



**COUNTRY
COMPARATIVE
GUIDES 2023**

The Legal 500 Country Comparative Guides

India

AVIATION FINANCE & LEASING

Contributor

Dentons Link Legal

DENTONS LINK LEGAL

Anand Srivastava

Managing Partner | anand.srivastava@dentonslinklegal.com

Namita Das

Partner | namita.das@dentonslinklegal.com

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

For a full list of jurisdictional Q&As visit legal500.com/guides

INDIA

AVIATION FINANCE & LEASING



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

India has signed and ratified the following:

- a. Warsaw Convention for the Unification of Certain Rules for International Carriage by Air, 1929;
- b. Chicago Convention on International Civil Aviation, 1944;
- c. International Air Services Transit Agreement, 1944;
- d. Hague Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, 1955;
- e. Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963;
- f. Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970;
- g. Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971;
- h. Montreal Supplementary Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Montreal Convention 1971;
- i. Montreal Convention for the Unification of Certain Rules for International Carriage by Air, 1999;
- j. Cape Town Convention on International Interests in Mobile Equipment, 2001 ("CTC");
- k. Aircraft Protocol to the Convention on International Interest in Mobile Equipment on Matters specific to Aircraft Equipment, 2001.

India has not signed the Geneva Convention on the International Recognition of Rights in Aircraft (1948) and the Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (1933).

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

India has made the qualifying declarations under CTC:

i. Non-consensual right or interest (arising from the time of a declared default by an airline) having priority under Indian laws (whether in or outside insolvency proceedings) in case of liens in favour of:

- airline employees for unpaid wages;
- rights of an Indian authority, relating to taxes or other unpaid charges;
- repairers of an aircraft object in their possession, to the extent of service(s) performed.

ii. Arrest or detention of an aircraft object under Indian laws for payment of amounts owed to the Government of India/any such entity/ organization /provider directly relating to the service or services provided by it.

iii. Application of CTC to all of India's territorial units.

iv. Following categories of interest (arising before a declared default by that airline) to be registrable under CTC for any category of aircraft object:

- liens in favour of airline employees for unpaid wages;
- liens or other rights of an Indian authority, relating to taxes or other unpaid charges;
- rights of a person obtaining a court order permitting attachment of an aircraft object.

v. All High Courts within India are the relevant courts for Articles I and XII of the CTC. vi. Any remedy available to a creditor under CTC may be exercised without court action and without leave of the court.

India has made the following declarations under the protocol:

i. Parties to an agreement contractually agree on the governing law. ii. Court to provide speedy relief in case creditor adduces evidence of default:

- within 10 days – for preservation of aircraft objects and their value; possession, control or custody of aircraft objects; and immobilization of aircraft objects.
- within 30 days – lease for management of aircraft objects and the income thereof; and sale and application of proceeds from aircraft objects.

iii. Opted for Alternative A (*Article XI – Remedies on insolvency*) and waiting period of two (2) calendar months.

India acceded to CTC in 2008, subsequently, amendments were made to the Aircraft Act, 1934 and Aircraft Rules, 1937 (“Aircraft Rules”). However, certain provisions of CTC continued to remain in conflict with a few municipal laws. As a matter of practice, the Indian Courts have considered referring to international conventions only to the extent they are not inconsistent with the municipal laws. Therefore, in the event of a conflict between CTC and a national law, the latter shall prevail.

The Ministry of Civil Aviation (“MoCA”) had released the draft Protection and Enforcement of Interests in Aircraft Objects Bill, 2022 (“CTC Bill”) for seeking public comments, for the implementation of provisions under CTC in a harmonised manner, which is yet to be tabled before the Parliament. However, per recent news Government aims to table CTC Bill in the upcoming monsoon session of the Parliament.

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

a. Lease Yes, as a matter of practice, Indian courts do recognize the autonomy exercised by parties from different jurisdictions to choose their applicable law as valid, provided that such autonomy is not in violation to any public interest or circumvents mandatory laws in India. While the Indian Contract Act, 1872 (“Contract Act”) is the governing law for all contracts executed

within India, lease agreements and security documents executed in relation to aircrafts governed by foreign laws would be prima facie enforceable. The Supreme Court of India has recognised the choice of a foreign governing law in contracts in a catena of cases. The determining factor is whether the contract is the bona fide intention of the parties and such contracts should not oppose the public policy. However, where all the parties to a contract are Indian, the same are required to be governed by Indian laws. In the event any lease agreement and/or security document is executed outside India, then such document shall be given due recognition as per the Indian laws on stamping, registration and notarization of documents within three months of bringing the original document to India. However, certain states such as Maharashtra and Karnataka also require payment of stamp duty on copies of such document.

b. Security document (for example, mortgage) Please refer to our response as to Q. 3.a. above.

