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TWEAKING IBC TO RESOLVE AIRLINE INSOLVENCIES

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ABSTRACT

The Convention on International Interests in Mobile Equipment (Cape Town Convention or CTC) read with the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (Aircraft Protocol) lay down the global legislative framework for financing and leasing of aviation assets. The Convention and the Aircraft Protocol stipulate that the municipal laws of member States shall contain provisions which allow lessors to repossess their aircraft objects during insolvency resolution of a distressed airline. India, being one of the signatories to the CTC and Aircraft Protocol, issued the notification no. S.O. 4321(E) dated October 3, 2023 through the Ministry of Corporate Affairs (MCA Notification) clarifying that moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) is not applicable to transactions/arrangement/agreements related to aircraft, aircraft engines, airframes and helicopters to which the CTC and Aircraft Protocol, apply.

While the object of the CTC and Aircraft Protocol is laudable, it bears consideration that conferring the lessors with the unrestricted right to repossess the aircraft objects during insolvency of an airline could be counter productive for the overall revival of the airline. In the absence of operating aircraft, the airline has negligible prospects of revival/ turnaround which can be detrimental to the various other stakeholders such as banks, financial institutions, employees, workmen, passengers whose interests are also inter-linked to successful resolution of the airline.

The aim of this research paper is to suggest an alternative approach which strikes a more equitable balance between the right of lessors to repossess aircraft viz creating space for distressed airline to revive its business as a going concern. The research paper shall examine: (a) stakes involved in an airline insolvency and measures required for a successful turnaround, (b) impact of the MCA Notification and its effects on the airline sector, (c) the manner in which other jurisdictions have incorporated provisions of the CTC and Aircraft Protocol in their municipal law; and (d) suggesting options which could be considered to balance the interest of lessors while giving the airline a realistic chance of revival.

Keywords: Airline Insolvency, Moratorium, Aircraft Lessors, Repossession, Balanced Approach

INTRODUCTION

The airline sector is strategically important for the Indian economy. The passenger traffic in India (domestic and international) has increased from 10.53 crore (in FY 2021-22) to 19.06 crore (in FY 2022-23),[1] and is slated to increase manifold in the near future. As per the latest market forecast by Airbus, India will require 2,210 new aircraft over the next 20 years.[2] The combined value of these aircraft will be over ₹ 20,40,000 crore, and financing of about ₹ 35,000 crore would be required for taking deliveries of 100 of the seaircraft each year.[3] With global aircraft leasing market expected to grow from $172.9 billion in 2023 to $317.5 billion by 2030,[4] it is anticipated that the majority of the financing for the import of new aircraft in India would be through lease arrangements backed by global financiers. However, the cost of availing financing through such lease-backed arrangements would be dependent on the level of legal protection available to the aircraft lessors/financiers, especially in repossession of the aircraft if the airline faces insolvency.

Needless to say, aircraft lessors want the unrestricted right to repossess aircraft during the insolvency resolution of the distressed airline. However, vesting such a right with them raises concerns regarding the ability ofthe distressed airline to renegotiate and have the leeway to operate the aircraft for running its business as a going concern. In the absence of operating aircraft, the airline has negligible prospects of revival/turnaround, which can have a detrimental impact on various stakeholders. These include passengers, vendors, banks and financial institutions, employees, and workmen. This can impact the economy as a whole. Therefore, from a legislative perspective, it is ideal to adopt an approach that strikes a delicate balance between protecting the legal rights and interests of the aircraft lessors during the insolvency resolution process of the airline on one hand, and the successful revival/turnaround of the airline company on the other.

Under the scheme of the IBC, with effect from the date of commencement of the corporate insolvency resolution process (CIRP) under the provisions of Chapter II of Part II of the IBC, a moratorium comes into place. It *inter-alia* restricts owners/lessors from repossessing the assets which are in the occupation/possession of the corporate debtor (CD) undergoing the CIRP.[5] This was an omnibus restriction which applied in the case of every CIRP, notwithstanding the sector in which the concerned CD was engaged in.

However, an exception to this restriction has recently been carved out in the context of the insolvency resolution of CDs in the airline sector. The MCA Notification issued on October 3, 2023 has clarified that the moratorium under section 14 of the IBC is not applicable to

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[1] Directorate General of Civil Aviation, *Handbook on Civil Aviation Statistics 2022-23*, 6 (2023), https://www.dgca.gov.in/digigovportal/?page=jsp/dgca/InventoryList/dataReports/aviationDataStatistics/handbookCivilAviation/HANDBOOK%202022-23.pdf&main4252/4205/sericename[hereinafter DGCA Report].

[2] *India aircraft demand seen at 2,210 over next 20 years,* Airbus, (Mar. 24, 2022), https://www.airbus.com/en/newsroom/press-releases/2022-03-india-aircraft-demand-seen-at-2210-over-next-20-years.

[3] Ministry of Civil Aviation, Government of India, *Report of the Working Group on 'Project Rupee Raftar'- Development of Aircraft Financing and Leasing in India*, 4 (2019).

[4] *Aircraft Leasing Market Size, Share & Covid-19 Impact Analysis, By Aircraft Type (Narrow Body, Wide Body, and Regional Body and Regional Aircraft), By Lease Type (Wet Lease, Dry Lease, and Damp Lease) and Regional Forecast, 2023-2030,* Fortune Business Insights (May, 2023),https://www.fortunebusinessinsights.com/aircraft-leasing-market-107476.

[5] The Insolvency and Bankruptcy Code, 2016, §14(1)(d), No. 31, Acts of Parliament, 2016 (India).

transactions/arrangements/agreements related to aircraft, aircraft engines, airframes and helicopters. It must be noted, however, that this exception applies to only those aircraft, aircraft engines, airframes and helicopters to which the Cape Town Convention and Aircraft Protocol (signed and acceded by India), apply.[6]

In the opinion of the researchers, this notification has the potential to create uncertainty in the resolution of airline companies facing distress. This is because it prioritises the interests of aircraft lessors over all other stakeholders of the distressed airline. These include banks and financial institutions, employees and workmen, passengers, and other vendors, all of who mare within the ambit of moratorium and whose interests are also interlinked to a successful resolution of the airline. Therefore, the present research paper seeks to suggest certain changes/modifications which may be incorporated into the IBC. These could further the prospect of resolution of airlines while giving more say to the lessors in the insolvency resolution process of troubled airline companies. The aim of this research paper is to propose a more balanced approach between the right of an aircraft lessor to take repossession of a leased aircraft vis-à-vis creating an opportunity for a distressed airline to revive and run its business as a going concern. Towards this end, the research paper delves into: (a) the airline sector in India and the growing prominence of lease as a measure of financing aircraft; (b) analysis of the provisions of the CTC and the Aircraft Protocol in relation to repossession of aircraft by the lessors during insolvency resolution of the distressed airline; (c) insolvency law for the resolution of airline companies in India, the stakes involved in an airline insolvency, and the measures required for a successful turnaround; the impact of the notification and its effects on the airline sector from an entrepreneurship perspective; (d) the manner in which other jurisdictions have incorporated provisions of the Cape Town Convention and the Aircraft Protocol in their municipal law; and (e) suggesting options which could be considered to balance the interest of lessors while giving the troubled airline a realistic chance of revival.

THE INDIAN AVIATION SECTOR AND AIRCRAFT LEASING

Brief historical background

India's history in the civil aviation sector dates back to February 18, 1911, when M. Picquet (a French pilot) flew from Allahabad to Naini, covering a distance of eight miles to deliver letters and postcards.[7] However, it was only in 1932 when Tata Sons Limited became the first airline (i.e. Tata Airlines) to begin commercial operations between Karachi – Ahmedabad – Bombay – Bellary – Madras.[8] Later, between 1933-34, a number of airlines such as Indian Trans Continental Airways, Indian National Airways, Madras Air Taxi Services etc. came up and the aviation activities expanded with new routes introduced in Karachi, Jodhpur, Delhi, Allahabad, Gaya, Calcutta, Akyab, Rangoon.[9] Subsequently, in 1946, Tata Airlines was renamed as Air India and converted to a public company.[10]

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[6] Ministry of Corporate Affairs, *Notification S.O. 4321 (E) under Section 14(3)(a) of the IBC* (Oct. 3, 2023), https://ibbi.gov.in/uploads/legalframwork/8273e42bb4de11d39f37ab81f96f93ec.pdf. [hereinafter MCA Notification].

[7] Sujan Kumar Saraswati, *Civil Aviation Environment in India*, 36 Econ. & Pol. Wkly. 1639, 1639 (2001)[hereinafter Sujan Kumar].

[8] J.R.D Tata, *The Story of the India Aircraft*, 65 Journal of the Royal Aeronautical Society 455, 459 (1961).

[9] Sujan Kumar, *supra note* 7, at 1639.

[10] Vippan Raj Dutt, *Dimensions Of Customer Service Quality – An Empirical Study Of Domestic Airline Industry In India*, Aligarh Muslim UnivInflibnet Service, 17 (2002) [hereinafter Vippan Raj Dutt].

At the time of independence in 1947, India had around 44 operational airports and 11 functional airlines.[11] However, owing to stiff competition and limited number of passengers, airlines began to undercut each other which led to losses.[12] Further, the increase in price of aviation fuel, operational expenditures and large fleets with less passengers took a heavy toll on the airlines operating at the time.[13] In 1948, Jupiter Airways went into liquidation, followed by Ambica Airlines in 1949, and later, many other airlines also went bankrupt.[14] Concerned by the stress in the aviation sector, in February 1950, the then Government of India (Government), set up the Air Traffic Enquiry Committee to recommend measures for improvement in the overall functioning of the industry.[15] The said committee, in its report, recommended voluntary mergers, deregistration of some airlines, and reallocation of assistance (including loans) to re-equip airlines with newer aircraft.[16] However, at that time, the Government was not keen to provide any financial assistance through restructuring of airlines and decided to nationalise the industry.[17]

As a result, the Air Corporations Act, 1953 (Air Corporations Act) was passed by the Parliament of India.[18] The salient features of the Air Corporations Act were that: (i) two corporations, Indian Airlines and Air India International, were established which had the power to operate any air transport, both domestic and international;[19] (ii) the finances and planning of the two corporations were to be controlled by the Government;[20] (iii) all licenses provided to private commercial operators for domestic scheduled services were nullified;[21](iv) the Government was given the power to regulate the functioning of the civil aviation industry in the country.[22]

Till the 1980s, India's civil aviation sector remained monopolised by the Government owned airlines.[23] However, in 1986, the Government again permitted the private sector companies to undertake air taxi services. The private sector companies included Air Sahara, Jet Airways, Damania Airways, East West Airlines, Modi Luft, and NEPC Airways.[24] Subsequently, in 1994, the Air Corporation Act was repealed which allowed the entry of private players (both resident and non-residents) in the airline industry.[25] However, not many operators were able to continue their business, and by 1997, only two private operators – Jet Airways and Air Sahara remained in business.[26]

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[11] Sujan Kumar, *supra note* 7, at 1639.
[12] Arijit Mazumdar, *Regulation of the Airline Industry in India: Issues, Causes and Rationale*, 70 Indian J. of Pol. Sci. 451, 452 (2009) [hereinafter Arijit Mazumdar].
[13] Vippan Raj Dutt, *supra note* 10, at 17.
[14] Sujan Kumar, *supra note* 7, at 1640.
[15] Ministry of Communication, Government of India, *Report of Air Transport Enquiry Committee* 2 (1950), https://space.gipe.ac.in/xmlui/handle/10973/26777.
[16] *Id.* at 105-116.
[17] Arijit Mazumdar, *supra note* 12, at 453.
[18] *Id.*
[19] The Air Corporations Act,1953, § 3, 7(1),No. 27, Acts of Parliament, 1953 (India).
[20] *Id.*, § 10.
[21] *Id.*, § 19.
[22] *Id.*, § 34.
[23] Pavithra Kumari and P. S. Aithal, *An Overview of the Aviation Industry in India with Special Emphasis on Privatization,* 4(2) IJCSBE 220, 221 (2020).
[24] Vippan Raj Dutt, *supra note* 10, at 19.
[25] The Air Corporations (Transfer of Under Takings and Repeal) Act, 1994, § 8(11), No. 13, Acts of Parliament, 1994 (India).
[26] Vippan Raj Dutt, *supra note* 10, at 19.

