VI. RUNWAY REPOSSESSION: A BRIEF OVERVIEW OF THE AIRCRAFT REPOSSESSION LAWS IN INDIA

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ABSTRACT

With a rising middle class and growing demand for travel, India is poised to become one of the largest domestic aviation markets in the world. To sustain and support this growing demand, Indian airlines would require numerous new aircraft. Most of these aircraft would be on the lease, thereby, making India's aircraft repossession/leasing laws extremely essential for the International aircraft financing/leasing community. The paper aims at providing a brief overview of India's aircraft repossession laws, and how they have been interpreted by the Indian judiciary. In this regard, the paper will examine five aircraft repossessions and how they were dealt with by the Courts. In conclusion, the paper will also cover the recent steps that have been taken by the Government to simplify aircraft repossession laws in India, and make India a much more lessor-friendly jurisdiction.

Introduction 107
The National Laws Regulating the Repossession, Deregistration and Export of Aircraft from India..... 109
Analysis of Judicial Decisions on Aircraft Repossession..... 110
Pre-Cape Town 110
GPA Finance Ltd v. East West Airlines..... 110
DVB Aviation Finance Asia PTE Ltd v. DGCA & Anr. 112
Post Cape-Town..... 115
Aer Lingus v. Airport Authority of India (2011)..... 115
Corporate Aircraft Funding v. Union of India & Ors. 115
AWAS 39423 Ireland Ltd. v. DGCA 117
Analysis of the Judicial Trend: 118
Conclusion 119

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I. INTRODUCTION

According to the International Air Transport Association ("IATA"), India is the world's fastest-growing domestic aviation market.[1] Due to an expected rise in demand, Indian carriers will need many new aircraft.[2] India is, therefore, seen as an attractive market for aircraft manufacturers, financiers, and lessors. However, in the international aviation finance and lease practice, there exists uncertainty regarding the possibility of repossessing, exporting, and deregistering an aircraft in case of default of an Indian airline or other operators.

Every aircraft finance transaction considers the need to have an immediate possession over the object on a default by the carrier, to be of utmost importance.[3] It allows both parties to analyze the economic risks and costs of the transaction, along with determining whether the financier would give credit to the airline. If a long and costly repossession process arises, the grounded aircraft may be 'cannibalized' by third-parties,[4] apart from exposing it to technical deterioration. This means that it would take more time to put the aircraft on the lease market before it could be profitable again. All of this increases the lessor's loss as a result of the defaulting lessee. The consequence of the risk analysis is that the financier or the lessor may decide

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[1] *India remains fastest growing domestic aviation market in 2017: IATA*, BUSINESS STANDARD, https://www.business-standard.com/article/companies/india-remains-fastest-growing-domestic-aviation-market-in-2017-iata-118020500823_1.html.

[2] *See India's aircraft orders to exceed 1000 with Jet airways imminent order; infrastructure a problem*, CAPA, https://centreforaviation.com/analysis/reports/indias-aircraft-orders-to-exceed-1000-with-jet-airways-imminent-order-infrastructure-a-problem-352895 (According to the report, India has the highest "Aircraft on order to Aircraft in service" ratio in the world).

[3] See PETER S MORRELL, AIRLINE FINANCE, (3rd ed. Ashgate, London).

[4] See Tushar Srivastav, *After Mallya's crash, Kingfisher fleet brings bad times for creditors*, HINDUSTAN TIMES, https://www.hindustantimes.com/business/a-liquor-baron-who-flew-too-high/story-OOfmP6kZahYlCD2ER0Rc3L.html.

not to agree to the transaction or agree only on the assurance of more financial compensation from the debtor for the additional economic risk.[5] Therefore, in practical terms, all aircraft finance and lease agreements include detailed provisions that permit the financier or lessor to *repossess* the object when the debtor defaults.[6]

Since most aircraft are leased by foreign aircraft leasing companies, the possibility to successfully repossess (in case of default by the lessee), deregister, i.e., cancel the registration of the aircraft from the Indian aircraft register,[7] and export the aircraft, requires that the concerned jurisdiction implements adequate local and international laws covering these aspects. Moreover, it must have a judicial system that is fast and properly implements these laws.

Registration is the primary link between the aircraft and the laws of the country where it is registered. Hence de-registration is of utmost importance for an aircraft lessor since unless deregistered from the Indian aircraft register, the aircraft will continue to be subject to Indian regulations.