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

No, there is no such customary or legal requirement.

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

Yes, Indian courts in most cases do recognize foreign judgments through statutory recognition. Even in cases where there is no reciprocal arrangement under the Civil Procedure Code, 1908 (“CPC”), Indian courts are liberal in enforcing foreign judgements through an action based on the judgements.

(a) Recognition of foreign judgements:

Under CPC ‘foreign judgment’ is defined to mean a judgment passed by a court situated outside India and not established or continued by the authority of the central government (in India). CPC is the core procedural legislation dealing with provisions regarding recognition and enforcement of reasoned judgments made by a foreign court of competent jurisdiction. Conclusiveness of a foreign judgment is ascertained basis the exceptions laid down under Section 13 of CPC, which are as follows:

- i. if it is not pronounced by a court of competent jurisdiction;
- ii. it is not on the merits of the case;
- iii. appears to be based on an incorrect view of international law or refuses to recognise the applicable Indian laws;
- iv. proceedings for judgment are opposed to principles of natural justice;
- v. obtained by fraud; and
- vi. sustains a claim founded on a breach of any Indian law in force.

(b) Enforcement of foreign judgements:

Section 44A of CPC deals with the execution of decrees passed by courts in a reciprocating territory, i.e., territories declared by the Government of India ("GoI") by notification in its official gazette and includes countries such as United Kingdom and Hong Kong. When a decree is passed by a court which is superior in hierarchy in a reciprocating territory, then such decree may be executed in India as if it were passed by a court in India. In such cases, an order is passed by the Indian court regarding its enforcement. For the enforcement of foreign judgments passed by nonreciprocating territories, a civil suit is required to be filed with the Indian courts for procuring a decree for enforcement. Accordingly, the courts in India may, subject to Section 13, pass an order for the execution of the decree, thus, giving recognition to such decree.

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

The registry maintained by Director General of Civil Aviation ("DGCA") is an owner-register as it contains details of the owner (name, nationality, and address) and the nature of the ownership, in addition to other information such as details about the aircraft (type, year of manufacture, date and period of registration and details of mortgage or hypothecation).

(a) The Aircraft Rules permit registration of an aircraft under either of the following categories:

- i. Category A – where the aircraft is wholly owned by (i) Indian citizens or; (ii) company

that is registered/has its principal place of business in India or; (iii) Central/State government or any company that it may own/control or; (iv) company registered outside India which has leased the aircraft to any person mentioned in (i); (ii); (iii) above.

- ii. Category B – where the aircraft is wholly owned either by (i) persons resident in/carrying business in India (who are not citizens); and (ii) company registered outside India and carrying on business in India. If an aircraft does not fall under the categories mentioned above in (i) and (ii) and/or if the registration of such aircraft is already valid in some other country, then registration of such aircraft may be denied by the authority.

(b) The aircraft owner seeking registration is required to submit an application (Form CA-28) within 5 working days (in cases of outright purchase) or within ten days (in cases of lease), before the expected date of issue of certificate of registration ("**Registration Certificate**"), along with the applicable fee.

(i) Registration Process:

Form CA-28 is required to be filed on the electronic portal of DGCA, i.e., e-GCA, following which the application is forwarded to the relevant government department for scrutiny and evaluation. The assigned DGCA officer ensures that the documents have been duly processed and that the appropriate procedures have been followed, so that the application is approved for issuance of the Registration Certificate. Subsequently, a notification regarding approval/rejection is sent to the applicant.

(i) Indicative list of documents required

- Customs clearance certificate/ bill of entry of the aircraft;
- Certificate of de-registration from the previous registering authority;
- Copy of invoice corroborating purchase made wholly by the applicant;
- Copy of lease agreement (in case of dry lease);
- Copy of import license issued by Director General of Foreign Trade ("DGFT")/ permission for import issued by MoCA; and
- Copy of consent issued by the owner (in case of mortgage/hypothecation).

Further, if an owner / lessor transfers the lease of an aircraft to a person or company the process as mentioned for registration of an aircraft shall be followed. However, the registration number of aircraft shall remain the same.

