



**Himachal Pradesh National Law University, Shimla (India)**  
**JOURNAL OF LAW, BUSINESS AND ECONOMICS (JLBE)**

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Journal Articles

ISSN: 2584-0436

JLBE

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Volume II (2023)

**TURBULENCE ON THE GROUND: An In-Depth Analysis of  
Rights of Aircraft Lessors and Airline Insolvency in India**

Rishabh Bansal & Ayushman Chouksey

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Recommended Citation:

Rishabh Bansal & Ayushman Chouksey, *Turbulence on the Ground: An In-Depth Analysis of Rights of Aircraft Lessors and Airline Insolvency in India*, II JLBE 128 (2023).

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# **TURBULENCE ON THE GROUND: An In-depth Analysis of Rights of Aircraft Lessors and Airline Insolvency in India**

*Rishabh Bansal\* & Ayushman Chouksey\*\**

[Abstract: *The present work aims to study the current rights of aircraft lessors in India which appear to contravene the provisions of the Insolvency and Bankruptcy Code, 2016. It offers a descriptive study as regards the provisions of the Cape Town Convention, 2001 and its implementation in India, while at the same time comparing it with other countries. Central to this discourse is the intricate challenge faced by lessors of leasing high valued aircrafts to airline companies making it extremely difficult for them to repossess their assets in case of debtor's insolvency. This causes the lessors to be in a labyrinth of pending suits for recovery while at the same time causing the planes subject to potential deterioration due to grounding of them until the moratorium period gets over under section 14 of current Insolvency and Bankruptcy code, 2016. Additionally, it explores the technicalities involved in the whole process of deregistration and repossession of the aircrafts of the lessors. It begins with an analysis of the Go-First Airline and its ramifications on the laws of insolvency, and tends to propound suggestions as to a requirement for a full-fledged legislation in India securing the protection and promotion of Aircraft lessors in India.*]

## **I**

### **Introduction**

From the end of nineteenth century, when two American gentlemen named Orville Wright and Wilbur Wright with a dream in their mind flew first successful motor-powered flight over North Carolina on 17<sup>th</sup> December, 1903 to it becoming the fastest mode of transit carrying a humongous sum of passengers every day, aviation industry has come a long way. The International Civil Aviation Organization

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(ICAO) is the main agency regulating the aviation sector in the world.<sup>1</sup> According to a study there are over 5000 airlines with ICAO codes. The world's largest airline in terms of passengers carried and fleet size is American Airlines.<sup>2</sup>

Boiling down to India, according to the Ministry of Civil Aviation, approximately 190.60 million passengers (both international and domestic) were carried off with 14 airlines operational in India.<sup>3</sup> The largest airline in India is Indigo covering about 48 destinations and operating about 1000 flights daily. Some other airlines include SpiceJet, Vistara, Go First, Air India etc. barring the Pandemic struck year, India's Aviation Sector has seen a constant bloom for the past 20 years.

One of the most common aircraft used by commercial airlines i.e. Boeing 737 has an average cost of \$99.7 million, this price could be as high as \$200 million depending upon the size of the aircraft.<sup>4</sup> Owing to this hefty sum of investment at one go it would not be viable for a newly entered player in the aviation industry to altogether buy an aircraft rather it would prefer leasing such planes. As per a report by PwC, about 80% of total commercial fleet in India is leased opposed to 53% globally. A significant factor affecting such airlines to opt for leasing is as most Indian airlines are relatively new and haven't reported consistent profits in the last fiscal years.<sup>5</sup>

Moreover, there is always a continuous change in technologies and trends in this sector which also justify these leases, it becomes easier for airlines to induct new aircrafts so that more and more profit could be yielded and competition could be constrained. Leasing is also a viable option when it comes to an easy financing environment as it is driven by liquid credit markets, lower interest rates and taxation benefits. As of 2018, Avolon an Ireland based Aircraft leasing company had the greatest no. of leases to Indian airlines. In addition to this, leasing of aircraft engines which is a subsequent step is also crucial. Major aircrafts engine lessors to Indian airlines include CFM International, Rolls-Royce, Pratt & Whitney etc.

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<sup>1</sup> Smithsonian National Air and Space Museum, *1903 Wright Flyer*, May 1, 2022, available at <https://airandspace.si.edu/collection-media/NASM-NASM2022-00100A-000001> (last visited on October 12, 2023).

<sup>2</sup> Travel Pedia, *How many airlines in the world?* September 18, 2023, available at <https://lovethemaldives.com/faq/how-many-airlines-in-the-world> (last visited on October 12, 2023).

<sup>3</sup> Ministry of Civil Aviation, Directorate General of Civil Aviation, Aircraft Act, 2020, *HANDBOOK OF CIVIL AVIATION STATISTICS*.

<sup>4</sup> SKYTHOUGH, *How Much Does A Boeing Plane Cost?* June 21, 2023, available at <https://www.skytough.com/post/boeing-plane-cost#:~:text=Boeing%20737%20costs%20an%20average,an%20average%20of%20%24418.4%20million> (last visited on October 12, 2023).

<sup>5</sup> PwC, *Aircraft leasing in India: Ready to take off*, February 2022, available at <https://www.pwc.in/assets/pdfs/research-insights/2021/aircraft-leasing-in-india-ready-to-take-off.pdf> (last visited on October 12, 2023).

Furthermore, India, which is one of the major aviation markets in the world, has an opportunity for providing financing up to USD 100 billion in the aircraft leasing segment in the next 20 years.<sup>6</sup> However this path does not seem to be a cakewalk as there are many precedents proving the challenges many airlines have faced in the sector which led to dire consequences. From Kingfisher in 2012 to Jet Airways in 2019 to recently Go First, airlines have been struck in their own turbulence.

