



Aviation Finance Comparative Guide



**TAN HASSANI
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LAW OFFICES

Aviation Finance Comparative Guide

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1. Legal framework

1. 1. Which laws typically govern aviation finance transactions in your jurisdiction?

Philippines

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The following statutes apply to aviation finance transactions in the Philippines:

- the Civil Code of the Philippines, which is the general law covering contracts and obligations;
- the Civil Aviation Authority Act (9497/2008), which is the special law covering aircraft registration and operations; and
- the Financing Company Act (8556/1998), as amended, which governs Philippine financing companies.

1. 2. If aviation finance documents are governed by laws other than your local law, what local law requirements (documentary and procedural) are required to ensure that foreign law documents are recognised and enforceable locally?

Philippines

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The High Court of the Philippines has held that no conflicts rule on the validity of contracts is expressly provided for under Philippine law. Nonetheless, choice of law is recognised by the Philippine courts under the Civil Code provision that the parties are free to stipulate the terms and conditions of their contract, provided that such terms and conditions are not contrary to the laws, morals or public policy of the forum.

In preparing for an aircraft finance transaction, the Philippine courts will consider:

- where the contract is made, is negotiated and is to be performed; and
- the domicile, place of business or place of incorporation of the parties.

All of these factors are taken into consideration in determining the validity of choice of law.

Philippine government agencies, tribunals and courts are formalistic insofar as foreign-issued or foreign-executed documents are concerned. Generally, these foreign-sourced documents must be notarised and apostilled (or consularised or legalised in the Philippine consulate where signed) in order to be recognised and enforced in the Philippines. Documentation such as the aircraft finance transaction documents that must be filed with the Civil Aviation Authority of the Philippines (CAAP) must be apostilled if foreign sourced.

The practical effect of this is that the aircraft owner-lessor – even if it signs through a counterpart outside the Philippines – should have its counterpart notarised and apostilled, since the lease will be filed with CAAP.

2. Finance structures

2. 1. What aviation finance structures are most commonly used in your jurisdiction?

Philippines

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For aircraft finance, the first and most common structure is a lease agreement between the aircraft owner-lessor and the Philippine lessee. Under this structure, the aircraft owner will be directly leasing to the Philippine lessee, which will also be the operator of the aircraft in the Philippines.

The second structure is a combination of a head lease and a sublease agreement. The head lease will be between the aircraft owner-lessor and an offshore company owned or controlled by the Philippine lessee and acting as head lessee (this offshore company can be, say, in the British Virgin Islands or the Cayman Islands). This offshore company then acts as sublessor and subleases the aircraft to the Philippine lessee, which will also be the operator of the aircraft in the Philippines. Under this second structure, the aircraft owner will be indirectly leasing to the Philippine lessee.

The third, but uncommon, structure is where an aircraft owner has a separate company or entity for each and every aircraft under finance leasing (rather than all aircraft owned by the aircraft owner and consolidated under one entity acting as lessor for all aircraft). Each separate company will then act as an aircraft lessor that can directly lease to the Philippine lessee, which will also be the operator of the aircraft in the Philippines. This structure is more common in operating leases than finance leases.

2. 2. What are the advantages and disadvantages of these different types of structures?

Philippines

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The main advantage of the first structure outlined in question 2.1 is the simplicity of the lease, which is a direct lease to the Philippine lessee-operator and thus reduces the transaction documents required to implement the first structure. However, the major disadvantage of this structure is the risk of the aircraft owner-lessor being seen as ‘doing business without a licence’ in the Philippines. The ‘doing business without a licence’ rule states that a foreign company doing business in the Philippines without a licence cannot sue in the Philippines, but may be sued in the Philippines. Effectively, this is a defence that the Philippine lessee can put up in case of dispute and that could potentially lock the aircraft owner-lessor out of access to the Philippine courts. This is the major hurdle under this structure; so before starting each finance lease transaction, care must be taken to avoid being seen as doing business in the Philippines without a licence. The phrases ‘doing business’ and ‘without a licence’ have specific legal definitions and must be taken into account in the overall structuring. To be sure, there are exceptions to this rule which will validate this structure; but this will vary on a case-by-case basis, depending primarily on the situation of the aircraft owner and its history (or lack thereof) in financing Philippine lessees.

