

India

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

India has ratified the Chicago Convention, but has opted not to ratify article 3 (Civil and State Aircraft) and article 83 (Transfer of Certain Functions and Duties) thereunder. India has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York in 1958 (the New York Convention). An award made in a country that is a party to the New York Convention, and that has further been notified as a reciprocating territory by the government of India, is treated as a 'foreign award' under Indian law.

India acceded to the Cape Town Convention on International Interests in Mobile Equipment and the Protocol to the Cape Town Convention on International Interests in Mobile Equipment (Protocol) on 31 March 2008. However, only specific provisions of the Cape Town Convention and the Protocol have become effective from 1 July 2008. It is pertinent to note that although the Cape Town Convention has been ratified, the government of India has not yet enacted legislation implementing the opt-in declarations of the provisions of such in India.

India is a party to the Warsaw Convention (1929), the Hague Protocol (1955) and the Montreal Convention (1999), and the provisions provided therein, subject to the provisions of the Carriage by Air Act 1972 (Carriage Act), have the force of law in India in relation to any carriage by air irrespective of the nationality of the aircraft performing the carriage. India has not signed the Geneva Convention on the International Recognition of Rights in Aircraft (1948) or the Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (1933).

2 Domestic legislation

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

There is no principal domestic legislation applicable to aviation finance and leasing. However, various aspects of an aircraft leasing and financing transaction are governed inter alia by the Indian contract laws, Indian company laws and Indian foreign exchange regulations. Also, the (Indian) Aircraft Act, 1934, read along with the (Indian) Aircraft Rules, 1937 and the Civil Aviation Requirements, as prescribed by the Directorate General of Civil Aviation (DGCA) from time to time, governs certain aspects of aircraft leasing in India.

3 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?

Indian law, in general, recognises the freedom of the parties from different jurisdictions to choose the proper law of contract. Therefore, Indian law will generally recognise a title transfer that is valid under the governing law of the contract, unless such recognition is against public

policy in India, or unless the choice of law appears to have been made with a view to avoid any mandatory requirements under Indian law.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Title in an aircraft can be transferred by execution of a sale agreement or a bill of sale between the seller and the buyer of the aircraft. If such agreement is executed outside India and is then brought into India, whether by way of physical delivery or fax, email or any other electronic means for any purpose, the same will have to be stamped within the statutorily prescribed period in accordance with the stamp laws in force in the relevant state in which the transaction documents are brought.

5 Transfer document requirements

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

As mentioned in question 4, documents that are executed outside India, and are subsequently brought into India, must be stamped within the statutorily prescribed period in accordance with the stamp laws in force in the relevant state in which the transaction documents are brought. In addition to the stamp duty requirement, the transfer documents should be notarised and apostilled for submitting to governmental authorities, essentially the DGCA.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The aircraft register in India is maintained by the DGCA. This register contains details in relation to the aircraft such as the following:

- the type of aircraft;
- the year of manufacture;
- the full name and address of the owner or lessor; and
- the full name and address of the operator or lessee.

This register is open for inspection by members of the public, both at the DGCA headquarters and on the DGCA website.

India has ratified article 83-bis of the Convention on International Civil Aviation and has also suitably amended the Aircraft Rules. There is no engine-specific register in India.

7 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?

As stated above, the DGCA's aircraft register is an owner registry, although it also includes details of the operator, if different from the

owner. There is no separate register for leases and aircraft engines maintained in India. Further, once registered with the DGCA, there is no requirement to have the aircraft ownership registered at any other registry in India. In case of a leased aircraft, in addition to the details mentioned above, details (names, nationalities and address) of the lessor and lessee, including the period of validity of the lease agreement, will also be required to be mentioned.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

The owner of the aircraft is required to register his or her interests in the aircraft with the DGCA by filing a prescribed form, along with providing supporting documentary proof in relation to the details mentioned therein together with the prescribed fee (calculated on the basis of the maximum permissible take-off weight of the aircraft). The DGCA has prescribed a period of two working days from the receipt of the form, fees and necessary supporting documents for an aircraft to be registered and a certificate of registration to be issued to the owner.