In this paper, we shall examine the Indian paradigm pertaining to the repossession, deregistration, and export of aircraft from India, and examine the relevant case laws, to understand the shortfalls of the system, and how it

[5] Nettie Downs, *Taking Flight from Cape Town: Increasing Access to Aircraft Financing*, 35 UPENNJIL 1 (2014).
[6] *See* PATRICK HANLEY, AIRCRAFT OPERATING LEASING: A LEGAL AND PRACTICAL ANALYSIS IN THE CONTEXT OF PUBLIC AND PRIVATE INTERNATIONAL AIR LAW, (2 ed. Wolter Kluwer 2012).
[7] *See* Aircraft Rules, 1937, Rule 36, MINISTRY OF CIVIL AVIATION, GOVERNMENT OF INDIA, https://www.civilaviation.gov.in/sites/default/files/moca_000947.pdf.

can be improved, especially in the context of the international aviation industry, considering the interconnected nature of aviation across the globe.

II. THE NATIONAL LAWS REGULATING THE REPOSSESSION, DEREGISTRATION, AND EXPORT OF AIRCRAFT FROM INDIA

The law covering the repossession, deregistration, and export of aircraft from India is intertwined between the legislative and executive orders on the one hand and judicial rulings on the other. The primary regulation, which governs aircraft regulations in India is the Aircraft Act, 1934 read along with Aircraft Rules, 1937 ("1937 Rules").[8] The Rules contain provisions, which govern the registration, deregistration, and export of Aircraft from India. In compliance with the Cape Town Convention, 2008[9] obligations, India has amended these rules from time to time to ensure conformity with the Cape Town requirements.

Most recently, India came out with a Standard Operating Procedure ("SOP") which provides the protocol to be followed by various stakeholders when repossessing/de-registering an aircraft under the Irrevocable De-registration and Export Request Authorization **("**IDERA") route.[10] As per the

[8] *See* Preamble to the Aircraft Act, 1934, Act No. 22, Acts of Parliament, 1934, https://legislative.gov.in/sites/default/files/A1934-22_0.pdf.

[9] The Cape Town Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285 (entered into force Mar. 1, 2006), https://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf (Convention on International Interests in Mobile Equipment or the Cape Town Convention is the International Treaty on asset-based financing and leasing. It aims at providing a certain and predictable International legal order to the asset-based financing and leasing community).

[10] *See Aeronautical Information Circular 12/2018*, DIRECTORATE GENERAL OF CIVIL AVIATION, Govt. of India, http://164.100.60.133/aic/AIC12_2018.pdf (An aircraft can be repossessed by two routes i.e. mutual route and IDERA route. Under the mutual route, the lessee is cooperating with the lessor and the leasing is ended on mutually agreeable terms.

SOP, the lessor/creditor is required to clear the dues (statutorily required (permissible) dues for example airport charges, customs duty (if any), GST etc, as per the 1937 Rules for a period of three months immediately preceding the date of the declared default, i.e., the date on which the request for de-registration was received by the Directorate General of Civil Aviation ("DGCA").[11] Further, the SOP also clarifies that all such dues have to be raised within 5 days from the date of declared default.[12] To understand the legal landscape better, it is important to analyse the judicial trend in this regard.

III. ANALYSIS OF JUDICIAL DECISIONS ON AIRCRAFT REPOSSESSION

This section provides an overview of some of the important Indian cases which relate to issues on the repossession, deregistration, and export of aircraft. A distinction has been made between the time-frame before and after India adopted the Cape Town Convention in 2008. Both periods discuss the relevant rulings in chronological order.

A. Pre-Cape Town

1. GPA Finance Ltd v. East West Airlines[13]

India saw her first repossession case in 1997. GPA Finance Ltd ("GPA") was the owner of two Boeing 737-200 aircraft, which it had leased

Whereas, in a scenario where the lessee is uncooperative, the lessor can unilaterally invoke IDERA for deregistration and export of the aircraft).

[11] *Id.* ¶ 5.

[12] *Aeronautical Information Circular*, *supra* note 10, ¶ 5.