## II

### Aircraft Leasing

As regards leasing of Aircrafts some crucial definitions are provided in chapter 2 of the Aircraft Leasing Manual released by the DGCA (The main regulatory agency governing aircrafts and flights in India).<sup>7</sup> As per the Civil Aviation Requirements (CAR) Section 3 series C part 1, any aircraft to be leased to an Indian operator or any aircraft given in lease to a foreign operator by any Indian player permission from the DGCA is mandatory which may either permit a short term leasing or take a decision under Article 83 bis of the Chicago Convention.<sup>8</sup>

It is noteworthy that India has officially ratified The Convention on International Civil Aviation, also known as the Chicago Convention, established the International Civil Aviation Organization, an expert agency of the United Nations charged with synchronizing international air travel. According to Article 83 bis of this convention, the state of registry may by agreement with the state of operator transfer some or all the responsibilities and functions regarding the aircraft. Once this transfer of responsibilities is done, the state of registry would not be accountable to the state of operator as regards to such responsibilities.<sup>9</sup>

Leasing of aircraft is a complex procedure and may sometimes lead to dire circumstances. Lease has been defined in chapter 2 of the Aircraft Leasing Manual,<sup>10</sup> as an agreement by a person (the lessor) to furnish an aircraft to another person (the lessee) to be used for compensation or hire purposes for a specified period or a defined number of flights. An AOP (Air Operator Permit) is necessary for any

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<sup>6</sup> The Economic times, 'India has USD 100 bn financing opportunity in aircraft leasing space in next 20 years', May 04, 2023, available at <https://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/india-has-usd-100-bn-financing-opportunity-in-aircraft-leasing-space-in-next-20-years/articleshow/99991492.cms?from=mdr> (last visited on October 12, 2023).

<sup>7</sup> Aircraft Leasing Manual, 2017, chapter 2.

<sup>8</sup> Civil Aviation Requirements, 2010, series C, part I.

<sup>9</sup> Convention on International Civil Aviation, December 7, (1994) 15 U.N.T.S. 295.

<sup>10</sup> Aircraft Leasing Manual, 2017, chapter 2.

organization or business that wants to engage in commercial aviation transportation.

In most lease agreements the state which issues such AOP is different from the state where the aircraft is registered in, therefore, making it necessary for both the lessors and the lease to know the requirements of states of registry and state of operation. As regards the registration and de-registration procedure is defined in rule 30 of the Aircrafts Rules, 1937,<sup>11</sup> and Airworthiness Procedures Manual Part II Chapter 1.<sup>12</sup>

### III

#### **Rights of Aircraft Lessors in India**

The Indian aviation industry is on the brink of crisis as the Aviation Working Group (AWG), a US based aircraft leasing watchdog released its report negating India's position for the second time. It has reduced India's score to 2 from 3.5 last year out of 5 in compliance rating.<sup>13</sup> This report substantiates the stand of Aircraft lessors to India, claiming an unprecedented decline in their rights. Consequences of this would be detrimental to the Indian Aviation Industry like increase in the leasing rates and ultimately resulting in costlier flight tickets. This would also result in loss of confidence of international lessors in India.

Though India has for a long time recognized these rights of the Aircraft lessors, but often these rights collide with the provisions of the IBC, 2016. It was here where things began to complicate a bit. The Aircraft Rules, 1937,<sup>14</sup> recognizes the rights of the lessors to initiate the process of deregistration and repossess the aircraft. But at the same time as per section 14<sup>15</sup> of the Insolvency and Bankruptcy Code, 2016, the adjudicating authority can issue a moratorium on such acts of repossession of aircrafts by the lessors if the lessee has filed for corporate insolvency resolution process. But it is established law that whenever there is a conflict between a rule and

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<sup>11</sup> Aircraft Rules, 1937, Rule 30.

<sup>12</sup> Airworthiness Procedures Manual, 2018, chapter 1.

<sup>13</sup> The Economic times, *Aviation leasing watchdog issues warning to India over plane repossessions*, May 12, 2023, available at <https://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/aviation-leasing-watchdog-issues-warning-to-india-over-plane-repossessions/articleshow/100181300.cms?from=mdr> (last visited on October 12, 2023).

<sup>14</sup> Aircraft Rules, 1937.

<sup>15</sup> The Insolvency and Bankruptcy Code, 2016, §14.

an Act passed by the parliament the latter prevails. And thus, when IBC would prevail it would cause lessors unable to exercise their rights.<sup>16</sup>

As of December 2022, the average time taken to resolve an insolvency case under the IBC is over 600 days, according to data from the Insolvency and Bankruptcy Board of India (IBBI).<sup>17</sup> Considering this it is the property of the lessor which in most cases is subjected to loss, in case of airlines, an aircraft which would remain grounded for several months would obviously become unfit for flying in future and moreover its value would be depreciated if constant maintenance is not done. This would affect the lessors who would see their aircraft worth a million dollars to be reduced to nothing.

Kingfisher Airlines in India ceased its operation in 2012. The Convention could not safeguard the interests of creditors or lessors because no law in this regard had been enacted. Furthermore, the courts' failure to respond to creditors' and lessors' requests to deregister and repossess the airlines' aircrafts hurt them even more. Because the Protocol's universal framework for protecting the interests of creditors and lessors was not carried out, they were at the mercy of our local laws and incurred significant losses. The Kingfisher scandal has affected not just creditors but also the country. The industry for aircraft leasing and finance has been harshly stuck since creditors are not safeguarded and are perpetually susceptible.<sup>18</sup>

The previous court order directing the DGCA to deregister the aircraft in accordance with Rule 30 of the 1937 Aircraft Rules,<sup>19</sup> was overturned in the case of *Directorate of Revenue Intelligence v. Corporate AirCraft Funding Co.*<sup>20</sup> to allow the government agency to conduct the investigation into the allegedly fraudulent activities. Not only this another bad precedent was set by the court in the case of *AER Lingus Ltd. v. Airport Authority of India*<sup>21</sup>, where the Airport Authority's request to hold an aircraft until its outstanding charges were resolved was granted, the non-consensual rights were once again given priority over those of the lessor.

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<sup>16</sup> BQ Prime, *India Must Remove Legal Hurdles To Drive Aviation Sector Growth*, September 27, 2023, available at <https://www.bqprime.com/business/india-must-remove-legal-hurdles-to-drive-aviation-sector-growth> (last visited on October 12, 2023).