In 2003, the introduction of low-cost carriers (LCC) by Air Deccan brought a new competitive spirit to India's civil aviation industry and challenged the duopoly of Jet Airways and Air Sahara.[27] Furthermore, the introduction of low-cost airlines also changed the perception that air travel was reserved only for the elites.[28] The initial success of LCC in India led to the entry of more players into the market. These included Spice Jet, Kingfisher, Indigo, Paramount, and Go Air.[29]

At present, around 14 airlines are operating in India. Out of them, Indigo commands 54.7% of the domestic market share, followed by Vistara (10.4%), Air India (9.3%), Spice Jet (8.4%), Go Air (8.4%), Air Asia (7.0%), Akasa Air (1.1%) and other airlines (0.7%).[30] Practically, 98% of the airline business in India is with three players, i.e. Indigo, Air India (which is amalgamating Vistara and Air Asia), and Spice Jet.

Growth prospects of civil aviation in India

With time, there has been an exponential growth in the aviation sector due to high investments, structural reforms, improvement in quality of services, entry of LCC, etc. At present, with a population of more than 1.3 billion, India has great potential for further growth and development in the aviation industry. Air transportation in India is already estimated to support 6.2 million jobs and contribute US $35 billion towards the country's GDP. Moreover, air transport and foreign tourists arriving by air are expected to support 1.5 % of the Indian GDP.[31] Further, the revenue contribution of the aviation sector is estimated to be over ₹ 87.5 billion through tax receipts from employees and corporates, and additional revenue of ₹ 9.8 billion through the supply chain.[32]

According to the International Air Transport Association (IATA), in the next ten years, India is expected to overtake China and the United States as the world's third-largest air passenger market.[33] The recent trends show that the air passenger traffic in India, both domestic and international, witnessed a positive growth and increased to 190.60 million (FY 2022-23) as compared to 105.35 million in the previous year.[34]

To cater to the rising air traffic, the Government has been working towards increasing the number of airports. As of 2023, India has 148 operational airports, which are slated to increase to 220 by 2025.[35] Further, in the Union Budget of 2023-24, ₹ 3,224.67 crore (US$ 440.36 million) was allocated to the Ministry of Civil Aviation.[36] The UDAN Scheme, which aims to

[27] *Id.*
[28] K. Deeppa, R. Ganapathi and Prasoom Dwivedi, *Services of Low-Cost Carriers in India: The Customer's Perspective,* 10(9) Indian J. of Sci. and Tech. 1, 1 (2017).
[29] Vippan Raj Dutt, *supra note* 10, at 20.
[30] DGCA Report, *supra note* 1, at 9.
[31] IATA, *The Importance of Air Transport in India,* 1, iata.org/en/iata-repository/publications/economic-reports/india—value-of-aviation/.
[32] Uttiya Bhattacharyya and Dr. Dhalla Rizwan Salim, *Modeling the Dynamic Air Transport Industry Aviation Fuel Demand in India,* 4 Int. J Sup. Chain. Mgt 35, 36 (2015).
[33] IATA, *The Future is Bright: But Not Without Its Challenges*, 1 (2018), https://www.iata.org/en/iata-repository/publications/economic-reports/the-potential-and-challenges-of-indian-aviation/.
[34] DGCA Report, *supra note* 1, at 6.
[35] *Indian Aviation Industry,* Indian Brand Equity Foundation(Aug. 2023), https://www.ibef.org/industry/indian-aviation.
[36] *Id.*

stimulate regional air connectivity, was allocated ₹ 601 crore (US$ 77.52 million).[37] Moreover, in 2023, the Government has accorded 'in-principle' approval for setting up of 21 greenfield airports across the country. Out of these, 11 greenfield airports have already been operationalised.[38]

The Government has further announced that it will spend US$ 11.88 billion by 2025 to boost regional connectivity by constructing new airports and modernising existing ones.[39] Further, as per the recent report of the Ministry of Civil Aviation, earlier, about 40% of the airspace in India was unavailable for civilian use.[40] This airspace has now been agreed to be released by the Indian Air Force.[41] This is estimated to provide overall benefit to the aviation ecosystem including significant savings in flight time, fuel usage, and reduction in carbon emission.[42]

Furthermore, globally, the maintenance, repairs, and operations (MRO) industry is expected to grow from US$ 68.5 billion in 2021 to US$ 117 billion by 2031. In light of this, the Government has envisaged developing an MRO industry in India that can, at the very least, fulfil the demands of the Indian airlines.[43] To achieve this, the Government has proposed various key steps, including setting up of a high-power task force for the promotion of MRO, the declaration of MRO and component warehouses as free trade zones with 0% GST, and import restrictions.[44]

Based on the above, it is evident that with the increase in passenger traffic and measures taken by the Government, the development in the aviation sector looks very promising. Having said this, airlines would be required to increase their fleet of aircraft substantially over the next few years to meet the increase in demand of passenger base. This would ultimately require a huge amount of finance, and for which,asset backed financing in the form of aircraft lease will have a key role to play. This aspect is analysed below.

Aircraft leasing and Indian aviation sector

As per the Air Leasing Manual issued by the Directorate General of Civil Aviation (DGCA), the term aircraft lease is defined to mean "*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*".[45] Aircraft leasing can be in the form of a wet lease, a dry lease or a damp lease. In a wet lease, the essential aircraft, crew, maintenance and insurance i.e.,

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[37] *Id.*

[38] Ministry Of Civil Aviation, *In-Principle approval to set up 21 new Greenfield Airports in country* (July 23, 2023), https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1942034.

[39] Jamie Freed and Gerry Doyle, *India To Boost Aviation Infrastructure As Demand Booms,* Reuters (Mar. 20, 2023), https://www.reuters.com/business/aerospace-defense/india-eases-leasing-rules-address-aircraft-shortages-minister-2023-03-20/.

[40] Ministry of Civil Aviation - Government of India, *Annual Report 2020-21* 3-4, https://www.civilaviation.gov.in/sites/default/files/migration/AR-Eng-2020-21.pdf.

[41] *Id.*

[42] *Id.*

[43] NITI Aayog, *MRO In India – Trends, Challenges and Way Forward*, Brief 18 (July 2022), https://www.niti.gov.in/sites/default/files/202303/Development%20of%20MRO%20%28Maintenance%20repair%20and%20overhaul%29%20industries%20for%20the%20aviation%20sector%20in%20India.pdf.

[44] *Id.* at 52.

[45] *Aircraft Leasing Manual*, DGCA 6 (2013), http://164.100.60.133/manuals/cap3200.pdf.

ACMI are also leased along with the aircraft.[46] In a dry lease,only the aircraft is leased without the crew.[47] Finally, in a damp lease, the aircraft is leased along with partial crew to the lessee.[48]

Leasing an aircraft has its own advantages. The cost of purchasing an aircraft is high and can substantially increase the capital expenditure of an airline.[49] To mitigate this risk, airlines, especially those operating at low cost, tend to lease aircraft as the cost gets spread across the lease period, making it possible for them to fly at competitive rates.[50] Typically, sale and lease-back model is resorted to for leasing the aircraft.[51] Under this model, the airline first purchases the aircraft from manufacturer. Then, close to the delivery, the airline sells it to the lessor, and later leases it back from the lessor.[52] With this model, the operator gets to operate younger flights with low maintenance cost, and also benefits from leasing back the aircrafts.[53] Additionally, the leasing of aircraft provides various other advantages to the operator, including that: (a) it conserves their working capital and credit capacity; (b) provides up to 100% of finance, with no deposits or prepayments; and (c) provides volume discounts for aircraft purchase that can be passed on to airline.[54]

As per Boeing's commercial market outlook for 2019–2038, LCCs in India have dominated the Indian market, accounting for 65% of all domestic seats and 52% of total capacity (including international travel).[55] Due to the large market share of LCCs in the airline sector, the total numbers of leased aircraft in India stood around 86% (in 2021).[56] In fact, Indigo, which has more than 300 aircraft in its fleet, has recently disclosed in its annual report that out of its total debt of ₹ 448,542 million, operating lease liability amounted to ₹ 415,477 million.[57]

At present, Indian airlines are highly dependent on foreign leasing companies to finance their acquisition of aircraft. As of 2021, Avolon (Ireland) is the largest lessor to Indian airlines, with GE Capital Aviation Services (Ireland) and DAE Capital (UAE) at the second and third position respectively.[58] The other lessors to Indian airlines include, BBAM (USA, Australia),

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[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Dipesh Shah and Pawan Kumar Chugan, *Aircraft Financing and Leasing in India Challenges & Opportunities: An Exploratory Study of Developing Aircraft Financing and Leasing in India,* in Business, Economy and Environment: Corporate Perspectives 282-290 (2019).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] Peter S. Morrell, Airline Finance, 196(3rded. 2007).

[55] *Commercial Market Outlook 2019-2038*, Boeing 50 (2019), https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUK Ewjo1ISjluSDAxXba2wGHSkOBk0QFnoECAkQAw&url=https%3A%2F%2Fs4cd98e6181776fd7.jimcontent.com%2Fdownload%2 Fversion%2F1597359309%2Fmodule%2F8027287461%2Fname%2Fcmo-sept-2019-report-final.pdf&usg=AOvVaw1FgkaqW4zjwb5WmJd7UUYl&opi=89978449.

[56] Shanglio Sun, *Fleet Composition of Major Airlines in India as of January 31, 2021, by Aircraft Ownership,* Statista (Sep. 29, 2022), https://www.statista.com/statistics/1249054/india-fleet-composition-of-major-airlines-by-aircraft-ownership/.

[57] *Indigo Annual Report 2022-23- Towards New Heights & Across New Frontiers*, Indigo 38 (2023), https://www.goindigo.in/content/dam/goindigo/investor-relations/annual-report/2022-23/Annual-Report-2023-24.pdf.

[58] *Knowledge Report on Leasing & Financing Aircraft in India*, Acumen Aviation Group, 6 (2021), https://aidat.in/wp-content/uploads/2016/08/Knowledge-report-on-Aircraft-leasing-financing-IFSC-India.pdf.

BOC Aviation (Singapore), Dubai Aerospace (UAE), CDB Leasing (China), Aircastle (USA), ALAFCO (Kuwait), DVB Bank (Germany), and Goshawk Aviation.[59] Almost 100% of the aircraft that have been leased by Indian airlines are from these foreign leasing companies.

Heavy reliance of the Indian airlines on foreign leasing companies has prompted the Government to develop an aircraft leasing market in India. In this regard, the Government has taken key steps including: (a) developing International Financial Services Centres at GIFT City; (b) permitting insurance companies to undertake aircraft insurance and invest in leasing and financing business; (c) enabling pension funds and alternative investment funds to participate in aircraft financing; (d) exempting corporate tax for a block period of 10 years within 15 years for leasing units; (e) notifying aircraft lease as a financial product.[60] However, while these steps are in the right direction, it will take some time for them to fructify.