The main advantage of the second and third structures outlined in question 2.2 is that they take into account the ‘doing business’ rule and veer away from its coverage. Because of this, these structures are far safer for an aircraft owner-lessor insofar as access to Philippine courts is concerned. However, because of this, the major disadvantage is the additional steps, requirements and costs for either (or both) the aircraft lessor and the Philippine lessee. Because there is another layer involved – the offshore company in the second structure and the ‘per entity lessor’ in the third structure – these structures are not as quick to implement. There are also more transaction documents required to be prepared and more documents to be filed with CAAP.

2. 3. What other factors should operators bear in mind when deciding on a financing structure?

Philippines

TAN HASSANI AND COUNSELS

For operators, aside from the usual commercial terms – which is a paramount consideration – one of the most important factors to determine is the tax implications on the rent payable by the operator to the lessor. In deciding on the structure, can review which jurisdictions has a tax treaty with the Philippines.

2. 4. Who are the most common providers of aircraft finance in your jurisdiction? Do any restrictions apply in this regard?

Philippines

TAN HASSANI AND COUNSELS

The most common providers of aircraft finance in the Philippines are foreign financing companies which do not have a local presence or a permanent establishment in the Philippines. Such foreign financing companies (or even foreign aircraft lessors under an operating lease) are mostly domiciled outside the Philippines.

3. Title transfer

3. 1. How is title to an aircraft legally transferred in your jurisdiction?

Philippines

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Title is transferred through a bill of sale as evidenced by registration with the Civil Aviation Authority of the Philippines (CAAP).

3. 2. What are the formal and documentary requirements for transferring title?

Philippines

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The requirements are:

- the application form prescribed by CAAP;
- a previous copy of the certificate of registration;
- documentary evidence of ownership (eg, a bill of sale);
- a copy of accounting clearance issued by CAAP to the former and new owners of the aircraft;
- a corporation document issued by the Securities and Exchange Commission/Department of Trade and Industry, if applicable;
- a secretary's certificate (if applicable);
- CAAP prescribed fees (eg, registration fees, energy tax, recordation fee);
- air operator certificate specification (if applicable);

- the Civil Aeronautics Board's list of aircraft approval (if applicable); and
- unless assumed by the new owner, confirmation that all liens and encumbrances annotated at the back of the certificate of registration have been:
 - satisfied or complied with; or
 - declared by competent authorities as null and void or ineffective.

For re-registration of an aircraft with the same nationality and registration mark, a new certificate of registration will be issued and new entry made in the Philippine aircraft register. The process is the same as for the registration of an aircraft.

All conveyances recorded with CAAP must comply with the requirements for the registration of documents, stating:

- the interest in the aircraft of the person by which such conveyance is made or executed or, in the case of a contract of conditional sale, the interest of the vendor; and
- the conveyance of such interest.

All documents issued and/or signed outside the Philippines must be apostilled or consularised at the Philippine consulate in that country.

3. 3. What is the process for transferring title?

Philippines

TAN HASSANI AND COUNSELS

Once the bill of sale is issued by the seller to the purchaser, the purchaser can file the bill of sale with the CAAP, together with the other supporting documents as discussed in 3.2.

3. 4. Are any charges, fees or taxes levied on the transfer of title?

Philippines

TAN HASSANI AND COUNSELS

A registration fee must be paid for the registration of an aircraft. The fee will depend on the aircraft's type, weight, intended use and type of engine. An energy tax fee and a recording fee may also be payable.

3. 5. Other than in case of insolvency, are there any laws under which the registered title holder may be forced to relinquish ownership of the aircraft (eg, expropriation, confiscation)?

