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The interplay between the Cape Town Convention and insolvency law when a private airline company undergoes liquidation in India

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Overview of the aviation insolvency proceedings before Indian courts

In India, the Insolvency and Bankruptcy Code (IBC) was introduced to safeguard stakeholders' interests and facilitate the restructuring of enterprises to continue their operations. Presently, the IBC governs all insolvency proceedings including the aviation industry.

The Corporate Insolvency Resolution Process (CIRP) under the IBC is initiated when the corporate debtor either voluntarily or involuntarily, (ie by any corporate creditor), files for insolvency. Once the application is made, and once the matter is admitted, the authority imposes a moratorium period on the corporate debtor to protect the interest of the corporate debtor. During such period, an interim resolution professional is appointed to regulate the operation of the corporate debtor, the IRP calls for claims from creditors and forms a committee of creditors. Thereafter, the resolution professional prepares a resolution plan for the corporate debtor which is to be approved by the committee of creditors and, on the basis of this plan, the company is restructured or the debts of all creditors are paid, proportionate to the assets of the company.

In May 2023, Go First ('Corporate Applicant'),^[1] one of India's private airlines, voluntarily filed for insolvency due to persistent issues with the supply of aircraft engines by Pratt & Whitney. The insolvency application was filed by the company itself based on a self-disclosed default of Rs. 330 crores towards interest to financial creditors and a total debt of Rs. 1,000 crores towards aircraft lessors and vendors. Despite strong opposition from financial creditors and aircraft lessors, the application was admitted by the Hon'ble National Company Law Tribunal (NCLT). On a subsequent

appeal, the Hon'ble National Company Law Appellate Tribunal (NCLAT) upheld the decision, dismissing the contention of malicious intent behind the insolvency filing.

Before the NCLAT one of the issues was the possession of the aircrafts of Go First. The argument by the lessors before the NCLAT was that the lease agreement was terminated by the lessor prior to the CIRP application as Go First had defaulted in payment, hence, Go First lacks legal grounds to claim possession and moratorium under Section 14(1)(d)[2] of the IBC on the lessor's assets. The lessors' termination of lease agreements aims to prevent their aircraft from being held by the Corporate Applicant during the moratorium. One of the most important aspects of airline operation is the aircraft itself. Deregistration and return of the aircraft to the lessors diminishes the value of an airline company. Section 14(1)(d) of the IBC aims to consider the corporate debtor as a going concern, where the corporate debtor can be revived by proper management and the dues of the corporate creditor to be repaid. On the other hand, CTC is more inclined towards protecting the interest of the lessors by ascertaining that they expeditiously regain the possession of their aircraft.[3] The IBC has proven to create a balance, as its provisions have both protected the interests of the corporate debtor and the going concern status of the business, while also posing challenges for lessors. While Section 14(1)(d) of the IBC aims to preserve the Corporate Debtor's assets by imposing a bar on lessors from asset recovery, the Indian aviation sector necessitates a comprehensive framework to safeguard lessors' interests amid the moratorium provisions.

The Ministry of Corporate Affairs' treatment of exception to 'moratorium' under IBC

The Ministry of Corporate Affairs (MCA) issued a notification dated 03.10.2023,[4] invoking Section 14(3)(a)[5] of the IBC, to delineate exceptions to the moratorium. This notification delineates that Section 14(1) of the IBC, imposing a moratorium, does not extend to transactions, arrangements or agreements governed by the Convention and the protocol concerning aircraft, aircraft engines, airframes and helicopters. India, a signatory to the Convention and the protocol since 31.03.2008, deposited its instruments of accession with the International Institute for the Unification of Private Law.

The purpose behind the MCA's moratorium notification is to facilitate lessors in promptly reclaiming their aircraft from airlines. By aligning with the CTC, the Indian government formally ratifies this international agreement, granting priority to the CTC over domestic bankruptcy laws. This action complements Section 14 of the IBC, which imposes a moratorium on proceedings and asset transfers upon commencement of insolvency. It also corresponds with the Cape Town Convention Bill, introduced by the Ministry of Civil Aviation in 2018, aiming to harmonise Indian insolvency law with the CTC's provisions.

