

Aircraft Deregistration and Repossession in India: Lessons from Kingfisher and SpiceJet

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In 2012, **Kingfisher Airlines**, one of **India's** major airlines, ceased operations. India and its courts delayed responses to the request of lessors and financiers to deregister and repossess their aircraft, upsetting the market for aircraft leasing and financing in India. The **Cape Town Convention on International Interests in Mobile Equipment (Cape Town Treaty)**, designed to address such situations, could not protect the lessors and financiers because India ratified the treaty after the delivery of the aircraft at issue. Many commentators believe that India's response to the Kingfisher case foreshadows India's responses to future airline bankruptcies within the scope of the Cape Town Treaty, and requests for aircraft deregistration and repossession.

Although India ratified the Cape Town Treaty in 2008, it has not passed legislation to give the treaty effect. Thus, aircraft lessors and financiers are still left to the mercy of local laws. Further, the issue of aircraft repossession is complicated by the intersection of India's bankruptcy, tax and private international law obligations, as well as its general airline industry.^[1] The Indian Directorate General of Civil Aviation (DGCA) may provide the largest hurdle to aircraft financiers and lessors attempting to deregister and repossess their aircraft, as it did in the Kingfisher case.^[2]

This article discusses the Kingfisher saga, as well as its impact on other Indian airlines, SpiceJet in particular, and the global financing and leasing sector. The article also discusses the SpiceJet case, which successfully thwarted bankruptcy amid attempts from aircraft lessors and financiers to deregister and repossess their aircraft. SpiceJet is a case study in the lessons realized from Kingfisher in many ways.

Kingfisher and Its Impact on Other Indian Airlines and the Financing and Leasing Sector

The Indian aviation industry has suffered financial strain since 2007. The strain was due in part to the global financial crisis, as well as several highly publicized incidents involving Indian regulatory agencies, including the Indian tax authority, and aircraft financiers and lessors. The collapse of Kingfisher, and subsequent events, presented challenges to aircraft financiers and lessors.^[3] Also, the collapse of the airline may predict India's commitment to its international legal obligations with regard to the remedial scheme of the Cape Town Treaty.

India's response to the Kingfisher case shaped the behavior of various stakeholders in the aviation industry after Kingfisher, in particular lessors and financiers, that may be to the detriment of the industry and burgeoning Indian economy. The Kingfisher case should inform future bankruptcies, including the current issues facing the financially distressed airline, SpiceJet.

Pre-Kingfisher

Prior to the Kingfisher case, the Bombay High Court provided some indication that it is sympathetic to aircraft lessors and financiers. *Aer Lingus Limited v. Authority of India* established that aircraft owners cannot be deprived their rights to deregister and repossess its aircraft in circumstances where the lessee has outstanding airport parking fees.^[4]

The case is factually different from Kingfisher. However, it raises an important question as to whether Indian courts will come to the rescue of lessors and financiers in cases involving distressed lessees and allow them to vindicate their rights to deregister and repossess their aircraft. This question plagued the Kingfisher saga, and the question remains open and untested in India in the post-Cape Town Treaty context.^[5]

The Kingfisher Case

DGCA suspended Kingfisher's operations because the airline could no longer repay its debts, and Kingfisher eventually ceased operations. At the time operations ceased, Kingfisher reported more than \$1 billion in debt. The airline reportedly continued to expand its operations even during a period of growing financial distress,^[6] which had an influence on the global leasing and financing sector. The experiences of DVB Bank (DVB) and International Lease Finance Corporation (ILFC) show the hurdles to aircraft deregistration and repossession in India.