Philippines

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In an aircraft finance lease, unless and until the Philippine lessee-operator under whose name the aircraft's certificate of registration has been registered as a lessee, the lessee-operator is not the owner of the aircraft. Indeed, the certificate of registration will only indicate the holder's interest as a leasehold (and not of ownership). Moreover, with proper annotation on the certificate of registration, an aircraft owner's interest as ownership is well documented and constitutes notice to third parties. Therefore, it is unlikely that the Philippine lessee-operator will be required to 'relinquish ownership' of an aircraft that it does not own. Nonetheless, as a fundamental power of the state, in general, expropriation can deprive the aircraft owner of the aircraft; but it will not be related *per se* to the aircraft finance transaction.

4. Registration

4. 1. What body administers the aircraft register in your jurisdiction?

Philippines

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Aircraft must be registered with the Civil Aviation Authority of the Philippines (CAAP). The CAAP is responsible for:

- establishing and maintaining a system for the national registration of aircraft in the Philippines;
- establishing and maintaining a system for the registration of liens, mortgages and other interests in aircraft or aircraft engines; and
- registering aircraft and liens, mortgages or other interests in aircraft or aircraft engines.

4. 2. What information is included in the aircraft register? Is this publicly accessible?

Philippines

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The aircraft certificate of registration must contain the following:

- the control number;
- the nationality or registration marks assigned for the aircraft;
- the manufacturer and the manufacturer's designation of the aircraft;
- the aircraft serial number as found on the aircraft data plate affixed to the aircraft;
- the name of the owner or operator;
- the address of the owner or operator;
- the date of issuance;
- the signature of the director general;
- a remarks section, which must include:
 - the date of expiration of the registration;
 - the intended use (commercial air transport, general aviation or aerial works); and
 - record payments; and
- on the back portion of the certificate, conveyances connected to the aircraft.

It is possible that CAAP may use some type of electronic register, but this is not accessible to the general public (it would likely be an intranet). However, any person may request access to information from CAAP, including a list of entries in the aircraft registry, as long as the information requested does not fall within any of the exceptions under the Freedom of Information Manual of CAAP. Additionally, and as a rule, no fees are payable for any request for access to information. However, a reasonable fee may be imposed for the reimbursement of necessary costs – including the costs of reproduction and copying of the information required – subject to existing rules and regulations. In no case may the applicable fees be so onerous as to defeat the purpose of the right to access information.

4. 3. What are the formal and documentary requirements for registration of an aircraft? What is the process for registration? What is the effect of registration? What is the effect of deregistration?

Philippines

TAN HASSANI AND COUNSELS

The Philippines has an operator registry. The Philippine Civil Aviation Regulations (PCARs) provide that no person may operate a civil aircraft unless the aircraft has been registered by its owner or operator.

An aircraft is eligible for registration if it is:

- owned by or leased to a citizen or citizens of the Philippines or corporations or associations organised under the laws of the Philippines at least 60% of whose capital is owned by Filipino citizens (as set out in Section 44 of Republic Act 9497), or a government entity of the Philippines; and
- not registered under the laws of any foreign country.

A foreign-owned or registered aircraft may be eligible for registration if it is utilised by members of aero clubs organised for recreation, sport or the development of flying skills as a prerequisite to any aeronautical activities of such clubs within the Philippine airspace, and if so authorised by CAAP.

For the aircraft registration requirements, please see questions 3.1, 3.2 and 3.3.

4. 4. If your jurisdiction has ratified the Cape Town Convention, can a local law deregistration power of attorney be acquired by a lessor/financier, and if so, does it provide any additional protection for such parties?

Philippines

TAN HASSANI AND COUNSELS

As of the time of writing, the Philippines has not ratified the Cape Town Convention on International Interests in Mobile Equipment and the related Aircraft Protocol.

4. 5. What are the formal and documentary requirements for registration of an aircraft lease? What is the process for registration? What is the effect of registration? What is the effect of deregistration?

Philippines

TAN HASSANI AND COUNSELS

The CAAP is responsible for:

- establishing and maintaining a system for the national registration of aircraft in the Philippines;
- establishing and maintaining a system for the registration of liens, mortgages and other interests in aircraft or aircraft engines; and
- registering aircraft and liens, mortgages or other interests in aircraft or aircraft engines.

