

AVIATION FINANCE & LEASING

India



Aviation Finance & Leasing

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Quick reference guide enabling side-by-side comparison of local insights, including into applicable treaties, domestic legislation and restrictions on governing law; title transfer; registration of aircraft ownership and lease interests; security; enforcement; taxes and payment restrictions; insurance and reinsurance; and recent trends.

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India



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OVERVIEW

Conventions

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

India has ratified the Rome Convention (1933), the Chicago Convention (1944), the Montreal Convention (1999), the Cape Town Convention (2001) and the Beijing Convention (2010). India is not a party to the Geneva Convention (1948).

Law stated - 21 March 2023

Domestic legislation

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

There is no principal domestic legislation that exclusively deals with aircraft finance and leasing. In India, aircraft finance and leasing transactions are governed by various acts of parliament, rules and regulations, the prominent ones being the Indian Contract Act 1872, the Aircraft Act 1934, the Aircraft Rules 1937, the Foreign Exchange Management Act 1999 (and the rules framed thereunder), and the Reserve Bank of India rules, regulations, circulars and notifications.

Law stated - 21 March 2023

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 recognises the principle of autonomy of parties, and, hence, the parties are allowed to choose any law to govern their contract. Typically, aviation finance transactions in India are governed by the laws of England or of a US state, most commonly New York.

Law stated - 21 March 2023

TITLE TRANSFER

Transfer of aircraft

How is title in an aircraft transferred?

The title to an aircraft may be transferred by written agreement or contract between the parties. The Directorate General of Civil Aviation (DGCA) recognises a bill of sale as a legal method of transferring title.

Law stated - 21 March 2023

Transfer document requirements

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

A document transferring title in an aircraft should fulfil all of the essential requirements for a valid contract as per the Indian Contract Act 1872. It should satisfy the test that a valid contract has been entered into, which is that:

- there has been an offer by the transferor;
- the offer has been accepted by the transferee; and
- the transfer has been made for some valid consideration.

The DGCA will need to be informed of any change of ownership of an aircraft. Until that change is incorporated on the certificate of registration, it is illegal for anyone to operate the aircraft. The owner or operator must apply to the DGCA for permission to operate the aircraft under the old certificate of registration while the new certificate is being processed. Once the transfer has been completed, the owner or operator must apply to the DGCA for the issue of a new certificate of registration through Form CA-28 and must pay the applicable fee. Among other things, the DGCA will request:

- the constitutional documents of the new owner;
- a copy of the executed bill of sale; and
- an affidavit from the previous owner that it has received the sale proceeds in full from the new owner.

For the transfer document to be accepted by the DGCA, it must be duly stamped, together with payment of stamp duty (if applicable). Further, notarisation (and, in certain cases, apostillation) of copies of the transfer document is also required.

Law stated - 21 March 2023

REGISTRATION OF AIRCRAFT OWNERSHIP AND LEASE INTERESTS

Aircraft registry

Identify and describe the aircraft registry.

The register is known as the Indian aircraft register and is a federal register maintained by the Directorate General of Civil Aviation (DGCA) in New Delhi, India. The registry records both the details of the owner and the operator. The register is open to inspection by the general public. Aircraft registered on the Indian aircraft register are given a three-letter registration number prefixed with the letters VT, for example, VT-XYZ.

The details that are contained in the certificate of registration and the aircraft register are:

- the type of aircraft;
- the manufacturer's serial number or certification number;
- the year of manufacture;
- nationality and registration marks;
- the full name, nationality and address of the owner or lessor, or both;
- the full name, nationality and address of the lessee;
- the usual station of the aircraft;
- the date of registration;
- the period of registration; and
- the name of the mortgagee or hypothecator.

India has entered into International Civil Aviation Organization article 83-bis agreements. However, these are sparingly used and, in fact, permitted only in extraordinary circumstances. India does not have a specific engine registry.

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?

The aircraft registry records the details of ownership, the details of the lease interest (if different from the owner) and the details of the operator. A person or entity claiming to be the owner of an aircraft must be able to prove ownership by way of a valid title document in its favour. There are no other registries (apart from the International Registry) where an ownership interest may be registered.

There is no separate registry for aircraft engines in India.

Law stated - 21 March 2023

Registration of ownership interests

Summarise the process to register an ownership interest.

