

The Curious Case of Go First: The Need of the Applicability of the Cape Town Convention in India

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ABSTRACT

*The insolvency of Go First has reminded observers of the grim reality of the aviation industry, where a sequence of negative events leads to a crisis from which recovery becomes impossible. The subsequent insolvency proceedings and the lessors' inability to recover their assets bring into the limelight the Convention on International Interests in Mobile Equipment (**Cape Town Convention** or **Convention**), which governs aircraft and other transportation assets and why India must implement the Convention's provisions into its existing law. The Convention has been recognised by the judiciary and statutory laws, but the need for legislation remains. The author, with an analysis of Go First's situation and the difficulty faced by the lessors, has made a case for legislation bringing the Cape Town Convention's provisions into Indian law. This case comment also provides a succinct summary of important provisions of the Convention and how with necessary modifications and clarifications, the Indian aviation sector would benefit substantially from legislation that governs the relationship between the lessor and lessee of aircraft.*

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I. INTRODUCTION

Go First, the low-cost airline with a six percent (6%) market share in the Indian passenger aviation sector,¹ filed for insolvency in May 2023 after the alleged non-delivery of engines by Pratt & Whitney, which according to the airline did not comply with the terms of an arbitral award granted by the Singapore International Arbitration Centre (SIAC).² The initiation of insolvency proceedings has led to the lessors of the airline being unable to recover the planes that were leased to the airline. While the lessors have been granted access to the planes for maintenance at least twice a month by the Delhi High Court, it has been submitted that during this time, the planes have parts missing and this problem has led to major losses to the lessors.³

This situation is a reminder of the urgent need for India to implement the Cape Town Convention⁴ in its existing statutory framework. The Convention seeks to address the problems that are faced by financiers of acquisitions of high-end equipment like aircraft and space assets. The nature and time taken to exercise the remedies would be longer and more

¹ Sukalp Sharma, 'With Go First gone, Indigo soars higher; May market share zooms past 60%' *The Indian Express* (New Delhi, 16 June 2023) <<https://indianexpress.com/article/business/aviation/go-first-indigo-may-market-share-8664645/>> accessed 30 August 2023.

² Manish Pant, 'Go First insolvency: Why the airline was staring at a crisis for long' *Business Today* (Noida, 28 May 2023) <<https://www.businesstoday.in/magazine/the-buzz/story/go-first-insolvency-why-the-airline-was-staring-at-a-crisis-for-long-380787-2023-05-10>> accessed 30 August 2023.

³ Aditi Shah and Aditya Kalra, 'Fan blades to escape slides — critical parts missing from 2 Go First jets, lessor tells court' *ThePrint* (New Delhi, 26 August 2023) <<https://theprint.in/india/fan-blades-engine-parts-go-missing-from-go-first-jets-lessor-says/1732393/>> accessed 29 August 2023.

⁴ Convention on International Interests in Mobile Equipment (signed 16 November 2001, entered into force 1 March 2006) 2307 UNTS 285 (Cape Town Convention).

cumbersome in some jurisdictions. The Convention seeks to create an international interest that significantly increases the speed and allows for a variety of forms of recovery of assets guaranteed by the Convention itself and does not require explicit national law.

A State must analyse the impact of ratifying a convention and what impact would it have on its national laws. In this aspect, the Convention has differentiated itself from other public and private international law instruments. It provides for the creation of an international interest, which is registered according to Article 16 of the Convention⁵ and therefore gains priority over the subsequently registered international interests and the unregistered ones. According to Article 1 of the Convention⁶, an international interest refers to the interest held by a creditor of mobile equipment. Article 7⁷ specifies four requirements to constitute a valid international interest. The agreement governing the interest must be in writing, it should relate to the object which the lessor has the power to dispose of, the agreement must also enable the object to be identified per the Aircraft Protocol⁸ (in cases of aircraft, it is the serial number and name of the manufacturer) and the determination of the secured obligations is possible through the security agreement. If the security agreement is valid under international law, the provisions of the Convention would override the national law and the existence of the type of interest created by the Convention is not relevant.

⁵ *ibid* [art 16].

⁶ *ibid* [art 1].

⁷ *ibid* [art 7].

