be located in Vietnam at the time of deregistration or export.

2.8.12 Aircraft Export Permits/Licences

A CAAV-issued export certificate of airworthiness (COA) issued by CAAV is a prerequisite for the export of the aircraft. The aircraft exporter will also need to complete customs export clearance and obtain a flight permit from CAAV to fly the aircraft out of Vietnamese territory.

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

No significant costs, fees or taxes are charged in respect of the export of an aircraft. However, an applicant for export must ensure that any outstanding aircraft parking fees, maintenance fees and other official fees are paid to the airport authority.

2.8.14 Practical Issues Related to Deregistration of Aircraft

The removal of registration marks from an aircraft must be made after deregistration is approved by CAAV. There are no exceptions to the requirement to obtain an export CoA.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

The Law on Bankruptcy No 52/2014/QH13, which took effect on 1 January 2015, sets out the procedures for the bankruptcy process, asset liabilities and measures for asset preservation during bankruptcy settlement as well as the procedures for business operation recovery (rehabilitation of business) and the declaration of bankruptcy. The bankruptcy process consists of the following main steps.

- The legal representative or the owner of the insolvent company, an unsecured creditor or partially secured creditor, an internal union representative or elected representative of employees or a shareholder/group of shareholders owning at least 20%

of ordinary shares for at least six months, files an insolvency request with the court.

- The court considers and accepts the insolvency request within three days of receiving the request.
- The court issues a decision on commencement of insolvency proceedings and appoints an asset management officer to prepare the list of creditors and debtors.
- Creditors' meetings are held and business rehabilitation is then undertaken.
- There is a declaration of bankruptcy and the assets are liquidated.

Under Vietnamese law, the lessee is considered insolvent if it fails to pay a debt owed after three months from its due date.

There are no regulations governing restructurings or reorganisations that a debtor commenced outside the bankruptcy proceedings. Those matters may be subject to the provisions under the Law on Enterprise No 59/2020/QH14 and the Law on Investment No 61/2020/QH14.

The Declarations to the Cape Town Protocol of Vietnam made under Official Notice No 67/2014/TB-LPQT, dated 29 September 2014, of the Ministry of Foreign Affairs, include a declaration regarding remedies on insolvency, which states that Vietnam applies Alternative A (under Article XI of the Cape Town Protocol) to all claims regarding insolvency and that the "waiting period" under Article XI(3) of the Cape Town Protocol will be 60 days.

Under Vietnam's declaration, a debtor or an insolvency administrator must give possession to a creditor within the waiting period or rectify all defaults and agree to perform all future obligations within that period. If a Vietnamese legislative document (other than the Constitution) and an international agreement to which Vietnam is a signatory contain different regulations on the same issue, the international agreement applies. If there is any conflict of insolvency regulations between the Cape Town Protocol and Vietnamese laws, the Cape Town Protocol will apply.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

See 2.9.1. Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations.

2.9.3 Co-Ordination, Recognition or Relief in Connection With Overseas Proceedings

See 2.9.1. Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

As the IDERA is an official document under the Cape Town Convention, which is irrevocably granted by the lessee and is registered with CAAV, it will remain effective after the liquidation of the lessee. The deregistration power of attorney will be considered terminated once the lessee is officially declared to be insolvent (ie, once it no longer exists).

2.9.5 Other Effects of a Lessee's Insolvency

If a lessee in possession of an aircraft is put into liquidation or administration:

- the aircraft will not be considered the lessee's asset. Under Vietnamese law, within ten days from the date of declaration of insolvency, the owner or lessor can provide the necessary documents to the Civil Judgment Enforcement Agency as evidence of the lease agreement with the lessee, with the aim of reclaiming the aircraft. However, the lease agreement can be reviewed by the official receiver;
- the repossession of the aircraft can be delayed on termination of the lease as the termination can be reviewed and challenged by the official receiver; and
- the liquidator or administrator will not prioritise the rights of any other creditors over the lessor's rights. However, the secured creditor naturally has rights over the asset, which are secured by the debtor before the receivership order and need not file a debt repayment application.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The unsecured assets of the lender will be managed by the official receiver. The assets will generally be sold at a public auction and the money received by the official receiver will be distributed to all creditors who have submitted their debt repayment application on a pro rata basis. If the aircraft owner or lessor cannot prove its legitimate rights to the official receiver, there will be a risk that the aircraft is considered an unsecured asset of the lessee and subject to a public auction.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

Under the Law on Bankruptcy, after the decision on the commencement of bankruptcy is made, the insolvent entity is prohibited from:

- dispersing and hiding assets;
- paying unsecured debts, except the unsecured debts incurred after the initiation of bankruptcy proceedings and the employees' salaries prescribed in the Law on Bankruptcy;
- renouncing the right over debt claims; and
- turning an unsecured debt into a secured or partly secured debt with collateral consisting of assets of the entity.