Until it has been recorded with CAAP and annotated on the original copy of the certificate of registration, no conveyance made or executed which affects title to, or interest in, any aircraft of Philippine registry or any portion thereof will be valid in respect of such aircraft or portion thereof against any person other than:

- the person by which the conveyance is made or executed;
- that person's heirs, assignees, executors, administrators, devisees or successors in interest; and
- any person having actual notice thereof.

Each conveyance so recorded will be valid as against all persons. No adverse claims may be recorded or annotated on the back of the certificate of registration unless original documents are presented evidencing such claims and payment of the corresponding fee.

After submission of a written letter from the owner requesting the recordation of a conveyance that affects the certificate of registration, the conveyance may be recorded only once the completeness of the following submitted documents has been confirmed:

- notarised conveyances; and
- the draft annotation to be signed by the parties involved.

The duplicate copy of the registration must be forwarded to the Regulatory Standards Department for record keeping and updating.

4. 6. What are the formal and documentary requirements for registration of an aircraft mortgage? What is the process for registration? What is the effect of registration? What is the effect of deregistration?

Philippines

TAN HASSANI AND COUNSELS

The process and requirements for an aircraft mortgage registration are the same as those for an aircraft lease registration. Please see question 4.5.

4. 7. Can aircraft be registered in your jurisdiction even if the operator is not from your jurisdiction?

Philippines

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As a rule, only aircraft owned by or leased to Philippine citizens or corporations or associations organised under the laws of the Philippines at least 60% of whose capital is owned by Filipino citizens or a government entity of the Philippines may be registered and operated in the Philippines.

However, a foreign-owned or registered aircraft may still be registered and operated within the Philippines if utilised by members of aero clubs organised for recreation, sport or the development of flying skills as a prerequisite to any aeronautical activities of such clubs within the Philippine airspace, and if so authorised by CAAP. This means that foreign-owned aircraft may be registered and engage in domestic air travel only.

Foreign registered aircraft may still be authorised to operate in and to the Philippines. The PCARs allow foreign-registered aircraft to perform commercial air transport operations in and to the Philippines upon the issuance of a validation of air operator certificate. A validation of air operator certificate will be issued by the director general of CAAP if satisfied that the foreign air operator:

- has a valid air operator certificate issued by a foreign civil aviation authority;
- has had its aircraft operator security programme approved by its civil aviation authority for the operations intended;
- meets the applicable flight requirements and equipment requirements under the PCARs;
- meets the standards contained in applicable annexes to the Chicago Convention for the operations to be conducted; and
- has obtained approval from the Philippine Civil Aeronautics Board.

5. Operating leases

5. 1. Are there any mandatory or advisable terms that should be included in an operating lease from a local law perspective?

Philippines

TAN HASSANI AND COUNSELS

From an aircraft lessor's point of view, since the Philippines is not a part of the Cape Town Convention, various powers of attorney should be generously inserted in the terms and conditions of the lease, which should include an irrevocable deregistration power of attorney.

A condition subsequent, such as ensuring the registration of the aircraft with the annotation of the aircraft lease agreement and the deregistration power of attorney, is highly advisable.

5. 2. What charges, fees or taxes arise from the execution of an operating lease?

Philippines

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From the Philippine side, the execution of an operating lease of an aircraft *per se* is not subject to charges, fees or taxes. However, the services of providers such as notaries public or the apostille process (or consularisation process) will incur their own service fees. A registration fee is payable for registration of the lease with the Civil Aviation Authority of the Philippines. For an aircraft lessor classified as a 'non-resident foreign corporation' under the Philippine Tax Code, a Philippine lessee will be required to withhold 7.5% on the gross rentals; although normally, under contractual terms and conditions, the payment of rentals will be net of withholding taxes. Effectively, the Philippine lessee will shoulder such withholding tax.

5. 3. Can either the lessor or the lessee assign or novate its rights in an operating lease in your jurisdiction?

Philippines

TAN HASSANI AND COUNSELS

Yes – under the Civil Code, the parties may generally stipulate such terms and conditions (including assignment clauses), as long as they are not contrary to the laws, morals or public policy of the forum. Effectively, the lessor or the lessee may assign depending on the terms and conditions of the lease agreement.