<sup>17</sup> Business Standard, *New bill could give aircraft leasing firms more power to repossess planes*, June 22, 2023, available at [https://www.business-standard.com/industry/news/new-bill-could-give-aircraft-leasing-firms-more-power-to-repossess-planes-123062200444\\_1.html](https://www.business-standard.com/industry/news/new-bill-could-give-aircraft-leasing-firms-more-power-to-repossess-planes-123062200444_1.html) (last visited on October 12, 2023).

<sup>18</sup> Wikipedia, *History of Kingfisher Airlines*, August 23, 2022, available at [https://en.wikipedia.org/wiki/History\\_of\\_Kingfisher\\_Airlines](https://en.wikipedia.org/wiki/History_of_Kingfisher_Airlines) (last visited on October 12, 2023).

<sup>19</sup> *Supra* note 14.

<sup>20</sup> *Revenue Intelligence v. Corporate AirCraft Funding Company LLC*, (2013) SCC OnLine Del 1898.

<sup>21</sup> *AER Lingus Ltd. v. Airport Authority of India and Union of India*, AIR 2015 SC 1903.



As of now there no such regulations in India which govern the rights of the Aircraft lessors in India, though Aircraft Rules, 1937,<sup>22</sup> have such provisions, but they haven't been implemented until now. Article 253 of Constitution of India empowers the Indian Parliament to make laws with respect to treaties. Moreover, in *Corporate Aircraft Funding Company LLC v. Union of India*,<sup>23</sup> the court took the stance that Article 51(c) of the Indian Constitution obligates India to honor its international obligations with regard to the Cape Town Convention and Protocol (hereinafter referred as CTC).<sup>24</sup>

Attempts have been made to formulate a new legislation considering the rights of lessors, but all have been futile. For instance, The Protection and Enforcement of Interests in Aircraft Objects Bill, 2022,<sup>25</sup> was introduced by the Ministry of Civil Aviation to help international aircraft leasing companies to repossess the aircraft in case of a financial dispute of an Indian airline. Also, the Cape town Convention Bill, 2018<sup>26</sup> was also introduced to comply with the Cape town convention, 2001,<sup>27</sup> to which India became a signatory in 2008. The main object of this introduction is because the legislations like Companies Act, 2013 and Insolvency and bankruptcy Code, 2016 are in conflict with the CTC, 2001.<sup>28</sup>

## IV

### Cape Town Convention and its Compliance in India

The CTC consists of two parts, i.e. the Convention on International Interest in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment and was signed in Cape Town on 16 November 2001. It was signed and adopted under the joint auspices of International Civil Aviation Organization (ICAO) and The International Institute for the Unification of Private Law (UNIDROIT). The main aim and objective of this enactment was to ensure there is a uniform regulation of

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<sup>22</sup> *Supra* note 14.

<sup>23</sup> *Corporate Aircraft Funding Company LLC v. Union of India*, (2013) SCC OnLine Del 1085.

<sup>24</sup> VII. Cape Town Convention and Insolvency in the Aviation Industry: A Global Study, 8.1 RFMLR (2021) 123.

<sup>25</sup> The Protection and Enforcement of Interests in Aircraft Objects Bill, 2022.

<sup>26</sup> The Cape Town Convention Bill, 2018.

<sup>27</sup> Convention on International Interests in Mobile Equipment, March 1, 2006, 2307 U.N.T.S. 285.

<sup>28</sup> INDIA BUSINESS LAW JOURNAL, *Aircraft Lessors Hope for a Smoother Runway Under New Bill*, September 11, 2023, available at <https://law.asia/smoothier-aircraft-runway-under-new-bill/> (last visited on October 12, 2023).

high valued assets in the Aviation Industry, whether they are Aircrafts, their engines, helicopters, propellers etc.

As different nations tend to have different rules as regards this Industry a uniform Convention was required. Moreover, the problem of International Aircraft lessors and rise of lending rates were also some issues addressed by this Convention. Prior to the Protocol, foreign financiers of aircraft had to depend on disparate national laws to defend their interests. In the event of a debtor or borrower default, the procedure of reclaiming the aircraft or the monetary resource was time-consuming, since it included a lengthy judicial action in multiple nations.<sup>29</sup>

India became a signatory to this Convention in 2008 while it acceded to the same in 2018. However, it has not yet been ratified by India, there were speculations for passing of the Cape Town Convention Bill in 2018 but it went in vain. The bill proposed for easy deregistration and repossession of Aircraft when the airlines become subject to financial crisis. The convention also calls for enhancement of legal predictability in these transactions involving Aircraft delivery by foreign lessor. The convention thus seeks to reduce the creditor's risk as they are to register themselves in an international register. The international Registry is called Irrevocable Deregistration and Export Request Authorization (IDERA)<sup>30</sup>.

As per the Article XI (8) of the convention<sup>31</sup> when any Lessor calls for deregistration of an aircraft the same has to be implemented by the concerned authority within five working days. So mainly the convention applies if a debtor is located in a contracting state at the time of contracting. If the debtor defaults, then the creditor has the following options: take possession or control of the assets, sell the assets or grant a lease, or collect income from the assets. In the event of default, the creditor may obtain court assistance to preserve the assets, gain possession, lease or manage them.<sup>32</sup>

As regards the Indian Legislation, according to Rule 30(7),<sup>33</sup> of the Aircraft Rules, the aircraft must be deregistered within five days of the IDERA holder's application and the recent court trend has been recognized to uphold the lessor's right of repossession. Additionally, Rule 32A,<sup>34</sup> of the Aircraft Rules stipulates that government assistance, and thus the assistance of its agencies, be provided to ease the export of aircraft following the termination of IDERA. However, the appropriate

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<sup>29</sup> RODNEY D. RYDER, AVIATION LAW 247-257 (2019).