[13] GPA Finance Ltd. v. Union of India, CW. No. 2368/1997 (dated 2 July, 1997, Bombay High Court).

to an Indian lessee. The lessee had further sub-leased the aircraft to East West Airlines ("East West"). In 1995, East West became insolvent and defaulted on the sub-lease agreements. When East West stopped paying the rent, the lessor (and the sub-lessor) initiated proceedings to repossess the aircraft. However, the lessor was faced with a variety of *non-consensual interests*, such as these *liens* regarded the non-payment to airport-fees and debts owed to other governmental institutions.[14] The two aircraft had already been flown out of India to another jurisdiction.

In this case, the regime of the 1937 Rules played a significant role. This is because India adopted the Cape Town Convention in 2008, which meant that the local laws were still applicable to the procedure covering the deregistration of the aircraft. The request by GPA to deregister the aircraft was refused by the DGCA on the ground that the carrier East West airlines had not paid the due 'in-land travel tax'.[15] The DGCA alleged that under the Indian aviation law, he had the right to 'distrain' and 'arrest' the aircraft.[16] The court decided that the DGCA could only detain and arrest the two aircraft under the applicable local laws if the objects were still within the territory of India. As the terms already indicated, the law required the seized object to be in the physical possession and control of the creditor. In the present case, the recovery could not be made by detainment or arrest of the aircraft as they were flown out of India. Therefore, the refusal to deregister the two aircraft was unreasonable, unwarranted, and unjustified. Both GPA and the sublessor were

[14] Nitin Sarin, *Aircraft Repossession in India: A 2017 overview*, SARIN AVIATION LAW (Jul. 9, 2018), www.sarinaviationlaw.wordpress.com/2017/05/21/aircraft-repossession-in-india-a-2017-overview/.
[15] *Id.*
[16] Sarin, *supra* note 14.

put to great loss due to the non-use of their aircraft. Finally, the DGCA was directed to deregister the two aircraft from the aircraft register and issue the necessary certificates within two days.

As far as the needs of the international and Indian aviation finance and lease communities are concerned, the court made a most welcome decision. While the aircraft had already been successfully repossessed and exported from India, the deregistration was also eventually taken care of. However, it is most unfortunate that the DGCA refused to deregister in the first place. To realize this most important remedy of the (sub)lessor, the creditor had to initiate litigation, which was rather time-taking and expensive. The aircraft were *grounded* for several months, which implied that technically, they deteriorated.[17] Besides, during the *downtime,* no lease rentals were received while the aircraft were parked in isolated areas of some airport. All of this led to millions of dollars of damages for the lessor of the aircraft. Therefore, it can be concluded that the 'court route', owing to the time involved coupled with other expenses like counsel's fee, is the least desirable from a commercial point of view for the international aviation finance community at large.

2. DVB Aviation Finance Asia PTE Ltd v. DGCA & Anr.[18]

An important case on the undesirable default-scenario is the case of *DVB Aviation Finance Asia PTE, Ltd.* ("DVB") *v. DGCA & Anr. (Kingfisher).* Kingfisher, which commenced operations in 2005, was a popular and fast-growing airline in India. While at some point in time it began to incur financial

[17] The airline ceased operations on 8th August 1996. The Court's verdict came in July 1997.
[18] DVB Aviation Finance Asia PTE Ltd v. DGCA, WP (C) 7661/2012 (Delhi High Court).

losses, it nevertheless continued expanding its fleet and ordering new airplanes. Eventually, it was forced to cease operations in 2012.

The German bank DVB had financed two Airbus A320-232 aircraft, which were leased to Kingfisher. The finance and lease transactions had been entered into before India had adopted the Cape Town Convention,[19] rendering the treaty inapplicable. DVB repossessed the two aircraft from the defaulting lessee at the Istanbul Airport in Turkey. DVB then asked the DGCA to deregister the two aircraft. Initially, the registration of the aircraft in India was based on the lease agreement, which allowed Kingfisher to lease the aircraft. However, as soon as the agreement was cancelled, there was no longer a valid ground for registration in India. Besides, the two aircraft had been taken out of the Indian territory, which meant that there was no longer a direct connection with India. Nevertheless, the DGCA did not honour DVB's request for the deregistration even though DVB had contractually obtained the needed De-Registration Power of Attorney ("DPOA") for each aircraft. Allegedly, the reason was that Kingfisher had protested against the deregistration.[20] Moreover, the DGCA had asked DVB to submit a statement from Kingfisher, which affirmed that it had no objection against the deregistration. However, for DVB, this request was unconscionable. Consequently, it initiated litigation against Kingfisher and the DGCA before the Delhi High Court. It requested the court to, *inter alia,* direct the DGCA to deregister the aircraft. The court ruled that the DGCA had to deregister the aircraft and that there was no need

[19] A separate lease agreement was established for each aircraft in June 2006. India adopted the Cape Town Convention on March 31, 2008 and it entered into force on 1 June 2008. Therefore, the lease agreements were not covered by the instrument.