5. 4. What are the respective obligations and liabilities of the lessor and lessee under an aircraft lease?

Philippines

TAN HASSANI AND COUNSELS

The lessor's obligation is straightforward: to deliver the aircraft to the lessee. The lessee's typical obligations are:

- to pay rentals on time;
- to use and operate the aircraft only in accordance with the declared usage;
- to notify the lessor of adverse events;
- to inform the lessor of the location and condition of the aircraft from time to time;
- to maintain insurance over the aircraft;
- to maintain the aircraft and records based on original equipment manufacturer and regulatory requirements; and
- not to deregister the aircraft.

5. 5. In the event of default, what options are typically available to enforce the operating lease? Do all or some enforcement actions require court applications? If so what are the associated costs and timescales involved?

Philippines

TAN HASSANI AND COUNSELS

Most operating leases are governed by non-Philippine law (typically, New York law or the law of England and Wales); and the venue will most likely be outside the Philippines, with actions or proceedings arising from or relating to the lease to be commenced before the courts of the state of New York or the courts of England.

However, from the Philippine side, some remedial actions may also be applicable. The lessor may recover possession of the aircraft by filing:

- an original action for replevin if the case is initiated outside the Philippines;
- an action for recognition of judgment with application for replevin if the case is filed and has been decided outside of the Philippines; or
- a civil case of breach of contract before the Philippine courts with an application for immediate delivery of the aircraft (replevin as a provisional remedy).

5. 6. Upon termination of the operating lease, how is repossession of the aircraft effected? Can airports assert a lien over all of the lessee's aircraft until unpaid charges have been discharged?

Philippines
TAN HASSANI AND COUNSELS

Repossession will generally be governed by the terms and conditions of the lease agreement itself, which will include:

- the location where lessee is to deliver the aircraft (normally outside the Philippines);
- the return conditions of the aircraft itself; and
- all logs and other manuals, certificates, inspection data, modification, maintenance and overhaul records and other documents required to be maintained.

Of particular importance is that the return of the aircraft will include engines which are not owned by the lessor. If the engine is owned by the lessee, the return conditions should include the obligation of the lessee to transfer ownership of the engine to the lessor. The aircraft may be delivered to and repossessed by the lessor in Manila. However, this could be burdensome because of:

- registry issues;
- hangarage;
- inspections; and
- the requirement for the pilot to fly out the aircraft.

CAAP has the general power to impose a lien on aircraft and machinery for unpaid charges, fees or fines. The Manila Airport Authority may impose dues, charges, fees or assessments to provide for a satisfactory return on its assets and the costs of using its facilities and services. If the aircraft owner or agent refuses or fails to pay, the Manila Airport Authority may, in addition to other legal remedies, detain such aircraft equipment or furniture belonging to the aircraft owner or agent until payment. However, the imposition of liens or detention of the aircraft can be disputed since the aircraft is not owned by the lessee.

5. 7. What disputes typically arise over operating leases in your jurisdiction and how are these typically resolved?

Philippines

TAN HASSANI AND COUNSELS

The most common cause of dispute is unpaid rent. There is no usual or typical method of resolution because it ultimately depends on the lessee's disposition. Some lessees will voluntarily return the aircraft, while others will be more adversarial.

5. 8. What other considerations should be borne in mind when concluding an aircraft lease in your jurisdiction?

Philippines

TAN HASSANI AND COUNSELS

The formalities and procedures when executing a lease agreement should be followed. Documents executed outside the Philippines should be either apostilled or consularised. As the Philippines is not a member of the Cape Town Convention, the deregistration power of attorney and lease contracts should be annotated on the certificate of registration.

6. Security

6. 1. What types of security interests in aircraft are available in your jurisdiction? Which are most commonly used and which would you recommend (if different)?

Philippines

TAN HASSANI AND COUNSELS

The most common security interest is to annotate the aircraft's certificate of registration with the name of the lessor and the deregistration power of attorney (DPOA) issued by the lessee in favour of the lessor. The purpose is to notify third parties that the lessee is not the owner of the aircraft.