Currently, the aircraft leasing industry in India is still at the nascent stage. It is only in the latter half of this year that Indian companies, such as Adani Ports and Special Economic Zone (APSEZ),[61] Air India, and Indigo announced about setting up leasing units in IFSC to carry out the business activity of owning and leasing aircraft.[62] Considering this aspect, the Indian airlines will invariably continue to have reliance on foreign leasing companies for financing the acquisition of aircraft. In fact, recently, the Directorate General of Civil Aviation (DGCA) had granted its in-principle approval to Air India and Indigo for import of 470 and 500 aircraft respectively, which are proposed to be inducted during the period of 2023-2035.[63] It is likely that most of these aircraft would be financed by foreign aircraft lessors. Having said this, the critical factor that would drive the confidence of foreign lessors in the Indian aviation market would be the legal protection available to them for repossessing the aircraft in case any Indian airline faces insolvency.

India is already a signatory to CTC which is an international instrument providing for a uniform legal regime for the creation, perfection, priority, and enforcement of the security interests in objects such as aircraft, railway, and space objects. The demand of the foreign aircraft lessors across the globe has been for aneffective implementation of the CTC in the State in which the leased aircraft and lessors are located. This is because, aircraft lease being a mode of asset-based financing, the lessor, upon default by the debtor, wants prompt realisation of the value of the leased asset for generating proceeds/revenues.[64]

It is incumbent for the aircraft lessors to factor the pricing of the lease rentals for the aircraft based on the remedies available to them for repossessing the aircraft through the

[59] *Id.*

[60] *Government taking steps to make India a hub for aircraft leasing and financing*, PIB (July 28, 2021), https://pib.gov.in/Press Release Page.aspx?PRID=1740009.

[61] Libin Chacko Kuiran, *Adani Ports incorporates aircraft leasing unit in GIFT City*, ITLN (Oct. 25, 2023), https://www.itln.in/latest-news/adani-ports-incorporates-aircraft-leasing-unit-in-gift-city-1350211.

[62] Arindam Majumder, *Indigo, Air India to Set up Leasing Units at the Gift City*, The Economic Times (Sep. 4, 2023), https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/indigo-air-india-to-set-up-leasing-units-at-gift-city/articleshow/103352060.cms?from=mdr.

[63] *Aviation Body Gives Nod to Air India, IndiGo to Import 970 Planes: Centre*, Press Trust of India (July 31, 2023), https://www.ndtv.com/india-news/aviation-body-dgca-gives-nod-to-air-india-indigo-to-import-970-planes-centre-4256746#:~:text=Aviation%20regulator%20DGCA%20has%20given%20an%20in-principle%20nod,IndiGo%20is%20to%20buy%20500%20planes%20from%20Airbus.

[64] Ronald Scheinberg, The Commercial Aircraft Finance Handbook 28 (2017).

effective implementation of the CTC. In the past, the Export Import Bank of the United States had reduced its exposure fee on financing of U.S. commercial aircraft by one-third for foreign buyers from countries that have ratified and implemented the CTC.[65] Further, authors in their studies have also estimated that upon adopting the CTC and Aircraft Protocol, a country could save between $7.6 billion and $11.1 billion over a twenty-year period,[66] and between thirteen and twenty percent per dollar of principal borrowed on interest.[67] Conversely, non-implementation of the CTC in its letter and spirit can increase the cost of lease rentals for airlines, which can have a detrimental impact on the end use customers/passengers and other stakeholders.[68]

It is estimated that in India, airlines have had to pay $1.2-1.3 billion extra in lease rentals because of the challenges faced by the foreign lessors in repossessing their aircraft within the country.[69] In this context, it is clear that the MCA has recently issued the Notification to further the right of lessors to repossess the aircraft swiftly during the insolvency resolution of the airline with a view to boost the confidence of the foreign lessors.[70] However, the Aviation Working Group Global (AWG) has still downgraded India to 'negative' from 'positive' owing to foreign lessors being unable to repossess their aircraft from Go Air which have been grounded since 2 May 2023.[71]

In view of the above, to appreciate the intent behind aircraft lessors seeking effective implementation of the CTC, a detailed analysis of the provisions of the CTC and the Aircraft Protocol is necessary.

CTC AND THE AIRCRAFT PROTOCOL

Background of the CTC

The history of CTC dates back to 1988, when T.B. Smith QC first proposed the idea of drafting an international convention to cover secured transaction for high value mobile equipment. This proposal was made during the diplomatic conference held in Ottawa for the signing of the Convention on International Financial Leasing and the Convention on International Factoring.[72] After assessing this proposal, the International Institute for the Unification of

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[65] Linda Formella, *EX-IM Bank Offers One-Third Reduction of its Exposure Fee on Export Financing for U.S. Large Commercial Aircraft,* EXIM(Jan. 20, 2003),https://www.exim.gov/news/ex-im-bank-offers-one-third-reduction-its-exposure-fee-export-financing-for-large-commercial.

[66] Anthony Saunders, Anand Srinivasan and Ingo Walter, *Innovation in International Law and Global Finance: Estimating the Financial Impact of the Cape Town Convention,* NYU Working Paper No. FIN-06-037 31–32 (2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894027.

[67] Vadim Linetsky, *Economic Benefits of the Cape Town Treaty,* Aviation Working Group 2 (Oct. 18, 2009), http://www.awg.aero/assets/docs/ economicbenefitsofCapeTown.pdf.

[68] Nettie Downs, *Taking Flight From Cape Town: Increasing Access To Aircraft Financing,* 35 U. Pa. J. Int'l L. 863, 881-883 (2014).

[69] *Airlines could save around $1.3 billion as leasing costs decrease: Civil Aviation Ministry,* Business Line (Oct. 7, 2023) https://www.thehindubusinessline.com/news/ibc-regime-made-air-carriers-pay-12-13-b-extra-lease-rentals-moca/article67389589.ece.

[70] MCA Notification, *supra note* 6.

[71] Saurabh Sinha, *GoAir fallout: Global leasing watchdog downgrades India*, Times of India (Dec. 8, 2023), http://timesofindia.indiatimes.com/articleshow/105825064.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

[72] R Goode, H Kronke and E Mckendrick, Transnational Commercial Law: Text, Cases and Materials 394 (2015).

Private Law (UNIDROIT) formed a study group to create the draft of the convention for harmonising the law on secured transaction involving high value collateral equipment which were later reduced to aircraft, rolling stock, and space assets.[73] The study group had participation of the IATA and the AWG, comprising of representatives from the aviation, manufacturing, and finance sectors, and was co-chaired by Boeing and Airbus.[74]

In the beginning of the process, AWG and the IATA worked with the representatives of the space, railway and other industries to craft a single convention that would serve the needs of all the industries.[75] This process took around eight years, and later, in 1996, it stalled due to non-consensus being reached on having a common set of rules for different industries.[76]

Subsequently, UNIDROIT reorganised the drafting process, whereby it was decided that it would oversee the draft of the base convention. Further, an aircraft protocol group comprising of the AWG, the IATA and the International Civil Aviation Authority was formed, which would draft the additional aircraft protocol to the base convention.[77] Finally, on November 16, 2001, the CTC and the Aircraft Protocol were complete and opened for signature at the diplomatic conference convened for this purpose in Cape Town.[78] The CTC entered into force with respect to aircraft on March 1, 2006, when the Aircraft Protocol entered into force.[79]

Key provisions of the Convention related to enforcement rights of aircraft lessors

The CTC, along with the Aircraft Protocol, specifically apply to three categories of aircraft objects, namely, airframes, helicopters, and aircraft engines.[80] Moreover, Article 2 of the CTC elucidated three type of international interests in aircraft objects, namely, charger under a security agreement; conditional seller under a title reservation agreement; and lessor under a leasing agreement.[81] For the purposes of the present article, the authors have limited their analysis of the CTC and the Aircraft Protocol in relation to repossession of aircraft by the lessor in case of default by the debtor.

Under the CTC, the term 'creditor' includes an aircraft lessor, [82] and the 'debtor' includes a lessee under a lease agreement. [83] Further, the term 'lease agreement' is defined to mean *an agreement by which one person (the lessor) grants a right to possession or control of an object (with or without an option to purchase) to another person (the lessee) in return for a rental or other payment.*[84]

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[73] Anton N. Didenko, The Cape Town Convention-A Documentary History 8 (2021).
[74] Mark J. Sundahl, The Cape Town Convention- its Application to Space Assets and Relation to the Law of Outer Space 23 (2013).
[75] *Id.*
[76] *Id.*
[77] *Id., see also* Sanam Saidova, *Security Interest Under The Cape Town Convention On International Interest In Mobile Equipment* 6 (2018) [hereinafter Sanam Saidova].
[78] *Id.*
[79] *Id.*
[80] International Institute for the Unification of Private Law, The Convention on International Interests in Mobile Equipment, art. 2, Nov. 16, 2001, 2307 U.N.T.S. 285[hereinafter CTC]; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, art. I, Nov. 16, 2001[hereinafter Aircraft Protocol].
[81] CTC, *supra note* 80, art. 2.
[82] *Id.*, art. 1(i).
[83] *Id.*, art. 1(j).
[84] *Id.*, art. 1(q).

In terms of the CTC, in the event of default by the debtor, an aircraft lessor: (a) can terminate the lease agreement and take possession and control of the aircraft; or (b) apply for a court order authorising or directing either of these acts. Once possession is regained, the aircraft lessor is free to utilise the aircraft as desired.[85] Further, the lessee and the lessor can contractually decide on an event of default that would give rise to the rights and remedies specified in Articles 8 to 10 and 13 of the CTC.[86] Additionally, upon default by the lessee, an aircraft lessor can also seek interim relief from a court in a contracting State where the aircraft is located. The relief so granted may include: (a) preservation of the aircraft; (b) gaining possession, control and custody of the aircraft; (c) managing the aircraft and the income there from; (d) immobilisation of the aircraft.[87]

Key provisions of the Aircraft Protocol

The CTC is further supported by three equipment (i.e. aircraft, space object, and railway) specific protocols. The specific protocol that deals with the aircraft is known as Aircraft Protocol. In case of any inconsistencies, the provisions of the Aircraft Protocol take precedence over the Convention.[88]

It is a given that post default, the primary concern for the lessor is the prompt repossession of the aircraft, as allowing the debtor to retain it poses various risks.[89] The lessor is wary of potential relocation to an unfavourable jurisdiction, and aims to initiate revenue generation by leasing the aircraft to new customers.[90] Keeping such hardship of the lessor in mind, Article IX of the Aircraft Protocol provides for the de-registration, and export and physical transfer of the aircraft in the event of a default.[91] De-registration, a prerequisite for re-registration in a different territory as per the Chicago Convention, is facilitated by Article IX.[92] The remedy of de-registration and export can be implemented through two approaches: (a) a self-help method, and (b) court assistance. These are set out below:

a) Self Help Remedy

In terms of Article XIII of the Protocol, an airline company, as part of its leasing arrangement with its lessors, may issue an "irrevocable de-registration and export request authorisation" (IDERA) substantially in the form and manner annexed to the Protocol, in favour of its lessors.[93] The lessor in whose favour the IDERA has been issued or its certified designee (IDERA Holder) shall be entitled to exercise the following remedies: (a) procure the de-registration of aircraft;[94] and (b) procure the export and physical transfer of the Aircraft Object[95] from the territory in which it is situated.

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[85] *Id.*, arts. 10, 54(2).
[86] CTC, *supra note* 80, art. 11.
[87] *Id.*, art. 13.
[88] CTC, *supra note* 80, art. VI.
[89] *Aircraft repossession upon default – A review of the issues of the United Kingdom, USA, India and Nigeria*, INSOL International, https://brownrudnick.com/wp-content/uploads/2019/12/INSOL-International-Restructuring.pdf.
[90] *Id.*
[91] Aircraft Protocol, *supra note* 80, art. IX.
[92] Aircraft Protocol, *supra note* 80.
[93] *Id.*, art. XIII(1).
[94] *Id.*, art. I(2)(i) [The phrase "de-registration of aircraft" means deletion/removal of registration of the aircraft from the designated aircraft register maintained by a national authority in charge of registration/deregistration of aircraft].
[95] *Id.*, art. I(2)(c) ["Aircraft Objects" shall mean airframes, aircraft engines and helicopters].

