Aircraft leasing in India - a look at the DGCA's policy prescription

Introduction

Owning the "big bird" is an expensive affair. Long waiting periods for acquiring new aircrafts further makes it an unattractive proposition for airline operators to buy aircrafts. Therefore, it is a common practice in the airline business to take aircrafts on lease. Leasing not only helps in increasing the fleet size at a fairly quick rate but also, and more importantly, reduces the cost of airline operators. There are different types of leases depending on the terms and conditions of the agreement. In India, like across the world, aircraft leasing is quite prevalent. There is an entire gamut of legislations, viz. Directorate General of Civil Aviation (**"DGCA"**), the Reserve Bank of India, Income Tax regulations, which lessors and lessees have to consider in an aircraft leasing transaction in India.

The current bulletin is restricted to the important provisions prescribed by the DGCA in the context of aircraft leasing. It lists out the various aircraft lease arrangements and proceeds to highlight the DGCA provisions to be considered in case of aircraft leasing (dry and wet lease) in India.

1.0 Types of leases

There are primarily three types of leases: (i) ACMI (Aircraft, Crew, Maintenance, and Insurance), or the wet lease; (ii) dry lease; and (iii) damp lease.

1.1 ACMI or wet lease - In case of wet lease or ACMI, the lessor i.e. the company leasing out the aircraft provides the crew, including pilots, engineers and flight attendants, besides maintenance and insurance, to the lessee i.e. the company/airline operator who takes the aircraft on lease. The salaries of the crew are paid by the lessor and not the lessee. However, the cost of fuel, parking, landing etc are paid by the lessee. Irrespective of whether the plane flies or not, the lessee has to pay for the minimum guaranteed block hours fixed by the lessor.

1.2 Dry lease - A dry lease does not include crew, maintenance or insurance. The average tenure of a dry lease is typically more than two years. Dry lease is of two types: operating and finance. In case of an **operating lease**, an aircraft is leased out for a short period of time compared to its total life. For instance, if the life of an aircraft is twenty (20) years, it would be leased out for a period of about eight (8) years. Upon the end of the lease period, the lessee returns the aircraft to the lessor and there is no option for purchasing the aircraft. On the other hand, a **finance lease** is a long-term lease and the lessee can purchase the aircraft on the completion of the lease period. The lease payments are in excess of 90% of the market value of the aircraft and the term of the lease is over 75% of the aircraft's usable life.

1.3 Damp lease - Damp lease is wet lease sans the cabin crew, which means the lessor provides for maintenance and insurance of the aircraft it leases out but does not provide a crew to the lessee. However, in order to give initial guidance to the crew of the lessee, sometimes, the lessor provides a trainer on board for a limited period of time.

2.0 DGCA requirements

2.1 Criteria for leasing of aircrafts by Indian operators

I. Permission from the DGCA - DGCA permission is mandatory before leasing an aircraft in India.[1] An Indian operator can either take an aircraft on lease from a foreign operator or another Indian operator.

➢ Aircraft on lease from a foreign operator - Where the Indian operator intends to take a foreign registered aircraft on lease, charter or any similar arrangement from a person holding Air Operator Certificate (**"AOC"**) issued by another state, the following information has to be provided by the Indian operator to the DGCA at least forty-five (45) days[2] prior to the proposed date of operation with the leased aircraft:- **(a)** name and address of the Indian operator and the lessor; **(b)** aircraft details; **(c)** AOC details along with operations specifications, if any, of the lessor; **(d)** name and contact information of the State of Registry; **(e)** a copy of the letter of intent; **(f)** planned arrangements for operation and maintenance of aircraft during the lease period; **(g)** proposed date of import into India.

➢ Aircraft on lease from an Indian operator - In the event an Indian operator intends to borrow an aircraft on lease from an Indian operator (for domestic or international operations), the following information has to be provided to the DGCA at least forty-five (45) days prior to the proposed date of operation with the leased aircraft:- **(a)** name and address of the operator from whom the aircraft is intended to be leased; **(b)** AOC details along with operations specifications of the lessee and the lessor; **(c)** aircraft type, registration number and its main base; **(d)** maintenance agency with scope of approval; **(e)** a copy of the draft lease agreement and maintenance agreement; **(f)** any amendment proposed to be made in the Operations Manual or other relevant documents; **(g)** a document giving details of the respective responsibilities of compliance with regulatory requirements such as FDTL, arrangements for Flight Operations Quality Assurance, flight dispatch and responsibilities of the lessor and the lessee with regard to operation, maintenance and quality system of the aircraft.

