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Vietnam: Law and Practice

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Tilleke & Gibbins



VIETNAM



Law and Practice

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Tilleke & Gibbins is a South-East Asian regional law firm with over 250 lawyers and consultants. Established in Bangkok in 1890, the firm 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 legal networks Lex Mundi, Multilaw, and Drew Network Asia (DNA). The firm's cross-disciplinary aviation team serves airlines, aircraft lessors and les-

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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 Vietnamese law, the execution of an aircraft or engine sale agreement is not subject to any specific tax or stamp duty. It is, however, 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

Under Vietnamese law, ownership of an aircraft includes 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. However, Vietnam lacks independent procedures for registering rights related to specific parts or engines. All existing registration procedures are for the entire aircraft, necessitating only brief information regarding the engine's number and designation.

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 provisions of law regarding the transfer of ownership of movable property. Generally, unless agreed or specified otherwise by the parties, the

ownership of the property is 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 would not be effectively recognised as a sale of the aircraft or engine itself.

1.2.2 Sales Governed by English or New York Law

Generally, Vietnamese law 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 the 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 authorised 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 the 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 sub-

mitted to CAAV. Within three working days from the 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 do not require any prior government applications or consents.

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

Under Vietnamese law, executing and/or delivering a bill of sale is not subject to any specific tax or stamp duty. It is, however, 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 compliance 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
- the contents of the foreign law are not identifiable regardless of the application of necessary measures prescribed by procedural law.

In addition, judgments rendered by foreign courts are not generally recognised and enforced in Vietnam, though 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 not yet signed such treaties with the UK and the US. Therefore, any recognition and enforcement of a foreign court 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

There are no material restrictions 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 would be able to present documentary evidence of the rent payments to the relevant authorities if so requested.

2.1.4 Exchange Controls

Generally, rent payments under a lease or repatriation of realisation proceeds between a

domestic lessee and an offshore lessor can be freely conducted.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

An aircraft lease is exempted from VAT and special consumption tax and is subject to import duty at the rate of 0%.

A lessor would be deemed 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. Additionally, 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 as to specific terms of aircraft leases governed by English or New York law.

Regardless, prior to granting approval for aircraft leasing (which is different from approval of a lease agreement), CAAV will consider the following:

- 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).

Accordingly, it is 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

There could be a risk of title annexation in respect of aircraft engines installed on an airframe because Vietnam does not have any independent procedures to register rights relating to these parts or engines. All existing registration procedures are for the entire aircraft, necessitating only brief information regarding the engine's number and designation.

As Vietnamese law does not specifically provide for the transfer of title to an aircraft, engine, or other installed parts, including the APU, such a transfer is subject to general provisions of law regarding the transfer of ownership of movable property. Generally, unless agreed or specified otherwise by the parties, the ownership of the property is 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 would not be effectively recognised as a sale of the aircraft or engine itself.

Regardless, there is still a possibility that the title to the removed parts, including engines that are installed on an aircraft, would subsequently “accede” to the aircraft under Vietnam’s Civil Code:

“Where property of more than one owner is merged to form an indivisible object and it is not possible to determine whether the property which is merged is a primary object or an auxiliary object, the newly formed object shall be the multiple ownership property of such owners; if the property which is merged consists of a primary object and an auxiliary object, the newly formed object shall belong to the owner of the primary object from the time when the new object is formed. The owner of the new property

must pay the value of the auxiliary object to its owner, unless otherwise agreed.”

However, this remains without precedent.

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 certain 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

Under Vietnamese law, a reference to “registration of aircraft” 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

Generally, approval of the aircraft leasing (not the approval of the lease agreement) from CAAV is required before the lessee operates a leased aircraft in Vietnam.

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 written. 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

Aside 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 prior to submission.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

The lessor would be deemed to have income derived in Vietnam through leasing the aircraft to the domestic lessee. The lessor would 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 exempted 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) prior to its entry into a lease, the lessor would not be deemed 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 the Vietnamese law perspective, the aircraft operator would 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 they have been registered in the Aircraft Register of Vietnam (for secured transactions in relation to the aircraft or engine) as well as the National Registration Agency for Secured Transactions (for security over other assets/property such as insurance proceeds or receivables).

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

Generally, all of the insurances should 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 is required 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), is required to purchase accident insurance for them.