The IDERA Holder may make an application to the Registry Authority[96] where the Aircraft Object is situated seeking deregistration and export of the concerned Aircraft Object (Deregistration Request). Such Deregistration Request is required to be honoured by the Registry Authority subject to applicable safety laws and regulations so long as : (a) the request is properly submitted by the authorised party under a recorded IDERA; and (b) the IDERA Holder certifies to the Registry Authority, if required by that authority, that all Registered Interests,[97] ranking in priority to that of the creditor in whose favour the authorisation has been issued, have been discharged, or, that the holders of such interests have consented to the de-registration and export of the Aircraft Object.

Lastly, the IDERA Holder is required to provide reasonable prior notice in writing of the proposed Deregistration Request to: (a) the debtor; (b) any person who, for the purpose of assuring performance of any of the obligations in favour of the lessor, gives or issues a suretyship, or a demand guarantee, or a standby letter of credit, or any other form of credit insurance. Additionally, the IDERA Holder must notify any other person having rights in or over the Aircraft Object, who have given notice of their rights to the chargee within a reasonable time prior to the de-registration and export.

b) Court Assistance

Court assistance can be requested by the lessors pursuant to Article13(1) of the Convention and Article X (6) of the Protocol.[98] Article 13(1) of the Convention allows for interim remedies in cases of debtor default, including the preservation of aircraft and aircraft objects, gaining possession, control, or custody of the aircraft, etc.[99] An order obtained under Article 13(1) of the Convention can be executed within five working days under Article X (6) of the Aircraft Protocol in the Contracting State where the aircraft is located.[100]

c) Obligations of the Contracting State under the Convention and the Aircraft Protocol related to insolvency of an airline

Under the CTC, "insolvency proceedings" have been defined to mean bankruptcy, liquidation, or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation.[101]

The Aircraft Protocol consists of specific approaches that Contracting States can adopt in their domestic law for addressing the rights of lessors to take repossession of the aircraft in case insolvency proceedings are initiated against the debtor. These approaches are set out below:

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[96] *Id.,* art. I(2)(o) ["Registry Authority" means the national authority or the common mark registering authority, maintaining an aircraft register in a Contracting State and responsible for the registration and de-registration of an aircraft in accordance with the Convention on International Civil Aviation dated 7 December 29144 ("Chicago Convention").]

[97] CTC, *supra note* 80, art. 1(cc) [The term "Registered Interest" shall collectively refer to: (i) International Interest; (ii) a registrable non-consensual right or interest (Registrable NCRI); and (iii) a National Interest specified in a notice of a national interest registered pursuant to Chapter V of the CTC.]

[98] Aircraft Protocol, *supra note* 80, art. X(6); CTC, *supra note* 80, art. 13.

[99] *Id.*

[100] *Id.*

[101] CTC, *supra note* 80, art. 1(l).

Alternative A: Under this approach, upon occurrence of an insolvency related event, the Resolution Professional (RP)/debtor would be required to give possession of the aircraft to the lessor at the end of the 'waiting period', or the date on which the creditor would be entitled to the possession of the aircraft object, if this Article IX of the Aircraft Protocol does not apply, whichever is earlier.[102]

Under this approach, the 'waiting period' would be the period specified in the declaration of the Contracting State. Contracting States that have adopted Alternative A in their domestic law have prescribed different waiting periods.[103] For instance, China, Jordan and New Zealand, among other countries, have declared the waiting period to be 60 days. On the other hand, Nigeria and Malaysia have declared it to be 30 days and 40 days, respectively.[104]

Further, until the lessor is given the possession of the aircraft, the RP/debtor would be required to maintain it and its value in accordance with the lease agreement.[105] The possession of the aircraft can be retained, if, within the waiting period, events of defaults have been cured by the lessee (except the one on account of filing for insolvency) and that it further agrees to perform the future obligations.[106] However, a second waiting period is not applicable in case the lessee defaults in the performance of its future obligations to the lessor.[107]

Alternative B: Under this approach, the RP/debtor is required to give notice to the lessor within the timeline specified in the declaration made by the Contracting State, pursuant to Article XXX(3) of the Aircraft Protocol (Notice).[108] By the said Notice, the RP/debtor is required to inform the lessor whether: (a) it will cure all the defaults (except the one on account of filing for insolvency) and agree to undertake future obligations under the agreement and related transaction documents; or (b) allow the lessors to take repossession of the aircraft.[109] If the RP/debtor fails to give the Notice or fails to allow the lessor to repossess the aircraft, then the lessor can approach the court for seeking necessary direction to repossess the aircraft.[110] In this regard, the court may order and require the lessor to take any additional step or provide any additional guarantee to comply with the terms of its order.[111] Further, pending the decision of the court, the aircraft object shall not be sold.[112]

Till date, only Mexico has adopted the Alternative B approach and declared that the debtor's notice must be given to the creditor within the contractually agreed time period.[113]

It is worth noting that unlike other States, USA has adopted a slightly different approach. In USA, upon filing of the insolvency petition, the automatic stay/moratorium becomes applicable

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[102] Aircraft Protocol, *supra note* 80, art. XI(2) (Alternative A).
[103] *Id.*, art. XI(3) *(Alternative A).*
[104] Sanam Saidova, *supra note* 77, at 246.
[105] Aircraft Protocol, *supra note* 80, art. XI(5) (Alternative A).
[106] *Id.*, art. XI(7) (Alternative A).
[107] *Id.*
[108] Aircraft Protocol, *supra note* 80, art. XI(2) (Alternative B).
[109] *Id.*
[110] *Id.,* art. XI(5) (Alternative B).
[111] Aircraft Protocol, *supra note* 80, art. XI(5) (Alternative B).
[112] *Id.,* art. XI(6) (Alternative B).
[113] Sanam Saidova, *supra note* 77, at 250.

which restricts the creditors from enforcing their recovery rights against the debtor.[114] However, an exception is provided under the Chapter 11 of the US Commercial Code, in relation to the bankruptcy of an airline company. Within 60 days from the date of filing a bankruptcy application, the debtor can elect to cure the events of defaults under the lease agreements, and thereby restrict the aircraft lessor from repossessing the aircraft, till such time.[115] However, the election to cure events of default by the debtor is subject to approval by the bankruptcy court.[116] Further, the timeline of 60 days for automatic stay can be extended further by the mutual consent of the debtor and lessor.[117] But, if the debtor fails to cure the default with 60 days from the date of filing the bankruptcy petition or such other date as decided mutually by the debtor and the lessor, then the lessor would have the right to repossess the aircraft.[118]

INTERPLAY BETWEEN AIRCRAFT LAWS AND THE IBC

The commencement of CIRP of Jet Airways Limited (Jet Airways) and Go Airlines (India) Limited (Go Air) prompted the need to examine the interplay between the provisions of extant laws pertaining to the regulation of airline companies in India, and the scheme of the IBC. One of the primary areas where such examination assumes critical importance is the right of a lessor to repossess its aircraft pursuant to defaults committed by the airline company in discharging its payment obligations towards lease rentals.

Remedies available to lessors under extant aircraft laws

The principal legislation governing the legal framework applicable to airline companies in India, is the Aircraft Act, 1937 (Aircraft Act), and the rules and regulations framed thereunder. Subsequent to the adoption of CTC and the Aircraft Protocol, India deposited Form No.27, making a declaration under Article XXX(1) of the Aircraft Protocol,[119] in terms of which India agreed to enforce the provisions under Article XIII of the Aircraft Protocol.[120] Subsequently, the provisions of Aircraft Rules, 1937(Aircraft Rules) were amended to accommodate the protection granted to lessors in terms of Article XIII of the Protocol.

In this context, the remedies made available to lessors under the provisions of Aircraft Act and Aircraft Rules (together Aircraft Laws) are set out herein below:

a) Firstly, Rule 30(6)(iv) of the Aircraft Rules stipulates that the Central Government shall mandatorily [121] revoke or cancel the certificate of registration if the lease in respect of the aircraft has expired or has been terminated by the lessor.

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[114] 11 U.S.C § 362.

[115] 11 U.S.C § 1110 (a).

[116] *See* Stephen R. Tetro et al., *Bankruptcy and Aircraft Finance,* Champan and Cutler3 (April 2020), https://www.chapman.com/media/publication/1011_Chapman_Bankruptcy_and_Aircraft_Finance_0420.pdf.

[117] 11 U.S.C, § 1110 (b).

[118] 11 U.S.C § 1110 (c).

[119] Aircraft Protocol, *supra note* 80, art. XXX(1) [art. XXX(1) stipulates that a contracting state may, at the time of ratification, acceptance, approval of, or accession tothis Aircraft Protocol, declare that it will apply any one or more of Articles VIII, XII and XIII of this Aircraft Protocol.]

[120] Article XIII of the Aircraft Protocol contains provisions pertaining to deregistration and aircraft of aircraft.

[121] Rule 30(6)(iv) of the Aircraft Rules stipulates the Central Government "may" cancel the registration of an aircraft registered in India *inter-alia* if the lease in respect of the concerned aircraft has expired or has been terminated. However, the Hon'ble Delhi High Court in the matter of *Awas 39423 Ireland Ltd and Ors* v. *Directorate General of Civil Aviation and Anr* 2015 SCC OnLine Del 8177 held that the term "may" is required to be interpreted as "shall" and accordingly, if the lessors have terminated the lease, then DGCA is obliged to cancel the registration of the aircraft.

b) Secondly, sub-Rule 7 was added to Article 30 of the Aircraft Rules,[122] which stipulated that if an IDERA Holder makes a Deregistration Request to the Central Government, the Central Government *"shall"* cancel the registration of the concerned aircraft[123] within a period of 5 working days. This would be done without seeking the consent or any document from the operator of the aircraft or any other person (including the airline company). To seek such cancellation of registration, the IDERA Holder is required to make an application (IDERA Application)[124] along with: (a) the original or notarised copy of the IDERA recorded with the DGCA; (b) priority search report from the International Registry regarding all Registered Interests in the aircraft ranking in priority; (c) a certificate from the IDERA Holder that all Registered Interests ranking in priority to that of the IDERA Holder in the priority search report have been discharged, or that the holders of such interests have consented to the deregistration and export of the aircraft. The cancellation of the registration of the aircraft, however, does not negate the right of the Central Government, or any affiliated entity, or any inter-governmental organisation in which India is a member, or other private provider of public services in India, to take actions such as arresting, detaining, attaching or selling an aircraft object under its applicable laws. These actions can be taken to recover owed amounts to the above mentioned entities, directly related to services provided by the aircraft in question.

c) Thirdly, Rule 32A was introduced into the Aircraft Rules. This stipulates that if the IDERA Holder makes an application for the export of the aircraft, the Central Government, consequent upon cancellation of the registration of an aircraft, under Rule 30(7) of the Aircraft Rules, shall take necessary actions to facilitate the export and physical transfer of the aircraft, along with spare engine, if any. This would be subject to: (i) the payment of outstanding dues in respect of the aircraft; and (ii) the compliance of the rules and regulations relating to safety of the aircraft operation.

d) In addition to the above, the DGCA, on November 16, 2018, issued 'Standard Operating Procedure for Implementation of Rule 32A Relating to Export of Aircraft Covered Under Cape Town Convention' (SOP).[125] The SOP, *inter alia*, states that when an IDERA Holder makes an IDERA Application, the DGCA is required to immediately publish the receipt of IDERA Application on its website, giving the date of receipt of the request, type and registration number of the aircraft, and the name of the operator in whose name the aircraft is registered.[126] In this regard, the airport operators are required to calculate the outstanding dues related to the aircraft in question for a period of 3 months immediately preceding the date of "declared default" (i.e. the date on which the request

[122] MCA Notification, *supra note* 5.