As mentioned above, there is no separate registration of title to the engine of an aircraft.

9 Title and third parties

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

The register of the DGCA is merely a 'notation' register; courts in India would accept the certificate of registration, issued by DGCA, as prima facie evidence of lessor, lender or owner interest in the aircraft. It would be difficult to defend a case in the courts against third parties if the owner has no or defective title as per the records of the DGCA.

10 Registration of lease interests

Summarise the process to register a lease interest.

See question 7.

11 Certificate of registration

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

The DGCA issues the certificate of registration for the aircraft. The following details are recorded in this certificate:

- the type of aircraft;
- the manufacturer's serial number;
- the year of manufacture;
- the nationality and registration marks of the aircraft;
- the full name, nationality and address of the owner or lessor;
- the full name, nationality and address of the operator or lessee;
- the usual station of the aircraft;
- the date of registration of the aircraft and the period of validity of such registration; and
- the name of the security interest holder, if any.

There is no separate engine certificate of registration in India.

12 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?

Under Indian law, the registration and deregistration of an aircraft may only be done by the owner or the owner's authorised representatives. Under the Aviation Rules, the holder of an irrevocable deregistration and export request authorisation (IDERA) may apply to the DGCA for cancellation of the registration of the aircraft prior to the expiry of the aircraft lease after:

- providing the original or notarised copy of the IDERA; and
- ensuring that either:
 - all registered interests in respect of the aircraft have been discharged; or

- the holders of such registered interests have consented to the deregistration or export of the aircraft.

The government of India amended Rule 30 (7) of the Aircraft Rules on 28 March 2017, which mandates the DGCA to deregister an aircraft within five working days post submission of an application as per the above mentioned procedure. Rule 32A imposes an obligation upon the central government to take action within five working days to facilitate the export and physical transfer of deregistered aircraft, subject to applicable safety rules.

In the normal course of things, it is not possible for the operator to block any proposed deregistration or export by an owner or mortgagee. However, there have been instances in the past where the operator has delayed deregistration or export of the aircraft by raising disputes regarding the termination of the underlying lease agreement before the Indian courts.

It is important to note that notwithstanding the above, the Aircraft Rules provide that any entity of the government of India, any intergovernmental organisation or any other private provider of public services in India shall have the right to arrest, detain, attach or sell an aircraft object for payment of amounts owed to the government of India (or any such entity directly providing services or performing the functions of the government of India) in respect of that object.

13 Powers of attorney

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

A valid deregistration power of attorney (DPOA) executed by the lessee or operator in favour of the owner or lessor enables such owner or lessor to deregister the aircraft without the need for judicial intervention. Further, Indian law provides for both revocable and irrevocable powers of attorney, the distinction being that for a power of attorney to be irrevocable it must be coupled with an interest of the attorney being appointed in exercising the power under the power of attorney. Based on our experience, it is advisable that a duly stamped and notarised copy of a DPOA (executed by the operator in favour of the owner) be filed with the DGCA in addition to the IDERA (discussed in more detail below), as this expedites procedures at the time of enforcement.

14 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.

An IDERA can be filed with the DGCA and the acknowledgement of the DGCA can be obtained. While there is no requirement that an IDERA be countersigned by the aviation authority (ie, the DGCA) it is advisable that the acknowledgement of the DGCA be obtained as this ensures that the DGCA will note the fact of issuance of the IDERA by the operator and that the owner or lessor is entitled to exercise its rights under the IDERA. While the DGCA does not have any preferred way to deal with a financier as the beneficiary's 'certified designee', they may at the time of making any filing ask for any further supporting documents relating to such financing arrangements.

The IDERA process exists in parallel with the DPOA, and the courts have recognised the IDERA as an instrument similar to the DPOA.

Security

15 Security document (mortgage) form and content

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

The security document is not required to be in any specified format or in any particular language. In practice, such security documents generally record the maximum secured amount and the underlying economic terms of the deal such as principal, interest and repayment dates.