2.5.3 Placement of Insurance Outside of Jurisdiction

Vietnamese law does not set forth a specific threshold for reinsurances placed outside of the jurisdiction, so 100% coverage could be feasible, except for reinsurances made under the insured's instructions. In this case the coverage could 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 third-party contract rights 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 accordance with the terms in the insurance policy/agreement or international customs, the written consent of the insurer must be obtained beforehand.

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 accordance with the lease agreement, and the lessor can sell the aircraft after termination if there are no restrictions provided 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) (obtained in accordance 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 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 lessee's consent.

2.6.3 Specific Courts for Aviation Disputes

There are no specific courts that are competent to decide aviation disputes. The general provincial-level People's Courts will handle aviation disputes if the case involves a foreign element. Vietnam also declared that provincial-level People's Courts are 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 obtain injunctive relief pending final judgment only in emergency circumstances pertaining 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 such a 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.

Vietnamese courts generally uphold submissions to a foreign jurisdiction. However, if the initiating party submits a claim to a foreign court, Vietnamese courts will only consider the foreign court order or judgment as evidence. Foreign court orders or judgments must first be recognised by Vietnamese courts in order to have legal effect in Vietnam.

Vietnamese courts would generally uphold a waiver of immunity.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Vietnamese courts generally do not enforce foreign court judgments, though there is a legal basis for recognition. 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 not yet signed such treaties with the UK and the US. Therefore, any recognition and enforcement of a foreign court needs to rely on the basis of reciprocity, which remains without precedent.

Vietnam enforces foreign arbitral awards, although the process can be burdensome.

Vietnam's Civil Procedural Code requires Vietnamese courts, when considering requests for recognition, not to re-try a case on which a foreign court or arbitration has rendered a judgment or award.

2.6.7 Judgments in Foreign Currencies

In principle, a lessor under an aircraft lease can pursue monetary claims in a foreign currency and a Vietnamese court can award 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. 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 court may award additional rent following termination of the lease only 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 in connection with the enforcement of an aircraft lease would be court filing 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 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Accordingly, Vietnamese courts recognise and enforce final arbitral decisions via this route, provided that the decision does not fall within one of the limited grounds for non-recognition under Vietnamese law.

2.6.13 Other Relevant Issues

Vietnamese courts generally do not grant claims for liquidated damages. Besides seeking injunctive relief in a lawsuit before the court, a lessor can seek to arrest an aircraft without a lawsuit in accordance with the ordinance on procedures for arrest of aircraft.

For foreign documents to be submitted to Vietnamese courts, they must be duly notarised/legalised and translated into Vietnamese. Hostile aircraft repossession in Vietnam is still possible although on average it may take multiple 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

In general, Vietnamese law recognises the concept of contractual assignment. Contractual novation is technically a common law concept, and it 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 are required to be included in the agreement/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 would 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 procedures concerning the assignment or novation arise.

2.7.4 Filing/Registration of Lease Assignments/Novations

Though 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 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

Under Vietnamese law, an aircraft lease assignment or novation may be subject to the general tax regime, which can include income tax and VAT.

2.7.6 Recognition of Transfer of Ownership Interests

The transfer of an ownership interest (or beneficial interest in the trust) would 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 from the date of receipt of the required application, CAAV will issue the certificate of deregistration 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-pri-

ority 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 application for deregistration 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 upon 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 requirements of an authorisation agreement under Vietnamese law. 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.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

A deregistration power of attorney may be recognised in Vietnam provided it satisfies requirements of an authorisation agreement under Vietnamese law. If so, 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 accordance 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

Under Vietnamese law, the grantor of a power of attorney is generally able to revoke it.

2.8.11 Owner's/Lessor's Consent

If a lessee is an applicant for registration 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 with the lessee for the registration of the IDERA and exercising the rights vested under the IDERA to deregister and/or export the aircraft. 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

In Vietnam, an Export Certificate of Airworthiness (COA) issued by CAAV is a requisite condition for 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

There are no significant costs, fees or taxes 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 procedures for the bankruptcy process, asset liabilities and measures for asset preservation during bankruptcy settlement, procedures for business operation recovery (rehabilitation of business) and the declaration of bankruptcy. The bankruptcy process comprises 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 shareholder 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 after the date 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 due debt 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 either 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 the Socialist Republic of Vietnam is a signatory contain different regulations on the same issue, the international agreement applies. Therefore, if there is any conflict related to regulations on insolvency 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

The Law on Legal Assistance No 08/2007/QH12, which took effect on 21 November 2007, prescribes the principles, competence, order and procedures for the provision of, among other things, legal assistance in civil matters and responsibilities of Vietnamese state agencies in legal assistance.