[123] Under the terms of Rule 5 of the Aircraft Rules, no aircraft can be operated unless such aircraft is registered with the Central Government in terms of Rule 30 of the Aircraft Rules.

[124] The format of making an IDERA Application has been prescribed in Appendix "A" of the Standard Operating Procedure being AIC 12/2018 issued by the Directorate General of Civil Aviation.

[125] *Standard Operating Procedure for Implementation of Rule 32A Relating to Export of Aircraft Covered Under Cape Town Convention,* Directorate General of Civil Aviation, AIC 12/2018(Nov. 16, 2018), http://164.100.60.133/aic/AIC12_2018.pdf [hereinafter SOP].

[126] *Id.,* Clause 3.

for deregistration was received by DGCA), and raise bills within 5 working days of the date of receipt of IDERA Request (Priority Dues) which are required to be paid by the IDERA Holder.[127] Once such payment is made by the IDERA Holder, the DGCA can then permit the IDERA holder to fly the aircraft out of India.[128]

A conspectus of the foregoing provisions demonstrates that under the prevailing Aircraft Laws, if an IDERA Holder makes a request for the de-registration and export of aircraft, then, so long as the conditions stipulated in Rule 30(2) read with 37 are satisfied, the Central Government (acting through DGCA) is mandatorily required to honour the request for deregistration and export the aircraft lodged by the IDERA Holder. This legal framework is in line with the declaration made by the Government in accordance with Article 54(2) of the CTC, which stipulates that "*Any and all remedies available to the creditor under the Convention which are not expressed under the relevant provision thereof to require application to the court may be exercised without court action and without leave of the court.*"

In this regard, the Hon'ble Delhi High Court, in the matter of *Awas 39423 Ireland Ltd and Ors. v. Directorate General of Civil Aviation and Anr*[129] (*Spice Jet Case*), observed that if the conditions set out in Rule 30 read with Rule 37 of the Aircraft Rules are satisfied, then the DGCA does not have any discretion and is obliged to deregister the aircraft. While arriving at its decision, it is relevant to note that the Hon'ble Delhi High Court placed reliance on the declaration made by the Government in the instrument of accession in terms of Article 54(2) of the CTC. Similar observations were made by the Hon'ble Delhi High Court in the matter of *Corporate Aircraft Funding Company LLC v. Union of India and Ors.*[130]

Interplay between the Aircraft Laws and IBC – Era of primacy of IBC over Aircraft Laws

In the foregoing paragraphs, the authors discussed that ordinarily, the remedies available to IDERA Holders under the Aircraft Laws are near absolute, and that its request for procuring deregistration and export are required to be mandatorily honoured by the Central Government. However, such rights available to IDERA Holders is put to test in cases involving insolvency resolution of airline companies.

Particularly, under the scheme of the IBC, simultaneous with the commencement of CIRP of a CD, a moratorium comes into force in terms of section 14 of the IBC. Section 14(1)(d) of the IBC stipulates that pursuant to the commencement of the CIRP of a CD, there is a prohibition on an owner/lessor from recovering any property which is in the occupation/possession of aCD. Consequently, in the event that an airline is subjected to CIRP, situations may arise wherein the right of an IDERA Holder to recover its aircraft by seeking deregistration and export under the Aircraft Rules is in direct conflict with the prohibition on such lessors to recover the aircraft which are in occupation/possession of the concerned airline company in light of section 14(1)(d) of the IBC.

This apparent conflict was put to test for the first time in the insolvency resolution process of Jet Airways. The Mumbai Bench of the Hon'ble National Company Law Tribunal (NCLT –

[127] *Id.,* Clause 5.
[128] SOP, *supra note* 125, Clause 8.
[129] Awas 39423 Ireland Ltd v. Directorate General of Civil Aviation, (2015) S.C.C. On Line Del. 8177 (India).
[130] Corporate Aircraft Funding Company LLC v. Union of India, (2013) S.C.C. On Line Del. 1085 (India).

Mumbai) passed an order dated June 20, 2019[131] commencing the CIRP of Jet Airways. Subsequent to the commencement of the CIRP, the lessors of Jet Airways sought to repossess their aircraft by making applications for deregistration and export of their respective aircraft with the DGCA. The RP of Jet Airways approached NCLT – Mumbai praying to restrain the DGCA from deregistering the aircraft until the completion of the CIRP. The NCLT – Mumbai passed an order dated July 5, 2019[132] (Jet Airways Order) observing that section 14(1)(a) of the IBC prohibits the institution of suits or continuation of pending suits or proceedings against the CD, including the execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel, or "*other authority*". The phrase "*other authority*" was held to be wide enough to include the DGCA. Accordingly, the restrictions imposed in terms of section 14 of the IBC are applicable even *qua* the DGCA.

The NCLT – Mumbai further observed that under the scheme of the IBC, while a CD is undergoing CIRP, the custody and control over the assets of the CD are vested with the RP. During such process, if the lessors are allowed to procure deregistration and possession of aircraft, then a situation may arise that most of the aircraft, which are *the most valuable assets of the corporate debtor, would be taken away by the lessors*. Lastly, the NCLT – Mumbai observed that in case of a conflict between the provisions of the IBC and the provisions of Aircraft Laws, the former shall prevail. In view of these grounds, the NCLT – Mumbai passed an interim order dated July 5, 2019[133] restraining the DGCA from deregistering the aircraft in the fleet of Jet Airways.

Similarly, in the matter of Go Air, the lessors of Go Air attempted to procure deregistration and export of the leased aircraft after Go Air filed for the commencement of CIRP under section 10 of the IBC on May 2, 2023. However, prior to the expiry of the statutory period of 5 days as prescribed under the Aircraft Rules for deregistration of aircraft, Go Air was subjected to CIRP, pursuant to the order dated May 10, 2023, passed by the Principal Bench, NCLT.[134] Consequently, the DGCA did not proceed with the deregistration of the aircraft in view of the moratorium which came into force in terms of section 14(1) of the IBC. Aggrieved by the decisions of the DGCA, the lessors approached the Hon'ble High Court of Delhi seeking direction against the DGCA to deregister the aircraft and allow the export of aircraft that were in possession of Go Air. Parallelly, the lessors approached the NCLT, Principal Bench contending that pursuant to the termination of the lease, the aircraft no longer vested with the CD (and consequently, the RP of the CD), and consequently prayed the NCLT, Principal Bench to direct the RP to refrain from operating or flying these aircraft.

While the matter is *sub-judice* before the Hon'ble High Court of Delhi as on the date of this article, the NCLT, Principal Bench dismissed the application filed by the lessors. Crucially, the NCLT, Principal Bench in its order dated July 26, 2023[135] (Go Air Order) made the following observations:

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[131] State Bank of India v. Jet Airways (India) CP 1938, 1968 and 2205 (MB) – MB – 2019 (N.C.L.T. Mumbai Bench).
[132] State Bank of India v. Jet Airways (India),(2019) S.C.C. OnLine N.C.L.T. 24944 (India).
[133] *Id.*
[134] Go Airlines (India) Limited, Company Petition No. (IB)-264(PB)-2023 (N.C.L.T. New Delhi (Special Bench)).
[135] Go Airlines (India) Limited, (IB)-264(PB)/2023, IA/3280/2023, IA/3277/2023, IA-2944/2023, IA/3254/2023, IA-3048/2023, IA-2850/2023 in Company Petition No. (IB) – 264-(PB)-2023 (N.C.L.T. New Delhi (Court V)).

(a) In terms of section 14(1)(d) of the IBC, there is a prohibition by an owner/lessor on the recovery of any "*property*" which has been in the occupation/possession of the CD. The term "*property*" includes "*money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property.*"[136] Further, the Hon'ble Supreme Court, in the matter of *Rajendra K Bhuta v. Maharashtra Housing and Area Development Authority,*[137] held that the term "occupied by" appearing in section 14(1)(d) of the IBC would mean actual physical possession.

(b) Aircraft which were provided by the lessors on lease to Go Air squarely fall within the definition of the term "property" under IBC. The physical possession of the aircraft is indisputably with Go Air. Accordingly, the aircraft would be covered within the scope of section 14(1)(d) of the IBC and the lessors would not be within their rights to claim possession of the aircraft.

(c) In the aviation industry, the prevailing practice is that most airline companies lease the aircraft for their operation rather than owning them. The provisions of IBC would have no meaning in respect of airlines as CDs, if the sole essence of the airline company is taken away. It would invariably result in the corporate death of the airline company, leaving no scope for resolution of the airline.

(d) The lessors were aware that Go Air had filed an application under Section 10 of the IBC praying for the commencement of its insolvency resolution, since it was widely reported in the media. This is strongly indicative of the fact that the objective behind the termination of lease agreements by the lessors was to evade the rigours of the moratorium as envisaged under Section 14 of the IBC.

The Jet Airways Order and the Go Air Order demonstrate that in instances where there has been a conflict between the remedies available to lessors to repossess their aircraft under the terms of Rule 30(7) read with 32A of the Aircraft Rules, and the prohibition imposed in terms of section 14(1)(d) of the IBC against an owner/lessor recovering property which is in occupation/possession of the CD, the prohibition imposed under the IBC has been held to prevail over the rights conferred on the lessors under the Aircraft Laws.

IBC Vs. Aircraft Laws – changing tides against IBC

The judgments in the matters of Jet Airways and Go Air espoused the primacy of the IBC over Aircraft Laws in cases of conflict. However, the aforesaid legal position appears to be on the cusp of undergoing substantial modifications to tilt the tide in favour of Aircraft Laws over IBC.

i. Notification issued by the Central Government under section 14(3)(a) of the IBC

The legal position according primacy to the provisions of IBC over Aircraft Laws underwent a *volte face* in view of the Notification issued by the Ministry of Civil Aviation. The

[136] Insolvency and Bankruptcy Code, 2016, § 3(27).
[137] Rajendra K. Bhuta v.Maharashtra Housing and Area Development Authority, A.I.R. 2020 S.C. 3274 (India).

Central Government (acting through MCA) issued the Notification in exercise of its powers under section 14(3) of the IBC,[138] clarifying that the moratorium under section 14 of the IBC is not applicable to transactions/arrangement/agreements related to aircraft, aircraft engines, airframes and helicopters to which the Cape Town Convention and the Protocol apply.

In other words, the Jet Airways Order and the Go Air Order accorded primacy to the provisions of IBC over Aircraft Laws and curtailed the rights of lessors to repossess their aircraft during the moratorium period. However, the Central Government took the legislative route to hold that a right available to a lessor under the Aircraft Laws to recover possession of its aircraft by exercising their right as an IDERA Holder shall continue to be available to the lessors, *notwithstanding the moratorium imposed in terms of Section 14 of the IBC*.

ii. Notification issued by the Ministry of Civil Aviation being Notification Number G.S.R 296I dated April 13, 2022

As a part of pre-legislative consultation, the Ministry of Civil Aviation issued a notification dated April 13, 2022, inviting public comments in relation to the proposed 'Protection and Enforcement of Interests in Aircraft Objects Bill, 2022' (Aviation Bill),which is proposed to be enacted to solidify India's commitment to its obligations under the CTC and the Aircraft Protocol. It is relevant to note that the Ministry of Civil Aviation espoused the enactment of a separate and dedicated legislation for implementing the CTC and the Aircraft Protocol as a few of their provisions are in conflict *with the provisions of existing laws such as the Civil Procedure Code, 2008, the Specific Relief Act, 1963, the Companies Act, 2013 and the IBC.*[139] In other words, the Ministry of Civil Aviation has proposed the Aviation Bill with the expressly avowed objective of giving primacy to India's obligations under the CTC and the Aircraft Protocol over all other laws for the time being in force, including the IBC.