To record an ownership interest in an aircraft, the DGCA requires a number of documents. Apart from a document of title (duly notarised), the DGCA will require no objection letters from all other parties denoted on the aircraft's certificate of registration (if the aircraft is already registered on the aircraft registry) and evidence of authority in favour of the signatories of such documents. For recording an ownership interest, a fee is payable and the DGCA may take up to four weeks to issue a new certificate of registration.

In the case of a change of ownership of an aircraft already registered in India, it is illegal for anyone to operate an aircraft without the name of the new owner having been endorsed on the certificate of registration. Therefore, specific permission must be sought from the DGCA to operate the aircraft pending the processing of the application for endorsement of the new owner on the certificate of registration. All documents to be submitted with the DGCA must be notarised. Title to an engine does not automatically vest in the owner of a host aircraft. The title of the owner of an engine, although not registrable in any registry in India, shall be recognised on the basis of a valid title document.

Law stated - 21 March 2023

Title and third parties

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

The register maintained by the DGCA contains the name of the owner, which shall be taken as a prima facie proof of ownership by Indian authorities. The effect of registration in India acts as notice to all third parties, including a person claiming to be a bona fide purchaser for consideration with no notice. Third parties could rely on the accuracy of the public registration of the ownership interest as recorded on the certificate of registration. However, double verification from the records of the DGCA is always recommended.

If the title is defective, the actual owner attempting to enforce its rights against the person claiming to be the owner will have to prove its title on the basis of valid title documentation. The actual owner would then need to apply to the DGCA for amendment of its records, failing which an aggrieved party would have to approach a court of law for a determination of rights.

*Law stated - 21 March 2023***Registration of lease interests**

Summarise the process to register a lease interest.

A notarised copy of the lease agreement is required to be submitted at the time of registration of the aircraft on the aircraft register. The aircraft register records certain particulars relating to the lease, such as the period of validity of the lease as well as the names, nationalities and addresses of the lessor and the lessee. The whole process may take up to four weeks from the date of application. All supporting documentation (as may be requested by the DGCA) must be notarised.

There is no separate register for leases in India.

*Law stated - 21 March 2023***Certificate of registration**

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

The DGCA issues a certificate of registration in relation to an aircraft. The certificate of registration contains the following details:

- the type of aircraft;
- the manufacturer's serial number or certification number;
- the year of manufacture;
- the nationality and registration marks;
- the full name, nationality and address of the owner or lessor, or both;
- the full name, nationality and address of the lessee;
- the usual station of the aircraft;
- the date of registration;
- the period of registration; and
- the name of the mortgagee or hypothecator.

There is no engine certificate of registration issued by the DGCA.

*Law stated - 21 March 2023***Deregistration and export**

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

The owner or mortgagee – or both, as the case may be – shall be required to give consent in the case of any deregistration in India. In usual circumstances, the DGCA will give notice to the concerned party to seek their comments or no objection. In India, there are several methods by which the registration of an aircraft may be cancelled by the DGCA. All methods, apart from the method prescribed under Aeronautical Information Circular (AIC) No. 12 of 2018, require the consent of the operator. For other methods, therefore, the operator may block the proposed

deregistration and export by an owner or mortgagee.

Law stated - 21 March 2023

Powers of attorney

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

A deregistration and export power of attorney (DPOA) should satisfy the general principles of powers of attorney (ie, it should not confer any power that the issuer itself does not possess). While, theoretically, a DPOA should enable an owner or mortgagee to freely deregister and export the aircraft from India, in practice, there may be variations as to how the DPOA is perceived by the DGCA. The introduction of AIC No. 12 of 2018 has virtually resulted in the DPOA losing its significance in relation to deregistration and export, thereby resulting in an irrevocable deregistration and export request authorisation (IDERA) being considered a superior tool for enabling deregistration and export.

Further, it is advisable that a DPOA be executed on Indian stamp paper and attested by a notary public. It is also recommended that it be executed in English. Advance recording of the DPOA with the DGCA is not required, although it is recommended. If the DPOA has been executed properly, then it cannot be revoked. The registration of DPOA is not required, but it is required to be recorded with the DGCA. A DPOA can be issued in favour of more than one person.

Law stated - 21 March 2023

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.

India acceded to the Cape Town Convention on 31 March 2008, with the convention entering force on 1 July 2008. The Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment was also acceded to and came into force on the same date.