Another security interest is a mortgage. However, insofar as the Philippines is concerned, a mortgage typically signifies that the lessee is actually the owner of the aircraft, but that the aircraft has been mortgaged in favour of a creditor or a lender. This is a totally different structure, with the aircraft's ownership being transferred at the start to the lessee. Because of this, we do not recommend a mortgage.

6. 2. What are the formal, documentary and procedural requirements for perfecting a security interest in an aircraft?

Philippines

TAN HASSANI AND COUNSELS

A security interest consisting of annotation of the interest in the aircraft's certificate of registration is quite straightforward. The aircraft lease agreement itself must be signed by both the lessor and the lessee. In addition, the DPOA must be issued by the lessee in favour of the lessor (the DPOA will normally be a condition precedent in the lease agreement itself). Both documents must be notarised (and, if signed outside the Philippines, must be either apostilled or consularised) and subsequently filed with the Civil Aviation Authority of the Philippines (CAAP) for annotation in the certificate of registration.

6. 3. Can security be taken over engines and/or any other aircraft parts in your jurisdiction? If so, how?

Philippines

TAN HASSANI AND COUNSELS

There are two ways to do so. First, if the engine is owned separately from the aircraft itself, the lease agreement over the engine can be annotated on the aircraft's certificate of registration. This gives notice to third parties that the engine is owned separately.

Second, the engine itself can be registered with CAAP and can have its own (separate) certificate of registration, in which the engine lease can also be annotated.

6. 4. What charges, fees or taxes arise from the perfection of a security interest in an aircraft?

Philippines

TAN HASSANI AND COUNSELS

CAAP charges a minimal recording fee for annotation in a certificate of registration. The fee can be as low as PHP 400 per annotation. This is separate from the CAAP fee to issue the certificate of registration itself (which can cost a little less than PHP 20,000).

6. 5. What are the respective obligations and liabilities of the owner and the secured party under the security interest?

Philippines

TAN HASSANI AND COUNSELS

The obligation and liabilities of the owner-lessor and lessee will depend on the main lease agreement itself. Since a security interest is merely an accessory contract (or an 'offshoot' of the main contract of lease), normally, as long as no event of default by the lessee has occurred or continues to occur, the owner-lessor's obligation is to ensure the quiet and peaceful possession of the lessee.

6. 6. In the event of default, what options are available to enforce the security interest? Is self-help available in your jurisdiction or does enforcement action have to go through the courts?

Philippines

TAN HASSANI AND COUNSELS

Self-help is not available in the Philippines. If the lessee voluntarily surrenders possession of the aircraft, the lessor can use the DPOA to file the necessary applications for deregistration and export of the aircraft.

However, if the lessee does not voluntarily surrender possession, most operating leases will be governed by non-Philippine law (typically, the law of England and Wales or New York law) and the venue will most likely be outside the Philippines, with actions or proceedings arising from or relating to the lease to be commenced before the courts of England or the courts in New York City.

However, from the Philippine side, some remedial actions may also be applicable. The lessor may recover possession of the aircraft by filing:

- an original action for replevin if the case is initiated outside the Philippines;
- an action for recognition of judgment with application for replevin if the case is filed and has been decided outside of the Philippines; or
- a civil case of breach of contract before the Philippine courts with an application for the immediate delivery of the aircraft (replevin as a provisional remedy).

6. 7. Will local courts recognise a foreign court judgement in favour of a lessor/financier?

Philippines

TAN HASSANI AND COUNSELS

Yes, foreign court judgments are recognised in the Philippines. If the case is filed outside of the Philippines and a final judgment has been rendered finding that the lessee is in breach, the lessor may commence an action for recognition of foreign judgment in the Philippines. There is no trial on the merits. Foreign judgments enjoy a presumption of validity and the party that seeks to challenge such foreign judgment has the burden of overcoming this presumptive validity.

6. 8. What other considerations should be borne in mind when perfecting a security interest in an aircraft in your jurisdiction?