The Aviation Bill envisages that In International Interest registered in accordance with CTC shall be recognised even in the CIRP of the concerned airline company.[140] However, this is without prejudice to: (a) any rules of law applicable in the insolvency proceeding relating to the avoidance of a transaction as a preference or a transfer in fraud or otherwise; or (b) any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator.[141]

Particularly in relation to a moratorium, the Aviation Bill stipulates that notwithstanding anything contained in section 14 of the IBC or in any other provision of IBC dealing with moratorium/interim moratorium, upon the commencement of the CIRP of a CD,

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[138] Section 14(3)(a) of the IBC stipulates that the moratorium imposed in terms of Section 14(1) of the IBC shall not be applicable to 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.

[139] Paragraph 3 of the Explanatory Note read with Section 31 of the Protection and Enforcement of Interests in Aircraft Objects Bill, 2022.

[140] Protection and Enforcement of Interests in Aircraft Objects Bill, 2022 [hereinafter Aviation Bill], § 18(1).

[141] *Aviation Bill, supra note* 140, Proviso to § 18.

the RP/CD who has actual or constructive custody of the Aircraft Object[142] is required to give possession of such Aircraft Object to the creditor/lessor within a period of: (a) 2 calendar months from the date of commencement of insolvency proceedings; or (b) the date on which the creditor would have otherwise been entitled to take possession of the Aircraft Object, whichever is earlier (Waiting Period).

During the Waiting Period: (a) the insolvency administrator or the debtor, as the case may be, is required to preserve the Aircraft Object and maintain it and its value in accordance with the terms of the lease agreement, notwithstanding any powers relating to the sale or disposal of assets conferred upon such administrator under the provisions of IBC; and (b) the lessor is entitled to apply for any other forms of interim relief available under the law for the time being in force.[143] Further, the RP is entitled to be indemnified by the creditors for all the reasonable costs incurred by the RP during the Waiting Period to preserve the aircraft.[144]

However, the RP may retain the possession of the Aircraft Object where, before the expiry of the Waiting Period: (a) all defaults under the agreement, other than a default constituted by the commencement of the insolvency proceedings have been cured; and (b) the insolvency administrator or the debtor, as the case may be, has agreed to perform all future obligations of the debtor under the agreement (Retention Obligations).[145] However, where the insolvency administrator or the debtor fails to perform all future obligations of the debtor by the Waiting Period, the creditor *may immediately exercise his right to take possession of the Aircraft Object* as well as exercise other remedies provided under this Act.[146]

Further, in a marked deviation from the observations in the Jet Airways Order and the NCLT Order, the Aviation Bill abundantly clarifies that even during the course of the CIRP of the CD, the lessors will still be entitled to procure deregistration and export of aircraft when the right of the lessor to repossess its aircraft crystallises.

The Aviation Bill further clarifies that the remedies available in relation to deregistration and export of aircraft shall be made available by the DGCA subject to aviation safety laws and regulations, in a manner as prescribed. These remedies are to be made available within 5 working days after the date on which the creditor notifies DGCA that it is entitled to procure those remedies crystallises, either on the expiry of the Waiting Period or upon the failure of the insolvency administrator to comply with his Retention Obligations.[147]

A critical change proposed to be introduced under the Aviation Bill is regarding the order of priority of claims during insolvency resolution proceedings. The scheme of the IBC provides an order of priority of claims in the context of both the CIRP and liquidation.

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[142] Pari materia to the term "Aircraft Object" defined under the Aircraft Protocol. *See* Section 2(4) of the Aviation Bill.
[143] Aviation Bill, *supra note* 140, § 19(3)(a).
[144] *Id.*, § 19(4).
[145] Aviation Bill, *supra note* 140, § 19(5).
[146] *Id.*, Proviso to § 19(5).
[147] *Id.*, § 19(8).

However, the Aviation Bill proposes to usher in a revised order of hierarchy of claims. Under the Aviation Bill, in the event an airline company is subjected to CIRP, then, *notwithstanding anything contained in any other law (including IBC)*, a creditor/lessor holding Registered Interest[148] shall rank in priority over all other creditors, except for the following non-consensual rights or interests:[149]

(a) liens in favour of airline employees for unpaid wages arising since the time of a declared default by that airline under a contract to finance or lease and aircraft object;

(b) liens or other rights of an authority of India relating to taxes or other unpaid charges arising from or related to the use of that aircraft object and owed by the owner or operator of that aircraft object, arising since the time of a default by that owner or operator under a contract to finance or lease that aircraft object;

(c) liens in favour of repairers of an aircraft object in their possession to the extent of service or services performed on and value added to that aircraft object.

In other words, the Aviation Bill stipulates the following hierarchy of claims in the context of insolvency resolution process: (a) non-consensual rights and interests; (b) creditors holding Registered Interest; and (c) order of priority as prescribed in IBC.

The Aviation Bill also stipulates that the remedies available to the creditors/lessor under this Act shall be in addition to all other remedies available to a creditor under the law for the time being in force or agreed upon by the parties unless such rights are inconsistent with provisions of the Bill.[150]

Motivations for changing tides – perceived *sui generis* nature of the airline industry?

The legal framework envisaged under the Aviation Bill read with the Notification issued by the MCA demonstrates that the legislature seeks to accord primacy to India's obligations under the CTC and the Aircraft Protocol to insolvency resolution under the auspices of IBC. It is noteworthy to explore the various considerations which motivated such a paradigm shift in law.

First and foremost, there are commercial objectives sought to be achieved by providing primacy to India's commitments under the CTC and the Aircraft Protocol. In the explanatory note for the Aviation Bill, the Ministry of Civil Aviation proposed to enact a legislation for the purpose of achieving the following objectives:[151]

(a) It was noticed that international financial institutions have not been giving due weightage to accession to CTC/Aviation Protocol by any country unless it is accompanied by an implementing legislation.

[148] Pari materia to the term "Aircraft Object" defined under the Aircraft Protocol. *See* Section 2(43) of the Aviation Bill.
[149] Aviation Bill, *supra note* 140, § 19(10).
[150] Aviation Bill, *supra note* 140,§ 20.
[151] Aviation Bill, *supra note* 140, para 3 of the Explanatory Statement.

(b) The Organisation for Economic Cooperation and Development has set a norm that a 10% discount will be given in the processing fee for a loan to acquire aircraft to the airlines of any country which is a party to the CTC/Aircraft Protocol, provided an implementing legislation has been passed by the specified country.

(c) An Act of Parliament would also provide greater confidence to the intending creditors resulting in a reduction of the risk applicable to asset-based financing and leasing transactions. The risk reduction is envisaged to result in a reduction in the cost of aviation credit, and will also bring down the lease rentals. This will be of immense help to the Indian aviation industry and will also benefit the passengers and other end users bypass-through price reductions and increased levels of service.

In addition to the aforementioned commercial reasons, legal commentators have hypothesised that the legal framework under IBC may not be adequately equipped for the insolvency resolution of entities in the aviation sector *inter-alia* on account of certain complexities which are unique to the airline sector. Accordingly, a*sui generis* legislation may be required for rehabilitation of airline companies undergoing stress. Some of these unique characteristic features are as under:

(a) Substantial assets involved in the aviation industry are capital intensive assets, 81% of which are leased commercially operated aircraft. The time typically taken for the completion of the CIRP under the IBC is not only likely to cause value erosion in relation to these assets but also result in massive maintenance expenditure;[152]

(b) Insolvency of airline companies involve substantial passenger interest wherein passengers may suffer both financial losses, on account of having purchased a ticket in relation to an aircraft which has suffered insolvency, and in some cases, welfare losses for being stranded in a location without any recourse to reaching their intended destination.[153] The treatment of the claims of these passengers may pose certain unique challenges:

(i) First and foremost, the welfare losses of passengers are not quantifiable;

(ii) Secondly, a passenger may purchase a ticket either from the airline itself through its physical counters or its website / mobile application or through a travel agency. In case of the former, the passenger himself will have a claim against the airline company. However, in case of the latter, the passenger may seek a refund and compensation for loss from the travel agency (subject to the cancellation policy of the travel agency). In such a case, the travel agency will, in turn, file a claim with the airline company for the amount claimed by the

[152] Dr. Neeti Shikha and Urvashi Shahi, *Policy Inputs on Report of Subcommittee on Prepack, Centre for Insolvency & Bankruptcy,* Indian Institute of Corporate Affairs 11 (Feb. 2021), https://iica.nic.in/images/Prepacks-in-India.pdf.

[153] Department of Transport, London, Airline Insolvency Review – Final Report, 8 (March 2019), https://assets.publishing.service.gov.uk/media/5cd1a8c940f0b6332070f283/airline-insolvency-review-report.pdf[hereinafter Airline Insolvency Report].

[154] The resolution professional of Go Air has published Guidelines for Filing of Claims by Operational Creditors (except workmen and employees) wherein: (a) passengers who have directly purchased tickets have been instructed to directly file their claims with the resolution professional; and (b) passengers who have purchased their tickets through travel agents/aggregator websites may not file their claims with the resolution professional. Travel Agents/ aggregators may file consolidated claims on their behalf.

consumer.[154] In addition to the above, travel agents in India also have the option of seeking a refund from IATA[155] in which case the IATA may file its claim against the RP. Lastly, some passengers who may have purchased their tickets through credit cards may claim refund/compensation from the credit card company and subsequently, the credit card company may file its claim against the airline company.

In view of the foregoing, making an assessment of which person is entitled to verify their claim, assessing the extent of the amount which is due and payable after taking into account the cancellation policies and ensuring that there is no double counting of claims is an extremely onerous and challenging task.[156]

(c) The aviation industry is a highly technical and consequently a highly regulated sector. Managing the affairs of an airline company as a going concern requires personnel comprising of a niche set of skills, training and knowledge. It also requires the engagement of persons who may liaison with the DGCA and ensure that all licenses, approvals, grants etc are regular and that the operations of the airline are carried out in accordance with applicable legal framework. Typically, insolvency administrators or the firm with which they are associated with may not have in-house expertise to navigate these complexities. Additionally, the existing personnel of the CD who may be equipped to assist the insolvency administrator in this regard may not be persuaded to remain in employment with an airline which is undergoing insolvency resolution process.[157]

(d) IBC is essentially a domestic law which only extends to the jurisdiction of India.[158] However, airline business more often than not involves complex cross border complications. Typically, the lessors are situated outside India. If an airline company operates international routes, it may have assets situated outside India. It may also be catering to Indian passengers who are travelling back to India from abroad who need to be protected and rehabilitated form the adverse effects of the airline company's insolvency.[159]

The commercial reasons for according primacy to Aircraft Laws over IBCis not within the scope of enquiry of this paper. However, from a legal perspective it bears examination whether according primacy to Aircraft Laws over IBC justify a legal framework which retains the near absolute rights available to lessors under Aircraft Laws, notwithstanding the ongoing insolvency resolution process of the airline company.

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[155] IATA settlement service between airlines and travel agents (known as the BSP or Billing and Settlement Plan), may allow IATA10 to reimburse travel agents for monies submitted to the airline, depending on the national bankruptcy legislation and the specifics of the airline's participation with IATA.

[156] Bahram Vakil and Gausia Shaikh, *Insolvency in Aviation Sector, Insolvency and Bankruptcy Code - A Miscellany of Perspectives,* Insolvency and Bankruptcy Board of India,115-117 (2019), https://ibbi.gov.in/en/publication/others.

[157] *Id.*

[158] Insolvency and Bankruptcy Code of India, 2016, § 1(2).