16 Security documentary requirements and costs

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

The documentary formalities for creation of an enforceable security are similar to the formalities in relation to the title transfer documents. In this regard, see questions 4 and 5. If the owner of an aircraft is an Indian company or a company with a registered place of business in India, then additional requirements to perfect the security will apply, such as filing of charges (discussed in more detail below).

17 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.

There is no separate register of aircraft mortgages in India. However, the Civil Aviation Requirements require the owner of an aircraft to file a notarised and apostilled copy of the mortgage documents evidencing the creation of the charge with the DGCA, which will endorse the name of the mortgagor on the certificate of registration.

As per law, if the mortgagor is an Indian company or a company with a registered place of business in India, the mortgagor must, within a prescribed period, register any charge (which includes a mortgage) created with the relevant Registrar of Companies (ROC) in the prescribed form. The Indian company laws require such filing to be made within 30 days of the creation of the charge, in the prescribed form, along with the complete particulars of the charge, including the instrument creating such charge.

18 Registration of security

How is registration of a security interest certified?

The registration of a security interest is certified by an acknowledgement given by the ROC at the time such registration is done by filing the prescribed forms along with the supporting documents. The ROC maintains a register of charges, which evidences the existence of the charge over the aircraft, and records the nature and details of the instrument creating the charge. The register of charges is a public document and constitutes notice to third parties of the existence of such charge. Only charges created by Indian owners of aircraft are required to be registered with the ROC. There is no requirement to do so for a foreign owner of an aircraft operated in India.

In respect of filings made with the DGCA, an acknowledgement of the same may be obtained at the time of making the filing.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

See question 18. Priority of charges is based on the date of creation of charges, not on the basis of date of registration of charges, provided the charges are in fact registered within the statutorily prescribed period.

20 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?

The concept of trust and security trustee is recognised in India. Typically, in financing transactions involving one or more lenders, the security over aircraft and leases is structured through a security trustee who holds and enforces the security interests on behalf of the lenders.

As per law, a mortgagee's right in an aircraft is a right in personam. Indian law also facilitates arrangements whereby a security trustee may hold the security for a changing group of beneficiaries. When the underlying loan is transferred or if the lenders change, although there is no security register in India it is advisable to inform the DGCA about such changes.

21 Security over spare engines

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

There is no requirement or regime in India for registration of a lease or mortgage of an engine, separate from that of the aircraft. In relation to leased aircraft, typically the engines are not considered as separate items.

In our experience, provisions in relation to title, security and obligations or restrictions in relation to spare parts are set out in the lease agreement, which also records evidence of owner's title and beneficial interest in relation to the parts (present and future) and also on the spare parts (present and future), whether such spare parts are repaired or replaced.

Enforcement measures

22 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?

An aircraft may be repossessed through the DGCA (DGCA process); or by initiating legal action (court process).

DGCA process

Under Indian law, the validity of the certificate of registration is co-terminus with the validity of the lease deed. Hence, after termination of the lease, all parties with an interest in the aircraft are required to submit to the DGCA separate plain-paper applications along with the necessary documents seeking the deregistration of the aircraft. Thereafter, an approval from the Bureau of Civil Aviation Security is required to obtain physical custody of the aircraft.

In the case of a hostile repossession, the owner, lessor or security trustee may repossess the aircraft on the basis of a duly stamped and notarised DPOA, an IDERA or both, if such instruments have been issued by the lessee in their favour. See question 12 for further information in this regard.

Court process

In the event that the lessor chooses not to follow the DGCA process or the DGCA fails or refuses to deregister the aircraft, the lessor may initiate legal action to repossess the aircraft. As the DGCA is a government body, the lessor can file a writ petition in the High Court, within whose jurisdiction the DGCA's order was passed, seeking to quash the DGCA's order and asking for a direction to be issued to the DGCA to rehear the application for deregistration and repossession.

23 Enforcement of security

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

The manner of enforcement of a security interest largely depends upon the type of interest to be enforced.

Immovable property

Creditors in India can take security over immovable property by way of mortgage. In India, mortgages are commonly in the form of an equitable mortgage or English mortgage. A mortgagee's right depends on the type of mortgage in question.

