

PANORAMIC

# AVIATION FINANCE & LEASING

Indonesia



LEXOLOGY

# Aviation Finance & Leasing

Contributing Editors

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## OVERVIEW

### Conventions

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

The Convention on International Interest in Mobile Equipment and its Protocols (Cape Town Convention (2001)).

Law stated - 1 July 2024

### Domestic legislation

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

Law No. 1 of 2009 on Aviation (Aviation Law), and its implementing regulations, which are issued by the Ministry of Transportation of the Republic of Indonesia, for example, implementing the Civil Aviation Safety Regulations.

Law stated - 1 July 2024

### Governing law

#### Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

There is no security interest that can be effectively created under Indonesian law over an aircraft. In Indonesian aviation transactions, the security over the aircraft is normally created through a foreign law-governed aircraft mortgage.

Law stated - 1 July 2024

## TITLE TRANSFER

### Transfer of aircraft

#### How is title in an aircraft transferred?

The Aviation Law acknowledges the bill of sale as evidence of aircraft ownership.

As long as the relevant parties agree that there is no requirement or they waive the requirement to have the aircraft physically delivered to the new owner when the transfer of title takes place, Indonesian courts should recognise the transfer of title where an aircraft is located in another jurisdiction when the transfer of title takes place.

However, Indonesia adopts a civil law system, which, unlike a common law system, does not require a court to strictly follow precedent. Thus, each case is decided based upon the presiding court's interpretation of the law and determination of the facts. Only certain limited

decisions of the Supreme Court are considered and become jurisprudence that lower courts use as a basis for their decisions in Indonesia.

Law stated - 1 July 2024

### **Transfer document requirements**

#### **What are the formalities for creating an enforceable transfer document for an aircraft?**

The bill of sale along with other required documents (which prove the ownership from the owner of the aircraft) will need to be submitted to the Directorate General of Civil Aviation of the Ministry of Transportation of the Republic of Indonesia (DGCA) for the aircraft registration process. After delivery of the aircraft, if there is a change in the ownership of the aircraft registered with the DGCA, the Certificate of Registration (C of R), which has been issued in the framework of a previous registration, will be deemed to be cancelled and will need to be returned to the DGCA. The DGCA will then issue a new C of R and make the appropriate entry in its Civil Aircraft Register.

The most efficient way of registering an aircraft is to appoint the operator of the relevant aircraft to carry out the registration process. However, it is also possible to appoint an attorney. To register the new aircraft owner, the holder of the C of R (the aircraft operator) or the new owner via its attorney must submit the following to the DGCA:

- application for the change of ownership, setting out the full name and full address of the new owner and date of change of ownership, signed by the authorised signatory of the new owner;
- DGCA Form 47-13, filled out and signed by the authorised signatory of the new owner;
- copy of evidence of the new ownership in a certified true copy form by a notary;
- copy of aircraft lease documentation in a certified true copy form by a notary reflecting the new owner;
- copy of evidence of insurance of the aircraft which has been legalised by the insurer, reflecting the new owner;
- aircraft deregistration statement letter;
- statement letter of no dispute;
- copy of the current C of R and Certificate of Airworthiness (C of A) of the relevant aircraft; and
- if an attorney is appointed, a notarised and consularised power of attorney.

Law stated - 1 July 2024

## **REGISTRATION OF AIRCRAFT OWNERSHIP AND LEASE INTERESTS**

### **Aircraft registry**

Identify and describe the aircraft registry.

Almost all details contained in the documents submitted to the DGCA are recorded in the aircraft registry in Indonesia. The DGCA would require supporting documents such as the relevant lease agreement, relevant bill of sale for the aircraft registration. However, there is no registry for aircraft engines.

Indonesia is an operator-based registration country.

Indonesia has ratified and implemented article 83 bis, and there are agreements between Indonesia and other jurisdictions, which have also been registered with the ICAO in accordance with the Rules for Registration with ICAO of Aeronautical Agreements and Arrangements (ICAO Docs 6685), especially with ASEAN countries.