Any transaction of this kind is invalid and will be handled according to the relevant Article in the Law on Bankruptcy.

The interim injunction, including different moratoria (eg, prohibiting transferring the rights to the assets of the insolvent entity or blocking the bank account of the entity) can be applied during the handling of the bankruptcy process.

2.9.8 Liquidation of Domestic Lessees

The eligible parties can file a bankruptcy request against the lessee before the court so that the domestic lessee can be liquidated or placed in administration or receivership.

2.9.9 Ipso Facto Defaults

To repossess an aircraft during a lessee's insolvency proceeding, the automatic prohibitions mentioned in

2.9.7 Imposition of Moratoria in Connection with Insolvency Proceedings must be lifted and the conditions stated in **2.9.8 Liquidation of Domestic Lessees** must be met as well.

2.9.10 Impact of Domestic Lessees' Winding-Up

The impact of a domestic lessee's winding-up is as follows.

- Aircraft: as the aircraft is not the lessee's asset, it will not be sold at a public auction.
- Lease rentals: the lessor has to submit a debt repayment application to the official receiver requesting the outstanding debts, which includes rent.
- Lease security deposit: the lessor has to fulfil similar requirements to lease rentals.
- Maintenance reserves: the lessor has to fulfil similar requirements to lease rentals.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

The Convention on International Interests in Mobile Equipment and the related Protocol on Matters specific to Aircraft Equipment took effect in Vietnam on 1 January 2015.

Vietnam has elected to implement authorising entry point (AEP) codes. It is therefore necessary to obtain an AEP code before making a registration application for an airframe or helicopter to the International Registry. Lessors should therefore apply for the required AEP codes at CAAV and then make the Cape Town filings on an airframe or helicopter. An AEP code will be issued by CAAV within three working days of the date of receiving a proper application.

2.10.2 Declarations Made Concerning Conventions

Vietnam has made declarations in line with Articles 39 (1)(a)-(b), 40, 53 and 54 (2) of the Convention on International Interests in Mobile Equipment (the "Convention") and Articles XIX(1), XXX(1),(2),(3) of the Protocol on Matters specific to Aircraft Equipment (the "Protocol").

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

Article XIII of the Protocol is incorporated into Vietnamese domestic law under Decree No 68/2015/ND-CP (as amended). An owner or applicant for registration of an aircraft can submit a registration application of the IDERA to CAAV. The application mainly includes:

- a pro forma application form;
- documents proving the legal status of the applicant; and
- documents proving international interests of the authorised party of the Vietnamese nationality aircraft.

CAAV will grant the confirmation for the registration of the IDERA within five working days of the date of receipt of a valid application.

If the application is incomplete, CAAV will provide a guideline document within one working day of receiving the application to assist the applicant in finalising it and if it is refused, CAAV will respond to the applicant in writing and clearly state the reason.

2.10.4 Enforcement of Conventions

There is at least one case before the Vietnamese courts in relation to parties enforcing the Convention and the Protocol, particularly with regard to aircraft deregistration and export.

2.10.5 Other Conventions

Vietnam has been a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft since 1997. However, it is not a party to the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

Subject to complying with the applicable laws, there are no restrictions on foreign lenders financing an aircraft locally or on borrowers using the loan proceeds.

3.1.2 Effect of Exchange Controls or Government Consents

Under Vietnamese law, a foreign loan must be made in a foreign currency, except in limited circumstances.

Vietnamese borrowers may purchase foreign currency at a licensed credit institution for the purpose of paying loan principal, interest and related fees. At the time of application for outward remittance of foreign currency to repay the foreign loan, the borrower must submit documentary evidence with respect to the remittance (eg, loan agreement, relevant invoices, governmental approval and any other relevant documents or instruments).

Medium and long-term loans, which have terms of over one year and short-term loans whose terms are extended to more than one year or on which there remains outstanding principal (including outstanding interest included in the principal) on the one year anniversary of the first withdrawal must be registered with the Central State Bank of Vietnam (SBV) or the relevant provincial branch of SBV.

3.1.3 Granting of Security to Foreign Lenders

Subject to complying with the applicable laws, borrowers are generally permitted to grant security to foreign lenders. However, a foreign lender or mortgagor cannot directly take mortgage over the real properties (including land and/or buildings attached to land) or use a Vietnamese bank as a security agent.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Subject to complying with the applicable laws, downstream, upstream and cross-stream guarantees by a Vietnamese borrower in favour of lenders could be permitted. In addition, these guarantees could be considered related party transactions and the relevant corporate approvals may be required.