Equitable mortgage

In an equitable mortgage, the mortgagee may enforce his or her security by filing a civil suit for either sale of the mortgaged property, or to sue the mortgagor personally for the mortgage money subject to the fulfilment of certain conditions. A mortgagee may also request the court to appoint a receiver for the mortgaged property in certain circumstances.

English mortgage

In an English mortgage, the mortgagee may enforce his or her security by filing a civil suit for either sale of the mortgaged property, or to

sue the mortgagor personally for the mortgage money subject to the fulfilment of certain conditions. In addition, in an English mortgage, a mortgagee may also have the power to sell the mortgaged property without the intervention of the court if certain conditions are satisfied.

Movable property

Movable properties are most commonly charged by way of execution of a 'Deed of Hypothecation'. A Deed of Hypothecation usually contains provisions entitling the creditor (beneficiary of the hypothecation) to appoint a private receiver (to take possession of the hypothecated properties) and sell the hypothecated properties without requiring the intervention of a court. Courts in India have, by and large, been consistent in upholding the lender's right to thus take possession of hypothecated properties and sell the same, provided the Deed of Hypothecation so empowers the lender.

Cash or bank accounts

Cash and bank accounts are charged in the same manner as movable properties, namely by way of execution of a deed of hypothecation. Upon default, if the bank accounts being charged are maintained with the lending bank itself, the lending bank shall have the right to appropriate monies lying credited in the account towards its dues. A charge by way of hypothecation may be created over account balances and bank accounts maintained with banks other than the lending bank as well. The manner of enforcement of a hypothecation created over bank accounts maintained with banks other than the lending bank will depend upon the process and procedure that had been followed at the time of creation of the hypothecation.

Securities

There are two separate regimes under which securities are pledged under Indian law, depending on the form of securities (ie, whether the securities are evidenced by physical certificates, or whether the securities are electronic or dematerialised). In the event that physical securities have been pledged, the lender has the right to sell the pledged securities and adjust the consideration received against its dues. In the event that dematerialised securities have been pledged, then the lender must first acquire the securities in its own name and thereafter transfer the securities to a buyer and appropriate the consideration for the sale towards its dues.

Effect of insolvency

Under the Insolvency and Bankruptcy Code, 2016 (IBC), if an order has been passed by the National Company Law Tribunal (NCLT) to commence a corporate insolvency resolution process (CIRP) against a corporate debtor (insolvency commencement date), a moratorium becomes applicable for a period of 180 days (extendable by up to a maximum of 90 days) (CIRP period). During the CIRP period, no suit or legal proceeding can be commenced (including any action to enforce security interest) against the corporate debtor and no pending proceeding can be proceeded with against the corporate debtor. Additionally, recovery of any property by a lessor where such property is in the possession of the corporate debtor is also prohibited during the moratorium.

However, in liquidation proceedings, a lessor is permitted to repossess its property. Section 36(4) of the IBC specifically lays down that assets owned by a third party, which are in the possession of the corporate debtor, shall be excluded from the liquidation estate. In liquidation proceedings, a secured creditor may either:

- relinquish its security, in which case its entire debt ranks second in the waterfall of payments made for liquidation of the general assets of the corporate debtor (after liquidation-related costs); or
- opt to stay out of the liquidation and enforce its security outside of the IBC liquidation process. To the extent that the secured debt is not discharged by the enforcement proceeds, the remaining debt of the secured creditor will rank much lower in the waterfall of payments (ranking after liquidation costs, secured creditors who have relinquished their security, employee or workmen's dues and unsecured financial debts).

The IBC also provides for clawback of transactions in certain instances. Under sections 43 and 45 of the IBC, the NCLT may reverse any transaction that is deemed to be a preferential transaction or an undervalued

transaction, respectively, in the period leading up to the commencement of the CIRP. The relevant look-back period for scrutinising suspect transactions is two years in the case of a related party and one year with any other person. Under section 50 of the IBC, the NCLT may reverse any transaction that is deemed to be an extortionate credit transaction, in the two-year period leading up to the commencement of the CIRP.

