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The Impact of Cape Town Convention on Aviation Insolvency

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ABSTRACT

This paper undertakes a comprehensive exploration of the implications of the Cape Town Convention on aviation insolvency, focusing specifically on its ramifications within the Indian legal landscape. Beginning with a thorough review of existing literature, it synthesizes the scholarly discourse surrounding the intersection of aviation law and insolvency frameworks.

Drawing from this foundation, the paper proceeds to elucidate the current insolvency regime prevailing in India, examining its adequacy, limitations, and relevance to the aviation sector. Within this context, the analysis navigates through the intricacies of the Cape Town Convention, shedding light on its provisions and potential impact on aviation insolvency proceedings.

One of the central themes explored in this paper is the dearth of dedicated legislation addressing the unique challenges faced by the aviation industry in India. The discussion underscores the critical need for a comprehensive legal framework tailored to the specific requirements of aircraft financing, registration, asset preservation, and the treatment of claims in the event of airline insolvencies.

In addition, the paper meticulously analyzes various issues pertinent to airline insolvencies in India, including legal requirements for maintaining the company as a going concern and the cross-border implications of insolvency proceedings. Through this examination, it identifies key challenges and obstacles faced by stakeholders, offering pragmatic insights for mitigation.

In its concluding remarks, the paper advocates for the integration of the Cape Town Convention into the Indian legal framework governing insolvency. By highlighting the potential benefits of such integration and proposing actionable steps for its incorporation into the Insolvency and Bankruptcy Code, the paper outlines a pathway towards enhancing the resilience and efficiency of the Indian aviation sector in the face of insolvency challenges.

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I. INTRODUCTION

The operational structure of an airline presents unique challenges for stakeholders involved in insolvency proceedings, including financiers and lessors. India ratified the Convention on International Interests in Mobile Equipment (CTC) and its Aircraft Protocol on July 1, 2008. The CTC aims to establish a consistent international legal framework safeguarding secured creditors, conditional sellers, and lessors of aircraft assets. It offers default remedies and creditor protection through registration in an International Registry, ensuring priority and security in case of debtor insolvency. However, India has yet to incorporate the specific provisions of the CTC and Aircraft Protocol into domestic legislation, as mandated by Article 253 of the Indian Constitution.

Currently, India faces a pressing need for a Cross-Border Insolvency Framework and specialized legislation addressing aviation insolvency. While the Insolvency and Bankruptcy Code,³ has significantly improved the ease of doing business in India,⁴ the recent Jet Airways case underscored the inadequacies regarding aviation and cross-border insolvency within the IBC framework.

The implementation of the Cape Town Convention and its associated Aircraft Protocol through the Cape Town Convention Regulations 2015 has alleviated certain restrictions typically imposed on third-party rights during insolvency proceedings, such as the moratorium observed during administration.

In 2018, the government introduced the Cape Town Convention Bill, 2018, aiming to clarify procedural requirements in aviation insolvency. However, the bill has yet to be enacted, and its potential impact on the IBC remains uncertain.

Existing Literature on the subject

In the past few years, while commenting on the prioritization of IATA, **David Capper, 2009**,⁵ considers the Australian High Court decision in *International Air Transport Association v Ansett Australia Holdings Ltd* on whether the International Air Transport Association (IATA) clearing house system, which prioritised the IATA over other unsecured creditors of an insolvent airline, offended the pari passu principle, compares the judgment with that of the House of Lords in *British Eagle International Airlines Ltd v. Compagnie Nationale Air*

³ Hereinafter, "IBC".

⁴ *Swiss Ribbons (P) Ltd. v. Union of India*, (2019) 4 SCC 17, ¶38.

⁵ David Capper, *New IATA clearing house passes Australian insolvency test: IATA v Ansett*, L.M.C.L.Q. 2009, 1(Feb), 15-18.

France.

Ulrich Stepler & Ralf Vogler, 2012,⁶ commented on the question of consumer protection. They argue that there is no identifiable need for the additional protection of passengers. Considers the legality of options for an aviation bankruptcy regime to help stranded passengers return and have their airfares refunded in the event of airline insolvency from the perspectives of European and international law. **Anna Venesziano, 2013,**⁷ responds to **Gilles Cuniberti, 2012**'s contention in his article "Advance relief under the Cape Town Convention",⁸ that the "relief pending final determination" provided by the Cape Town Convention on International Interests in Mobile Equipment 2001 art.13 is a hybrid between an interim relief and a final remedy whose exact nature has been left open. **Kolte et al. (2017)**⁷ have used the Altman Z Score Model to predict airline insolvencies in India and have found Kingfisher Airlines and Jet Airways to be the airlines which were most likely to go bankrupt.