<sup>30</sup> *Id.*

<sup>31</sup> Convention on International Interests in Mobile Equipment, March 1, 2006, 2307 U.N.T.S. 285, article XI (8).

<sup>32</sup> PAUL B. LARSEN & JOSEPH C. SWEENEY & JOHN E. GILLYCK, AVIATION LAW 1188-1189 (2012).

<sup>33</sup> Aircraft Rules, 1937, Rule 30(7).

<sup>34</sup> Aircraft Rules, 1937, Rule 30 A.

Civil Aviation Requirements published by the DGCA, which describe the process for the same, must be studied alongside the aforementioned rules.

## V

### Airlines in Turbulence

In the present time, the airline industry is facing a significant drawback of bankruptcy as companies in the modern world, are in dire need of a larger capital to pay their debts, which on non-performance results in insolvency of the said Organization. The aviation industry in India too faced similar challenges owing to the nation's recognition as a growing economy. On insolvency, the companies normally incorporate liquidation to settle their dues while on the rare occasion do pass the resolution program in order to restart their operation and start afresh.

One Such Airline was Kingfishers Airlines which started its operation in 2003. The airline is currently burdened with accumulated losses, debts to airport authorities, and unpaid salaries to its employees. This whole crisis led to the non-operational of the Kingfisher's Aircraft. The DGCA cancelled Kingfisher's license as the company failed to incorporate their revival resolution plan. The biggest mistake the company made was when it acquired Air Deccan. It resulted in a giant debt of Rs 8200 crores for Kingfishers. The whole scenario led to the non-operation of Kingfishers in the year 2012.<sup>35</sup>

In the SpiceJet case from 2015, the Delhi High Court gave the Directorate General of Civil Aviation (DGCA) an explicit order to deregister any aircraft that had been leased to SpiceJet by lessors. The order was made due to SpiceJet's unwillingness to pay lease rent, which resulted in issuing a default and termination notice.<sup>36</sup> SpiceJet stated that it would be extremely harmful to enforce the default notice while it was through its current bankruptcy and restructuring plan. However, the Court supported the Irish lessors, citing India's commitments under the Cape Town Convention and Protocol. The Convention gave the lessors the authority to act in accordance with their financial judgment because there was no question that the debtor had defaulted.<sup>37</sup>

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<sup>35</sup> Sharma, Gaurav and Gupta, Chander, *A Review on Kingfisher Airline 'Prosperity Converted Into Bankruptcy'* (May 31, 2019).

<sup>36</sup> *Ireland Ltd. & Ors. v. Directorate General of Civil Aviation & Anr.*, 2015 SCC OnLine Del 8177

<sup>37</sup> Charvee Kantiwal, *Turbulence: IBC and Insolvency Proceedings in the Indian Aviation Sector*, IBC Laws (July, 2023).

Jet Airways is considered one of the most prominent airline industry players. The Jet Airways gained popularity and became the most successful airline in India in over a decade. In 2018, Jet Airways incurred a loss of USD 152 million.<sup>38</sup> These losses were due to many reasons, such as the rise of aviation fuel prices, competition with low-cost carriers, etc., which led to the Insolvency of Jet Airways. Even though Jalan Kalrock took over Jet Airways, it can still not resume its operation since its insolvency proceeding started because there is the hurdle of transferring ownership of Jet Airways between the lender and the winning bidder of the Jet Airways and also due to the complex ongoing CIRP process under the IBC.<sup>39</sup>

Previously, the cases that involved the matter of Insolvency and bankruptcy were dealt with on the law laid down in section 433,<sup>40</sup> read with 434,<sup>41</sup> of the Companies Act 2013, which did further complicate the case for the judiciary as the acts in place were not very elaborative of the law required to handle the matter at hand, leading to heavy reliance on many different legal texts, opinions and precedents. Owing to these confusions and an unnecessary delay in delivering justice, the legislature felt the need to articulate the Insolvency and Bankruptcy Act. Thus, in the year 2016, they enacted the same for a faster redressal of subsequent cases in this regard.

## VI

### Insolvency: A Crash Landing

The process of reviving an airline industry from bankruptcy is complicated. Creating and implementing a plan to save an airline is time-consuming, as it takes around 180 days to complete the insolvency as per section 12<sup>42</sup> of the Insolvency and Bankruptcy Code, 2016. If the committee of creditors still needs to be satisfied with the resolution plan, then it may exceed further 90 days. The resolution professional has a very challenging job as they must carry out the whole corporate insolvency resolution process while following the duties mentioned under section 18,<sup>43</sup> of the IBC. But after a resolution plan is approved, there may still be loopholes in executing the corporate insolvency resolution plan. For instance, Jet Airways has completed

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<sup>38</sup> Jashim, Tasfia, Asma & Farzana, *The Bankruptcy of Jet Airways in India*, 11, IJUM Journal of Case Studies in Management, (2020).

<sup>39</sup> Mint, *Jet Airways' air permit extended*, August 1, 2023, available at <https://www.livemint.com/companies/news/jet-airways-air-permit-extended-11690829687413.html> (last visited on October 13, 2023).

<sup>40</sup> The Companies Act, 2013, § 433.

<sup>41</sup> The Companies Act, 2013, § 434.

<sup>42</sup> The Insolvency and Bankruptcy Code, 2016, §12.

<sup>43</sup> The Insolvency and Bankruptcy Code, 2016, §18.

its resolution plan, and even after executing it, it still needs to implement its resolution plan and resume its operations fully.

The Government of India enacted the IBC to deal with insolvency proceedings in India. The relevant change of the law is related to a moratorium of 180 days (extendable up to 270 days) as provided in section 14,<sup>44</sup> effectively prohibiting all creditors of the corporate debtor from initiating any legal action or arbitration proceedings, or enforcing their security interests or reclaiming their collateral.<sup>45</sup> Any rights to enforce, be it under a lease agreement, security instrument, or any other statutory provisions, shall be in abeyance during the moratorium period. This is considered as the loophole in respect of the lessors' right.