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

While there is no specific register for security documents in India for recording a mortgagee's interest vis-a-vis an aircraft, if the mortgagor is an Indian company, then it is required to register a charge with the relevant Registrar of Companies ("RoC") within 30 days of its creation. Further, the mortgagor Indian company is also required to maintain a register of charges at its registered office, recording the details of the charge created. In terms of other compliances, every document creating a security interest would need to be adequately stamped as per the applicable stamp laws. Further, under the Indian Registration Act, 1908, a mortgage deed may be registered with the registrar, subject to payment of the prescribed registration fee. If the mortgagor is an Indian company, the forms filed with the RoC and the register of charges maintained by such company is documentary proof for creation of charges. The registry maintained by DGCA, discussed in response to Q. 6 above, contains details about the mortgage and hypothecation created against an aircraft. Further, the Registration Certificate also constitutes documentary evidence of a charge being created on the aircraft.

A document executed outside India is required to be registered within 4 months of its arrival in India. In case of a document apostilled in a country that is a member of the Hague Convention of October 5, 1961, such document is recognised for all legal purposes in India.

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

a. Ownership Interest (for example, proof of title to third parties of ownership)

Any document pertaining to ownership interest shall

mandatorily be registered, failing which such document cannot be used to create, operate, declare, limit, and assign any right, title or interest in any immovable property. An aircraft is required to be registered with the DGCA, for which a Registration Certificate is issued. Courts in India recognise the admissibility of the Registration Certificate issued by DGCA and may accept it as an evidence of ownership interest in the aircraft. At the time of filing an application for obtaining a Registration Certificate, details of the owner of the aircraft are required to be furnished.

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

As mandated under Civil Aviation Requirements ("CAR"), if the aircraft is taken on a dry lease (which is often the case), application for obtaining Registration Certificate requires not only the details of the parties to the lease agreement but also a copy of the agreement. Therefore, the Registration Certificate issued takes into account the information on lease, which would perfect the status of the lessor.

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

Where it is mandated under Indian laws to register a charge, such as in the case of an Indian company on whose aircraft a charge has been created, as per the provisions of Companies Act, 2013, such registration would suffice as notice of existence of the charge being in effect. If any aircraft has been hypothecated/mortgaged, the owner/operator is required to submit relevant documents towards such charge creation, for endorsement in the Registration Certificate.

In terms of priority of charges, the same is based on the date of creation of charge and not registration of the charge, subject to the charge being registered as per timelines prescribed under applicable laws. That said, the waterfall of charges, i.e., whether it being a first charge, second charge, or is a pari passu charge will be the subject matter of commercial arrangement of the facilities so extended. Note that where registration of charges is mandatory under Section 77 of the Companies Act, 2013, no liquidator or creditor can take into account charges which have not been perfected.

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

CAR defines lease with respect to aircrafts as an

agreement by a lessor to furnish an aircraft to another person (the lessee) to be used for compensation or hire purposes for a specified period or a defined number of flights.

Types of leases recognised under CAR:

(a) Financial lease, pursuant to which all risks and rewards incidental to ownership of an asset are transferred to the lessee. (b) Operational leases (which is the most common form of aircraft lease in India), are of following categories:

i. Wet or Damp lease – lessor assumes the operational control of the aircraft operations.

- Wet lease-out – when an Indian registered aircraft is leased out to a foreign operator, with a duration of 12 months.
- Wet lease-in – when a foreign registered aircraft is taken on lease by an Indian operator holding an air operator's certificate, for a duration of 3 months (subject to a one time extension of an additional 3 months).
- Intra State Wet Lease – when an Indian registered aircraft is taken on lease by another Indian air operator's certificate holder, for a duration of 12 months (subject to a one time extension of an additional 12 months).

ii. Dry lease – lessee assumes operational control of an aircraft.

- Dry lease-out – when an Indian registered aircraft is leased-out to a foreign operator without change of aircraft registration.
- Dry lease-in – when a foreign registered aircraft is taken on lease by an Indian air operator's certificate holder without change of aircraft registration.

The duration for both types of dry lease is of 12 months (subject to a one-time extension of an additional 12 months).

Lease documents executed in foreign countries when presented in India will be required to adhere to the legal requirements such as stamping, registration, notarization and translation (if required), as may be applicable.

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

CAR and the Aircraft Leasing Manual issued by DGCA mandates for leases to be approved prior to execution. An application for approval for leasing an aircraft has to be filed with the DGCA, with information such as (i) parties to the lease; (ii) details of the aircraft; (iii) type of lease; (iv) duration; (v) area of operation, to name a few, along with the copy of the lease agreement.