Amy Flavell et al, 2018,⁹ analyses sector regulation and requirements on insolvency, including the ATOL scheme, structuring an insolvent sale, and some of the particular issues that may arise in an aviation industry insolvency while explaining the collapse of Monarch Airlines. **Caloline Sumner, 2017,**¹⁰ Highlights consumer protection issues raised by the collapse of Monarch Airlines Ltd, noting the limits of the ATOL protection scheme. Argues that aviation insolvency rules in the UK prevent attempts at rescuing a failing airline and calls for wider insolvency reforms proposed in 2016 to be taken forward. **Mike Woollard, 2014,**¹¹ Outlines the two options for implementation of the Convention on International Interests in Mobile Equipment 2001, which must be applied in its entirety if a contacting state intends to adopt Article XI which deals with insolvency remedies.

The question of what assets form a part of the bankruptcy proceedings, which will be relevant under Section 18 of IBC under Indian context, was noted by **Morden L. Jakobsen & Morten Pedersen, 2015,**¹² where they commented on the judgement of *Re Cimber Sterling A/S* on whether nine aircraft engines, that had been leased to an airline before its insolvency and installed in its aircraft, formed part of the bankruptcy estate pursuant to the Geneva Convention

⁶ Ulrich Stepler and Ralf Vogler, Airline insolvency protection: a justified form of relief or the next level of "consumerism"?, A. & S.L. 2012, 37(4/5), 359-368.

⁷ Anna Veneziano, Advance relief under the Cape Town Convention and its Aircraft Protocol: a comment on Gilles Cuniberti's interpretative proposal, C.T.C.J. 2013, 2, 185-190.

⁸ Gilles Cuniberti, Advance relief under the Cape Town Convention, C.T.C.J. 2012, 1, 79-94

⁹ Amy Flavell *et al*, Holidays and leisure: weathering the storm, C.R. & I. 2018, 11(3), 113-116.

¹⁰ Caroline Sumner, Airlines, consumers and business rescue, C.R. & I. 2017, 10(6), 224-225.

¹¹ Mike Woollard, Technical Update, Recovery 2014, Win, 14-16.

¹² Morten L. Jakobsen and Morten Midtgaard Pedersen, The Danish aircraft engine dispute: the sequel, A. & S.L. 2015, 40(6), 421-427.

on the International Recognition of Rights in Aircraft 1948 article XVI.

Current Insolvency regime in the country

IBC protects the rights of creditors and other stakeholders. The IBC has proved to be a highly effective legislation.¹³ The primary objective of the IBC is maximization of assets,¹⁴ and providing time-bound insolvency resolution.¹⁵ It is also pertinent to mention that the IBC was brought forth to solve, the question of bankruptcy and insolvency purely limited to the domestic scenario of India.¹⁶ The committee of creditors is empowered to consider the feasibility and viability,¹⁷ or modify,¹⁸ the resolution plan. Whereas Adjudicating Authority can either approve or reject it. The Objective of the code is to respect the commercial wisdom of COC,¹⁹ and thus, reviewing decision of the COC was never the intention of the IBC.²⁰

II. CAPE TOWN CONVENTION

The 2001 Convention on International Interests in Mobile Equipment ('**the Cape Town Convention**')²¹ and its associated Protocols dealing respectively with security interests and title-retention rights in aircraft objects,²² railway rolling stock²³ and space assets,²⁴ came into force on 1 March 2006.²⁵ The Convention having received 72 ratifications and the Aircraft Protocol has 65. India is also a state party to the convention and protocol.

The state responsibilities for Aviation sector result from the collaboration between the International Institute for the Unification of Private Law (UNIDROIT), an international, intergovernmental body, and the International Civil Aviation Organization (ICAO), The International Air Transport Association (IATA) also plays an important role as the international private organization representing the worldwide aviation industry.