[159] *Airline Insolvency Report, supra note* 153, at 118 – 119.

PRIMACY OF AIRCRAFT LAWS OVER IBC – CONSEQUENCES ON AIRLINE SECTOR IN PARTICULAR AND THE SCHEME OF THE IBC AS A WHOLE

Consequences on the scheme of IBC – Risk of dilution of "sector agnostic nature" of IBC

The modification to the scheme of IBC *vide* the Notification and the proposed modifications to Aviation Laws in terms of the Aviation Bill is likely to have far reaching consequences on the insolvency resolution of airline companies in India. These developments harken back to the legal position echoed in the *SpiceJet Case* where the Hon'ble Delhi High reaffirmed the near absolute right of lessors to repossess their aircraft by seeking deregistration and export in their capacity as IDERA Holders.

But before analysing the specific consequences of these developments on the airline industry, on a fundamental level, it may be relevant to examine whether allowing sector specific considerations to prevail over the all-encompassing insolvency framework in India under the IBC is a step in the right direction.

The very genesis of the IBC is rooted in evolving a single robust legal framework pertaining to insolvency resolution of debtors in the backdrop of a myriad of legislations governing the framework of insolvency resolution such as the Sick Industrial Companies Act, 1985 (now repealed), Provincial Insolvency Act, 1926, Presidency Towns Insolvency Act, 1920 etc., which grossly failed to achieve time-bound resolution of stressed assets.[160]

It is noteworthy that in the Problem Statement identified in Volume I of its Report titled *"Rationale and Design"*, the Bankruptcy Law Reforms Committee (BLRC) recognised that the multiplicity of legal arrangements has given rise to contradictory legal outcomes. It echoed the need for a single unified framework for dealing with insolvency and bankruptcy processes *of all legal entities* in India, notwithstanding the nature of business which such entities are engaged in. Particularly, the BLRC recommended that to preserve and ensure legal clarity, *"there should be a single Code to resolve insolvency for all legal entities"* such that *"all questions related to insolvency of any legal entity in India will find answer in a single Code."*

The BLRC recommended a single code taking into account the following advantages: (a) having a single unified code ensures legal clarity and certainty when there arises any question of insolvency or bankruptcy; and (b) a common insolvency and bankruptcy framework for individuals and enterprises will enable more coherent policies when the two interact. In other words, when different entities interact with each other, the factum of all these entities being governed under the terms of a common framework substantially improves business environment. For instance, it is quite common that in an enterprise, a company engaged in the steel sector may borrow monies from a creditor, which is secured by way of: (a) a corporate guarantee by another group company which is engaged in the power sector; and (b) a mortgage over a piece of land owned by another group company engaged in the real estate sector. In this scenario, having a common legal framework for insolvency resolution of one or more entities, irrespective of the sectors in which these companies conduct their business, makes the whole legal system synchronous, inexpensive, and helps increase efficiency of recovery.

[160] Anirud Wadhwa et al., Guide to the Insolvency & Bankruptcy Code xi (1st ed.,2019).

In view of the above, the IBC was specifically enacted as *"a sector agnostic legislation"* aimed at providing a single window for insolvency resolution of all legal entities notwithstanding the sector in which the concerned CD is operating.

Further, the scheme of the IBC has been open to recognise that insolvency resolution of certain category of CDs may require specific treatment considering the special nature of the business and the stakeholders involved. Often the legislature has found a way to accommodate these interests within the broader framework of the IBC. For instance, in the context of insolvency resolution of entities in the real estate sector, the Central Government: (a) included homebuyers within the definition of "financial creditors" (FCs) and consequently has granted them rights of representation, participation and voting in the Committee of Creditor (CoC) of the CD; and (b) is now contemplating to allow insolvency resolution of specific projects as opposed to CIRP of the corporate entity as a whole.[161] Similarly, in the case of insolvency resolution process for non-banking financial companies, the IBC provides a specific framework for their insolvency resolution which is *parimateria* to the insolvency resolution of any other corporate entity, but with certain modifications, taking into account the unique nature of the business of the non-banking financial company (NBFCs) and the stakeholders involved.

It is also crucial to know that while the IBC has accommodated sector specific interests, it has not given ground to the primacy of objectives sought to be accomplished under the IBC to other sectoral interests/legislation. For instance, while suitable amendments have been incorporated into the IBC to accommodate the interests of stakeholders of CD involved in the real estate sector, the primacy given to the IBC in terms of section 238[162] have not been diluted, and that in case of conflict, the provisions of the IBC still prevail over the provisions of Real Estate Regulatory Authority (RERA).[163] Similarly, while the IBC has entertained modifications in the interest of stakeholders of the CD involved in the financial services sector, courts/tribunals have still held that in case of conflict, the provisions of the IBC shall prevail over sectoral laws applicable to these financial services.[164]

Furthermore, a key objective of insolvency law is the efficient allocation of resources.[165] Having a single framework for insolvency resolution ensures a single regulatory/judicial system. For instance, in the present legal framework, the regulatory issues pertaining to insolvency resolution of legal entities, notwithstanding the sector in which these entities conduct their business, is overseen by the Insolvency and Bankruptcy Board of India (IBBI). Further, the judicial forum which addresses disputes on questions pertaining to insolvency

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[161] *File No. 30/38/2021 – Insolvency, Government of India,* Ministry of Corporate Affairs (Jan. 18, 2023), https://www.mca.gov.in/content/dam/mca/pdf/IBC-2016-20230118.pdf.; Project-wise resolution of corporate debtors engaged in the real estate sector has already been judicially recognised. *See* Flat Buyers Association Winter Hills – 77, Gurgaon v. Umang Realtech Private Limited [Company Appeal (AT)(Ins) No. 926 of 2019]; Whispering Tower Flat Owner Welfare Association v. Abhay Narayan Manudhane [Company Appeal (AT)(Ins) No. 896 of 2021].

[162] § 238 of the IBC stipulates that the provisions of IBC shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

[163] Pioneer Urban Land and Infrastructure Limitedv. Union of India, Writ Petition (Civil) No. 43-2019 (Supreme Court of India).

[164] Airforce Group Insurance Society v. R. Subramaniakumar, Company Appeal (AT)(Ins) No. 546 and 552 of 2021.

[165] MS Sahoo and Harshita Garg, *Don't let sectoral laws dilute IBC,* Financial Express(Nov. 6, 2023), https://www.financialexpress.com/opinion/dont-let-sectoral-laws-dilute-ibc/3297817/.

resolution is the NCLT. All of these regulatory/judicial apparatus function under the umbrella of the MCA. Having a dedicated regulator, a quasi-judicial forum, and a dedicated regulatory and academic apparatus, all functioning under the same nodal ministry ensures that all issues of law, policy, and procedure are appropriately dealt with by individuals who are equipped with specialised knowledge and expertise in relation to issues of insolvency resolution. The benefit of such efficient allocation of expertise/resources is often lost in the event of sectoral dispensations being accommodated under the IBC. The insolvency resolution of such companies, primarily under the auspices of the IBC and the regulatory/adjudicatory apparatus set up under the IBC, may end up becoming a hotchpotch involving multiple regulators, ministries and regulatory/judicial apparatus.

Furthermore, it is worth considering that the argument that certain unique characteristic features of an industry merits it to be exempted from the overall framework of the IBC may prove to be a dangerous slippery slope. Every industry has certain unique characteristic features on the basis of which arguments can be made that such industry ought to be excluded from the scheme of the IBC.[166] However, allowing such sector specific considerations to encroach the framework under the IBC amounts to effectively creating a different insolvency framework for each sector, thereby converting an otherwise sector agnostic market-wide law to a sectoral law.[167]

Primacy of Aircraft Laws – Consequences on insolvency resolution of airline companies

It is trite to mention that the most crucial property of an airline company undergoing the insolvency resolution process is the fleet of aircraft that are in its possession. As has been correctly observed in both the Jet Airways Order and the Go Air Order, the provisions of the IBC would have no meaning in respect of airlines as CDs, if the sole essence of the airline company's business, i.e., the aircraft is taken away. It would leave no scope for the successful insolvency resolution of the airline, and lead to its corporate death.

In effect, the Notification in terms of which the lessors have unbridled right to repossess their aircraft, notwithstanding the prevailing moratorium, has the potential to affect the continuation of the CD as a going concern and impede its successful resolution. As regards the proposed amendments in terms of the Aviation Bill, the RP/CoC is attempting to provide breathing room by way of the Waiting Period, during which the RP may enter into an arrangement with the lessors to retain possession of the aircraft pursuant to undertaking Retention Obligations. By providing such breathing room, the Aviation Bill definitely proposes a better middle ground between protecting the right of the lessors on one hand, while at the

[166] For instance, in 2018, companies engaged in the power sector made a representation that power sector should be given special dispensation from the provisions of the Reserve Bank of India's Framework for Resolution of Stressed ssets dated 12 February 2018 *(repealed)* which *inter-alia* stipulated that in the event of failure to resolve the stress of a company under this framework, the borrower is required to be referred to CIRP under IBC. The representation was made on the following grounds: (a) coal shortage and taking away of captive mines in some cases; and (b) non-availability of long-term power purchase agreements for the industry. Similar representation was made by companies engaged in the steel sector who sought dispensation from the applicability of provisions of IBC to companies in the steel sector. *See* Jyoti Mukul, *Why IBC must be sector – agnostic,* Business Standard (July 2, 2018), https://www.business-standard.com/article/opinion/why-ibc-must-be-sector-agnostic-118070100732_1.html.

[167] *Id.*

same time providing the RP with an opportunity to retain custody of the aircraft for the purposes of managing the affairs of the CD as a going concern.

Having said that, a few practical challenges emerge even under the proposed Aviation Bill. First, the Aviation Bill proposes a Waiting Period which is the earlier of: (i) two calendar months from the date of commencement of insolvency proceedings; or (ii) the date on which the creditor/lessor would have otherwise been entitled to take possession of the Aircraft Object. Typically, until the moratorium becomes applicable, the lease agreements entered into in relation to the aircraft confer the lessors with the right to take immediate custody/ possession of the aircraft in the event of any default committed by the airline in making payment of its lease rentals. Consequently, the insolvency administrator/CoC may not realistically have any meaningful breathing room to make arrangements to undertake Retention Obligations and consequently maintain custody/control over the aircraft. As against that, the entire idea behind the moratorium of 180 days, extendable up to 270 days with an outer time limit of 330 days during the CIRP, is to preserve the assets with the CD while the CoCs, along with the RP, is looking at various options for resolution of the CD.

Secondly, in any event, an essential pre-condition for the Retention Obligation required to be undertaken by the insolvency administrator, is to cure all pre-existing defaults towards the lessor. However, typically, an airline company under stress may not have the necessary wherewithal to cure all its defaults towards its lessors. Consequently, notwithstanding the Waiting Period, realistically, the insolvency administrator may not be in a position to retain custody/control of the aircraft.

One solution to the issue of arranging funds for the purposes of undertaking the Retention Obligation could be raising interim finance by the RP. However, there are two major challenges to relying on interim finance: (i) first, it has been observed that the lenders have either been hesitant to extend interim finance to distressed entities or have extended the bare minimum interim finance required for the completion of the insolvency resolution process.[168] A study indicates that in 85% of the cases where interim finance was raised, the amount raised was less than ₹5 Crore.[169] Accordingly, it may be ambitious to rely on interim finance to undertake Retention Obligations; (ii) second, "interim finance" under the IBC is treated as "insolvency resolution process cost" and consequently is accorded super-priority status while the claims against the CD are being discharged. However, as set out in the foregoing paragraphs, the Aviation Bill stipulates the following hierarchy of claims in the context of insolvency resolution process wherein NCRI and claims of creditors holding Registered Interest (including lessors) will have higher priority even over priority payments prescribed under IBC. In the absence of the super- priority status hitherto enjoyed by interim financiers, it may become even more difficult to raise interim finance to fund the Retention Obligations of the insolvency professional.