Security over land use rights, assets attached to the land, aircraft or vessels must be registered with the relevant registrars to be valid and enforceable against third parties.

3.1.5 Lenders' Share in Security Over Domestic SPVs

Subject to any applicable foreign ownership restrictions, a pledge or mortgage over the shares of a domestic special purpose vehicle that owns the financed aircraft is advisable and recognised under Vietnamese laws.

3.1.6 Negative Pledges

The parties may agree upon a negative pledge undertaking in a loan or facility agreement, to the extent that the agreement or undertaking does not contradict the fundamental principles of Vietnamese law.

3.1.7 Intercreditor Arrangements

Subject to complying with the applicable laws, there are no material restrictions or requirements imposed on intercreditor arrangements.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent (such as the facility agent) under a syndicated loan are recognised under Vietnamese law.

3.1.9 Debt Subordination

Vietnamese law does not specifically address methods of debt subordination, except for subordinated debts issued by credit institutions or banks.

The parties can generally agree upon subordination. Vietnamese law also provides that the order of priority for payment between the jointly secured parties may be changed if the jointly secured parties reach an agreement on changing the order of priority for payment between themselves.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

Subject to complying with the applicable laws, the transfer or assignment of all or part of an outstanding debt under an English or New York law-governed loan could be permissible and recognised in Vietnam.

3.1.11 Usury/Interest Limitation Laws

SBV is generally entitled to fix or impose limits on foreign lending interest rates. However, no limit has been set.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

Security over aircraft may be created by way of a mortgage or pledge in Vietnam. Insurance proceeds, payments, rents, profits, revenue or other receivables as the result of the sale, lease or other disposition of the aircraft may also be secured under Vietnamese law.

3.2.2 Types of Security Not Available

Apart from a mortgage and pledge, other forms of security are generally impractical to take in relation to an aircraft.

3.2.3 Trust/Trustee Concepts

The concepts of trust and security trustee are generally not recognised and the laws also do not allow a bank to act as a security trustee or agent for a foreign lender(s). A bank may instead provide the services of an agent or hold security as an agent in favour of foreign lenders as their authorised representative in a syndicated loan.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

Vietnamese law does not specifically address the assignment of rights to an aircraft by a borrower to a security trustee, which is also not a recognised concept.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

To the extent permitted by laws, it is possible to assign the rights and benefits only without assigning the attendant obligations of the lessor under an aircraft lease as well. The prior consent of the counterparty is not required. Notification must be served instead.

3.2.6 Choice of Foreign Law

A security assignment or a guarantee could be governed by English or New York law. However, the chosen foreign law, irrespective of it being chosen, will not apply in the following circumstances.

- The application of the law or the consequence thereof are inconsistent with the fundamental principles of Vietnamese law.

- The contents of the foreign law are not identifiable regardless of the application of necessary measures prescribed by procedural law.

If the chosen foreign law is considered inapplicable, Vietnamese law will apply instead.

With respect to an aircraft pledge/mortgage, as a matter of practice, in addition to entering into a security over the aircraft under, and in compliance with, the foreign law, the parties could also enter into a Vietnamese law-governed pledge or mortgage.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

Vietnamese law does not require the security assignment to be in a particular form. However, it should be made in writing for registration purposes.

In addition, the security assignment in a foreign language must be translated into Vietnamese and the translation must be certified as a true translation by a Vietnamese notary public.

3.2.8 Domestic Law Security Instruments

If an English or New York law-governed security assignment is taken in respect of an aircraft registered domestically there will be no additional domestic law security instrument that a financier needs to take.

When the security assignment creates a registrable international interest in respect of an aircraft under the Cape Town Convention, this international interest may be filed in the International Registry. In addition, any change of securing or secured party must also be registered with the Civil Aviation Authority of Vietnam. The government fee for the filing is VND550,000 (approximately USD22).

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

In principle, English or New York law-governed security assignment or a domestic law security instrument can be registered domestically.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

Subject to complying with the applicable laws, the transfer of security interests over an aircraft and/or engines is recognised in Vietnam.

3.2.11 Effect of Changes in the Identity of Secured Parties

Vietnamese law does not specifically address the effect of non-registered changes in the identity of secured parties. The security interests should technically not be jeopardised insofar as the secured parties do not change. However, it is still advisable to register any change in the identity of the secured parties with the relevant registrars for the purpose of enforcing the security.

3.2.12 “Parallel Debt” Structures

The concept of parallel debt is not recognised in Vietnam.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

With the exception of specific facts or circumstances, such as having a permanent establishment in Vietnam before its entry into a security assignment, it is unlikely that a foreign secured party will be considered to be resident, domiciled or carrying on business in Vietnam solely as a result of its execution or enforcement of the security assignment.