**Law stated - 1 July 2024**

### **Registrability of ownership of aircraft and lease interests**

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

No. To date, it is not possible to register or record the lease interest or international interest, including any security interest created over aircraft or aircraft engines.

**Law stated - 1 July 2024**

### **Registration of ownership interests**

Summarise the process to register an ownership interest.

There is no registration of ownership interests or international interests in Indonesia. Normally, ownership interests or international interests are registered in a foreign law jurisdiction.

**Law stated - 1 July 2024**

### **Title and third parties**

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

There is no registration of ownership interests in Indonesia.

**Law stated - 1 July 2024**

### **Registration of lease interests**

Summarise the process to register a lease interest.



There is no registration of lease interests in Indonesia.

**Law stated - 1 July 2024**

### **Certificate of registration**

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

The C of R is issued by the DGCA to the operator of the aircraft. It cites the name of the operator, name of the owner and aircraft details (ie, registration mark, type and manufacturer).

**Law stated - 1 July 2024**

### **Deregistration and export**

**Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?**

The owner's consent is not required. However, if the irrevocable deregistration and export request authorisation (IDERA) has been registered and acknowledged by the DGCA, the owner can request that the DGCA deregister the aircraft using the IDERA. In that case, consent from the operator is not required. However, in practice, the operator may take certain action to prevent the aircraft from being repossessed physically. This makes a 'hostile' repossession very difficult in Indonesia.

**Law stated - 1 July 2024**

### **Powers of attorney**

**What are the principal characteristics of deregistration and export powers of attorney?**

A Deregistration Power of Attorney is not a power of attorney in an IDERA, but just a normal power of attorney (based on contractual arrangements). Normally it would be an irrevocable power of attorney and can be granted to any third party. However, it is always revocable, although it states otherwise and the revocation would result in default under the agreement. Further, as it is a normal power of attorney, it terminates upon the bankruptcy or apparent insolvency of either the grantor or the attorney.

This also applies to the winding-up or appointment of a provisional liquidator, assuming this means that the company is under suspension of payment, bankruptcy and/or liquidation. Therefore, it may not be usable during the repossession process and only give certain degree of comfort to the beneficiary of the deregistration power of attorney. However, an IDERA that has been registered with and acknowledged by the DGCA should survive insolvency.

**Law stated - 1 July 2024**

### **Cape Town Convention and IDERA**

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Indonesia has ratified the Cape Town Convention (2001) and enacted the Aviation Law, as implementation of the Cape Town Convention. The IDERA must be acknowledged by the DGCA as the civil aviation authority in Indonesia. Certain documentation will need to be submitted to the DGCA to obtain the acknowledgment from the DGCA.

Indonesia also acknowledges and can acknowledge a certified designee (known as Certified Designee Letter – CDL). The CDL will be deemed an ‘extension’ of the IDERA. Please note that the original acknowledged IDERA by the DGCA must be submitted to the DGCA and will be kept by the DGCA during the lifetime and validity of the CDL.

A point to note for IDERA (and CDL) registration: the applicant must show to the DGCA the underlying documents and the basis for the IDERA (and CDL), for example, lease agreement or the relevant finance documents, including the relationship or correlation between the operator and the beneficiary of the IDERA (or the CDL).

**Law stated - 1 July 2024**

## **SECURITY**

### **Security document (mortgage) form and content**

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

There is no effective means to create an Indonesian security interest over an aircraft.

**Law stated - 1 July 2024**

### **Security documentary requirements and costs**

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

Not applicable.

**Law stated - 1 July 2024**

### **Security registration requirements**

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

Not applicable.

Law stated - 1 July 2024

### **Registration of security**

How is registration of a security interest certified?

Not applicable.

Law stated - 1 July 2024

### **Effect of registration of a security interest**

What is the effect of registration as to third parties?

Not applicable.

Law stated - 1 July 2024

### **Security structure and alteration**

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

Not applicable.