[20] Kingfisher alleged that it: 1. had a right under the lease to purchase the aircraft; 2. had acquired an equity interest in the aircraft as it had rent under the lease.

for a Kingfisher-issued no-objection statement, as DVB had obtained a valid DPOA. While the litigation was necessary for DVB to implement the deregistration, it was unnecessarily time-consuming and costly. Besides, this delay had a significant negative impact on the value and sale of the two aircraft.[21]

The Kingfisher case shows that while a financier or lessor can successfully repossess an aircraft, this remedy may not be enough. The creditor must also be able to sell or lease the airplane. This requires a smooth deregistration process. Subsequently, the financier or lessor must be able to re-register the aircraft in the jurisdiction of choice.

Additionally, the Kingfisher episode sent a shockwave across the global finance and lease practice.[22] This further led the financial world to take a more cautious approach towards Indian carriers.[23] Several foreign financiers and lessors even threatened to withdraw all their investments from India.[24] As a result of this strong criticism, the Indian government was forced to update the local repossession, export, and deregistration laws. For this

[21] Srivastav, *supra* note 4.
[22] *Aircraft Deregistration and Repossession in India: Lessons from Kingfisher and Spice Jet*, KATTEN, www.kattenlaw.com/Aircraft_Deregistration_and_Repossession_in_India_Lessons_from_Kingfisher_and_SpiceJet.
[23] HANLEY, *supra* note 6.
[24] Arinban Chowdhury, *Kingfisher Airlines Collapse: Leasing companies reluctant to do business with Indian careers*, THE ECONOMIC TIMES (Sep. 06, 2013), https://m.economictimes.com/industry/transportation/airlines-/-aviation/kingfisher-airlines-collapse-leasing-companies-reluctant-to-do-business-with-indian-carriers/articleshow/22352878.cms#:~:text=they%20have%20purchased.-,%E2%80%9CKingfisher%20Airlines'%20collapse%20unravelled%20the%20inherent%20difficulties%20of%20leasing%20into,vice%20president%2C%20communications%20at%20the.

purpose, India decided to cooperate with the Aviation Working Group to align these laws with the regime of the Cape Town convention.

B. Post-Cape Town

1. Aer Lingus v. Airport Authority of India (2011)[25]

This case demonstrates how the Indian courts have given varied and diverse interpretations of the rights of the lessors and financiers. The Bombay High Court, in the instant case, held that "the liability to pay airport charges is with the airlines, who were operating the aircraft, and not the lessor who had leased the aircraft, and lessor's right cannot be subdued by a dereliction on the part of the airline". The court thus ruled that "in any case the aircraft lessors cannot be deprived of their rights to deregister and repossess the aircraft".[26]

Unfortunately, this ruling did not survive for too long, as on appeal, the Supreme Court of India set it aside.[27] The Apex Court held that the aircraft could be detained by the airport authorities until the dues are cleared.".[28]

2. Corporate Aircraft Funding v. Union of India & Ors.[29]

Corporate Aircraft Funding ("CAF") was the mortgagee of a Bombardier Challenger 300 corporate aircraft. It was registered in India with the DGCA. The aircraft, which was owned by Peel Aviation Ltd ("PAL"), was leased in 2008 to an Indian company named Golden Wings Pvt. Ltd.

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[25] Aer Lingus v. Airport Authority of India and Ors., (MANU/MH/1351/2011).
[26] *Id.*
[27] *See* Airport Authority of India vs. Aer Lingus Limited & Ors. (SLP (Civil) No. 9545-9546/2011)
[28] *AAI can detain aircraft if airlines default on dues*, THE TIMES OF INDIA (Apr. 5, 2011), https://timesofindia.indiatimes.com/india/AAI-can-detain-aircraft-if-airlines-default-on-dues-SC/articleshow/7875288.cms.
[29] Corporate Aircraft Funding v. Union of India & Ors., WP (C) 792/2012 (High Court of Delhi).