DVB was an acquisition financier for two A320-232 aircraft. DVB sought to deregister and gain possession of its aircraft after Kingfisher began its financial collapse. DVB successfully repossessed one of its aircraft, as it was outside of India, but faced difficulty in the deregistration process. Kingfisher objected to the deregistration of the aircraft, claiming that it had ownership rights. This objection led DVB to sue DGCA and Kingfisher. Kingfisher argued that it had purchase option and an acquired equity interest in the aircraft through payment of rent to the lessor under the lease agreement.^[7]

A local court ultimately directed DGCA to deregister the aircraft. The court, however, did not go into the merits of Kingfisher's claims that the deregistration of the aircraft conflicted with the airline's right to exercise its purchase option.^[8] Like DVB, ILFC faced similar hurdles in regaining possession of its six leased aircraft. It took the company six months to secure the successful removal of one of its A321 aircraft.^[9]

The Kingfisher case demonstrated the willingness of Indian courts to rescue lessors and financiers, but there is a limit to that generosity. The courts typically aided in scenarios where the lease agreement was unilaterally terminated or the aircraft was outside of India's jurisdiction. It remains open whether Indian courts will entertain an argument that a purchase option in a lease agreement creates equity rights for the lessee and, thus, deregistration and repossession in favor of the lessor is in conflict with the lessee's equity interest.^[10]

Kingfisher's Impact on Other Airlines and the Financing and Leasing Sector

Commentators predicted that post-Kingfisher, it would be more difficult for Indian airlines to secure financing and leasing opportunities. They also predicted a rise in leasing rates and price of loans. Many commentators also noted that India's behavior in the Kingfisher case undermined the Cape Town Treaty.^[11]

The financing and leasing sector reacted as predicted. Lessors demanded premiums to cover risk in leasing aircraft to Indian airlines, e.g., one-year security deposits, rather than the standard three-month security deposit. They also demanded a commitment to hire the aircraft for as long as nine years. Some lessors even sought government guarantees for the aircraft.^[12]

Indian airlines suffered as well. IndiGo is India's most profitable airlines and set to have 20 A321 and 184 A320 aircraft delivered over the next few years.^[13] Much of IndiGo's ability to remain unscathed from the Kingfisher saga is because it remained debt-free during the period the Kingfisher debacle occurred.^[14] By contrast, Jet Airways and SpiceJet witnessed jumps in aircraft leasing costs as compared to previous years.^[15]

The Future Realized

While the Cape Town Treaty did not apply in the Kingfisher case, many commentators believed it could foreshadow India's response to a future airline bankruptcy.^[16] At the end of 2014 and the beginning of 2015, two major events occurred in the Indian aviation community. First, India amended its aircraft rules to provide protection for lessors and financiers. The new sub-rule requires the DGCA to deregister an aircraft provided certain conditions.^[17] Second, SpiceJet came under increasing financial pressure, resulting in its lessors terminating their leases with the airline and demanding the return of their aircraft. SpiceJet is the first airline to test India's commitment to the Cape Town Treaty and its new sub-rule.^[18]

Much like the Kingfisher case, several lessors, frustrated by the DGCA's hesitation and delay, sought relief in court. Two such lessors are Wilmington Trust SP Services (Dublin) Limited (Wilmington Trust) and AWAS. The Delhi High Court, interpreting the sub-rule, recently issued an order stating that the DGCA must deregister the aircraft and has no discretion in the matter.^[19] The Delhi High Court also requested that the DGCA delay deregistration of the aircraft so that SpiceJet could potentially reach settlements, which the airline did with Wilmington Trust.^[20]

Five other lessors also pursued actions against SpiceJet in the Madras High Court.^[21] SpiceJet originally disputed that these five companies were the actual lessors for the applicable aircraft. Recently, SpiceJet and BBAM, manager of the five leasing companies, entered into an in-principle understanding. BBAM agreed to suspend its court action requesting to wind up SpiceJet and deregister the five aircraft. The parties still need to satisfy the terms of settlement and execute definitive agreements.^[22]

The SpiceJet case should lessen some of the uncertainty surrounding the Kingfisher saga, but the case still does not give complete assurance to financiers and lessors. In February 2015, SpiceJet had a change of ownership and a wave of fresh funding to reinvigorate the ailing airline, allowing it to repay its debts and saving it from potential bankruptcy.^[23] The Delhi High Court's response, granting but delaying deregistration, may be due in part because SpiceJet improved its financial position. Financiers and lessors must be careful to recognize that those facts may have colored the Delhi High Court's response.