The DGCA recognised the need to set up a procedure for submitting IDERAs to the DGCA to streamline the acknowledgement process of the same. An IDERA holder, or his or her authorised signatory, is now required to make an application in a particular format as enshrined in the relevant Civil Aviation Requirements and submit this to the DGCA on the e-GCA portal. Physical copies of the e-application must be submitted to the DGCA subsequently along with, inter alia, two notarised copies of the IDERA.

The appropriate officer at the DGCA makes a note of the IDERA application on the aircraft register and returns the application both on the e-GCA portal and in physical form, along with a letter confirming the lodging of the IDERA, which details, inter alia, the IDERA Specific Reference No. and a notarised copy of the IDERA with an acknowledgement stamp.

Following the IDERA route is a much more certain method of securing deregistration and export rather than invoking powers under a DPOA.

Law stated - 21 March 2023

SECURITY

Security document (mortgage) form and content

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

A security document may be in any form as required by the parties to it provided, however, that the document is a valid contract under Indian law. Parties are free to choose the language of the security document (English is perfectly acceptable). The document may be in any form, but it should contain a maximum secured amount and the various terms and conditions (economic and otherwise) agreed to between the parties. Mortgages governed by foreign law are fully valid and binding in India. Therefore, in most circumstances, there may be no requirement for the foreign parties to enter into a local law mortgage, especially when the mortgagee and mortgagor are non-resident foreign parties.

Law stated - 21 March 2023

Security documentary requirements and costs

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

A security document, if being presented before an authority in India, should ideally be notarised and translated if not in English. The documentary costs of the same are minimal.

Law stated - 21 March 2023

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.

For effective creation and perfection of a security document, it is not necessary that it be filed with the aviation authority or any other registry. However, a copy of the security document (notarised) should be submitted to the Directorate General of Civil Aviation (DGCA) so that the name of the mortgagee may be duly endorsed on the certificate of registration of the aircraft. The typical documents that are required are a copy of the security document and request letters from the mortgagee, the owner of the aircraft and the operator of the aircraft, etc. The time taken by the DGCA to endorse the name of a mortgagee on an aircraft's certificate of registration is between two and four weeks. Costs may also vary according to the documentation requested by the DGCA and the time taken by the authority to clarify whatever queries it may have from the parties concerned. If one of the parties is an Indian entity incorporated under or governed by the Companies Act 2013, then registration of a charge under section 77 of the Companies Act 2013 may be necessary. However, this varies on a case-by-case basis.

Law stated - 21 March 2023

Registration of security

How is registration of a security interest certified?

A certificate of registration in relation to an aircraft denoting the name of the security interest holder shall be issued by the DGCA. The certificate of registration does not state the rank or priority of the security interest.

Law stated - 21 March 2023

Effect of registration of a security interest

What is the effect of registration as to third parties?

Once registered, the same shall constitute public notice to third parties. Further, as per Indian law, the registration of a security interest in the aircraft shall also constitute persuasive value against any third party claiming to be a bona fide purchaser without notice. Registration of a security interest with the DGCA does not establish any priority. In cases where it is mandatory under Indian law for a charge to be registered under section 77 of the Companies Act 2013, the law mandates that no liquidator or creditor shall take notice of such a charge unless the charge is duly registered.

Law stated - 21 March 2023

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 a trust is recognised under Indian law. The nature of the security is a right in personam and the trustee may hold the security for a changing group of beneficiaries without affecting the security. Registrations are required to be made only if there is going to be a change to the owner of the aircraft. If an aircraft is owned by a trust and is sold to another third party requiring a change of name of the aircraft certificate of registration, then the procedure for amendment of the certificate of registration must be followed to endorse the name of the new owner. If there is a change in beneficiaries resulting in no change of the aircraft certificate of registration, no action is required.

Law stated - 21 March 2023

Security over spare engines

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

The DGCA does not record security interests in engines, which includes spare engines. However, the doctrine of title annexation does not apply in India. Thus, the engines shall be treated separately from the aircraft.

Law stated - 21 March 2023

ENFORCEMENT MEASURES

Repossession following lease termination

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

On 15 November 2018, the Directorate General of Civil Aviation (DGCA) issued Aeronautical Information Circular (AIC) No. 12 of 2018, which deals with 'Standard Operating Procedure for Implementation of Rule 32A Relating to Export of Aircraft Covered under Cape Town Convention'. In addition to setting out the procedure to be followed following receipt of an application from an irrevocable deregistration and export request authorisation (IDERA) holder, the AIC provides the format in which an IDERA holder is to make an application to the DGCA for deregistration on the basis of an IDERA. The procedure for deregistration and export of an aircraft under AIC No. 12 of 2018 is as follows.