Philippines

TAN HASSANI AND COUNSELS

Philippine government agencies, including CAAP, strictly require that foreign-issued or foreign-signed documents be apostilled or consularised in order to be recognised in the Philippines. Once done, the actual process of annotation in the certificate of registration is straightforward.

6. 9. Has your jurisdiction ratified the Cape Town Convention? If yes, are there any notable exceptions to the ratification? If yes, in your opinion, could any conflicts arise between the Cape Town Convention and local law in an enforcement scenario? If yes, have any enforcement issues arisen in relation with regard to conflicts between the Cape Town Convention and local law?

Philippines

TAN HASSANI AND COUNSELS

No, the Philippines has not ratified the Cape Town Convention.

7. Aircraft sale and purchase

7. 1. How are aircraft sale and purchases typically effected in your jurisdiction? Are there any differences in the sale of airframe versus engines?

Philippines

TAN HASSANI AND COUNSELS

The main document in an aircraft sale is the bill of sale (or deed of sale) issued by the seller. Normally, as supporting documents, the Civil Aviation Authority of the Philippines (CAAP) will also require submission of the proof of authority to sell and buy from both the seller and the buyer. For companies and other entities, a board resolution or a directors' resolution showing the authority to sell or authority to buy will be required. The original certificate of registration will also be surrendered to CAAP.

If the certificate of registration has an annotation, unless assumed by the new owner, all liens and encumbrances annotated at the back of the certificate of registration should have been cancelled.

There is no difference in the sale of the airframe and engine.

7. 2. What players are typically involved in an aircraft sale and purchase?

Philippines

TAN HASSANI AND COUNSELS

Normally, the seller, the buyer and an escrow agent. The legal counsel for either or both will also typically be involved.

7. 3. Is the manufacturer/seller bound by a duty to disclose? What representations and warranties will it typically make?

Philippines

TAN HASSANI AND COUNSELS

If the aircraft is new, representations and warranties will depend on the laws of the place with jurisdiction over the manufacturer. If the aircraft is pre-owned, normally there is no duty to disclose. The buyer is required to conduct its own due diligence and typically the seller will be selling on an 'as is, where is' basis.

7. 4. What due diligence is typically conducted in an aircraft sale and purchase?

Philippines

TAN HASSANI AND COUNSELS

The duty to conduct due diligence rests with the buyer. Due diligence typically consists of:

- technical due diligence, including hiring a service provider to conduct pre-purchase inspection; and
- legal due diligence, to review the documents pertaining to both the seller as an entity and the aircraft itself, as well as the documents pertaining to registration of the aircraft.

7. 5. What are the formal, documentary and procedural requirements for conclusion of an aircraft sale and purchase?

Philippines

TAN HASSANI AND COUNSELS

During the closing of an aircraft sale and purchase with an escrow, the following documents are prepared:

- a bill of sale;
- escrow confirmation that there are no liens on the aircraft (if any, counsel for the buyer who are situated in the seller's country can also confirm that there are no liens on the aircraft upon searching with the relevant authorities);
- a directors' certificate (or equivalent document) showing the board resolutions of the seller and of the buyer approving the sale and purchase of the aircraft;
- proof of compliance with all conditions precedent (as may be indicated in the lease agreement);
- the aircraft's certificate of airworthiness;
- the aircraft's export certificate of airworthiness; and
- the aircraft deregistration.

While not required for the purposes of the sale, we also advise the seller to prepare its apostilled company registration documents and tax residency certificate to hand over to the buyer.

7. 6. What are the respective obligations and liabilities of buyer and seller during the transaction, and what are the consequences of any breach?

Philippines

TAN HASSANI AND COUNSELS

The obligations of the buyer and the seller will be indicated in the sale and purchase agreement. Primarily, the obligation of the seller is to sell and issue the bill of sale to the buyer upon receipt of the full purchase price (or, if there is an escrow, upon receipt of the escrow of the full purchase price). Normally, the seller will also have to prepare (and turn over to the escrow) the conditions precedent, as previously discussed.