The SpiceJet case seems to indicate that Indian courts are serious about India's commitment to the Cape Town Treaty and their willingness to allow lessors to vindicate their right to repossess and deregister their aircraft. The case also indicates the courts' desire to protect ailing airlines, at least where an airline can and does improve its financial position. Lessors and financiers, however, should be still wary that India would protect their rights and interest over the rights and interests of Indian airlines. India still has not passed legislation giving effect to the Cape Town Treaty. Thus, lessors and financiers may still find themselves at the mercy of Indian courts, preventing further growth in India's already distressed airline industry.

Conclusion

India's response to airline bankruptcy and attempts by lessors and financiers to repossess aircraft is still untested. Although SpiceJet provides the potential for India to rectify the damage caused by the Kingfisher case, if Kingfisher, however, is an indicator, the courts likely will be unsympathetic to the rights of lessors and financiers in the aviation industry. Their natural response will be to raise the barriers to financing or exit the market.

[1] Nithya Narayanan, *Aircraft Repossession in India – Turbulence Ahead, Buckle Up!*, 38 *Annals of Air and Space Law* 445-60 (2013).

[2] *India's Misbehaviour Undermines Cape Town Convention*, *Air Finance* (March 13, 2013), <http://www.airfinancejournal.com/Article/3341264/Indias-misbehaviour-undermines-Cape-Town-convention.html> [hereinafter *India's Misbehavior*].

[3] Ashwin Ramanathan & Ms. Nithya Narayanan, *Aviation Disputes in India: Flying Unchartered Skies*, *Acquisition International*, June 1, 2014, at 86.

[4] Narayanan at 445-60.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Kingfisher Suspension Raises Question for Lessors & Financiers, Could Add to India's Cost Pressures*, *Center for Aviation* (March 28, 2013), <http://centreforaviation.com/analysis/kingfisher-suspension-raises-question-for-lessors--financiers-could-add-to-indias-cost-pressures-102603>.

[10] Narayanan at 445-60.

[11] *India's Misbehavior*, *supra* note 2.

[12] Karthikeyan Sundaram, *Kingfisher Default Said to Raise Airline Costs: Corporate India*, *Bloomberg* (September 20, 2013), <http://www.bloomberg.com/news/articles/2013-09-19/kingfisher-default-said-to-raise-airline-costs-corporate-india> [hereinafter *Kingfisher Default*].

[13] *India's Misbehavior*, *supra* note 2.

[14] *Indigo FY13 Profit Rises to Rs 993 Crore*, *the Hindu* (Sept. 24, 2013), <http://www.thehindu.com/business/Industry/indigo-fy13-profit-rises-to-rs-993-crore/article5163806.ece>.

[15] *Kingfisher Default*, *supra* note 12.

[16] *India's Misbehavior*, supra note 2.

[17] Ministry of Civil Aviation Rules (3rd Amendment), 2015, Gazette of India, Rule 30(7) (Feb. 10, 2015).

[18] Legacy of Kingfisher Airlines Debacle Hangs over Repossession Row between BOC Aviation and SpiceJet, *AviTrader* (Jan. 23, 2015), <http://www.avitrader.com/2015/01/23/legacy-of-kingfisher-airlines-debacle-hangs-over-repossession-row-between-boc-aviation-and-spicejet/>.

[19] *AWAS 39423 Ireland Ltd. & Ors. v. Directorate General of Civil Aviation*, (2015) WP(C) 871/2015 India); & *Anr. And Wilmington Trust SP Services (Dublin) Limited v. Directorate General of Civil Aviation & Anr*, (2015) WP(C) 747/2015 (India).

[20] Court Asks DGCA Not to De-register SpiceJet Planes till April 6 (March 26, 2015), <http://profit.ndtv.com/news/industries/article-court-asks-dgca-not-to-de-register-spicejet-planes-till-april-6-749545>.

[21] Madras HC Allows Lessors to Issue Notice to SpiceJet on Winding Up Petitions (March 27, 2015), http://www.business-standard.com/article/companies/madras-hc-orders-to-issue-notice-to-spicejet-on-winding-up-petitions-115032600310_1.html [hereinafter *Madras HC Allows Lessors to Issue Notice*].

[22] SpiceJet Reaches In-Principle Settlement with BBAM (April 1, 2015), <http://dashboard.flightglobal.com/app/#/articles/410799?context=email>.

[23] *Madras HC Allows Lessors to Issue Notice*, supra note 6.

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