3.2.14 Perfection of Domestic Law Mortgages

A domestic law mortgage over an aircraft or engine must be registered with the Vietnamese authorities to be effective and enforceable in Vietnam. A security interest is generally perfected and enforceable against third parties once it is recorded in the Aircraft Register (for aircraft and installed engines via CAAV) or in the Security Measures Database of Vietnam (for uninstalled engines, insurance proceeds, receivables and other movable assets via the National Registration Agency for Secured Transactions (NRAST)).

3.2.15 Differences Between Security Over Aircraft and Spare Engines

There are procedural differences in terms of registering security over aircraft versus spare engines in Vietnam. Aircraft and installed engines can be regis-

tered with CAAV and recorded in the Aircraft Register. Meanwhile uninstalled (spare) engines are treated as movable property and registered with NRAST.

3.2.16 Form and Perfection of Security Over Bank Accounts

The typical form of security over bank accounts is a mortgage. Vietnamese law does not stipulate whether the bank's consent is required. However, obtaining consent first would be advisable for the purpose of enforcing the security.

3.3 Liens

3.3.1 Third-Party Liens

The concepts of a lien over an aircraft, a security interest created under it and a security trustee are generally not recognised under Vietnamese law. Security over aircraft is instead typically established through mortgages or pledges. In addition, Vietnamese law permits the creation of security interests over insurance proceeds, payments, rents, profits, revenue or other receivables resulting from the sale, lease or other disposition of the aircraft.

3.3.2 Timeframe to Discharge a Lien or Mortgage

The discharge or deregistration of an aircraft mortgage can be completed within a day.

3.3.3 Register of Mortgages and Charges

It is possible to register the aircraft mortgage and the interests of other parties, such as the mortgagee, in the Aircraft Register.

3.3.4 Statutory Rights of Detention or Non-Consensual Preferential Liens

In principle, the competent Vietnamese authorities have statutory rights to detain an aircraft in specific circumstances, such as drug trafficking or a failure by the air operator to pay relevant dues to the airport or air navigation authorities. Vietnamese law also recognises the indirect right of the creditors, owners, victims or other interested persons to detain an aircraft if it causes damage to a third party while flying. The creditors, owners, victims or other interested persons can exercise this right by sending an aircraft detention request to the court of the province or city where the aircraft is grounded.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

A potential purchaser of an aircraft can verify that an aircraft is free of any mortgages by submitting a formal request and obtaining official information from CAAV and NRAST.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

There are no differences in enforcing a security assignment as opposed to a loan or a guarantee in general. Subject to the parties' agreement, the conditions to enforce a security assignment, a loan or a guarantee might be different. If the debtor does not voluntarily fulfil its obligations, the creditor will have to take the matter to a suitable dispute resolution forum, such as a court or arbitration, to facilitate enforcement.

3.4.2 Security Trustees' Enforcement of Their Rights

The security trustee concept is not recognised under Vietnamese law.

3.4.3 Application of Foreign Laws

See 2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

See 2.6.6. Domestic Courts' Recognition of Foreign Judgments/Awards.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

In principle, a secured party needs to obtain a court order to take physical possession of an aircraft to enforce a security agreement or aircraft mortgage without the consent of the lessee or operator.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

In principle, the provincial level People's Courts have authority to decide enforcement actions under a security agreement or aircraft mortgage.

3.4.7 Summary Judgments or Other Relief

A secured party can only obtain injunctive relief pending final judgment in emergency cases to enforce a security agreement or aircraft mortgage. The secured party must file an application to the court during the settlement of a lawsuit. The statutory timeframe for the court to review and grant injunctive relief (if such a request for injunctive relief is acceptable) is about three to five working days in total. Depending on the court's decision or request, the secured party may have to provide security or a guarantee in order to obtain injunctive relief.

A secured party cannot obtain summary judgment or equitable relief. A full trial must be conducted before a final judgment is issued and the concept of equitable relief is not recognised under Vietnamese law.

3.4.8 Judgments in Foreign Currencies

A secured party under a security agreement or aircraft mortgage can pursue monetary claims in a foreign currency and the Vietnamese court can award or recognise as requested.

3.4.9 Taxes/Fees Payable

A secured party does not have to pay a significant amount of taxes or fees in connection with the enforcement of a security agreement or aircraft mortgage in Vietnam. Court filing fees, enforcement fees and legal fees will be the main required fees.

3.4.10 Other Relevant Issues

See 2.6.13 Other Relevant Issues.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

In a notable case, a provincial level court in Vietnam applied injunctive relief by temporarily suspending implementation of CAAV's deregistration certificate when the aircraft had already been registered in a foreign country after CAAV's deregistration certificate was issued.

4.2 Current Legislative Proposals

See 2.6.13 Other Relevant Issues.

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