Typically, aircraft lease transactions in India are operational leasing arrangements, which means that the aircraft lessors/financiers of such transactions will be considered as 'operational creditors' as per the IBC, with no decision-making or negotiating power with the COC during the insolvency process or at the stage of approval of the resolution plan. If the lease transaction is a financial lease, which can be termed as a hire-purchase arrangement, the lessors/financiers of such leases could be considered as 'financial creditors'. This creates a problem concerning the rights of lessors as there is no active participation of the 'operational creditors', and there is also a threat to the airplanes after the liquidation.

With regard to the insolvency provisions of Cape Town Convention, declarations lodged by India under the Aircraft Protocol at the time of its accession mention that India opted to apply Article XI, Alternative A, in full of all categories of insolvency proceedings. Per the declaration, Alternative A's 'waiting period' is 60 days (i.e., two calendar months). So, the remedies granted by Alternative A conflict with the provisions of the IBC.<sup>46</sup>

While the IBC, upon admission of an insolvency petition, gives a moratorium of 180 days (extendable up to 270 days), during which aircraft owners, lessors, and financiers are barred from enforcing its security or repossessing their security, the Cape Town Convention Alternative A allows the security interest holder to repossess their secured asset after the 'waiting period' if the defaults under the relevant agreement remain uncured during the 'waiting period'.<sup>47</sup>

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<sup>44</sup> *Supra* note 15.

<sup>45</sup> BW LEGAL WORLD, *The Dichotomy Between Insolvency Laws And Capetown Convention Amidst GoFirst Insolvency*, July 3, 2023, available at <https://bwlegalworld.businessworld.in/article/The-Dichotomy-Between-Insolvency-Laws-And-Capetown-Convention-Amidst-GoFirst-Insolvency-/03-07-2023-482701/#:~:text=The%20Conflict%20Between%20IBC%20And,in%20possession%20of%20the%20lessee> (last visited on October 13, 2023).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

Keeping in view the evolving insolvency jurisprudence, the Government of India should come up with the legislation to ascertain that the rights of lessors will be protected. The rights of a creditor under the Cape Town Convention and Aircraft Protocol would be read in accord with the IBC, mainly due to the absence of an established insolvency jurisprudence in the aviation industry, apart from some instances relating to the winding up of Kingfisher Airlines (which occurred before the ratification of the Cape Town Convention and implementation of IBC), some of which are still pending at various courts in India. This is even more pertinent now due to the current financial distress of Jet Airways.

## VII

### Go First Crisis

Go First Airlines was a company registered under the Companies Act of 1956. It started its airline operation in 2004, and it has been running at a low cost under the brand name 'Go Air'. The aircraft was registered with the civil aviation regulator and licensed by the Directorate General of Civil Aviation. The company was renamed "GoFirst" in 2021 and was considered India's third-largest airline operator. The GoFirst was considered highly feasible in terms of the price compared to the other airlines. It is the major player in the aviation industry as it has around 9% of the domestic market share and is considered the major player in the aviation market of India. It has 54 aircraft, out of which only 26 are operational. It is regarded as a low-cost carrier, and its poor strategies and lower operational costs make it the dominant position in India. They offer lower ticket prices that upsurge their customer base, which results in higher operating costs. The issue with the GoFirst started when its 28 aircraft had to be grounded, resulting in a massive loss. Due to the non-operation of the 28 aircraft, the company had to cancel around 4118 flights.<sup>48</sup>

The reason behind the non-operation of the 28 aircraft was that the engines of the planes were alleged to be defective which were provided by Pratt and Whitney manufacturers. GoFirst already had an agreement with Pratt and Whitney, which was a mainstream player in the aircraft manufacturing market. GoFirst has claimed that the 28 grounded aircraft were inherently defective. P&W denied the allegation of GoFirst, which resulted in the filing of arbitration against P&W. The Singapore International Arbitration Centre (SIAC) passed an arbitral award in favor of GoFirst and directed P&W to supply ten serviceable engines to GoFirst by 27.04.2023 and

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<sup>48</sup> Businessline, *GoFirst saga: Will the crisis-hit airline fly again?* July 02, 2023, available at <https://www.thehindubusinessline.com/business-laws/gofirst-saga-will-the-crisis-hit-airline-fly-again/article67033603.ece> (last visited on October 13, 2023).

also to deliver ten functional machines each month till December 2023.<sup>49</sup> GoFirst stated that P&W did not obey the order of the SIAC, and as a result, again, GoFirst suffered a massive loss. Most aircraft were leased, and due to the failure in its business, the lessors and vendors were claiming their payments due on the GoFirst. Lessors argued Rs. 2660 crore, and vendors claimed Rs. 1202 crore from GoFirst.<sup>50</sup>

The high debt resulted in filing of the Insolvency before the National Company Law Tribunal (NCLT), Delhi under section 10,<sup>51</sup> of the IBC. The event caused inconvenience to the passengers, and thus DGCA ordered Go First to stop the operation. The GoFirst initiated its insolvency proceeding under section 10,<sup>52</sup> of the IBC which got approved by the NCLT Delhi. The court stated that “the company is not able to pay its debt, and because of the unpaid debt subsisting above Rs. 11000 Crore and the default committed by the Corporate Applicant towards the same, the Corporate Applicant are not disqualified under Section 11<sup>53</sup> of IBC, 2016, we have no other option but to admit the present Application under Section 10<sup>54</sup> of IBC, 2016. Accordingly, the application of the Corporate Applicant is admitted. As a necessary consequence, the moratorium in terms of Section 14(1)(a), (b), (c) & (d)<sup>55</sup> is declared.”<sup>56</sup>

In the present case, the aircraft were stuck due to the moratorium period, and their operation were stopped. The lessors demanded the inspection of the plane as they affirmed that their aircraft were grounded and non-operated by the lessors and their value was diminishing and were subject to constant degradation. The HC of Delhi granted their request and authorized the professional team of the lessors to inspect the aircraft during the moratorium period,<sup>57</sup> but the NCLT rejected this request on the grounds that the current issue is not a question of law but rather relates to a

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<sup>49</sup> The Economic Times, *Singapore arbitration court tells P&W to supply engines to Go First*, Jul 06, 2023, available at <https://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/singapore-arbitration-court-tells-pw-to-supply-engines-to-go-first/articleshow/101553504.cms?from=mdr> (last visited on October 13, 2023).