Upon receipt of the above information, the DGCI finalizes the modalities for operation of the leased aircraft at a meeting with the Indian operator. Where the aircraft is taken on lease from a foreign operator, the representatives of the foreign operator and the regulatory authority are also allowed to participate in the meeting. The DGCA can conclude

[1] Section 3, Air Transport Series "C" Part I of the Civil Aviation Requirements lays down the criteria for leasing of aircrafts by Indian operators.

[2] The duration can be reduced in the following cases: (i) where the aircraft originally intended to operate the scheduled flight is grounded for technical reasons like maintenance, inspection, mandatory checks or any other reason; (ii) the existing lease agreement has expired and a new agreement is yet to be concluded; (iii) the aircraft has been leased or chartered to meet an emergency such as natural calamity, unrest or similar other situation; (iv) aircraft is supposed to be operated under a short-term lease not exceeding three months.

an agreement under Article 83*bis*[3] with the State Registry and the State Operator for transfer of certain regulatory functions. It also has the discretion to impose conditions while granting permission to the Indian operator for operations with the leased aircraft.

II. Lease agreement and stamp duty - Pursuant to the DGCA permission, the Indian operator can conclude a formal lease agreement with the lessor. The agreement should include the conditions decided by the State of Registry and the State of Operator and the ones imposed by the DGCA. A copy of the lease agreement has to be, thereafter, filed with the DGCA at New Delhi (the DGCA usually asks for a notarized copy from the airlines). The copy of the lease agreement does not attract stamp duty in the State of Delhi but it is necessary to stamp the lease agreement in the relevant state, (the state in which the airline is incorporated or has its operational base), prior to filing with the DGCA. Stamping is necessary to ensure that the lease agreement is enforceable in a court of law. In India, the stamp duty rates vary from state to state.

2.2 Requirements of dry lease[4]

1. Registration of aircraft - Operation of foreign aircrafts on dry lease requires registration of aircraft in India. The leased aircraft ought to have a valid Certificate of Registration (**"CoR"**) and Certificate of Airworthiness (**"CoA"**) and must be entered in the operating permit of the operator. According to Civil Aviation Requirements (**"CAR"**) regulations[5], registration of aircrafts can be done either in Category A or B. For leased aircrafts, the registration[6] falls under Category A. The registration of the aircraft is valid as long as the lease is in force and the aircraft is maintained and operated in accordance with (i) the DGCA regulations; (ii) the terms and conditions specified in the operator's permit; and (iii) the operator's maintenance control and operations manuals. The operator can apply to DGCA for extension of validity of the CoR.

2. Airworthiness of the aircraft - Once the aircraft is registered, the owner or his authorized representative has to apply to DGCA in a prescribed form together with the requisite fees prescribed in rule 62 of Aircraft Rules 1937 for obtaining CoA.[7] An application for issue of Aircraft Noise Certificate is also to be made along with the CoA application. CoA is valid for a period of twelve (12) months. In case of imported aircraft, the validity begins from the date of issue of Export Certificate of Airworthiness and is restricted to the validity specified in the Standard Certificate of Airworthiness issued by the country of export.

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[3] Article 83*bis* which entered into force on June 20, 1997, provides for the possibility of transferring certain functions and duties from the State of Registry to the State of Operator. The State of Registry shall be relieved of responsibility in respect of the functions and duties transferred. India has ratified Article 83*bis* and made changes in the local regulatory provisions, which allows for transfer of responsibility for airworthiness and operational control of leased aircraft operations.

[4] CAR Section 3, Air Transport Series "C" Part I, December 30, 1993

[5] CAR Series F, Part I, Section 2- Airworthiness dated September 10, 1998.

[6] The procedure for obtaining CoR has been covered in detail in our Aviation Bulletin- VIII, which can be accessed at http://psalegal.com/pdf/Aviation%20Bulletin%20-%20Issue%20VIII.pdf. Therefore, it is not being elaborated here.

[7] Idem.