1. The IDERA holder shall file an application as per the format given by the DGCA.

2. The DGCA shall immediately post the fact of the application being filed by the IDERA holder on its website, giving the date of receipt of the request, type, registration details and name of the operator. The DGCA shall also email all designated officers of all the airport operators the same information.
3. The DGCA shall deregister the aircraft in accordance with Rule 30(7) (ie, within five working days of receipt of application from the IDERA holder). It shall also email the date of such deregistration to all designated officers of all the airport operators.
4. The airport operators shall calculate the outstanding dues relating to the aircraft in question (not of the fleet) for three months immediately preceding the date of receipt of the application from the IDERA holder – the date of declared default. Dues prior to this three-month period are not to be included in these calculations.
5. The airport operators shall raise bills within five working days of receipt of the first email from the DGCA (step 3). The airport operator shall forward all such bills to the IDERA holder by email with a copy also sent to the DGCA and indicate the relevant bank details to enable electronic payment.
6. Any other central government entity or any intergovernmental organisation in which India is a member, or another private provider of public services in India that has any outstanding dues pertaining to the aircraft in question (not of the fleet), may also raise its bills and intimate the DGCA within five working days of the date of receipt of the application from the IDERA holder – the date of declared default. The DGCA shall inform the IDERA holder by email about such liability only if received within five working days from the date of declared default. The DGCA shall not be responsible for any dues not notified to it within the specified period of five working days.
7. The IDERA holder, on receipt of any bills by email, may make the payment.
8. Once payment is made by the IDERA holder, the said person receiving payment shall issue a certificate to the IDERA holder within two working days of receiving payment, stating that the bills raised by them have been cleared. This certificate shall also be forwarded to the IDERA holder by email with a copy sent to the DGCA.
9. The IDERA holder shall submit to the DGCA a copy of the certificate of payment of bills along with its request for permission to export the aircraft from India.
- 10 On receipt of such a request, the DGCA shall issue the necessary permissions promptly as provided in Rule 32A.
- 11 On receiving permission from the DGCA, the IDERA holder shall send an email to the concerned airport operator forwarding a copy of the DGCA's permission and indicating the exact date of the flight out of India while also requesting a bill in respect of any dues accrued in relation to the aircraft after the date of declared default up to the day of departure.
- 12 The airport operator shall raise a bill for such dues within one working day and send the same to the IDERA holder by email with a copy sent to the DGCA, along with all necessary bank details.
- 13 Once the IDERA holder makes the payment, the aircraft may depart from India in accordance with the DGCA's permission and no airport operator shall prevent the aircraft from leaving India.

Law stated - 21 March 2023

Enforcement of security

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

Although India has made the relevant declarations under the Cape Town Convention stating that self-help remedies are available to a creditor, in practical terms, a court order may be necessary. In the case of admission of insolvency proceedings, repossession of the aircraft is prohibited during the moratorium period.

A moratorium under the Insolvency and Bankruptcy Code 2016 may be issued initially for a period of 180 days, extendable for another period of 90 days (or any further time that the tribunal may deem fit, not exceeding 330 days in total).

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 do provide for liens, which are extensive and have been listed below.

Third-party lien/detention

The Airport Authority of India and private airports that derive their rights from the authority may exercise a lien on the aircraft for any unpaid dues, such as landing and parking charges.

An unpaid bailee can exercise a mechanics lien.

Similarly, statutory dues such as taxes and worker wages form the first charge on the asset.

The government or its agencies can confiscate, detain or requisition aircraft (whether foreign-owned or otherwise) under certain circumstances.

Detention under the Aircraft Act

Under the Aircraft Act, the central government may, in the interest of public safety or tranquillity, direct that any aircraft or class of aircraft be delivered forthwith or within a specified time to such an authority as named by the central government to be at the disposal of the government for public service. Any person who suffers direct injury or loss by reason of such an order shall be entitled to compensation, as determined by an authority appointed by the central government.