Upon receipt of such application, DGCA determines whether an approval (which may be conditional) is to be granted for such lease. The terms of the lease agreement approved by DGCA must incorporate the terms of the agreement (if any) between the state of registry and the state of operator of the aircraft, in addition to any conditions laid down by DGCA while granting approval.

A signed copy of the lease must be submitted to DGCA within 7 days from the receipt of approval. Thereafter, the leased aircraft will be entered in or deleted from (as the case may be) the 'Air Operator's Permit/ Certificate' of the Indian operator.

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

There is no separate regime in India governing the ownership rights of engines. Aviation regulations in India do not regard engines as a part separate from the entire aircraft while making an entry in the register or while dealing with registration or lease rights for an aircraft. In our experience, the terms and conditions related to engines are set out in detail in the contract entered into between the parties.

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

Typically, security interest over a movable property can be created by way of hypothecation, mortgage, lien, and charge. That said, the most preferred mode of creation of security over an aircraft is by way of mortgage/hypothecation.

13. Are there any particular terms or

characteristics that such a security document must take (for instance, a cap on the secured liabilities)?

Security documents are a product of deliberate negotiations amongst the borrowers and secured creditors/lenders. As per such negotiations, certain terms that are customary may be included in the document such as right of secured creditors to take possession of the aircraft upon occurrence of a default; or restrict the owner/borrower from creating encumbrance in favour of third party without approval of the lenders; or right of the secured creditors/lenders to be indemnified for identified losses.

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

There is no specific format/requirement devised by the DGCA for perfection of a security document. However, in case, where aircraft has been mortgaged/hypothecated, the CAR mandates the operator to submit the consent of the owner and relevant documents to this effect for the endorsement of the name of the mortgagor on the Registration Certificate. Moreover, the perfection requirement under the Companies Act, 2013 is explained in our answer to Q. 8.

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

Based on a conjoint reading of CAR and the Carriage by Air Act, 1972, aircraft operators are required to maintain insurance policy for amount passable to cover its liability towards passengers and their baggage, crew, cargo, hull loss and third-party risks. Additionally, the carrier may be required to furnish evidence to DGCA that it has obtained adequate insurance, covering its liability, under the applicable laws.

An insurer (Indian) is required to reinsure a minimum of 5%, of the sum assured on each policy, with an Indian re-insurer. The sum assured on each policy shall be capped at 30% of the sum assured, or, as may be prescribed by the regulatory authority. The remaining reinsurance may be reinsured in overseas market, for which London is the typically preferred.

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

In the absence of any specific prohibition imposed by the regulatory authorities on cut-through clauses, it can be argued that such clauses can be enforced in India. In the past, the enforceability of such clauses has been a point of discussion amongst relevant stakeholders.

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

While applicable laws do not prescribe for any minimum amount for such insurance however, as per Carriage by Air Act 1972 read with relevant CAR, aircraft operators are required to maintain a current insurance for an amount adequate to cover its liability towards passengers and their baggage, crew, cargo, hull loss and third-party risks.

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

One of the critical issues in aircraft financing is repossession of aircrafts in the event of default on part of the lessee/mortgagor. Therefore, under such circumstances, it becomes necessary for the lessor to prevent the lessee in-default from continuing operations by taking back possession of the aircraft. For initiating re-possession, the lessor/owner has to first ensure deregistration of the aircraft.

De-registration of an aircraft:

The de-registration of an aircraft may only be done by the owner/its authorised representatives. The Indian courts have held that upon failure to repay mortgage amount, a security trustee is entitled to exercise their rights and remedies available under any of the transaction documents and/or applicable laws and/or

under the CTC. If the lessor/security holder seeks to deregister and export the aircraft, it should be a party authorized to do so under the Irrevocable De-Registration and Export Authorisation ("IDERA") and apply to DGCA for de-registration.

Consequent to cancellation of registration, the IDERA holder may make an application to the authorities for export of the aircraft. Upon receipt of such application, the authorities shall facilitate the export and physical transfer of the aircraft (along with the spare engine, if any). However, prior to such physical transfer of the aircraft, all outstanding dues should be cleared and rules with respect to safety of aircraft operation shall be complied with.