Law stated - 1 July 2024

### **Security over spare engines**

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

Unlike an aircraft, an engine can be secured by way of pledge or fiduciary security. However, to create a security interest, the operator must own, not lease the engine.

Law stated - 1 July 2024

## **ENFORCEMENT MEASURES**

### **Repossession following lease termination**

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

There is no legal basis for self-help remedies such as taking physical possession of a leased aircraft in Indonesia. However, under the Aviation Law, a creditor can request a temporary

action from an Indonesian district court. The parties will submit to the jurisdiction of a certain district court as agreed in the relevant aircraft lease agreement, or a district court with relative competence in the event the aircraft lease agreement contains no forum choice provision.

A secured party/lessor should not be required to pursue its claim through judicial proceedings as long as (1) the lease agreement has been registered with the International Registry, (2) the lessor has the right under the lease agreement to unilaterally terminate the lease agreement following the lessee's default, and (3) the secured party/lessor holds the IDERA which has been registered with and acknowledged by the DGCA.

There are no specific requirements or non-contractual procedures to terminate a lease agreement. However, if the lease agreement is governed by Indonesian law (which is rare in practice), it is custom in case of termination following default that the non-defaulting party send up to three demand letters with reasonable intervals, before it can proceed with the termination. Further, unless explicitly waived, the non-defaulting party should seek court approval for termination in certain circumstances.

Other than arguing before an Indonesian court, there are no legal means for the lessee to impede the default remedies. However, please note that in practice, the lessee may prevent physical repossession in various ways, which could make repossession very difficult.

**Law stated - 1 July 2024**

### **Enforcement of security**

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

Generally, with respect to the recognition and enforcement by the Indonesian courts of security rights which are established under and governed by a law other than that of Indonesia (Foreign Security Rights): (1) there is no conclusive case law in Indonesia on this matter; and (2) if the Foreign Security Rights are enforced in a court in Indonesia, that court may wish to determine whether those Foreign Security Rights are comparable to security rights that may be granted under Indonesian law. If the court finds and determines that there are discrepancies of substance, pursuant to which the lender would have a materially more favourable position vis-a-vis the collateral provider than a creditor would have under the laws of Indonesia, it is not inconceivable that enforcement of the rights concerned will be refused. However, to the best of our knowledge, there have been no decisions of any Indonesian court recognising Foreign Security Rights as security rights under Indonesian law.

**Law stated - 1 July 2024**

### **Priority liens and rights**

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

The law of Indonesia provides for liens and/or similar possessory rights and rights of detention in favour of third parties. The aircraft may also be seized if it is involved in a criminal case. In this regard, the Government of Indonesia also made declarations under article 39 and article 40 of the Cape Town Convention, as follows:

Form No. 1 (Specific opt-in declarations under article 39) Indonesia declares that 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:

(1) (a):

- Liens in favour of airline employees for unpaid wages arising since the time of a declared default under a contract to finance or lease an aircraft object;
- Liens or other rights of an authority of Indonesia relating to taxes or other unpaid charges arising from or related to the use of that aircraft object, and arising since the time of a declared default under a contract to finance or lease that aircraft object; and
- Liens or other rights 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.

Form No. 4 (general opt-in declarations under article 39) Indonesia declares that nothing in the convention shall affect its right or that of any entity thereof, or any intergovernmental organisation in which Indonesia is a member, or other private provider of public services in Indonesia, to arrest or detain an aircraft object under its law for payment of amount owed to the government of Indonesia, any such entity, organisation or provider directly relating to the services or services provided by it in respect of that or another aircraft object.

(1) (b):

Form No. 6 (opt-in declarations under article 40):

Indonesia declares that 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:

- Liens in favour of airline employees for unpaid wages arising prior to the time of declared default under a contract to finance or lease an aircraft object;

- Liens or other right of an authority of Indonesia relating to taxes or other unpaid charges arising from or related to the use of an aircraft object, and arising prior to the time of a declared default 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.