<sup>50</sup> Business times, *More trouble for Go First! Six lessors invoke letters of credit, issue notices to airline*, May 02, 2023, available at <https://www.businesstoday.in/industry/aviation/story/more-trouble-for-go-first-six-lessors-invoke-letters-of-credit-issue-notices-to-airline-379767-2023-05-02> (last visited on October 13, 2023).

<sup>51</sup> The Insolvency and Bankruptcy Code, 2016, §10.

<sup>52</sup> *Id.*

<sup>53</sup> The Insolvency and Bankruptcy Code, 2016, §11.

<sup>54</sup> *Supra* note 53.

<sup>55</sup> The Insolvency and Bankruptcy Code, 2016, §14(1).

<sup>56</sup> National Company Law Tribunal (New Delhi Bench), *Go Airlines (India) Limited* (May 10, 2023).

<sup>57</sup> *Accipiter Investments Aircraft 2 Ltd. v. Union of India*, (2023) SCC OnLine Del 3895.

statutory provision of the IBC.<sup>58</sup> One of the reasons is that, according to section 25,<sup>59</sup> of IBC, it is the duty of the Resolution Professional to preserve and protect the asset and property in his possession. The matter was then appealed to the NLCAT, and the National Company Law Appellate Tribunal (NCLAT) agreed with the High court decision and permitted the lessors for inspecting their Aircrafts.<sup>60</sup> But the tussle is still ongoing between the lessor and the debtors of the aircraft and the matter would be heard by the new bench of NCLT.

The main problem in the present case is with Pratt and Whitney, against whom Go First has made several allegations for selling a defective engine to the Aviation company. The arbitral awards were won by the GoFirst over the Pratt and Whitney. In a quick response Pratt and Whitney filed a lawsuit against Go First in the United States, challenging the arbitrator's order about the arbitral order.

## VIII

### **Aircraft Lessors Versus Insolvency Bankruptcy Code**

The airline industry is struggling with the problem of bankruptcy in India. More than five airlines have been shut down from 2018 to 2023. Airlines all over the World are facing the problem of increasing fuel prices and also the low carrier competition between the airlines. In the meantime, The International Air Transport Association (IATA) is giving a positive sign of reviving the airline industry all over the World. One of the strategies for the airline's resuscitation is financing. Filing for Bankruptcy becomes a necessary tool for airlines to reorganize their finances and stay in business.

On the other hand, there is a problem that allowing too many airlines to file for bankruptcy could lead to a consolidation of the industry and a reduction in competition. Insolvency is a mechanism that protects the creditors' interest and ultimately revives the company. Before the Insolvency and Bankruptcy Code 2016, the whole debt recovery or issues of Non-Performing Assets (NPA) were dealt with the Companies Act. The main idea behind the legislation of the IBC is to cater to the difficulties posed by the NPAs in the banking sector and allow the company's members, such as creditors, to resolve the bankruptcy problem and restart its operation.

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<sup>58</sup> *National Company Law Tribunal, (New Delhi Bench), Go Airlines (India) Limited v. Abhilash Lal*, 27 (July 26, 2023).

<sup>59</sup> The Insolvency and Bankruptcy Code, 2016, §25.

<sup>60</sup> *National Company Law Appellate Tribunal, (National Company Law Tribunal), Engine Lease Finance B.V v. Resolution Professional of Go Airlines (India) Ltd. & Anr.*, 5 (August 18, 2023).



Section 14<sup>61</sup> of the IBC deals with a moratorium in which the assets of the debtor are ceased temporarily to be taken by any of the creditors. The idea behind the suspension is to oversee the company's assets and rescue the company's business. The remedy available to the creditor is not against the principle of equity of returning the debt to the creditor but to ensure the revival of the company.<sup>62</sup>

This particular provision acts in derogation to the rights of the aircraft lessors in the aviation industry because they are forced to wait till the moratorium period gets over. Section 14(1)(b),<sup>63</sup> specifies that the "asset" belongs to the corporate debtor, which in this case is owned by the operational creditors i.e., the lessors. Consequently, seizing assets that belong to the lessors could create problems for the leasing company.<sup>64</sup>

Clarifying ownership and possession may assist in resolving this issue, as lessors are the true owners of the aircraft, and the airlines merely possesses them as a lease, not making them its own assets. Section 14(1)(d),<sup>65</sup> clears this confusion which states that the owners or lessors of the property in possession of the corporate debtor i.e., airlines in this case cannot recover the property when the moratorium is imposed.<sup>66</sup> This clearly implies that the corporate debtors (airlines) do not own the assets (aircrafts) but rather only possess them subject to the terms of the contract. Lessors are thus facing difficulties due to this ambiguity in this provision and it needs to be revamped.

It must be noted that the aircraft lessors are operational creditors of the airlines. It is stated by virtue of section 5(20),<sup>67</sup> of the IBC that an "operational creditor" means "a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred."

Going by the provisions of section 52,<sup>68</sup> of the code it specifies that a secured creditor (a creditor in favour of whom security interest is created) can enforce, realise, settle,

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<sup>61</sup> *Supra* note 15.

<sup>62</sup> Abhijnan Jha & Chetan Chawla, *The Limits to a Moratorium: Interplay Between the Indian Insolvency and Bankruptcy Code and Defensive Proceedings*, February 1, 2023, available at <https://blogs.law.ox.ac.uk/oblb/blog-post/2023/02/limits-moratorium-interplay-between-indian-insolvency-and-bankruptcy-code> (last visited on October 13, 2023).

<sup>63</sup> The Insolvency and Bankruptcy Code, 2016, §14(1)(b).