Documents required for de-registration:

The application to DGCA for de-registration must be accompanied with the necessary documents such as (i) original or notarized copy of IDERA (as recorded with DGCA) (ii) priority search report regarding all interests in the aircraft registered with the international registry under CTC, ranked in order of priority. Additionally, a certificate issued by the IDERA holder declaring that (i) the registered interests have been discharged or, (ii) holders of the interests have consented to deregistration, shall be furnished.

Within five (5) days of receipt of application, DGCA will, without even seeking any consent/document from the operator, de-register the aircraft.

19. How can a mortgagee (or equivalent security interest holder), lessor under a lease or designee/beneficiary of an IDERA deregister the aircraft? Please also state any conditions, procedural steps, formality requirements or documentation (for example, original, legalized, translated Lease/Mortgage/IDERA etc.) required to effect this

Please refer to explanation provided regarding deregistration of aircrafts, under Q. 18, above.

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

No, the government or the lessee cannot prevent the repossession/ de-registration of an aircraft, if the

necessary requirements are met by an IDERA holder. Post amendment to the Aircraft Rules in 2018, upon receipt of an application from an IDERA holder, DGCA is now obliged to de-register an aircraft within 5 days without seeking consent of the lessee (as explained under response to Q. 18 above).

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

Judicial intervention may not be required unless DGCA fails to execute its obligation under law for which the courts may issue a writ of mandamus. A case in which DGCA did not de-register the aircraft after having received the application, was adjudicated by the Delhi High Court in *Awas 39423 Ireland Ltd. and Ors. v. Directorate General of Civil Aviation and Ors.*, where the issue at hand was whether a court would be obliged to refer a matter to a statutory authority if such authority does not act on its legal obligations. It was held that there was no need for directing the authority to re-visit an issue, especially when essential elements for such authority to exercise its power existed and the reasons for failure to take action are legally untenable.

Therefore, the statutory authority had to act, as per the duties entrusted upon them under law. The court also held that without legitimate legal rights under municipal laws, it cannot interdict the process of de-registration on grounds of equity as it would be contrary to the provisions of CTC to which India is a party.

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

Generally, legal title is transferred in India by way of executing a sale agreement or bill of sale between the parties. Moreover, Contract Act provides for certain essentials for an agreement to be a valid contract, such as a valid offer and acceptance, intent for creation of a legal obligation, free consent of the parties, competent parties, lawful consideration and lawful object.

Once the terms of sale are finalized by the parties, the agreement must be executed on stamp paper of requisite value as may be prescribed under applicable

stamp laws, followed by its notarization and registration. However, in case where the sale agreement is executed outside the territory of India and subsequently, brought in India by any means, the agreement must be stamped as per Section 18 of the Indian Stamp Act, 1899, within 3 months from the date of its receipt in India.

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

Following are the processes which may be undertaken for sale of an aircraft post enforcement:

- a. In accordance with the arbitral award passed by arbitral tribunal (if arbitration was invoked between the parties as result of dispute): The enforcement of such arbitral award passed shall follow the procedure similar to an enforcement of a decree as provided under the CPC as is mentioned below.
- b. By person other than bank/financial institution: Upon the court issuing a decree, the decree holder may file an application for execution of the decree, before the court. Additionally, where the decree is for specific movable property, the same may be executed by way of seizure of such property or attachment of the property. It is mandatory that a decree passed shall be duly enforced. In cases of attachment of any property, the court is authorised to sell such property through a public auction which is carried on by an officer appointed by the court. Please note that we have explained the intricacies involved in the execution of a foreign decree in our response to Q. 5.
- c. Bank/financial institutions: On receipt of the copy of the recovery certificate under Recovery of Debts and Bankruptcy Act, 1993, the recovery officer may recover the amount of debt as specified in a manner provided in the certificate, such as, by way of an attachment and sale of movable property of the defendant.

In any of the aforementioned cases, if public sale is directed by the court or tribunal then such sale is executed in consonance with the directions as given in the decree. In addition, such sale is executed either by the court or officer appointed by the court. Having said that, the decree holders have a very restricted role to

play in such sale of assets. It is pertinent to highlight that Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") was enacted to enable banks and financial institutions to auction properties in cases where the borrowers have failed to repay their loans for recovery of non-performing assets. However, Section 31 (c) of the SARFAESI Act specifically carves out the security enforcement over an aircraft and hence the lenders of the aircraft(s) do not have any recourse under the SARFAESI Act.

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

Lease rentals in India are subject to the following taxes:

- a. Royalty; and
- b. Goods and Services Tax ("GST").