("GWPL"). CAF had extended a loan to PAL, which was secured by a mortgage on the aircraft. GWPL was in default and the lease was terminated on March 30, 2010. CAF had repossessed the aircraft and it was flown out of India to England in April 2010. CAF was seeking the deregistration of the aircraft from the aircraft registry of India. The DGCA refused to deregister the aircraft on behalf of the request of the Directorate of Revenue Intelligence.[30] By 2008, India had already adopted the Cape Town Convention. The lessee GWPL had executed in favour of the CAF, an 'Irrevocable Power of Attorney' ("POA"), which empowered the petitioner to seek the deregistration of the aircraft in case of default. Moreover, the lessee had issued an 'Irrevocable Deregistration and Export Request Authorization' ("IDERA"). This document was executed according to the provisions of Article XIII of the Aircraft Protocol.[31]

After deliberations pertaining to a detailed referral to the *GPA v. East West Airlines* case,[32] the court directed the DGCA to deregister the aircraft. The Court's decision was primarily based on the fact that the lessee had issued an IDERA, which was accepted by the DGCA. The IDERA was lodged in conformity with the mandatory regime of the Cape Town Convention. According to the Court, this gave CAF the absolute right to request the deregistration, which the DGCA was obliged to honour.

However, this decision was later set aside by the Division Bench of Delhi High Court in *Directorate of Revenue Intelligence v. Corporate*

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[30] *Id.*
[31] *See* Article XIII, Protocol to The Convention On International Interests In Mobile Equipment On Matters Specific To Aircraft Equipment, UNIDROIT, https://www.unidroit.org/instruments/security-interests/aircraft-protocol.
[32] *GPA Finance Ltd.*, *supra* note 13.

Aircraft Funding LLC & Ors.[33] The Bench observed that normally a [c]ourt would not direct a statutory authority, such as the DGCA, to exercise its discretion in a particular manner. The court directed the DGCA to make a 'reasoned decision' of whether or not to deregister the aircraft within four weeks of the lessor making a written submission to support its application for de-registration. In summary, the court ruled that the DGCA has to act in a manner that fulfils the intention of the 1937 Rules. Thus, in the opinion of the court, the power to deregister an aircraft is an enabling power. This means that the DGCA has to act on a discretionary basis. Therefore, the court's ruling created an air of legal uncertainty for the international aviation finance and lease community.

The international aircraft finance and lease community was upset after the Division Bench ruling, as the Court had refused to address the lessor's arguments relating to the applicability of the Cape Town Convention. It was argued that the court created additional economic risks and costs for the aircraft finance market at large. Moreover, the court had further slowed down the procedure, which under the Cape Town Convention should be a 'speedy process'. This is because the DGCA was given an extra four-week time to solve a long-standing problem, as the aircraft had already been grounded for three years.

3. AWAS 39423 Ireland Ltd. v. DGCA[34]

This case is also known in practice as the *SpiceJet* case, wherein the court made some significant clarifications. It was held that the lessor must

[33] Directorate of Revenue Intelligence v. Corporate Aircraft Funding LLC & Ors., (LPA) 226/2013 (See Judgement dated 10.05.2013 passed in Letters Patent Appeal (LPA) 226/2013 (Delhi High Court)).
[34] AWAS 39423 Ireland Ltd. v. DGCA, WP(C) 871/2015 (High Court of Delhi).

have fulfilled his obligations as required under the newly inserted Rule 30(7) of the 1973 Rules.[35] Consequently, it became mandatory for the DGCA to deregister the aircraft. Further, the court ruled that the '5 days rule', as contained under Article X(6)(a) of the Aircraft Protocol, must also be honoured by the DGCA.