Any authority so authorised by the central government can detain any aircraft if, in the opinion of such an authority, the flight of such aircraft would involve danger to persons in the aircraft or to any other person or property, or such detention is necessary to secure compliance with any of the provisions of the Aircraft Act and the Aircraft Rules applicable to such aircraft or such detention is necessary to prevent a contravention of any rules made under section 5(2)(h) and (i) of this act.

Detention during emergency

The government or its agencies can confiscate, detain or requisition aircraft (whether foreign-owned or otherwise) during a general emergency.

The central government is also empowered to seize:

- any aircraft belonging to the enemy;
- any aircraft or class of aircraft that is owned or operated by, or in the possession or custody of, any person domiciled or resident in enemy territory;
- any aircraft or class of aircraft the operation of which is likely to aid or assist the enemy; or
- any aircraft or class of aircraft the operation of which is likely to be prejudicial to the defence of India or to public safety.

Such an order may also require any aircraft or class of aircraft to be placed at the disposal of any authority specified therein.

Any person authorised by the central government can, where it appears necessary in the interest of the defence of India and civil defence to do so, order that any particular aircraft at any place in India shall not leave that place until permitted to do so by such authority or person as may be prescribed in that order.

This power was exercised by the government during the state of emergency declared in India in 1962 and 1971 under the Defence of India Acts 1962 and 1971, and the rules made thereunder. The acts and their rules remained in force until six months after the revocation of the emergency order.

Rule 36 of the Aircraft (Security) Rules 2011 also permits the Commissioner of Security to detain an aircraft for security purposes if so required.

As per the Epidemic Diseases Act 1897, as amended by the Epidemic Diseases (Amendment) Act 2020, the central government is empowered to take measures to inspect and detain any conveyance (including aircraft) leaving or arriving at any land port, seaport or aerodrome of India, as the case may be.

Under the Narcotic Drugs and Psychotropic Substances Act 1985, any conveyance (including aircraft) used for transportation of illegal drugs may be detained unless it is proven that it was so used without the knowledge of the owner and all reasonable precautions were taken against such use.

Aircraft may also be detained and, in extreme circumstances, sold under the customs and other tax laws of India.

Law stated - 21 March 2023

Enforcement of foreign judgments and arbitral awards

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

Indian courts will enforce the party's choice of law. In transactions concerning aircraft in India, English and New York law are fairly common choices of law. India has entered into treaties for reciprocal enforcement of judgments. In certain cases, a foreign decree can be enforced in India directly as if it had been passed by a court in India. Section 44A of the Civil Procedure Code 1908, inter alia, provides that where a foreign judgment has been rendered by a superior court in any country or territory outside India, which the government has by a notification declared to be a reciprocating territory, it may be enforced in India by proceedings in execution as if the judgment had been rendered by the relevant court of India.

Courts in India may refuse execution if it is shown to the satisfaction of the court that the decree falls within any of the following exceptions specified in section 13 of the Civil Procedure Code 1908, which, inter alia, provides that a foreign judgement shall be conclusive of any matter directly adjudicated upon, except where:

- it has not been pronounced by a court of competent jurisdiction;
- it has not been given on the merits of the case;
- it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases where such law is applicable;
- the proceedings in which the judgment was obtained were opposed to natural justice;
- it has been obtained by fraud; and
- it sustains a claim founded on a breach of any law in force in India.

Section 44A, however, only refers to decrees or judgments under which a sum of money is payable. The decree so obtained must, therefore, be a money decree to fall within the purview of section 44A.

In the absence of any reciprocal arrangement or treaty, a suit will have to be filed for enforcement of any such judgment or any such order obtained. The United Kingdom has been declared as a reciprocal territory for the purpose of section 44A. Curiously, the United States is not so. Accordingly, the judgment of a court in the United States may only be enforced by a suit upon the judgment and not by proceedings in execution (under section 44A).

In a suit on a foreign judgment, the court cannot go into the merits of the original claim or question its correctness or propriety. Through precedent, the courts have held that the word 'judgment' in the expression 'foreign judgment' has been assigned the same meaning given to it in English law and refers to the decree or order of a foreign court. A foreign judgment must be final and conclusive in the court in which it is passed for it to be considered a valid cause of action. To establish that a final and conclusive judgment has been pronounced, it must be proved that, in the court in which it has been pronounced, the judgment conclusively, finally and forever established the existence of the right for which it sought to make conclusive evidence in India so as to make it *res judicata*.