24 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 laws of India recognise the following liens in favour of third parties:

- airline employees for unpaid wages;
- repairers for repairs of aircraft in the repairers' possession, to the extent of service or services performed; and
- governmental or other unpaid statutory dues.

In the event that an aircraft has been detained by any authority for the non-payment of dues by the operator, the owner of the aircraft may be required to seek relief from the courts. There have been numerous instances where the courts have held that the aforementioned liens are to be borne by the operator and their failure to pay cannot result in the detention of the aircraft.

In addition, Indian laws permit the central government to empower any authority to detain an aircraft if such detention is necessary to secure compliance with a domestic legislation or when such detention is necessary to prevent a contravention of any such legislation or to implement any order made by any court. For instance, the Airport Authority of India has been authorised to detain an aircraft until all fees owed to it by the operator have been paid.

In addition, the central government has the power to give directions to detain or requisition either foreign-owned or locally owned aircraft in the interest of public safety and security. There is no statutory requirement for the central government to compensate the affected parties. However, as India has entered to bilateral investment agreements with several countries, a foreign investor could resort to legal protection accorded under such agreements, against the government of India for any discriminatory treatment and claim adequate compensation for any such detention or expropriation.

Taxes and payment restrictions

25 Taxes

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

Lease rentals payable to a non-resident for use of aircraft for the purpose of a business carried on in India by the payer (whether by resident or non-resident) is taxable in India as royalty under the domestic tax law, and is subject to withholding tax at the rate of 10 per cent (plus applicable surcharge and cess) on a gross basis.

Loan repayments to non-residents may comprise two components: principal and interest. The principal amount of the loan would not be taxable in India and would not be subject to tax withholding in India. However, the interest element would be taxable in India under the domestic tax law if the loan is borrowed for the purpose of a business carried on in India by the payer (whether by resident or non-resident) and would be subject to withholding tax in India at the applicable rates, which may vary from 5 per cent (plus applicable surcharge and cess) to 40 per cent (plus applicable surcharge and cess), depending on the nature of debt instrument. Further, the gain, if any, arising to a non-resident from a transfer of an aircraft registered and operated in India may be subject to capital gains tax in India under the domestic tax law. The rate of tax would depend upon the period of holding of the aircraft. If the aircraft is held for a period exceeding three years, then the capital gains, if any, would be taxed at the rate of 20 per cent (plus applicable surcharge and cess); otherwise the same would be taxed at the rate of 40 per cent (plus applicable surcharge and cess). The same would be subject to tax withholding accordingly. However, all three

Update and trends

The Aircraft Rules, 1937 were amended on 23 March 2017 by way of notification in the Official Gazette of the Government of India. As per the amendment, the Directorate General of Civil Aviation (DGCA) is obliged to deregister the Aircraft within five working days, where the lessor (being the party in whose favour the IDERA under the authority of Article XIII of the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment was issued), seeks deregistration and complies with Rule 30 (7) of the Aircraft Rules, 1937. Once the registration of the aircraft is cancelled under Rule 30(7), the central government, under the newly inserted Rule 32A, is required to take action within five working days to facilitate the export and physical transfer of the aircraft, along with spare engines, if any, subject to compliance with applicable safety rules and regulations relating to that aircraft's operation.

above-mentioned tax liabilities may be subject to any benefits available under the applicable tax treaty.

There may not be any way to minimise the aforesaid tax liabilities. The capital gains tax, if any, applicable on sale of an aircraft registered and operated in India, would not be impacted by whether the aircraft is on the ground or in the airspace of the jurisdiction.

Further, grossing-up provisions are recognised under Indian income tax laws. However, in case of gross-up, for the purposes of deduction of tax, the amount on which tax is required to be deducted and deposited to the account of the central government shall be increased to an amount such that after the deduction of tax thereon, the net income is equal to the actual amount paid to the recipient of payments. Lease payments would be subject to goods and services tax. Further, transfer of aircraft in certain circumstances may be subject to goods and services tax.

26 Exchange control

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

India is an exchange-controlled jurisdiction, and matters relating to remittance or repatriation of foreign exchange are governed by the provisions of the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder.