IV. ANALYSIS OF THE JUDICIAL TREND:

Some of the above-discussed rulings demonstrate the willingness of a handful of Indian courts to come to the rescue of the international financiers and lessors of aircraft. However, the following facts show the diverse nuances in the system, which make India a risky jurisdiction for the international aviation finance and lease practice. *Firstly*, the proceedings in the Indian courts are typically very time-consuming. In the above-mentioned cases, the parties agreed on a mutually amicable solution, otherwise, the case could have lingered on for years. Unfortunately, when negotiating these "mutually amicable solutions", often the defaulting airline would be hostile and uncooperative. *Secondly*, these judgements have been delivered by the High Courts of Delhi and Bombay, which means that the other High Courts are not bound to, and may not agree with their views. Therefore, to acquire a conclusive certainty, the issues raised need clarification from the Supreme Court of India, like the one on governmental liens.[36]

Thirdly, the Indian courts have generally dealt with operating leases, where the ownership of the aircraft is generally clear. However, it needs to be seen whether the Indian courts will acknowledge the rights of lessors in a

[35] *Id.*
[36] KATTEN, *supra* note 22.

finance lease containing a purchase option. In such a transaction, the lessor's right may be in conflict with the lessee's equity right in the aircraft. To complicate it further, the current accounting practice in India recognizes the financial lessee's ownership rights as an asset.[37] Thus, the willingness of the Indian courts may turn into hostility in disputes involving financial leases.

V. CONCLUSION

As mentioned earlier, the Indian government has considered taking away the above-addressed dramatic deregistration issues. More specifically, it intends to ease some of the rules and policies so that the lessors can swiftly take possession of their aircraft without any hurdles. The new policy also intends to underscore the supremacy of the Cape Town Convention over the Indian laws.[38]

For this purpose, the government of India had been cooperating closely with the Aviation Working Group to realign the outdated Indian deregistration laws with the requirements of the Cape Town Convention. As a result, the 1973 Rules were amended and, *inter alia*, a new clause was added to affirm the rights of financiers and lessors, which had 'registered their international interest' as provided by the treaty. Accordingly, the added clause provides that when the Cape Town Convention applies, the deregistration request shall be processed within 5 working days.[39] However, the IDERA-holder has to apply before "the expiry of lease", along with the required documentation.

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[37] Nithya Narayanan, *Aircraft Repossession in India: Turbulence ahead, buckle up!*, 38 ANNALS OF AIR & SPACE LAW (2013).
[38] *Id.*
[39] *See* The Aircraft Rules, 1937, Rule 30(7), MINISTRY OF CIVIL AVIATION, GOVERNMENT OF INDIA, https://www.civilaviation.gov.in/sites/default/files/moca_000947.pdf

Nevertheless, the rule also contains a proviso, which states that such deregistration shall not affect the right of any entity to sell, arrest, or attach the aircraft, to whom payments in respect of the services provided to the aircraft in question are due.[40]

Not only has the Indian government expressly confirmed the deregistration rights of the financiers and lessors, but the right to export has recently been recognized under the amended Aircraft Rules.[41] The condition being, however, that the aircraft must be subject to the Cape Town Convention. If the lessor applies for the export of the aircraft, the government shall facilitate the transfer of the object within 5 working days. The same applies to spare engines.[42]

Nonetheless, any liens will be effective in case there are any uncleared dues owed to governmental agencies. Therefore, it is concluded that the Indian alignment efforts explicitly affirm the need for the enforcement of the deregistration and export rights of lessors and financiers of aircraft. However, there is still no guarantee that the courts in India will apply the new amendments in the Aircraft Rules uniformly. It is owing to these discrepancies and shortcomings that the international aviation finance and lease practice still does not have much confidence in providing Indian airlines with substantial

[40] *See* proviso *Id.*
[41] *See* Aircraft Rules, 1937, Rule 32A, Standard Operating Procedure AIC 12/ 2018, MINISTRY OF CIVIL AVIATION, GOVERNMENT OF INDIA, http://164.100.60.133/aic/AIC12_2018.pdf (Inserted by GSR (no.) 295E dated 23.03.2017).
[42] This in alignment with the Aircraft Protocol to CTC, which require the relief to be granted within 5 working days of the submission of request. See Article X (6) (a) of the Aircraft Protocol, UNIDROIT, https://www.unidroit.org/instruments/security-interests/aircraft-protocol.

amounts of credit.[43] Consequently, despite being a potentially lucrative market, India remains a dangerous and uncertain jurisdiction from a practical and legal perspective.

[43] The overall score of India is 47.8% out of 100 % and in the Pillsbury repossession index Indian jurisdiction has been classified as "red'. The important index covers many developing and developed countries and they are located worldwide. Included in the research are topics such as repossession, deregistration and export risks. (2018 Figures), https://www.pillsburylaw.com/images/content/1/1/v2/111003/World-Aircraft-Repossession-Index-Second-Edition-March-2017.pdf.