Some of the other requirements relating to operation of aircrafts taken on dry lease are listed below: The Indian aircraft operator:

- is responsible for airworthiness and control of the aircraft;
- has to provide complete aircraft maintenance programme to the Regional Airworthiness office for approval including the issue of flight release, maintenance policy, storage lives of components;
- has to train its engineers and flight crew to the satisfaction of DGCA and obtain necessary approvals before maintenance or operation of the aircraft commences;
- should establish his own ancillary shops for investigation of failed components, repair and overhaul of the rotables installed on the aircraft or collaborate with other operators;
- should have an operations manual for the type of leased aircraft, which should be updated regularly. All the flight crew should be made thoroughly familiar with the contents of the manual before they start flying the aircraft type;
- should comply with all the safety regulations and fit the requisite instruments and equipments in the leased aircraft in accordance with the DGCA regulations;
- importing aircraft on lease has to ensure that all the Airworthiness Directives, modifications and inspections declared mandatory by DGCA are complied with even if their compliance is not mandatory in the country from where the aircraft is imported.

2.3 Requirements of wet lease[8]

Operation of foreign aircraft leased by Indian operators is normally permitted on dry lease basis. Import of aircraft for domestic air transport operations on wet lease basis is not permitted except in emergency situations and in the following circumstances such as the existing aircraft of an operator is grounded for maintenance/inspection checks or due to any other unforeseen reasons. (In such cases, wet leasing is permitted only for the duration of grounding of aircraft);[9] **OR** the existing aircraft is involved in some accident/incident or due to expiry of existing lease and delay in finalization of new lease agreement, there is a reduction in capacity of the operator; **OR** for revival of sick operators who should have an agreement with the lessor initially for wet lease for a period not exceeding six (6) months and, thereafter, automatic conversion to dry lease for the remaining period of lease; **OR** short term induction of capacity required to meet emergency situation such as natural calamity, industrial unrest or any other similar situation.

Other important provisions pertaining to operation of aircrafts on wet lease are:- **(a)** The State of Registry has to confirm that their legislation enables them to divest themselves of the functions and duties which are the object of the transfer agreement, agree for surveillance of aircraft operations and maintenance by DGCA, and furnish a letter from the concerned regulatory authority to this effect; **(b)** There should be a well defined agreement between the lessee and lessor stipulating that the Indian operator and DGCA will have the authority to exercise airworthiness and operational control on the wet lease aircraft operations; **(c)** the lessee and the lessor must hold a valid and current operating permit or AOC for the type of operations;

[8] CAR, Series C, Part-I, Section 3 dated December 30, 1993 and AIC 03/1998.
[9] The period of the lease includes transportation period required to and fro for replacement aircraft.

(d) the aircraft should not be older than fifteen (15) years since manufacture; **(e)** the aircraft should be free from any accident; in case of one, details thereof should be furnished to the DGCA; **(f)** the flight crew and the maintenance personnel have to comply with the Indian operator's and the DGCA's instructions and maintain the aircraft in accordance with the latter's regulations;[10] **(g)** the foreign crew and maintenance engineers can be deployed only after they are cleared by the security agencies and on issue of validation/approval by DGCA; **(h)** the aircraft has to be endorsed on the permit and Operations Specifications of the operator.

2.4 General requirements applicable to both dry and wet leases

For leased aircraft operations in India, the aircraft should have been type-certificated by Federal Aviation Administration of USA or Joint Airworthiness Authority of Europe or Civil Aviation Authority of UK or any other authority acceptable to DGCA. It is the operator's responsibility to confirm that the lease agreement does not contain any provision which will be binding the DGCA. The lessor, on his part, has to give an undertaking in the lease agreement that he will comply with all the applicable CAR rules. The DGCA can withdraw permission for operation of a particular aircraft in India under lease agreement if during service it is found that safety of the aircraft operations is in doubt or CAR requirements or any other safety rules have not being complied with.

Conclusion

The cost of purchasing an aircraft can be restrictive to an airline which wants to embark on or expand its fleet. Leasing enables the cost to be spread across many years and allows the operator to fly at a relatively economical price. Like in other jurisdictions, the process of aircraft leasing is fairly complex in India involving numerous paper work. By and large, Indian airlines take aircrafts on "dry lease". A "wet lease" is allowed only under few situations and is also more expensive than a dry lease. It is critical to negotiate the terms of the lease cautiously. One of the common disputes that arise in aircraft leasing is related to defaults in payment by the lessee and the lessor's subsequent attempt to re-possess and de-register the aircraft (the most recent case being GECAS's complaint against Kingfisher Airlines). As a result, the parties tend to get mired in long-drawn legal battles. Therefore, it is crucial for the transacting parties to negotiate carefully, have adequate built-in measures to avoid litigation, comply with all the regulatory compliances related to aircraft leasing to ensure a "high-flying" partnership.

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[10] In case of a violation, the DGCA can debar the operator from operating in India.