India has ratified the Geneva Convention (1948) and the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958).

Any foreign award under the New York Convention or the Geneva Convention can be enforced in India in accordance with the provisions of Part II of the (Indian) Arbitration and Conciliation Act 1996. Where the concerned court in India is satisfied that such a foreign award is enforceable under the act, the award is deemed to be a decree of that court and enforceable as such. The courts will not revisit the issues involved in the arbitration or sit as a court of appeal.

Law stated - 21 March 2023

TAXES AND PAYMENT RESTRICTIONS

Taxes

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

Lease payments under an operating lease

Depending on the domicile of the lessor, the relevant double tax avoidance treaty shall have to be referred to before specifics of possible taxes can be provided. The rule that exists at the time of rendering this opinion is that, should the lessor not have any permanent establishment in India, it should ordinarily not be liable to any tax in India. This, however, is subject to change and is based on the assumption that the lessor is an Irish entity taking advantage of the India-Ireland Double Taxation Avoidance Treaty. Should the parties qualify under the relevant double taxation avoidance agreement, withholding tax may also not be applicable for lease payments made under an operating lease.

Loan repayments or payments under a finance lease

Loan repayments or rental payments under a finance lease may be subject to tax in India. Specifics vary on the basis of the structure and factual matrix of each transaction. Similarly, withholding tax may also be applicable to payments made under a finance lease or repayment of loan, or both.

Transfer of aircraft

Transfer of title of an aircraft while in India shall subject it to a local goods and services tax levy, and possibly other

taxes. Aircraft transfers are, thus, effected once the aircraft is situated in a third-party country or over international waters (as the case may be).

Gross-up provisions are recognised under Indian law.

Law stated - 21 March 2023

Exchange control

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

India is an exchange-controlled country. The relevant enactment is the Foreign Exchange Management Act 1999, which is administered by the Reserve Bank of India (RBI). Any financing or repatriation of realisation of proceeds under a loan, guarantee or security document would require the approval of the RBI. In general, payment of lease rentals under an operating lease (and supplemental rent) require only the prior permission of the remitters' authorised dealer bank. The authorised dealer bank shall, on a scrutiny of the documents (which may include a form 10F, no permanent establishment certificate or tax residency certificate, as the case may be), permit or reject the request for remittance of funds to the foreign party. In cases of finance leases, the prior approval of the RBI is mandatorily required before remittance of any proceeds overseas. Payments of insurance claim payouts, if being remitted overseas in foreign currency, would also require approval from the RBI.

Law stated - 21 March 2023

Default interest

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

In principle, there is no such limitation. These things are left to the parties to decide. However, courts always have the power to fix reasonable amounts of interest if they are of the opinion that the default interest is punitive in nature.

Law stated - 21 March 2023

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?

If the aircraft is being imported into India by a scheduled airline, there is no import duty. In the case of an export, if the lessee is cooperating and allows the lessor to use his or her import-export code (IEC Code), then even export shall be free. In the eventuality of hostilities with the lessee, the export may become a complicated procedure and often a fine is imposed by customs that may be up to 10 per cent of the declared value of the asset.

An IEC Code is not required for unilateral export of aircraft from India via the IDERA route.

Law stated - 21 March 2023

INSURANCE AND REINSURANCE



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Captive insurance

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

Indian-registered aircraft may be insured by an Indian insurer who, in turn, would seek reinsurance on the international insurance market provided, however, that there is a 5 per cent reinsurance retention mandatorily required with the General Insurance Company of India.

Law stated - 21 March 2023

Cut-through clauses

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

Cut-through clauses and their enforceability in India have been debated time and time again; however, the general view is that they are enforceable in India.

Law stated - 21 March 2023

Reinsurance

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

Assignments of insurance and reinsurance are routinely carried out in aircraft transactions in India.

Law stated - 21 March 2023

Liability

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

Unless the direct involvement and consequent negligence of the foreign owner, lessor or financier are proven in respect of the operation of the aircraft or the activities of the operator, no liabilities would be imposed on the foreign party. However, it is not uncommon for an opportunistic litigant to implead the foreign parties to any proceeding brought in India, however bleak the prospects of imposition of liability may be.

Law stated - 21 March 2023

Strict liability

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

The owners, lessors, financiers and others cannot be held responsible for the action or inaction of the lessee in respect of the operation of the aircraft.