This governmental intervention aims to restore confidence among aircraft lessors in the Indian market by assuring that the moratorium does not hinder their rights. It is anticipated that this measure will foster more international participation in the aircraft leasing market, aligning with India's aspiration to emerge as a leading hub for aircraft leasing. The notification is perceived as a significant step towards creating secure and reliable business opportunities in the aviation sector, especially for the



ft lessors.



rding its binding effect, the MCA's notification aligns with the CTC.



ever, due to the Convention predating the IBC, the notification does not have a retrospective effect on the airline industry. Further, it is pertinent

te that this notification is applicable only for CIRP proceedings. In

to apply the CTC procedure in India and give lessors the ability to

er their leased aircraft or equipment from a corporate debtor during a

moratorium, the MCA produced a bill in 2018, which is under public

consultation. This notification represents the CTC Bill in part. There is still

uncertainty over the applicability of MCA notification dated 03.10.2023 to

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ongoing bankruptcy cases, though it does imply a possible decrease in leasing costs and a return of legal confidence. The fact that insolvent airlines don't have protection during the CIRP due to absence of a moratorium period might makes it difficult for them to keep running smoothly, which in turn can adversely affect the other stakeholders.

A comparison of CTC with Indian insolvency law in the aviation sector

The CTC, along with the protocol specifically addressing Aircraft Equipment (Aircraft Protocol) of 2001, constitutes a global framework of treaties aimed at protecting the interests of lessors in the event of default by lessees.^[6] The primary objective of the CTC is to facilitate the financing of high-value aircraft, engines and spare parts by reducing the risk for lessors and establishing procedural remedies for them. In pursuit of this goal, the Aircraft Protocol contains certain provisions, such as those outlined in Article XI regarding Remedies on Insolvency, which offer effective recourse to creditors in cases of default, including interim measures such as the de-registration and export of aircraft.^[7]

The application of the CTC within the Indian legal framework, particularly concerning insolvency proceedings in the aviation sector, presents a complex situation. A fundamental disparity exists between Indian insolvency laws and the provisions of the CTC. The essence of the CTC lies in establishing a common legal regime for the leasing and financing of high-value aviation assets in order to make the operations as cost-effective and affordable as possible.^[8] This objective primarily benefits creditors, particularly aircraft lessors, and other stakeholders within the aviation industry.

By contrast, Indian insolvency legislation IBC serves dual purposes. Firstly, it endeavours to rescue viable businesses, and secondly, it facilitates the exit of non-viable entities.^[9] The IBC addresses the reorganisation and insolvency resolution of corporate debtors, partnership firms and individuals. The crux of contention lies in the differing priorities between the CTC and the IBC. While the CTC prioritises minimising losses and expenses for creditors, including aircraft lessors, the IBC focuses on revitalising corporate debtors and preserving their status as going concerns.

In the landmark case of Gujarat Urja Vikas Nigam Ltd. v Amit Gupta,^[10] the Hon'ble Supreme Court underscored the significance of maintaining the 'going concern' status of debtors by preventing the termination of critical agreements, such as power purchase agreements. Similarly, applying the principles of the CTC to the Indian legal and business landscape, leased aircraft emerge as indispensable assets crucial to the operation of airline companies.

There is a conflict between the Indian insolvency law and the contractual rights of the aircraft lessor when repossessing the aircraft once the airline company goes into insolvency. This is the moratorium of 180 days, which can be further extended to 90 days thereby prohibiting various actions, including repossession of assets held by the corporate debtors. Under the CTC it is 60 days, after which aircraft lessors can repossess the aircraft.

This clearly indicates that the 60 day 'waiting period' under the Alternative A of the protocol, is directly in conflict with the moratorium under Section 17 of the IBC.^[11]

Conclusion

Insolvency is more complex than insolvencies in other sectors due to the international mobility of assets and protection of interest of the party. When these airlines default on the rentals or go bankrupt, the lessors and other stakeholders suffer loss. The insufficiency of IBC with respect to lessors' rights over the repossession of aircraft is ultimately resulting significant loss to them and subsequently affecting India's international participation in the aircraft lease market, as they start terminating lease agreement and deregistration of the aircraft.