The Cape Town Convention is concerned with three categories of aircraft objects divide into

¹³ *Innoventive Industries v. ICICI Bank*, (2018) 1 SCC 407, ¶27.

¹⁴ *Swiss Ribbons (P) Ltd. v. Union of India*, (2019) 4 SCC 17, ¶59.

¹⁵ *Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd., Company Appeal (AT) (Insolvency) No. 346 of 2018*.

¹⁶ Report of the [Joint Parliament Committee, 2016](#).

¹⁷ *Vijay Kumar Jain v. Standered Chartered Bank*, 2019 SCC OnLine SC 103, ¶22.

¹⁸ Regulation 39(4) of the CIRP Regulations.

¹⁹ Insolvency Law Committee Report, March 2018, ¶11.3.

²⁰ Mr. Jairam Ramesh, Supplement to Synopsis of Debate, Rajya Sabha, Page 806.

²¹ Adopted 16 November 2001.

²² Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (adopted 16 November 2001, entered into force 1 March 2006) (the Aircraft Protocol).

²³ Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Rolling Stock (adopted 23 February 2007) (the Luxembourg Protocol).

²⁴ Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (adopted 9 March 2012) (the Space Protocol).

²⁵ The UN Treaty Series (2307 UNTS 285)

airframes, aircraft engines (which are often separately financed) and helicopters.²⁶ They regularly used around cross-national borders or orbit round the Earth and they are generally of high-unit value. This poses problems for creditors, title reservation agreements or leases and procedural difficulty under Insolvency proceedings. Default remedies exercisable against the debtor in one jurisdiction may be not recognised in another country and the same applied to the creditors rights.

The Cape Town Convention addresses these concerns in ways that are radical, even revolutionary.²⁷ The Convention applies where the debtor is situated in a Contracting State at the time of the agreement²⁸ or alternatively, in the case of aircraft, the agreement relates to a helicopter, or an airframe pertaining to an aircraft, registered in a Contracting State which is the State of registry at that time.²⁹

The Convention gives the creditor a set of basic default remedies (repossession, sale, collection of income),³⁰ including speedy advance relief on the production of evidence of default,³¹ while the Aircraft and Luxembourg Protocols confer additional remedies of deregistration (aircraft),³² export and physical delivery.³³ The creditor's international interest is protected by registration in the international registry, created under the provisions of the Convention.³⁴ Registration gives that interest priority over subsequently registered interests and over unregistered interests,³⁵ whether registrable or not, with exceptions in favour of non-consensual rights or interests which under a Contracting State's laws give priority over the equivalent of an international interest and are declared by that State to have priority over a registered international interest.³⁶ Finally, the Convention and the Aircraft Protocol contain rules to protect the creditor against the consequences of the debtor's insolvency, subject to avoidance of transactions in fraud of creditors and preferences.³⁷

The benefits of these instruments are considerable.³⁸ Economic assessments estimating that such ratification would save billions of dollars a year in the cost of borrowing and in premiums

²⁶ Art I Aircraft Protocol.

²⁷ Arts 2, 7 Cape Town Convention.

²⁸ Art 3(1) and 4 Cape Town Convention.

²⁹ Art IV Aircraft Protocol.

³⁰ Art 8(1) Cape Town Convention.

³¹ Art 13 Cape Town Convention.

³² Art IX(1) Aircraft Protocol.

³³ Art IX(1) Aircraft Protocol, Art VII(1) Luxembourg Protocol.

³⁴ Art 16 Cape Town Convention

³⁵ Art 29(1).

³⁶ Art 39.

³⁷ Art 30 Cape Town Convention and art XI Aircraft Protocol.

³⁸ Art 30 Cape Town Convention and art XI Aircraft Protocol.

for export credit insurance have been borne out by experience for example, OECD states offer a “Cape Town Convention discount” from the minimum premium rate they are required to charge for credit insurance provided that they make a prescribed set of declarations.³⁹

Finally, the Convention provides for certain responsibilities which apply only if States make an opt-in declaration,⁴⁰ while for certain others a State may opt out.⁴¹ These duties are: the availability of speedy advance relief for a creditor who adduces evidence of default;⁴² the provision of the remedy of de-registration and export and delivery of aircraft at the behest of the creditor where there has been default, with a requirement of expeditious administrative action;⁴³ and, under the Aircraft Protocol, timely relief to the creditor on the debtor's insolvency and the provision of insolvency assistance to foreign courts in carrying out the provisions for the protection of the creditor on the debtor's insolvency.⁴⁴