Under Indian law, the lessee under a dry lease remains primarily liable for loss or damage caused by the aircraft to third parties; although, in the event of a claim, it is likely that both the lessor and the lessee would be arrayed as parties in

the claim. Both the lessor and the lessee will be liable for negligence in relation to the aircraft arising as a result of their own acts and omissions.

Normally, a lessee under a dry lease remains liable for injuries to the person or property of third parties and passengers and is responsible for any breach of environmental laws.

The Indian law on vicarious liability confines the liability of the master only to the torts committed by his or her servants and agents where the same were within the scope of the servant's or agent's authority. As the relationship between the lessor and lessee is on a principal-to-principal basis, there will be no vicarious liability either.

However, there are four exceptions to the above rule and the lessor may be held liable:

- where it (the lessor) retains control over the lessee and interferes with, or makes himself or herself a party to, the tortuous act, or both;
- where the act contracted to be done is wrongful or illegal;
- where a legal or statutory duty is imposed on the owner, lessor or financier; and
- where the act contracted to be done is, by its nature, likely to cause danger to others; in such a case, the lessor must take all reasonable precautions against such risk.

Law stated - 21 March 2023

Third-party liability insurance

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

There are no quantified minimum requirements for the amount of third-party liability cover that must be in place.

Law stated - 21 March 2023

UPDATE AND TRENDS

Key developments of the past year

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

Before an aircraft is permitted to be exported from India on the basis of an irrevocable deregistration and export request authorisation, all goods and services tax (GST) (payable by a defaulting lessee) is required to be paid in full by the lessor or owner. This poses unique challenges as GST is a state-enforced provision and there is no asset-based recording of GST payments. Therefore, there is no method to calculate how much GST remains unpaid against a particular aircraft without a certificate from the defaulting lessee.

The government of India has taken steps towards creating a domestic aircraft leasing and financing platform. This is in the form of encouraging investment into Gujarat International Finance Tec-City, India's first international financial services centre, by providing a number of tax and other incentives to lessors such as:

- 100 per cent corporate tax exemption (for 10 out of 15 years) with units set up under the Indian Financial System Code (IFSC) having the flexibility to select any 10 years out of a 15-year block;
- zero per cent stamp duty on activities related to setting up units under the IFSC and acquisition of any movable assets (including aircraft) for a period of 10 years; and
- no withholding of taxes on aircraft lease payments in the nature of royalty paid to non-residents by units under

the IFSC that commence operations on or before 31 March 2024.

The Ministry of Civil Aviation (MoCA) published a draft of the Protection and Enforcement of Interests in Aircraft Objects Bill 2022 vide a gazette notification on 13 April 2022 for public comments. The Bill aims to implement the provisions of the Convention on International Interests in Mobile Equipment (the Cape Town Convention) and Protocol on Matters Specific to Aircraft Equipment (the Aircraft Protocol), which were adopted by India in 2008, and is a long-awaited piece of proposed legislation to ensure compliance with the treaty obligations and to avail the full benefits of proper accession to the treaty.

Having taken into account the comments received, the MoCA, vide a subsequent gazette notification dated 20 July 2022, published an amended draft of the Bill for further public comments. Comments were sought from stakeholders by 19 September 2022. An update on the progress of this key legislation (as at the date of issuance of this opinion) is awaited.

Law stated - 21 March 2023

Jurisdictions

	Austria	Benn-Ibler Rechtsanwälte GmbH
	Belgium	Kennedys Law LLP
	Brazil	Basch & Rameh Advogados Associados
	British Virgin Islands	Conyers
	Canada	YYZlaw
	Egypt	Shahid Law Firm
	Germany	Freshfields Bruckhaus Deringer
	India	Sarin & Co
	Indonesia	Nurjadin Sumono Mulyadi & Partners
	Israel	Gottlieb, Gera & Co
	Italy	Pierallini Studio Legale
	Japan	Nishimura & Asahi
	Latvia	SUCCESS410.COM Specialized Advisory Services
	Lithuania	Šulija Partners (Lithuania)
	Malta	Dingli & Dingli Law Firm
	Netherlands	Stek
	Nigeria	Streamsowers & Köhn
	Spain	Augusta Abogados
	Sweden	Vinge
	Switzerland	Meyer Legal
	United Arab Emirates	HFW
	United Kingdom - England & Wales	Clyde & Co LLP
	USA	Milbank LLP