Under law, Indian operators do not require any approval of the Reserve Bank of India (RBI) for any remittance of operating lease rentals, opening of letters of credit towards security deposit etc, in respect of import of aircraft, aircraft engines or helicopters on an operating lease basis. However, for other payments (eg, rentals in financial lease transactions, indemnity payments and payments towards insurance premia), the prior approval of the RBI might be required.

27 Default interest

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

While there are no express limitations on the amount of default interest that can be charged on lease or loan payments, the courts have been active to ensure that such interest is not usurious or excessive. In determining if the rate of interest charged is excessive, the courts may consider the market rate, inflation and also a fall in the bank rate. In the absence of any agreement or statutory provision or mercantile usage, the courts may also defer to the market rate upon establishment of a totality of circumstances justifying the exercise of such equitable jurisdiction.

28 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?

Import

To import an aircraft into India, the owner of the aircraft must apply for a temporary certificate of registration. The fee payable in respect of a temporary certificate of registration for an aircraft is 25 per cent

of the fee payable for applying for a certificate of registration (which varies depending on the maximum permissible take-off weight of the aircraft). If the aircraft has been imported into India for private use, in addition to the temporary certificate of registration, the owner of the aircraft will also need to apply to the Director-General of Foreign Trade (DGFT) for an import licence. The custom duty payable for an import licence is waived for import of aircraft by operators who have been approved by the Ministry of Civil Aviation to provide scheduled (passenger) and non-scheduled (charter) services. However, in certain cases a 'no objection certificate' may be required from the DGCA for import of the aircraft prior to availing such exemption.

Export

Except where an exemption has been granted by the DGCA and DGFT (in case of private aircraft), no owner can export an Indian-registered aircraft from India without obtaining an export licence. The costs for obtaining this licence vary from case to case. In addition to obtaining the export licence, the owner of the aircraft will need to obtain a 'ferry flight permit', for flying the aircraft outside India. An application for a ferry flight permit can be made along with the request for deregistration. There are no costs involved in obtaining a ferry flight permit.

Insurance and reinsurance

29 Captive insurance

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

As per law, an operator of aircraft in India has an obligation to maintain adequate insurance to cover its liability towards passengers and their baggage, crew, cargo, hull loss and third-party risks in compliance with the requirements of the Carriage Act, or any other applicable law. In aircraft lease financing transactions, the lessee is required to obtain such insurance from an Indian insurer that is generally reinsured with an offshore reinsurer subject to satisfying certain requirements, including that such reinsurer shall maintain a prescribed credit rating of an international credit rating agency.

However, an Indian insurer must also reinsure a minimum of 5 per cent of the sum assured on each policy (which shall be capped at a sum of 30 per cent (or such other sum prescribed by the regulatory authority) of the sum assured on each policy) with an Indian reinsurer.

30 Cut-through clauses

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

In our view, the prior approval of the RBI is likely to be required to be obtained by the Indian insurer in order to include a cut-through clause. However, several insurers in India take the view that the approval of the RBI is not required for including a cut-through clause. In any event, this is a compliance item for the Indian insurer and not for any other party.

31 Reinsurance

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

In our view, a prior approval from the RBI is likely to be required in connection with assignment of reinsurances. However, several Indian insurers tend to take the view that no prior approval from the RBI is required.

That said, we have seen that the assignment of reinsurances in favour of lenders is an Indian industry standard in aircraft financing transactions.

32 Liability

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

No. Under Indian law, the liability for damages is imposed only on the carrier and the owner is not liable for the operator's actions as long

as ownership is clearly distinct from operation of the aircraft and the owner is not involved in the actual operation of the aircraft.

33 Strict liability

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

While the common law principle of strict liability exists in India, its application is limited to matters not covered by a specific statute. Since an aircraft or carrier's liability in India is codified in the Carriage

Act, the common law principle of strict liability finds no application to instances covered by the Carriage Act.

34 Third-party liability insurance

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

Yes. As per the Carriage Act, the operator of an aircraft has an obligation to maintain insurance for an amount that is adequate to cover its liability towards passengers and their baggage, crew, cargo, hull loss and third-party risks.



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