**Law stated - 1 July 2024**

### **Enforcement of foreign judgments and arbitral awards**

#### **How are judgments of foreign courts enforced? Is your jurisdiction party to the 1958 New York Convention?**

Generally, judgments of foreign court will not be recognised and enforced by the courts of Indonesia, unless there is an applicable convention between the state where the foreign court is domiciled and Indonesia. To the best of our knowledge, to date, Indonesia has yet to enter into an agreement/convention for the enforcement of foreign court decisions. To obtain a judgment which is enforceable in Indonesia, the claim must be brought before or re-litigated by a competent Indonesian court. A judgment rendered by any foreign court in respect of an agreement could however be offered, accepted, and given such evidentiary weight as the Indonesian Court may deem appropriate under the circumstances as to the applicable laws of that jurisdiction. We see that in practice, this does not prevent lessors to grant jurisdiction to foreign courts in lease agreements involving aircraft to Indonesian lessees.

Indonesia is a party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Enforcement of a foreign arbitral award may be denied if: (1) the award is issued by an arbitrator or arbitration tribunal in a foreign country which is not a signatory to an international convention on the recognition of foreign arbitral awards to which Indonesia is a signatory, or does not have a bilateral arrangement with the Republic of Indonesia for the recognition of arbitral awards on a reciprocal basis; (2) the award is not on commercial law matters; or (3) the award is against the public policy of the Republic of Indonesia.

**Law stated - 1 July 2024**

## **TAXES AND PAYMENT RESTRICTIONS**

### **Taxes**

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

The seller should not be subject to any corporate income tax in Indonesia on any gain on the sale of an aircraft irrespective of whether the Aircraft is physically located in Indonesia or not at the time of sale, since the source of income is not from Indonesia, unless such entity of a Permanent Establishment (PE) in Indonesia (considered further below) or tax resident in Indonesia,

Technically, the sale of an Aircraft while it is physically located in Indonesia should not be subject to VAT or any other sales or transfer type taxes where the Seller and the Buyer are both tax-resident outside of Indonesia.

Under the Indonesia Income Tax Law (ITL), the term 'permanent establishment' includes the existence of a place of business namely, a facility that can be in the form of land and building, including machines, equipment, warehouse and computer or electronic agent or automated equipment that are owned, leased, or used by an organiser of electronic transactions to run an internet business activity.

A 'place of business' is typically regarded as fixed or permanent in nature and used to carry out business or to conduct activities of an individual who does not reside in Indonesia or a corporate that is not established and domiciled in Indonesia.

There is no specific provision that stipulates whether the presence of an aircraft in Indonesia constitutes a 'place of business' that may create a PE in Indonesia.

Based on the above provision and considering that an aircraft is typically moveable in nature and the lease is a dry lease, it is assumed that the mere presence of an aircraft in Indonesia should not create a taxable presence or PE in Indonesia for the non-resident owner or lessor of the aircraft.

Indonesia does not impose stamp duty, but notarial transfer documents should be attached with a duty stamp of 10,000 rupiahs per document. The cost for the duty stamp normally borne by the Seller.

Based on the above, no Indonesian taxes should arise from the transfer of an aircraft in Indonesia.

As for the lease, on the basis that the aircraft is on lease to an Indonesian lessee, withholding tax in respect of the lease can still arise (regardless of where the aircraft is registered).

**Law stated - 1 July 2024**

### **Exchange control**

#### **Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?**

In general, there is no exchange control in Indonesia. A person may freely hold, use and transfer funds in foreign currencies.

However, the conversion of Indonesian rupiah to foreign currencies or the purchase of foreign currency conducted by a bank and its customers, in the amount of more than US\$25,000 per month (or its equivalent) per customer, or US\$100,000 per month (or its equivalent) per customer for purchase of foreign currency for derivative transactions (forward and option transactions), must be based on an underlying transaction, with a maximum amount

required under the underlying transaction. No approval is required for transactions that exceed the aforementioned thresholds; they just need to be reported to the Indonesian Central Bank.