⁸ Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (signed 16 November 2001, entered into force 1 March 2006) (Aircraft Protocol).

The Convention has brought within its ambit aspects of law which were previously considered within the exclusive jurisdiction of national domestic law like the impact when insolvency takes place. According to Article 30 of the Convention,⁹ an international interest would become effective if it was initiated before the commencement of insolvency proceedings and the registration followed the Convention's provisions. Once a valid insolvency proceeding is initiated, the benefits for the creditors when the debtors belong to a Contracting State come into effect.¹⁰ In the United States of America (US), American Airlines had the benefit of gaining access to assets through obtaining enhanced equipment trust certificates. If a State becomes a signatory to the Cape Town Convention, the non-US airlines would also be able to access this feature, resulting in situations where market borrowing becomes much cheaper than obtaining bank loans. This financial advantage helped British Airways in 2013 when it raised money through trust certificates.¹¹ Air Canada has also obtained money through this financial method.¹²

Another major impact of the Cape Town Convention has been in the sector of credit insurance. According to the Organisation of Economic Co-operation and Development (OECD)'s Arrangement on Officially Supported Credits, a state that has implemented the Cape Town Conventions' provisions into its national laws can create a Cape Town

⁹ Cape Town Convention (n 4), art 30.

¹⁰ Roy Goode, 'Private Commercial Law Conventions and Public and Private International Law: The Radical Approach of the Cape Town Convention 2001 and Its Protocols' (2016) 65 *International & Comparative Law Quarterly* 523, 526.

¹¹ Adam Tempkin, 'British Airways launches debut EETC offering to finance planes' (*Reuters*, 26 June 2013) <<https://www.reuters.com/article/newstory-idUSL2NoF11TH20130625>> accessed 30 August, 2023.

¹² *ibid.*

Convention Discount from the rate they must charge for providing credit insurance.¹³ This discount allows access to cheaper finance for aircraft operators which in turn would lead to savings of about USD eight billion (USD 8 billion) over twenty (20) years.¹⁴

Therefore, the Convention benefits both aircraft manufacturers and airlines since the export cost of the manufacturers for leasing is reduced which in turn leads to cheaper lease rates for the airlines and the size of the airlines' fleet would also increase as a result.

II. THE CAPE TOWN CONVENTION BILL, 2018 AND ITS NECESSITY

A proposal to implement the Cape Town Convention was brought by the Civil Aviation Ministry in October 2018. According to the Ministry, there was a need to bring a law governing the applicability of the Convention since many of its provisions conflict with the provisions of the Civil Procedure Code, 1908¹⁵ and the Insolvency and Bankruptcy Code, 2016 (IBC).¹⁶

The need to implement the Convention into Indian law becomes pertinent since the provisions of the Convention relating to international interest are presently not available to lessors of aircraft in India, where the moratorium imposed under Section 14 of IBC¹⁷ prevents the lessor

¹³ Goode (n 10).

¹⁴ *ibid* [527].

¹⁵ The Code of Civil Procedure, 1908.

¹⁶ The Insolvency and Bankruptcy Code, 2016 (IBC 2016).

¹⁷ *ibid* [s 14].

from transfer or disposing of their assets once a moratorium is imposed. Therefore, it is argued by the author that India should make the provisions of the Convention part of Indian law by introducing the draft Cape Town Convention Bill, 2018 (**Draft Bill**).¹⁸

The provisions of the Draft Bill also show the intention of the legislature to help encourage the benefits that arise out of becoming a signatory to the Convention. According to Section 3 of the draft, the provisions of the Convention shall have the force of law in India which would enable lessors and airlines to take advantage of the benefits the Convention offers to contracting states.¹⁹

However, the draft legislation did not discuss what would happen in cases of conflict between the Convention's provisions and the provisions of IBC governing moratorium and denial of access to assets to the lessors. Therefore, while the legislation is being reworked presently according to sources, the legislature must make certain key decisions as to how the Convention would be interpreted and how the Convention and IBC would work together.

A Contracting State to the Convention must choose between two approaches to insolvency according to Article XI of the Aircraft Protocol²⁰ and declare the choice as per Article XXX of the Protocol.²¹ The first alternative allows the lessor to reclaim the asset's possession once the waiting period, declared by the Contracting State ends. Till re-

¹⁸ The Cape Town Convention Bill 2018.