[168] Insolvency and Bankruptcy Board of India, *Quarterly Newsletter for July-September, 2022: Interim Finance-A Saviour*.
[169] Iyer V. V. et al, *An analysis of interim finance ecosystem as a supporting tool for the IBC regime*, Anusandhan: Exploring New Perspectives On Insolvency, 259 & 276(2022).

RECOMMENDATIONS

As underscored herein above, the most important asset of an airline company, which is crucial for its insolvency resolution, is the aircraft. However, in terms of the Notification, upon the commencement of the CIRP of an airline company, the lessors are provided with near unbridled right to strip the airline company off its most valuable asset. In view of this, while the Notification no doubt protects the interests of the lessors, it is likely to prejudicially affect the prospects of the insolvency resolution of an airline company. As regards the legal framework envisaged in the Aviation Bill, while it attempts to balance the interests of both the lessors and the airline company, there are practical challenges which may create substantial roadblocks for the RP to undertake Retention Obligations and retain possession of the aircraft.

In addition to the specific consequences on the insolvency resolution of the concerned airline company, having a sector specific law as the primary legislation for insolvency resolution of companies engaged in that sector may have the effect of diluting the rigour of the IBC as a whole. This may also affect the rights of FCs of such airline companies.

In this context, the researchers recommend certain modifications to be considered for introduction within the framework ofthe IBC to ensure the balancing of interests between the lessors and the airline company undergoing the insolvency resolution process.

(i) Allowing lessors to enjoy rights of representation, participation and voting in the meetings of CoC of the airline company

The legal framework under the IBC envisages that the primary decision making in a CIRP is by the CoC consisting of FCs of the CD. The Hon'ble Supreme Court in the matter of *Swiss Ribbons Private Limited and Anr v. Union of India and Ors.*[170] observed that the following factors justify the powers conferred to FCs: (i) financial contracts involve large sums of money given by fewer persons, whereas operational creditors (OCs) are much larger in number and the quantum of dues is generally small; (ii) FCs have specified repayment schedules and agreements which entitle such creditors to recall the loan in totality on defaults being made, which the OCs do not have; (iii) further, FCs are, from the start, involved with the assessment of the viability of CDs and are, therefore, better equipped to engage in restructuring of loans as well as the reorganisation of the CD's business in the event of financial stress.

It is crucial to note that all the unique intelligible characteristic features of a FC which justify their forming part of the CoC, as recognised in *Swiss Ribbons,*are applicable even in the case of lessors, even though in a strict legal sense they qualify as OCs. In the aviation sector, airline companies typically enter into lease agreements with certain identified lessors involving a huge financial liability. The lease rentals payable under the lease agreements have to be paid as per a specified repayment schedule. Further, the aircraft companies conduct heavy due diligence and assess the viability of the operations of the airline company before entering into the lease agreement. As seen above, the global aircraft leasing business is predominantly controlled by a select

[170] Swiss Ribbons Private Limited v. Union of India, Writ Petition (Civil) No. 99 of 2018 (Supreme Court of India).

group of 8-10 large players, who possess a good understanding of the aviation business globally. Further, considering the importance of aircraft in the insolvency resolution of an airline company, the aircraft lessors arguably are one of the most important stakeholders. Taking into account all these facts, the lessors may be conferred with all the powers enjoyed by FCs in a CIRP of the CD such that the lessors are actively involved in the insolvency resolution process of the airline company. This would give a realistic opportunity to an airline company to revive with the participation of its lessors and FCs, in contrast to the present proposal to let the lessors repossess aircrafts to the detriment of all other stakeholders of the airline company, i.e. FCs, vendors, workmen, shareholders, etc.

(ii) Treating lessors at par with secured creditors in the liquidation waterfall

Section 53 of the IBC may be suitably amended such that lease rentals payable to lessors may be treated second in priority, at par with the claims of workmen and secured creditors during the liquidation process. This will ensure that during the liquidation process, the claims of the lessors are accorded the highest priority after the insolvency resolution process and liquidation costs. Additionally, section 30(2)(b) of the IBC may also be suitably clarified to stipulate that in case of lessors, the minimum amount payable to OCs in terms of section 30(2)(b) of the IBC will be calculated as per the amended waterfall mechanism under section 53 of the Code. The amended mechanism places claims of lessors second in priority after the claims of workmen and employees. This would create a better level playing field for lessors and FCs, both of which provide strategic financing for an airline company as compared to the present distribution waterfall envisaged under section 53 of the IBC or the Aviation Bill.

(iii) Allowing airline companies to take benefit of interim moratorium

From the experiences of Jet Airways and Go Air, it can be easily surmised that the moment any creditor or the debtor itself files an application for insolvency resolution of the airline company (Insolvency Application), the lessors immediately commence taking measures towards exercising their rights as an IDERA Holder and repossessing their aircraft. During this period, since the CD has not been subjected to the insolvency resolution process, the benefit of the moratorium is not available to the CD/or its assets. Considering the extant Aircraft Laws confer near unbridled right on the lessor to repossess its aircraft within a short span of five working days, the CD may stand stripped of its most valuable assets even before the commencement of its CIRP. Accordingly, in the case of insolvency resolution of airline companies, the benefit of the moratorium ought to be extended to the CD/its asset immediately upon the filing of the Insolvency Application.

(iv) Allowing airline company to take benefit of prepackaged insolvency resolution process

The Central Government introduced Chapter III – A into the scheme of the IBC,[171]

[171] Inserted *vide* the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021.

introducing the framework for prepackaged insolvency resolution (Prepack Framework). A pre-packaged insolvency resolution allows a hybrid of both "formal" and "informal" resolution processes, providing both: (a) flexibility to the CD and its creditors to amicably arrive at a mechanism for the resolution of stress of the CD; and (b) providing it legal sanctity by way of a stamp of approval from a court/tribunal.[172]

As mentioned hereinabove, the airline industry is a highly technical and consequently a highly regulated sector. Additionally, compared to other sectors, the number of players engaged in the airline sector is relatively fewer. In light of these factors, there may not be too many prospective resolution applicants who have the inclination or the capability to submit resolution plans for an airline company. Furthermore, in the absence of a Prepack Framework, the existing promoters/personnel/management of the CD may not be incentivised to actively participate in the CIRP of the airline company, which, more often than not, leads to a change in the management and control of the CD as the only scenario for its resolution. This may prejudice the ability of the RP to effectively manage the affairs of the airline company as a going concern during its insolvency resolution process.

To remedy this issue, the benefits of Prepack Framework can also be extended to airline companies. The CD may be allowed to submit a "base resolution plan", setting out the terms of the insolvency resolution and the manner of settlement of its dues with the various stakeholders of the CD. Pursuant to arriving at a mutually agreed upon terms of settlement, the terms of such settlement may be approved by the Adjudicating Authority (AA) by way of a formal insolvency resolution process.

It is noteworthy that in the United States, the debtor typically starts negotiating with the creditors in relation to arriving at a settlement even prior to the filing of an Insolvency Application. Typically, the Insolvency Application is filed only once the creditors and the airline company reach a finality in relation to the terms of their settlement. However, in India, considering that the Prepack Framework is currently inapplicable to CDs other than micro, small and medium enterprises, the benefit of employing such methods for an expeditious and streamlined resolution of stress in airline companies is currently unavailable.

Furthermore, in case the lessors seek to renegotiate the terms of their leases with the CD post the completion of its insolvency resolution process, the lessors are constrained to be in a state of uncertainty. This is because, until a resolution plan is approved and such approval attains finality, there is no clarity on which resolution applicant would take over the management and control over the affairs of the airline company. However, in the event the benefit of Prepack Framework is extended to airline companies, the lessors will have clarity that the management/control over the affairs of the CD shall remain with the existing promoters/shareholders of the airline company. This will provide a sense of certainty to the lessors while renegotiating the terms of their leases.

[172] Ministry of Corporate Affairs, *Report of The Insolvency Law Committee on Pre-Packaged Insolvency Resolution Process* 109 (2021).

(v) Preservation of aircraft and fleet

It is reiterated that without its aircraft being available, the failure of the insolvency resolution process of a CD is a very high possibility. Accordingly, *in addition to introducing all of the above-mentioned modifications*, the framework under the IBC should ensure that the rigour of the protections provided under section 14(1)(d) of the IBC is not diluted during the 330-day period available under the IBC for insolvency resolution of a CD. In lieu of this, the lessors can of course be given more powers in the decision-making process in the CoC, as well as in the distribution waterfall for an airline company. Furthermore, the services being provided by lessors qualify as an "essential service" under section 14(2A) of the IBC. Consequently, the Central Government should take measures towards ensuring that so long as current dues are being met, the lessors do not take any measures towards repossessing their aircraft.

In this kind of an approach, it may be justifiable for the Central Government to issue necessary directions to the DGCA that it shall not entertain any IDERA Application if such an application is made subsequent to the filing of an Insolvency Application against the airline company. This may in turn require withdrawal of the Notification with an object that the CD is not stripped off of its most invaluable asset at the very initiation of the insolvency resolution process.

(vi) Enactment of cross-border insolvency resolution framework

A key characteristic feature of the airline sector is the cross-border nature of its operations. For instance, an airline company may have both passengers and lessors from different parts of the world. It may have assets in different parts of the world where it conducts its operations. Consequently, an insolvency resolution of an airline company will see the involvement of multiplicity of jurisdictions in different capacities. It is noteworthy that in the insolvency resolution of Jet Airways, parallel insolvency resolution proceedings were instituted both by the NCLT – Mumbai and the District Court of Netherlands (where Jet Airways had regional sub-offices). In this regard, the RP of Jet Airways appointed by NCLT – Mumbai and the Administrator appointed by the District Court of Netherlands had to execute a "*Cross Border Insolvency Protocol*", approved by the National Company Law Appellate Tribunal (NCLAT). The objective was to promote cooperation and coordination with each other in order to conduct the insolvency resolution of Jet Airways in a smooth and streamlined manner.[173]

While the NCLAT in Jet Airways provided a judicial solution to the problems arising due to a multiplicity of insolvency resolution processes instituted in different jurisdictions, it would be beneficial if the scheme of the IBC provided for an exhaustive cross-border insolvency resolution framework in India. This will inspire confidence in various stakeholders of the CD, particularly those situated outside India, that the scheme of the IBC is well equipped to handle all the issues which may arise in the insolvency resolution of the airline company on account of the involvement of a multiplicity of jurisdictions.

[173] Jet Airways (India) Ltd v. State Bank of India, Company Appeal (AT)(Insolvency) No. 707 of 2019.

Summing up, while there are strong arguments in favour of the protection of the interest of lessors and their right to repossess aircraft in case of default by the lessee, it is equally important that a realistic opportunity is provided for revival of a troubled airline, giving due consideration to the commitment of the Indian state as a signatory to CTC and the Protocol. This is essential, considering its importance to the overall economy and the limited number of airline operators in India. While this may require a rebalancing of approach, merely looking at the rights of one stakeholder may jeopardise the interest of all other stakeholders, i.e. FCs, vendors, employees, and most importantly, the consumers. It is in this context that the aforementioned changes to the scheme of the IBC may be considered. They would allow the balancing of interest of stakeholders, whereby lessors can have a gInreater say in the insolvency resolution process, in lieu of temporarily giving up their right to repossession for 330 days. At the same time, they would afford to the airline and all its stakeholders, a reasonable opportunity to make efforts for its revival. In the long run, of course the development of an indigenous industry on the leasing and MRO side may be required to reduce the overall dependency on overseas leasing companies, which may not have the same interest in the overall economic situation as an indigenous and local operator.