<sup>64</sup> Business Standard, *Corporate affairs ministry exempts aviation from IBC's moratorium clause*, Oct 5, 2023, available at [https://www.business-standard.com/economy/news/corporate-affairs-ministry-exempts-aviation-from-ibc-s-moratorium-clause-123100401176\\_1.html](https://www.business-standard.com/economy/news/corporate-affairs-ministry-exempts-aviation-from-ibc-s-moratorium-clause-123100401176_1.html) (last visited on October 13, 2023).

<sup>65</sup> The Insolvency and Bankruptcy Code, 2016, §14(1)(d).

<sup>66</sup> *Maharashtra Industrial Development Corpn. v. Santanu T. Ray*, (2022) SCC OnLine NCLAT 180.

<sup>67</sup> The Insolvency and Bankruptcy Code, 2016, §5(20).

<sup>68</sup> The Insolvency and Bankruptcy Code, 2016, §52.

compromise or deal with the secured assets in accordance with such law as applicable. This implies that under section 52(4),<sup>69</sup> the property or assets of the secured creditor could be repossessed in case of corporate debtor becoming insolvent. Then drawing an analogy if secured creditors are empowered with this remedy, then it should also be given to the operational creditors of the corporate debtor.

The procedure in the IBC cannot solve the problem concerning the lessor's rights, as most of the airplanes in India are running on the leasing basis. So, there should be some additional or separate mechanism than the IBC that will defend the rights of the lessors in India.

## IX

### **Rights of Aircraft Lessors in Other Jurisdictions**

The laws regulating the financing of aircrafts are much stricter in other countries as compared to India. The reasons are stricter adherence to the provisions of the Cape Town Convention and more stricter laws of Insolvency that the lessors in those jurisdictions feel confident to contract. It is due to this confidence that they tend to reduce leasing cost thus causing a boom in the Aviation sector of such jurisdiction.

Starting with the regulations in the United States, following the expiry or termination of the lease, an event of default of payment or in case the aircraft is subject to the Cape Town Convention, the owner named in the Certificate of Registration can initiate the deregistration of the aircraft authorized under the IDERA. If an IDERA has been issued, the operator of a leased aircraft should not be able to block the deregistration by the holder of the IDERA. It is mostly used by the parties in the United States as an extra layer of protection. If any of the breach above mentioned is effectuated by the lessee then the lessor by virtue of section 2A-525(2) of the Uniform Commercial Code,<sup>70</sup> can use "self-help" remedies to take repossession of the aircraft without even court's order and if the lessee resists in this then the lessor can also seek a court's order.<sup>71</sup> Moreover, the federal courts in US agree that once a foreign judgment has been recognized in New York, it is enforceable in the equal way as a local judgment, and the parties are entitled to avail themselves of the same tools as parties to a locally issued judgment. This highlights

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<sup>69</sup> The Insolvency and Bankruptcy Code, 2016, §52(4).

<sup>70</sup> Uniform Commercial Code, 1952, section 2A-525 (U.S.A.).

<sup>71</sup> IGLC.com, Aviation Finance & Leasing USA 2023, June 30, 2023, *available at* <https://iclg.com/practice-areas/aviation-finance-and-leasing/usa> (last visited on October 13, 2023).

the extent of compliance exercised by the federal courts in the United States of America. Moreover the 11 U.S. Code § 1110,<sup>72</sup> justify that the ratification of the Cape Town Convention by the United States has not caused any conflicts or issues with any local laws. However, it is believed that Article XI of the Protocol to the CTC,<sup>73</sup> was based after Section 1110 of the U.S. Bankruptcy Code. A 60-day term similar to the "waiting period" envisioned by Alternative A of the Protocol to the CTC is provided by Section 1110, and secured parties are given identical safeguards.

China ratified the Cape Town Convention in 2008 and since then it is seen as a target region for most lessors and has contributed to its aviation sector. It is because China adopted the "hard" Insolvency regulations providing a waiting period of 60 days in lieu of the convention and export remedies specifically dealing with deregistration of aircrafts and its repossession, protocol's choice of law clauses (Article VIII) and interim relief measures (Article X). According to such regulations the lessors can exercise "self-help" and take physical possession of the aircrafts at the discretion of the court. Moreover, China has simplified its tax burden and provided exemptions attracting aircraft lessors from around the world.<sup>74</sup>

It was in 2007 that demand of aircrafts were on a rise in China due to unprecedented rise in the passenger traffic and air travel demand. Consequently, a need for revamping the aircraft leasing industry was felt and a large number of financial institutions, led by China's leading banks, began establishing their aircraft-leasing units as well as expanding their capacities and market share. To boost the aircraft leasing industry, the Chinese Ministry of Finance, the State Administration of Taxation, and other government agencies released documents. Due to the actions of the government, 600 leasing companies of various types were registered in Shanghai's Free Trade Zone (FTZ) in less than two years.<sup>75</sup> As per the Chinese government estimate, by the end of 2017, China controlled one in every ten leased aeroplanes worldwide, up from a tiny proportion in the global leasing market in 2007. Thus, China has illustrated that the entire ecosystem must be in place for the airline leasing industry to thrive.

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<sup>72</sup> U. S. Code: Title 11, 1926, section 1110 (U.S.A.).

<sup>73</sup> Convention on International Interests in Mobile Equipment, March 1, 2006, 2307 U.N.T.S. 285, article XI.

<sup>74</sup> CLIFFORD CHANCE, *Cape Town Convention and Aircraft Protocol – CHINA*, November, 2008, available at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2008/11/cape-town-convention-and-aircraft-protocol-china.pdf> (last visited on October 13, 2023).

<sup>75</sup> PRIMUS PARTNERS, *AIRCRAFT LEASING INDUSTRY Has India nailed the landing?* May, 2023, available at <https://www.primuspartners.in/docs/documents/KVsaluunn0EVD2PZId8P.pdf> (last visited on October 13, 2023).