Such taxes are ascertained depending on the domicile of the lessor and the provisions of Double Taxation Avoidance Agreement ("DTAA") between the country of lessor and India. Accordingly, the provision of withholding taxes on such transactions can be exempted by the virtue of DTAA.

Unless exemptions or relaxations are granted by tax authorities and/or pursuant to the provisions of DTAA, the aforesaid taxes are payable on the lease of an aircraft.

In this regard, to incentivize aircraft leasing and financing, GoI has introduced plethora of exemptions for units operating in Gujarat International Finance Tec-City ("GIFT City"), which is an International Financial Services Centre ("IFSC") established under the domestic laws.

Please refer to our response to Q. 31 for an indicative list of incentives in GIFT City.

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

In India, sales tax has been replaced by GST. GST is levied as per applicable rates on the sale of an aircraft, including private aircrafts. Such rates may vary

depending upon the nature of operation of the aircraft. Unless exemptions or relaxations are granted by tax authorities, applicable GST is payable on the sale of aircrafts.

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

The import or export of aircraft in /outside India is subject to compliance with applicable laws. Set out below are the key compliances to be undertaken for import/export of aircrafts:

- a. The importer/exporter must have the Importer Exporter Code issued by DGFT, as mandated by the Foreign Trade (Development and Regulation) Act, 1992.
- b. A declaration in case of export of aircraft is required to be furnished to the specified authority (except for those aircraft or aircraft engines which is subject to reimport into India after overhauling/ repairs within 6 months from the date of their export) under the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015.
- c. The export value of goods is required to be realized and repatriated to India within 9 months from the date of exports.
- d. As per the Master Direction on Import of Goods and Services, physical goods are required to be imported into India within 3 years in the case of capital goods, and within 6 months in all other cases. Additionally, the remittances toward imports should be paid not later than 6 months from the date of shipment, except in cases where amounts are withheld towards the guarantee of performance, etc.
- e. Scheduled/ non-scheduled operators can make advance remittance for import of aircraft and other aviation related purchases without bank guarantee or an unconditional and irrevocable standby letter of credit, up to USD 50 million. Accordingly, Authorized Dealer Category - I ("AD") banks may allow advance remittance, without obtaining a bank guarantee or an unconditional, irrevocable

standby letter of credit, up to USD 50 million, for direct import of each aircraft, helicopter and other aviation related purchases.

- f. DGCA has also prescribed a two-stage process for the issue of permission for the import of aircraft (other than for private use), namely, (i) In principle approval; or (ii) No objection certificate for import. Application for such approval/NOC is required to be filed with DGCA along with documents under relevant CARs. The aircraft to be imported must be in line with criteria in relation to its type, certificate, age, and other relevant mandatory requirements as enunciated in the relevant CARs.

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

In India, the manner of receipt or payment of foreign exchange in relation to the import and export of goods / services is governed by the Foreign Exchange Management Act, 1999 read with the Foreign Exchange Management (Manner of Receipt and Payment), Regulations, 2016. In relation to the export of goods / services, it is obligatory on the part of the exporter to realize and repatriate the full value of goods/services to India within a period of 9 months from the date of export through the AD bank as per the aforementioned regulation.

Further, the Indian operators do not require any approval from the Reserve Bank of India for the transfer of funds relating to operating lease rentals, the opening of a letter of credit or a security deposit, against the operating lease of an aircraft. However, a transaction effected in pursuance of a financial lease may require approval from the Reserve Bank of India.

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

The enforcement of security interest by creditors may be enforced in accordance with the provisions of the executed security documents. As mentioned in detail at Q. No. 18 above, the Aircraft Rules were amended from an ease of enforcement perspective, which has played a pivotal role in enabling foreign creditors and lessors in re-possessing their aircrafts in a time-bound manner.

Below are the case studies from the pre and post amendment era.

(a) Pre-amendment era, where judicial intervention became the need of the hour, thus increasing the time for enforcement:

- i. Kingfisher Airlines ("KA"): In accordance with the remedies provided under the operating lease agreements, lessors of the aircrafts requested DGCA for de-registration of aircrafts of KA on account of default in payment of lease rentals. However, owing to certain objections raised by KA, DGCA instructed lessors to procure a no objection certificate from KA before granting de-registration. The aggrieved lessors then filed a writ petition before Delhi High Court ("DHC"). Consequently, DHC directed DGCA to de-register the aircraft and set aside the requirement of no objection certificate, as lessors already had the benefit of a de-registration power of attorney. It is important to note that lessors had already seized the aircraft post termination of lease arrangement.
- ii. SpiceJet Limited ("SJ"): In a similar situation, lessors of the aircrafts had to approach DHC for deregistration and re-possession of the aircrafts of SJ. Subsequently, DHC held that DGCA is obliged to deregister the aircraft and that it had no discretion in the matter, provided conditions given in the rules are met.

