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The Dichotomy Between Insolvency Laws And Capetown Convention Amidst GoFirst Insolvency

This article stresses the need for reforming the aircraft laws of India to make it a more amenable jurisdiction for aircraft lessors

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03 July, 2023
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foreign investments, and aviation was a major focus industry leading to the creation of prominent private airlines in India including IndiGo, SpiceJet, and AirAsia India, among others. The growth of the aviation industry has also led to the emergence of fairly new private airlines such as Vistara and Akasa Air.

These airlines often, to save costs and get their hands on the new technological advancements opt to take aircraft on lease instead of purchasing them. This allows airlines to have access to a fleet of aircraft without the significant upfront capital investment required for purchasing new planes. Statistically, around 80% of the total commercial fleet in India is leased compared with 53 per cent globally. Avolon was the largest lessor to Indian airlines, with GE Capital Aviation Services and BBAM at the second and third positions respectively.

Leasing also offers flexibility in terms of fleet size, enabling airlines to adjust their capacity according to market demand. Lessor companies look for jurisdictions that are favourable for them, with lower tax rates along with a way to safeguard their investments, to ensure a fair return on their assets. These jurisdictions in turn lower the cost of leasing which is favorable for lessees. Maintaining this balance between economic freedom for airlines and the interests of lessors is essential for a healthy and sustainable aviation industry.

However, the recent order of the Delhi NCLT, dated May 10, 2023, ordered a moratorium on Go First's assets and did not allow the lessors of Go First aircraft to take the aircraft back from Go First. The lessors filed an appeal against the NCLT order, which was also heard by NCLAT, but NCLAT upheld the order of NCLT Delhi. This interpretation of the NCLT Order that the aircraft leases are the property of Go First and therefore the moratorium applied, is in conflict with the Cape Town Convention.

This article stresses the need for reforming the aircraft laws of India to make it a more amenable jurisdiction for aircraft lessors.

The Cape Town Convention And The Aircraft Protocol

The Convention on International Interests in Mobile Equipment, popularly known as the Cape Town Convention (CTC) and the Protocol on Matters Specific to Aircraft Equipment (Aircraft Protocol), 2001 is a framework of global treaties designed to safeguard the lessors' interest in case of default by the lessee. The CTC/Protocol's primary goal is to achieve efficient financing high-value aircraft, engines and spare parts by lowering a lessor's risk and creating procedural remedies for the lessor. To that end, the Aircraft Protocol has certain provisions (Article XI- Remedies on Insolvency) that provide an effective remedy to the creditor in circumstances of default, including de-registration and export of aircraft as a measure of interim relief.

The Article XI – Remedies on insolvency

Alternative-A

Upon the occurrence of an insolvency related event, the insolvency administrator or the debtor as applicable, shall subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of :

- a)End of the waiting period
- b)The date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.

In furtherance of this, India has lodged certain declarations under the aircraft protocol at the time of the deposit of its Instrument of Accession that state:

Form No. 23 (General declaration under Article XXX(3) in respect of Article XI providing for the application of Alternative-A in its entirety to all types of insolvency proceedings)

India will apply Article XI, Alternative A, of the Protocol in its entirety to all types of insolvency proceedings, and that the waiting period for the purposes of Article XI(3) of that Alternative shall be two (2) calendar months."

This effectively means that Aircraft Lessors ought to get possession of their aircraft within 2 months of declaring insolvency. The core issue for conflict, however, is that while India has acceded to the convention in 2018, it has not been ratified by Parliament, which means it is not yet law in the country. Hence, any other standing law including the Insolvency and Bankruptcy Code, 2015 has primacy over the convention. The 2018 bill gave an overriding provision over all other Indian acts, including the IBC, 2016.

However, the government came up with another Bill in 2021, called as the draft Protection and Enforcement of Interests in Aircraft Objects Bill, 2022, which states that notwithstanding the provisions of moratorium or interim-moratorium, under the IBC, the debtor or the insolvency administrator, whosoever has custody of the aircraft object, shall give possession of the aircraft object to the creditor within 2 months. This bill was put out for public comments in April 2022, but it has not been introduced in

India's Aviation Laws: A Comprehensive Legal Framework

India has adopted many international aircraft best practices, such as maintaining aircraft registers and recording leases, to safeguard the interests of aircraft lessors and financiers. Initially, the DGCA required clarification from the concerned operator before deregistering of the Aircraft under the Irrevocable Deregistration and Export Request Authorization (IDERA) process established by the Cape Town Convention.