III. DEARTH OF LAW FOR AVIATION SECTOR IN INDIA

On October 2, 2017, Monarch Airlines, a UK-based carrier, faced administration, resulting in over 110,000 passengers being stranded abroad and more than 300,000 future holiday bookings being lost, impacting an additional three-quarters of a million individuals. Similarly, in India, Kingfisher Airlines ceased operations in 2012, and in 2013, its licenses were revoked by the Directorate General of Civil Aviation (DGCA) amidst allegations of deliberate loan defaults by its promoters.

Proponents of the influence of political economy on the legal framework argue that it played a role in expediting the passage of the Insolvency and Bankruptcy Code, 2016 (the Code). Three years post the Code's enactment, another significant airline finds itself in insolvency. On April 17, 2019, Jet Airways (India) Limited (Jet Airways) made public its decision to halt operations, initiating the corporate insolvency resolution process (CIRP) on June 20, 2019. This marks the inaugural airline insolvency proceeding under the Code, likely to introduce distinctive challenges inherent to aviation sector insolvencies.

In India, aircraft lease transactions usually take the form of operational leasing, wherein the aircraft lessors/financiers are classified as 'operational creditors' according to the Insolvency and Bankruptcy Code (IBC). This classification implies that during the insolvency proceedings

³⁹ Arrangement on Officially Supported Credits (TAD/PG (2016) 1, dated 1 February 2016) Annex III, Sector Understanding on Export Credits for Civil Aircraft (ASU), Appendix II, Annex 1.

⁴⁰ Aircraft Protocol art XXX (1) – (3).

⁴¹ Convention, art 55, Aircraft Protocol art XXX (5).

⁴² Art 13 Cape Town Convention.

⁴³ Arts IX and X(6) and (7) Aircraft Protocol.

⁴⁴ Arts X and XII Aircraft Protocol

or when approving the resolution plan, these lessors/financiers have no authority to make decisions or negotiate with the Committee of Creditors (COC). However, if the lease transaction is structured as a financial lease, akin to a hire-purchase agreement, the lessors/financiers may be recognized as 'financial creditors' under the IBC.

It's important to note that India became a party to the CTC and the Aircraft Protocol before the enactment of the IBC. Consequently, the IBC takes precedence over any conflicting laws. Similar to other key commercial legislations like the Companies Act, 2013, Indian Contract Act, 1872, or the Sale of Goods Act, 1930, the IBC is designed as a comprehensive law applicable across all industries. However, as companies from various sectors undergo insolvency proceedings, the adaptability of the Corporate Insolvency Resolution Process (CIRP) is being put to the test. Fulfilling the stringent timelines set by the Code, sustaining airline operations during CIRP, and managing numerous lessor claims stemming from such insolvencies have raised novel legal questions under the Code.

IV. CAPE TOWN CONVENTION BILL, 2018

The Cape Town Convention Bill, 2018, published by the Ministry of Civil Aviation, Government of India on October 8, 2018, aimed to incorporate the CTC/Aircraft Protocol into Indian law. Included in the Bill is a provision prioritizing the Convention/Protocol over conflicting laws. Additionally, it grants the Government authority to establish rules for the implementation of the Convention and Protocol within India. Despite its introduction, the implementation has yet to occur. Consequently, the CTC and Aircraft Protocol remain subject to Indian domestic laws, including the IBC.

Given the developing landscape of insolvency law, it is challenging to determine whether creditor rights outlined in the CTC and Aircraft Protocol will align with those under the IBC. This uncertainty is compounded by the absence of established insolvency jurisprudence specific to the aviation sector, aside from cases related to the winding up of Kingfisher Airlines (predating the ratification of the CTC and implementation of the IBC), some of which remain pending in various Indian courts.

V. ISSUES IN AIRLINE INSOLVENCIES IN INDIA

Be it the nature of operations or the complexities of aircraft financing and asset preservation, multiple issues contribute to the difficulties in dealing with insolvencies in the aviation sector. In this section, we discuss some of these issues.

a) Aircraft Financing

It's often financially impractical for airlines to own aircraft outright. As a result, they often enter into complex financing arrangements with both financial institutions and aircraft manufacturers. In cases of default, it's common for the lessor to reclaim possession of the aircraft, further reducing the airline's available assets.