(b) Post-amendment era

- i. Jet Airways ("JA") defaulted in payment of lease rentals to its aircraft lessors. However, due to the amendments to the Aircraft Rules, which automated the repossession and de-registering process making it time efficient, the lessors were able to repossess their aircrafts in a timely manner.
- ii. GoFirst filed the petition for initiation of insolvency, before the National Company Law Tribunal, Delhi ("NCLT") and subsequently moratorium was declared on May 10, 2023, which restricted lessors to repossess the aircrafts. The matter is pending before the NCLT and lessors have been restricted from repossessing their aircrafts from past 2 months.

In our experience, during pre-amendment era the entire repossession process would typically conclude in 5-9 months. However, post amendment of the Aircraft Rules, the time period for the re-possession process has significantly reduced and is typically concluded within a

few weeks, except in GoFirst bankruptcy due to declaration of moratorium.

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

Gol, through MoCA, vide gazette notification dated April 13, 2022, has invited public feedback on the draft 'Protection and Enforcement of Interests in Aircraft Objects Bill, 2022' ("**Aircraft Bill**").

Key highlights:

- a. The same will be applicable on the lessor who is not domiciled in a country which is a signatory to CTC.
- b. Provision for certain remedies to creditors in cases of default by the debtor such as taking re-possession of the aircraft, selling or granting a lease of such aircraft, collecting any income/profits from the management of such aircraft.
- c. Further, lessor may seek de-registration and export of the aircraft. The lessor can also terminate the lease agreement and take the possession of the aircraft in the event of default by lessee in honoring the lease agreement.

Nevertheless, the creditor is under an obligation to declare the occurrence of default by the debtor to DGCA before effecting any remedy prescribed in the Aircraft Bill.

Further, the revised Aircraft Bill was published again on July 20, 2022, however, it is pending and expected to be tabled in the upcoming monsoon session of the Parliament.

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

Recent developments:

(a) A circular was issued by authority established under the International Financial Services Authority Act, 2019 ("**IFSCA**"), on May 18, 2022, on the 'Framework on Aircraft Operating Lease', with an aim to notify a framework for enabling aircraft lessors to undertake

activities such as: (i) operating lease for an aircraft lease arrangement, including sale and lease back, purchase, novation, transfer, assignment, and such other similar transactions; (ii) asset management support services and any other related activity with prior approval of the IFSC authority.

(b) 'Project Rupee Raftaar' is a report of the working group set up, under the aegis of MoCA, to examine the regulatory framework relating to financing and leasing of aircrafts in India. Key changes proposed under this report are as follows:

1. GoI has proposed a draft Cape Town Convention Bill, 2018 to be enacted to ensure full implementation and give overriding effect to CTC;
2. To establish an online registry of all Indian registered aircrafts and engines, linking DGCA's online register and electronic International registry; and
3. To create separate categories of alternative investment fund and scheme for mutual funds targeting investment into special purpose vehicle engaged in aircraft leasing.

Case laws:

(a) **Credit Suisse AG v. SpiceJet Limited (Company Petition No.363 of 2015 and C.A. Nos.887 & 888 of 2015 and 55 of 2020)**: The Hon'ble Madras High Court had passed an order for the winding up of SpiceJet (SJ) on account of failure to make payments to the tune of USD 24 million to Credit Suisse AG. Payment was due to the maintenance, repair, and overhauling service provider, i.e., SR Technics, who had a financing agreement with Credit Suisse AG, giving the latter the right to receive payments from the airline. After handing in a bank guarantee worth USD 5 million on the direction of the court, SJ challenged the order in the Supreme Court in January 2022. Subsequently, in April, the airline finally announced that it had reached a settlement with Credit Suisse AG involving payment of an amount over a mutually agreed period of time, for which Credit Suisse AG was mandated to receive the pending dues on behalf of SR Technics. Since then, SJ and Credit Suisse AG have signed and concluded the settlement and consent terms regarding the pending dispute between the two parties.