The obligation of the buyer is mainly to pay the purchase price by the closing date. Any breach by either the seller or the buyer may terminate the sale and purchase agreement. If the buyer is the party in breach, it will normally forfeit the down-payment or deposit made.

7. 7. What charges, fees or taxes arise from the conclusion of an aircraft sale and purchase? Are there sales tax exemptions – for example, if the aircraft is being sold to an operator that will continue to use the aircraft to generate revenue?

Philippines

TAN HASSANI AND COUNSELS

If the seller is a foreign company with no presence in the Philippines, it will not be subject to the jurisdiction of the tax authorities of the Philippines and thus the income will not be taxable in the Philippines (although it might be taxable in the place with jurisdiction over the seller). From the Philippine buyer's point of view, if the seller is a non-resident foreign corporation (as defined in the Philippine Tax Code), there is no income tax due on the sale of the aircraft.

7. 8. What other considerations should be borne in mind when conducting a sale and purchase of an aircraft in your jurisdiction?

Philippines

TAN HASSANI AND COUNSELS

The formalities of the documentation are important to recognise the sale in the Philippines and for the purposes of filings with CAAP. A Philippine buyer should also ensure that it has no unpaid assessments or dues with CAAP, as this can hamper the timely registration of the aircraft in its name as the new owner.

7. 9. Are the payments of deposits refundable under term sheets if a sale does not proceed and do the parties have a duty of good faith in the conduct of sale and purchase negotiations?

Philippines

TAN HASSANI AND COUNSELS

Whether the deposit is refundable will depend on the sale and purchase agreement. It is a contractual agreement between the parties. Normally, however, it is usually non-refundable, save in expressly stipulated situations indicated in the sale and purchase agreement.

8. Insurance

8. 1. What insurance requirements apply to aircraft in your jurisdiction?

Philippines

TAN HASSANI AND COUNSELS

Insurance requirements do not apply to the type of aircraft *per se*; rather, insurance requirements refer to the type of operations an aircraft is engaged in. For example, insurance requirement for general aviation aircraft vis-à-vis commercial airline aircraft is vastly different.

Another factor that can distinguish is the insurance requirement of the owner or lessor vis-à-vis the insurance requirement of the regulatory authorities that regulates the operations of the aircraft.

8. 2. If local insurance is required, can local insurers assign reinsurance contracts in your jurisdiction?

Philippines

TAN HASSANI AND COUNSELS

Yes, local insurers can assign reinsurance contracts directly to the insured. There are also some insurance policies with “cut through” clauses or endorsements which allow the insured to claim against the reinsurer.

8. 3. What other forms of insurance feature in the aircraft finance market in your jurisdiction?

Philippines

TAN HASSANI AND COUNSELS

Insurance for financed aircrafts is mostly hull and liability insurance (with liability insurance usually covering bodily injury and death liability (including passengers) and property damage liability). This type of insurance requirement is usually mandated by the aircraft owner-lessor.

9. Trends and predictions

9. 1. How would you describe the current aircraft financing landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

Philippines

TAN HASSANI AND COUNSELS

Philippine-based lessees continue to require aircraft financing because the reality is that there is no local alternative to getting financing for an aircraft. Local lenders and local financial institutions are hesitant to provide financing, especially if the only security is the aircraft itself. This is because local lenders do not have the technical expertise to maintain and operate an aircraft in the event of default.

Currently, the key challenge for Philippine-based lessees is the uncertainty and fluctuation of the Philippine peso against the US dollar, which makes it harder for Philippine lessees to budget their monthly payments.

10. Tips and traps

10. 1. What are your top tips for the smooth conclusion of an aircraft financing transaction and what potential sticking points would you highlight?

Philippines

TAN HASSANI AND COUNSELS

After more than a decade of closing aircraft financing deals, we have observed that the transaction documents of an aircraft financing are generally more or less the same. However, we have also observed that foreign aircraft lessors do not always receive guidance on the requisite supporting documents, which are equally as important as the main transaction documents. These supporting documents are required under Philippine laws and regulations – both as to the documents themselves and as to the procedure for execution – to ensure that the transaction is recognised in the Philippines, especially in the event of a dispute.



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