However, the recent Notification issued by the MCA represents a positive step forward, particularly in its efforts to harmonise the Indian insolvency law for the aviation sector with the CTC. The case of Go First indicates that a harmonious construction and interpretation is required to recognise the right of the aircraft lessor under contract (ie the lessee airline company when it goes into bankruptcy and the need to repossess aircraft as per the contract). The interpretation of insolvency law to revive the airline business is a going concern in keeping the interest of the other party, for example bankers, creditors, lenders and employees of the airline. Whereas the government by MCA notification tried to comply with CTC terms to reduce the moratorium from 180 days to 60 days to facilitate aircraft lessors to get repossession of their aircraft.

India's ratification of the CTC provisions and adherence to its compliant international practices regarding aircraft exports are crucial. This move would provide relief to aircraft lessors, fostering their engagement in the Indian market, and offer airlines competitive leasing rates for aircraft within the country. Furthermore, the recent order by the Hon'ble Delhi High Court on 26 April 2024, instructing the Directorate General of Civil Aviation to process the deregistration applications for Go First's aircraft, highlights the ongoing challenges and legal intricacies faced by lessors in the aviation sector. The Resolution Professional of Go First was also restrained from removing any parts or documents from the planes and was ordered to provide updated information to the lessors. This ruling not only impacts aircraft lessors serving Indian airlines but also affects SpiceJet and EaseMyTrip, who submitted a joint bid for Go First. By upholding the rights of lessors and ordering expeditious deregistration process, the court's decision establishes a precedent for future disputes to be resolved expeditiously in the aviation sector.

Decisions about deregistration, pending rental dues, lease commitments during moratorium, aircraft export and lease renegotiations have both legal and economic impacts on the aviation industry. It's important for India's legal and regulatory systems to provide clarity and certainty, enabling efficient aviation financing and leasing activities. Thus, there is a need to expeditiously resolve the existing disputes in the aviation industry in line with the law that is best applicable to the current situation. Thus, it is needless to say that the Indian legislations and courts have initiated steady steps towards safeguarding the rights of lessors.


In the long run, it appears that India is ready to adopt the international convention to safeguard the overall aviation sector in India so that Indian aviation companies can get aircraft leases at a competitive price.


Notes

[1] Go Airlines (India) Limited Company Petition No. (IB) – 264/(PB)/2023

[2] Insolvency and Bankruptcy Code- Section-14(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: — (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

[3] Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment, signed at Cape Town on 16th November

 Ministry of Corporate Affairs, New Delhi, Notification No. S.O. 4321(E) dated 13rd October, 2023

 Insolvency and Bankruptcy Code- Section-14(3) The provisions of sub-section (1) shall not apply to (a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority

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[insolvency-with-aviation-financing](https://www.orfonline.org/expert-speak/tackling-india-s-airline-insolvency-with-aviation-financing-reforms#:~:text=the%20aircraft%20object,.CTC%20and%20its%20protocol%20are%20global%20legal%20frameworks%20that%20pro)

[reforms#:~:text=the%20aircraft%20object,.CTC%20and%20its%20protocol%20are%20global%20legal%20frameworks%20that%20pro](https://www.orfonline.org/expert-speak/tackling-india-s-airline-insolvency-with-aviation-financing-reforms#:~:text=the%20aircraft%20object,.CTC%20and%20its%20protocol%20are%20global%20legal%20frameworks%20that%20pro)

[7] <https://indiacorplaw.in/2019/08/murky-case-aviation-insolvency-india.html>

[8] <https://awg.aero/project/cape-town-convention/#:~:text=CTC%20is%20a%20treaty%20designed,thereby%20providing%20substantial%20economic%20benefits>.

[9] www.ibbi.gov.in/uploads/publication/e42fddce80e99d28b683a7e21c81110e.pdf

[10] Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta AIROnline 2021 SC 123.



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