Regarding overseas proceedings, only a final foreign court judgment might have legal effect in Vietnam in terms of being recognised and enforced. A partial judgment or interim relief is not recognised and enforceable in Vietnam. Foreign court judgments and decisions may be submitted as evidence before Vietnamese courts. Vietnamese authorities may provide support and co-ordination to the states with whom the country has an agreement on mutual legal assistance.

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 would remain effective after the liquidation of the lessee. The deregistration power of attorney would be deemed 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

Should a lessee in possession of an aircraft be put into liquidation or administration:

- the aircraft would 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 to reclaim 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 prior to 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. Generally, the assets will 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. Therefore, if the aircraft owner or lessor cannot prove its legitimate rights to the official receiver, there would be a risk that the aircraft would be 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 prescribed above is invalid and will be handled according to the relevant article of 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.

2.9.10 Impact of Domestic Lessees' Winding-Up

The impact of a domestic lessee's winding-up is as follows.

- Aircraft – since the aircraft is not the lessee's asset, it will not be sold at a public auction.
- Lease rentals – the lessor is required 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 “authorised entry point” (AEP) codes. It is therefore necessary to obtain an AEP code before making a registration with the International Registry. Lessors should therefore apply for the required AEP codes at CAAV and then make the Cape Town filings. An AEP code will be issued by CAAV within three working days from the date of receiving a proper application.

2.10.2 Declarations Made Concerning Conventions

Vietnam has made declarations pursuant to 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 an application for registration 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 from 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 in case of refusal, 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 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 but 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 compliance with 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, save for 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 thereto (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 anniversary date of one year from the first withdrawal, must be registered with the Central State Bank of Vietnam (SBV) or its relevant provincial branch.

3.1.3 Granting of Security to Foreign Lenders

Subject to compliance with applicable laws, borrowers are generally permitted to grant security to foreign lenders. However, a foreign lender or mortgagor cannot directly (or use a Vietnamese bank as a security agent) take mortgage over the real properties (including land and/or buildings attached to land).

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Subject to compliance with 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 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 compliance with 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.

Generally, the parties can 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 compliance with 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

Generally, the SBV is entitled to fix or impose limits on foreign lending interest rates, but no limit has been set.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

In Vietnam, security over aircraft may be created by way of a mortgage or pledge. 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

Except for a mortgage and pledge, other forms of security cannot be taken over 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. 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; or
- the contents of the foreign law are not identifiable regardless of the application of necessary measures prescribed by procedural law.

With respect to an aircraft pledge/mortgage, as a matter of practice, we also recognise that, 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 the purpose of registration.

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 the securing party or secured party must also be registered with the Civil Aviation Authority of Vietnam, and 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 compliance 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. Technically, the security

interests should 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 the enforcement of 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

Save for specific facts or circumstances, such as having a permanent establishment in Vietnam prior to its entry into a security assignment, it is unlikely that a foreign secured party would be deemed 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 CAAV to be effective and enforceable in Vietnam. The security will take effect when it is registered and recorded in the Aircraft Register of Vietnam.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

As Vietnam does not have any independent procedures to register a security over spare engines (procedures are for the entire aircraft, necessitating only brief information regarding the engine’s number and designation), 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

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 beforehand would be advisable for the purpose of enforcing the security.

3.3 Liens

3.3.1 Third-Party Liens

The concepts of a lien, a security interest created thereunder, and a security trustee are generally not recognised under Vietnamese law. In Vietnam, an aircraft can be mortgaged or pledged. Insurance proceeds, payments, rents, profits, revenue or other receivables resulting from the sale, lease or other disposition of the aircraft may also be secured under Vietnamese law.

3.3.2 Timeframe to Discharge a Lien or Mortgage

The discharge or deregistration of the 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 certain 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 damages to a third person 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 the National Registration Agency for Secured Transactions.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

In general, there are no differences in enforcing a security assignment as opposed to a loan or a guarantee. 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 would be required 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 concept of a security trustee 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 obtain injunctive relief pending final judgment only in cases of emergency 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 be required 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 as requested.

3.4.9 Taxes/Fees Payable

A secured party is not required to pay a significant amount of taxes or fees in connection with the enforcement of a security agreement or aircraft mortgage in Vietnam. The main fee required would be court filing fees and legal 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 Certificate of Deregistration when the aircraft had already been registered in a foreign country after the issuance of CAAV's Certificate of Deregistration.

4.2 Current Legislative Proposals

See 2.6.13 Other Relevant Issues.

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