(b) **State Bank of India v. Jet Airways (India) Ltd. (IA No. 2081 of 2020 in CP (IB) No. 2205/MB/2019)**: Jet Airways (JA) was under insolvency for over two years after it shut operations in April 2019, making it the first Indian airline to undergo insolvency proceedings under the Cross Border Insolvency Protocol along with Insolvency and Bankruptcy Code, 2016 ("IBC"). A petition was filed before the National Company Law

Tribunal, Mumbai against JA under the IBC, for the initiation of insolvency proceedings by the financial creditor. The tribunal finally accorded its approval of the resolution plan on June 22, 2021. Consequently, in 2022, the new promoters had retained the brand name and were to resume operations with around 25 aircrafts and restart international flights. However, operations have not started till date and a dispute has emerged between the new promoter and lenders and the matter is *sub judice*.

(c) **Go Airlines (India) Limited. (Company Petition No. (IB) -264(PB) / 2023)**: Go First filed the petition for initiation of the insolvency process under Section 10 of the Insolvency and Bankruptcy Code, 2016 ("IBC") on April 30, 2023, before the NCLT. On May 10, 2023, NCLT admitted the application and declared moratorium under Section 14 (1) (a) (b) (c) & (d) of the IBC whilst appointing Mr. Abhilash Lal as Interim Resolution Professional ("IRP") and directing him to take charge of the Corporate Debtor/Applicant with immediate effect.

Further, NCLT ordered IRP to take all necessary steps including the execution of the Arbitral Award (*Singapore International Arbitration Centre emergency award directing P&W to dispatch, without delay, at least 10 serviceable spare leased engines within 28 days from this award and further supply 10 spare leased engines per month until December 2023*) to keep the Corporate Debtor/Applicant as a going concern. NCLT also ordered the suspended management to deposit INR 5 Cr. with the IRP to meet immediate expenses.

(d) **SMBC Aviation Capital Ltd. Vs Interim Resolution professional of Go Airlines (India) Limited., Abhilash Lal (Company Appeal (AT) (Insolvency) No. 593 of 2023)**: National Company Law Appellate Tribunal ("NCLAT") upheld the NCLT order.

(e) **Accipiter Investments Aircraft 2 Limited Vs Union of India (W.P. (C) 6569/2023)**: Several lessors filed writ before the Delhi High Court ("DHC") seeking order against DGCA to deregister the aircraft pursuant to Rule 30(7) of the Aircraft Rules, 1937. The matter is still pending before the DHC. However, DHC pronounced the judgement on interim relief in favour of lessors and held that there exists a balance of convenience in favour of lessors as the value of these aircrafts is diminishing on a daily basis.

Thus, DHC permitted lessors to inspect and maintain the aircraft and restricted GoFirst to remove any part from the aircraft without the consent of the lessor.

Further DHC observed (*prima facie*) that aircrafts are "assets" owned by the lessors and the IRP is not required to take control over the same.

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

To combat the financial challenges faced by lessors and lenders owing to the COVID-19 situation, GoI introduced, *inter alia*, the following:

(a) Extension of validity of approvals granted to maintenance, engineering and training organisations. This is helpful especially when renewal of such validity has a costly fee.

(b) Incentives available to lessors, insurance companies, and other stakeholders operating in GIFT City:

- i. Exemption from corporate tax for a period of 10 years within the first 15 years for leasing units;

- ii. Exemption from stamp duty on documents for transactions carried out from an IFSC at GIFT City;
- iii. Lease of aircraft or helicopter or engines or any other part of the aircraft has been designated as 'financial product under the IFSCA, which will provide an impetus to the aviation industry;
- iv. Insurance companies have been permitted to undertake aircraft insurance and invest in leasing and financing business;
- v. Enabling re-leasing of aircraft and engines within India at the end of expiry or termination of an existing lease without physical re-export of aircraft; and
- vi. Granting waivers from Importer Exporter Code and General Remittances for overseas lessors and financiers.

(c) On June 16, 2022, the Central Board of Direct Taxes exempted tax deduction on lease rentals paid to aircraft leasing units, under Section 194-I of Income Tax Act, 1961.

(d) Circular dated On February 23, 2023 issued by Ministry of Commerce and Industry (Department of Commerce) - unit in IFSC dealing with leasing activities, if allowed by IFSC authority may not be required to maintain separate office and may utilise office space or manpower or both, of another unit set up in IFSC.

Contributors

Anand Srivastava
Managing Partner

anand.srivastava@dentonslinklegal.com



Namita Das
Partner

namita.das@dentonslinklegal.com