As regards Russia, the CTC came into force in 2013 in furtherance of which it was declared that Russia will ratify the entirety of Alternative A of article XI of the Protocol in all insolvency proceedings in accordance with paragraph 3 of article XXX of the Protocol,<sup>76</sup>. The waiting time will be 60 calendar days for the purposes of article XI of the Protocol and as regards section 54 of the Convention any remedy available to a creditor under any provision of the CTC that does not explicitly entail application to court may be exercised outside of court. It also agreed that Article XIII of the protocol,<sup>77</sup> which introduces IDERA will be applied. Whenever there will be a contravention between the Russian Regional law and the Cape Town Convention, the convention would prevail. This itself substantiates its compliance to the convention and makes it the most lessor friendly state and would mitigate the risks associated with deregistration and repossession of aircrafts.<sup>78</sup>

The national insolvency laws have adopted Article XI of the Convention, even in other well-developed common-law countries like Canada. As a result, if the flaws are not fixed and future obligations are not pledged to be fulfilled by the insolvent corporation within 60 days, possession of the aircraft must be handed. In a recent decision, the Canadian courts for the first time recognized this applicability. Also in Australia, the court acknowledged in the most recent insolvency case involving Virgin Australia that the rules of the Cape Town Convention, which have been integrated in the Australian domestic law through the Cape Town Convention Act, 2013. This will prevail over other domestic legislations.<sup>79</sup>

The bankruptcy of Virgin Airlines also resulted in a crucial decision under the Convention, as seen in the case of *Wells Fargo Trust Company, National Association v. VB Leaseco Pty Ltd*.<sup>80</sup> Among the ratifying states, Australia was the first to interpret Article XI (2) of the Protocol. The Federal Court ruled that the terms outlined in the leasing agreements compelled the corporate debtor to transport the leased engines to the lessors' premise in Florida at its own expense.

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<sup>76</sup> Convention on International Interests in Mobile Equipment, March 1, 2006, 2307 U.N.T.S. 285, article XXX.

<sup>77</sup> Convention on International Interests in Mobile Equipment, March 1, 2006, 2307 U.N.T.S. 285, article XIII.

<sup>78</sup> CLIFFORD CHANCE, *Has there been a Cape Town breakthrough in Russia?* August, 2013, available at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2013/08/has-there-been-a-cape-town-breakthrough-in-russia.pdf> (last visited on October 13, 2023).

<sup>79</sup> Arundhati Barman Roy & Bhoomi Shah, *Cape Town Convention and Insolvency in the Aviation Industry: A Global Study*, 8 RGNUL Fin & Mercantile L Rev 118 (2021).

<sup>80</sup> *Wells Fargo Trust Company, National Association (as owner trustee) & Anor v. VB Leaseco Pty Ltd (administrators appointed) & Ors*, S60/2021 (AUS. H.C.) (Unreported).

## X

### Visibility in Lessor Rights

On 3rd October 2023, the Indian government came up with the notification stating that subsection (1) of section 14,<sup>81</sup> of the IBC will not extend to the aircrafts leased in India.<sup>82</sup> This may be viewed as a notable advancement in the aviation industry especially amid the poor rating of India as per AWG watchdog report. Consequently, this step would attract aircraft lessors from different countries and instil confidence in them for contract with Indian service providers and would thus tend to reduce the leasing rates causing a boom to the Indian aviation sector.

The notification would act as a catalyst in the progression of India's compliance to the CTC to which India is a signatory. The rights of the lessors are the main subject matter of the notification with regards to the moratorium period under Section 14,<sup>83</sup> of the IBC. The notification also states that now the lessors can seek deregistration of aircrafts and export them without the permission of the Airlines if there is default in sum of the airlines or if the airline has become insolvent.

It is noteworthy that this is just a beginning in the field, the government should come up with a full-fledged scheme to increase the compliance of the Convention and rights of lessors. This would not only supplement the aviation industry but also enhance India's image in the global arena.

## XI

### Conclusion

The Indian airline industry, once soaring with ambition, has faced a turbulent journey over the years. The stories of airlines like Kingfisher, SpiceJet, Jet Airways, and GoFirst illuminate the sector's challenges, shedding light on critical aspects of insolvency and bankruptcy in India. These airline crises were driven by a multitude of factors, ranging from mismanagement, unsustainable financial burdens, and cutthroat competition, to aircraft defects. In response to these challenges, the Indian government introduced the Insolvency and Bankruptcy Code (IBC) in 2016, a comprehensive legal framework aimed at streamlining the resolution process for distressed companies.

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<sup>81</sup> *Supra* note 15.

<sup>82</sup> Ministry of Corporate Affairs, Section 14 of IBC shall not apply to Aircrafts, S.O. 4321(E) (Notified on October 3, 2023).

<sup>83</sup> *Supra* note 15.

The IBC brought about a moratorium period, as per Section 14, which temporarily suspends creditors from pursuing legal actions against the corporate debtors while resolution plans are devised and implemented. However, this protection has inadvertently created hurdles for aircraft lessors, who find their valuable assets grounded during the moratorium, negatively affecting their financial interests.

It is clear that the legislation needs to strike a balance between protecting the interests of both creditors and operational creditors like aircraft lessors. The recent notification by the Indian government marked a substantial stride in tackling this issue. By exempting aircraft leases from the purview of Section 14 of the IBC, India aims to attract the rights of aircraft lessors, boost the aviation sector, and enhance its compliance with the Cape Town Convention, an international treaty designed to protect the interests of aircraft financiers.

The notification's impact extends beyond economic benefits. It signals India's commitment to international best practices and promotes confidence in global investors. If implemented effectively, this policy alteration will not only support the Indian aviation industry but also enhance the country's reputation on the world stage.

Furthermore, the comparative analysis of how other countries handle aircraft lessors' rights in insolvency cases underscores the need for India to adapt and align with international standards. China, the United States, Canada, and Australia have shown flexibility in dealing with lessors' rights, allowing them to repossess aircraft more promptly. India can derive assistance from these jurisdictions to further amend its legal framework to cater to the specific needs of aircraft lessors. As the industry reorients itself in a post-pandemic world, the lessons learned from past turbulence will be crucial in ensuring a more stable and prosperous future.