In addition, any foreign exchange flow that occurs arising from transactions other than the withdrawal of an offshore loan is subject to a monthly reporting requirement due on the fifteenth day of the following month for the following transactions: (1) trade transactions of goods and services and other transactions between residents and non-residents, (2) positions held and changes in offshore financial assets covering position and increment or decrease of all assets which are of the claim against a non-resident as stated in the financial statement and bookkeeping, (3) positions held and changes in equities of a non-resident and other related liabilities, (4) positions held and changes in offshore derivative liabilities, (5) an offshore commitment and contingency positions report, and (6) a custodian customer's commercial paper positions report. If a party fails to meet the reporting requirement, administrative sanctions in the form of fines or written reprimands and/or a notification to the relevant authorities may be imposed.

Further, any transaction carried out in Indonesia, by residents or non-residents, must be effected in rupiah, and parties are prohibited from refusing to accept the rupiah as payment if rupiah must be used for such transaction. Certain types of transaction are exempted from the aforementioned requirement. However, we believe a lease transaction carried out within Indonesia, without a cross-border element, would not be exempt from the mandatory use of rupiah rule.

**Law stated - 1 July 2024**

### **Default interest**

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

In general, there is no limitation on the default interest that can be imposed. There is an old colonial usury law (*Woekerordonantie*) which is still in force, but it should not have any effect on market standard lease arrangements.

**Law stated - 1 July 2024**

### **Customs, import and export**

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

To bring the aircraft into the jurisdiction or take it out of the jurisdiction, costs and fees relating to the customs, import and export of the aircraft could be incurred. These costs and fees will be imposed on the airline/operator.

To export the aircraft, an export permit must be obtained from the Directorate General of Customs and Excise (DGCE) and notice of export should be made. To apply for the permit, necessary documents should be filed with the DGCE simultaneously with or after deregistration from the DGCA. Please note that the lessor/owner will have to engage an



Indonesian licensed customs agent to obtain the necessary export documents without the lessee's assistance.

Law stated - 1 July 2024

## INSURANCE AND REINSURANCE

### Captive insurance

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

Under the Aviation Law, the airline must meet minimum requirements for insurance over the aircraft, the personnel of the aircraft; second-party damage; third-party damage; and aircraft incident and accident investigation activities. There is no minimum percentage of the insurance that must be retained, but we understand that the insured amount should be based on the value of the aircraft.

Law stated - 1 July 2024

### Cut-through clauses

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

Yes, cut-through clauses under the insurance and reinsurance documentation are legally effective.

Law stated - 1 July 2024

### Reinsurance

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

Yes, assignments of reinsurance are legally effective. In the Indonesian market, it is also common that the insurer provides a security interest (in the form of fiduciary security) over the reinsurance claims in favour of the lessor/owner/financier.

Law stated - 1 July 2024

### Liability

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

Indonesian law does not impose any liabilities on the owner, lessor or financier for the operation (including the maintenance or insurance) of the aircraft.

Law stated - 1 July 2024

### **Strict liability**

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

No, Indonesia does not adopt a strict liability regime for owners, lessors, financiers or others with no operational interest in the aircraft.

Law stated - 1 July 2024

### **Third-party liability insurance**

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

Under the Aviation Law, the airline must meet minimum requirements for insurance for third-party damage over the aircraft.

Law stated - 1 July 2024

## **UPDATE AND TRENDS**

### **Key developments of the past year**

What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Generally, there are easements in the licensing of the aircraft operator under Law No. 11 No 2020 on Job Creation, for example, reducing the minimum ownership of an aircraft and reducing administrative documentation in relation to obtain certain licenses.

Apart from the suspension of debt payment cases involving Garuda Indonesia and Sriwijaya Air (generally due to the aftermath of the covid-19 pandemic), there are no landmark cases in the industry.

Law stated - 1 July 2024