

INDIA SUMMARY NOTE ON
CAPE TOWN CONVENTION AND AIRCRAFT PROTOCOL

1. Accession

On November 26, 2007, the Indian Government approved India's accession to the Cape Town Convention on International Interest in Mobile Equipment ('Convention') and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment ('Protocol'). On March 31, 2008, India filed the articles of accession to the Convention and the Protocol, and the Convention came into force on July 1, 2008 after the mandatory three-month period.

India has made certain declarations under the Convention and the Protocol, a copy of which is [Annexure A](#).

2. Necessity for legislation?

Once ratified, international conventions and treaties have the force of law and do not per se need independent legislations. However, if there is a conflict with the municipal laws of India, latter will prevail¹(see para 3 below).

It appears that the Government of India did not wish to bring in legislation, even in short form, for certain political reasons, but has been careful in making declarations under the Convention that it hoped will not fall foul of the existing municipal laws. However if it does, the Courts will interpret the provisions so as to give effect to the intention. Otherwise, municipal laws will prevail as stated below in para 3.

¹ See *Maganbhai Ishwarbhai Patel v. Union of India* (AIR 1969 SC 783) and *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey* (AIR 1984 SC 667).

3. Supremacy of municipal laws

As stated, the President's executive power to enter into treaties remains unfettered.² The executive power of the Government is coextensive with the legislative powers of the Parliament. The treaty making function is exercised and regulated by the Executive, absent legislation on the subject. In practice of course, the President of India does not negotiate treaties. Plenipotentiaries do so. The President ratifies and signs under advise of the Government.

Under Article 253 of the Indian Constitution, Parliament has power to enact laws for the whole or any part of India in order to implement treaties and international agreements, irrespective of the State list, Union list, or the Concurrent list³.

It is now well established by various judicial pronouncements⁴ that in case of a conflict between an international treaty and clear and unambiguous statute, the Courts will give effect to the statute. If such law is ambiguous, the Courts will adopt the doctrine of harmonious construction so as to avoid a conflict. Indian practice appears to be similar to the English and the American practices. We understand that international law is not always enforceable in the municipal Courts of England, and the United States. Municipal Courts give effect to international law, if it does not conflict with the municipal law.

4. Grey areas

A perusal of the Indian declarations reveals certain grey areas: for instance Article 16 of the Convention provides for setting up of an International Registry in Ireland where interests in the aircraft, engines, etc. including assignments are registered. Per Article 29, a registered interest has priority over other interest subsequently registered and over unregistered interests. However, in bankruptcy proceedings in India, workmen's dues and secured creditors' dues have priority over other debts and if the assets of the company are insufficient, then such dues abate in equal proportion.

² Extracts from statement of the Government of India on national laws and practices in the matter of conclusion of treaties made in response to a circular letter addressed by the Secretary General of the United Nations to Government in January 1951, U.N. Doc.ST/LEG/SER.B/3 December 1952, PP.63 -64.

³The Constitution of India divides legislative powers between the Federal Government (Union list) and the various State Governments (State list). Under Concurrent list both (Federal and State Governments) are empowered to enact laws.

⁴ *Jolly George Varghese v. Bank of Cochin* (AIR 1980 Supreme Court p.470); *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey* (AIR 1984 Supreme Court p.667).

Per the Indian declarations made under Article 39(1)(a) of the Convention, following categories of non-consensual right or interest have priority over an interest in an aircraft object, equivalent to that of the holder of a registered international interest and have priority over registered international interest, whether in or outside insolvency proceedings:

- (a) *liens in favour of airline employees for unpaid wages arising since the time of a declared default by that airline under a contract to finance or to lease an aircraft object;*
- (b) *liens or other rights of an authority of India relating to taxes or other unpaid charges arising from or related to the use of that aircraft object and owed by the owner or operator of that aircraft object, and arising since the time of a default by that owner or operator under a contract to finance or lease that aircraft object; and*
- (c) *liens in favour of repairers of an aircraft object in their possession to the extent of service or services performed on and value added to that aircraft object.*

In absence of declaration by India with respect to Article 8 of the Convention, secured creditors can exercise following remedies, in an event of default, without going to Court:

- (i) take possession or control of any object charged to it;
- (ii) sell or grant a lease of any such object; or
- (iii) collect or receive any income or profits arising from the management or use of any such object.

Although, the Convention and the Declarations permit ‘self help’ and provide for speedy interim reliefs as enumerated in Articles 8 and 13⁵, it is not easy to take

⁵ Article 8 of the Convention: provides that subject to any declaration made by the Contracting State under Article 54, the chargee may-

- (a) take possession or control of any object charged to it;
- (b) sell or grant a lease of any object; and
- (c) collect or receive any income or profits arising from the management or use of any such object.

Article 13 of the Convention: provides that the Contracting State shall ensure that pending final determination of a creditor’s claim, it can obtain from a court speedy relief in the form of:

- (a) preservation of the object and its value;
- (b) possession, control or custody of the object;
- (c) immobilisation of the object;
- (d) lease or, except where covered by sub-paragraph (a) to (c), management of the object and income therefrom.

physical control or possession of such equipment, income or profit without backing of law. An analogy can be drawn with recovery agents of banks, in which case the Reserve Bank of India (Central Bank of India) has issued certain guidelines which make 'self help' remedy by use of force unlawful. The said guidelines prescribe safeguards in this context, a copy of which is [Annexure B](#).

The ten day period for grant of interim reliefs (provided by Article 13 of the Convention), though not in conflict with municipal law, is not of much practical application in certain Courts. In some others, relief can be expected fairly quickly anyway, sometimes within two to three days. Existing Indian legislation requires Courts to grant relief within certain fixed time periods, but in practical terms, this again depends very much on the particular Court.