¹⁹ *ibid* [s 3].

²⁰ Aircraft Protocol (n 8).

²¹ *ibid* [art 30].

possession takes place, it would be the duty of the insolvency professional to preserve the asset and ensure its maintenance. The insolvency professional or debtor may retain the aircraft's possession if it agrees to rectify all defaults other than the default that caused the insolvency proceeding and an agreement exists that the requisite future obligations would be met. If these obligations are not met, the asset would become the lessor's property and the remedies available to the lessor under Article IX²² would become available. Under this article, the lessor may obtain de-registration and physical transfer of the asset. After this right has been exercised, Article 8 of the Convention²³ allows the lessor to further lease or sell the asset as the organisation deems fit. A notice of at least ten (10) days shall be provided according to paragraph 4 of Article IX²⁴ after which further sale or lease of the asset may take place.

The second alternative requires the debtor to provide notice to the creditor within the time specified by the State's declaration about his intent to cure the defects apart from the defect that caused insolvency or whether the creditor can obtain re-possession of the asset within the declared period. If notice is not given or the promise of returning the asset is not complied with, the court may pass a necessary order to allow the creditor to obtain repossession of the asset. Until an order is passed regarding the claim and the international interest, the asset's sale cannot take place.²⁵

In the author's opinion, once the Cape Town Convention is implemented, the second alternative should be adopted by the Parliament once the law

²² *ibid* [art 9].

²³ Cape Town Convention (n 4), art 8.

²⁴ Aircraft Protocol (n 8), art 9.

²⁵ *ibid* [art 11].

is implemented. This is because the second approach aligns with the existing approach of India's insolvency law. It allows the debtor to collect the necessary resources to revamp his business structure and also provides credence to allowing airlines to recover from losses in an already cut-throat business environment. This alternative would also benefit the lessor since the entire process of resale and transfer would lead to the asset being unused with the potential for damage through accidents or other reasons remaining while it is in India as observed in the Go First case. The role of the insolvency professional in preserving the assets therefore becomes vital and the appointment by the National Company Law Tribunal of the interim resolution professional under Section 17 of the IBC²⁶ and the Committee of Creditors under Section 22 therefore gains more significance.²⁷

III. CONCLUSION

The Go First case has brought back into the limelight the convention,²⁸ which India had acceded to in 2008 and is a part of Indian legislation through the various amendments to the Aircraft Rules,²⁹ which have provided an operating procedure according to which the de-registration procedure must take place. The latest amendments mark a shift in Indian jurisprudence which was initiated by the Delhi High Court in the judgment of *Wilmington Trust SP Services (Dublin) Limited & OR's. v*

²⁶ IBC 2016, s 17.

²⁷ *ibid* [s 22].

²⁸ Cape Town Convention (n 4).

²⁹ Aircraft (Third Amendment) Rules, 2015 (ATAR 2015).

*Directorate General of Civil Aviation & An.*³⁰ where it was held that the Directorate General of Civil Aviation did not have any discretion to de-register an asset once the creditor had complied with the requirements of Rule 30(7),³¹ which is *pari materia* to Article IX of the Protocol.³²

While there does exist judicial backing of the Convention in India, it is argued that its efficacy concerning the recovery of assets rises by a large amount once it becomes established in the nation's law and the passage of benefits takes place at various stages of the supply chain of the aviation sector. Therefore, a Draft Bill with necessary clarifications relating to situations where conflict may happen between the Indian laws and the Convention must be implemented as soon as it is feasible.

³⁰ *Wilmington Trust SP Services (Dublin) Ltd v Directorate General of Civil Aviation* 2015:DHC:2623.

³¹ ATAR 2015 (n 29), r 30.

³² Neha Singh, '20 Years of Cape Town Convention - Indian Perspective On Aviation's Lynchpin Framework' (*Mondaq*, 7 October 2021) <[https://www.mondaq.com/india/aviation/1119112/20-years-of-cape-town-convention---indian-perspective-on-aviations-lynchpin-framework->](https://www.mondaq.com/india/aviation/1119112/20-years-of-cape-town-convention---indian-perspective-on-aviations-lynchpin-framework-) accessed 30 August 2023.