However, this was changed when the Government of India made certain amendments to the Aircraft Rules, 1937 ('Aircraft Rules') which came into force on February 9, 2015, as the Aircraft (Third Amendment) Rules, 2015. The amendment essentially inserted Rule 30(7) which is in pari materia with Article IX(5) of the Protocol that provides for deregistration and export provisions. Post this, the High Court of Delhi in *Wilmington Trust SP Services (Dublin) Limited Vs. DGCA & Ors* held that the insertion of Rule 30(7) did not provide the DGCA with any discretion once an application for deregistration was filed and it was a mandatory provision. Therefore now, no clarifications need to be taken from the airlines operator. The DGCA now has to deregister an aircraft, within five (5) working days, when the party holding an IDERA files an application for deregistration under Rule 30(7) of the Aircraft Rules.

The Aircraft Rules were further amended in 2017 to insert Rule 32A which provides that upon an application being made by the IDERA holder for export of the Aircraft, once the registration of an Aircraft is cancelled under Rule 30(7) of the Aircraft Rules, the DGCA shall take action to facilitate the export and physical transfer of the aircraft, along with the spare engine, if any, subject to payment of dues and compliance with applicable safety rules and regulations, relating to that aircraft operation.

The DGCA issued the Standard Operating Procedure ('SOP') on November 16, 2018, to resolve a few procedural complications that arose regarding Rules 30(7) and 32A of the Aircraft Rules. The SOP provides a definitive set of actions which the creditor may need to take to export the aircraft from the Indian jurisdiction once it is deregistered under Rule 30(7) of the Aircraft Rule

The Conflict Between IBC And The Cape Town Convention

Section 14(1)(d) of the IBC gives a provision of moratorium which bars the recovery of any property by a lessor of the property that is in possession of the lessee. This moratorium period under IBC lasts until the Corporate Insolvency Resolution Process ends which has a time limit of 180 days, extended further by 90 days. This effectively means that the aforementioned Alternative A's "waiting period" of 60 days under the Protocol, is in direct conflict with the moratorium under section 14 of the IBC. This conflict results in the IBC, 2016 getting primacy due to it being a special national law compared to the Cape Town Convention which is a general international treaty.

Further, the overriding provisions of the Cape Town Convention Bill of 2018 and 2021 will have their conflicts with Section 238 of the IBC who also states that IBC will have an overriding effect over any inconsistent existing law.

The Need For Swift Implementation Of The Cape Town Convention

The GoFirst case is the first time an airline has filed a petition for voluntary insolvency and the conflict between the laws stands more prominent than ever. Timely ratification and incorporation of the Convention into domestic legislation are crucial in ensuring that India's aviation laws align with global standards. India can enhance legal certainty, attract foreign investment, and foster a conducive environment for aviation financing and leasing activities.

The recent Go First bankruptcy case underscores the urgent need for India to ratify and implement the Convention, ensuring the protection of stakeholder's right and promoting a stable and vibrant aviation industry.

Conclusion

As India is a huge market, for leasing companies where private airlines are largely dependent on aircraft lessors, it is not merely a legal conundrum, but also an economic necessity to implement the Cape Town Convention. The need for separate legislation cannot be stressed enough to alleviate the fears of aircraft leasing companies. Imposing moratorium under IBC not only affects the lessors as they suffer loss for not being able to lease out their planes to other companies, but also cost the corporate debtors/ defaulting airlines who bear the costs relating to parking charges of aircrafts, which they may not be able to use.

In light of the latest news that the Government of India is planning to introduce the Cape Town Convention Bill in the monsoon session of Parliament it is crucial at this juncture that the bill be voted and passed. Furthermore, it is required that a clarification be issued that the proposed Cape Town Convention Act holds primacy over IBC. In the alternative, provisions can be added that under Section 14(3) of the Insolvency and Bankruptcy Code, the transactions within the scope of CTC are exempted from general insolvency stays. Therefore, CTC compliant practices by the civil aviation authority and other Government authorities responsible for the export of aircraft objects must be established. Only then this dichotomy be resolved and aircraft lessors get confidence

market for aircraft lessors and give a boost to the aviation sector in India.

It is important for India to ratify the provisions of Cape Town Convention and adopt CTC- compliant international practices when it comes to exporting of aircrafts. This will give relief to aircraft lessors and encourage them to conduct business in India and give airlines a competitive rate to lease aircrafts in India.

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