Additionally, during Corporate Insolvency Resolution Process (CIRP), there's the challenge of categorizing lease-related claims as either financial or operational debt, and verifying claims, including accelerated rent payments. All claim amounts are typically assessed as of the insolvency commencement date during CIRP. However, this may conflict with the contractual rights of lessors, raising questions about whether the Code supersedes these contractual rights.

b) Legal Requirements for Running the Company as a Going Concern

The aviation industry demands specialized skills, training, and expertise, necessitating a framework of licenses, regulations, and other prerequisites for operating airlines as ongoing enterprises. For instance, under the Aircraft Rules, 1937, an airline must secure an Air Operator Certificate, contingent upon adherence to Schedule XI of the Aircraft Rules. The Directorate General of Civil Aviation (DGCA) holds discretionary powers to revoke this certificate if the aircraft ceases operations.

Moreover, to maintain eligibility for this certificate, the airline must appoint an Accountable Manager (AM). During Corporate Insolvency Resolution Process (CIRP), the Resolution Professional (RP) assumes the role of AM and inherits the associated risks and liabilities outlined by the DGCA. However, it's common for the RP or their firm to lack in-house expertise in this domain. Consequently, it's crucial for the RP to persuade the airline's senior management to remain with the company to ensure regulatory compliance..

c) Registration

Each aircraft must be registered with the Central Government to operate. According to Rule 30(7) of the Aircraft Rules, the registration of an aircraft can be canceled within five working days upon receipt of an application from a holder of an Irrevocable Deregistration and Export Request Authorization (IDERA), without requiring consent or documentation from the aircraft operator or any other party. It's imperative for the courts to definitively determine whether the execution of such an IDERA would be subject to prohibition under the moratorium imposed by the Insolvency and Bankruptcy Code.

d) Asset preservation

Regarding other assets of the airline, such as slots and traffic rights, these are allocated to airline companies through a defined process and are not owned by the airline itself. Currently, civil aviation rules do not outline a procedure for the reversion of these rights to a restructured airline. Therefore, the Resolution Professional (RP) must engage in discussions with the Directorate General of Civil Aviation (DGCA), the Ministry of Civil Aviation, and airport authorities to negotiate the preservation of these slots and traffic rights on an ad hoc basis.

If a viable business plan for the airline is feasible, the Ministry of Civil Aviation and DGCA are more likely to consider safeguarding these assets. However, the absence of these assets during the Corporate Insolvency Resolution Process (CIRP) and the associated uncertainty may deter potential resolution applicants and impede the airline's resolution. This creates a circular dilemma where the preservation of assets depends on their initial preservation.

e) Treatment of Claims

Apart from claims stemming from debts owed to financiers and lessors, a significant portion of claims against a bankrupt airline pertain to consumers. When an airline goes insolvent, consumers face two types of losses: financial loss (as their purchased tickets lose value) and personal welfare losses if they are stranded abroad. This could include delays, discomfort, anxiety, stress, and, in severe cases, health and employment issues. Each consumer's situation may entail further losses.

Furthermore, when it comes to filing claims, it's crucial to examine the ticket's source of purchase to verify and scrutinize such claims. Evaluating the scope, nature, and amount of these claims can be a daunting task for the Resolution Professional (RP) under the Code. This is particularly challenging due to the sheer volume of claims and the potential for duplicate claims arising from the same transaction.

f) Cross-Border Implications

The very nature of the business of an airline company leads to a situation where the assets of the company may be located in more than one jurisdiction. In such case, it may be possible that insolvency proceedings are initiated in more than one jurisdiction. Such is the case in the insolvency of Jet Airways.

Indian law takes a broadly territorial approach to cross-border insolvency.⁴⁵ Having an office

⁴⁵ N.L. Mitra (et al.), Report of the Advisory Group on Bankruptcy Laws, at Recommendation 24 on 42 (2001)

in India and assets located here is enough to prove that the place of business is in India,⁴⁶ and accordingly, insolvency law will apply to such cases. There is no provision for the recognition of foreign judgments and orders since the Civil Procedure Code does not apply to the IBC.⁴⁷ Before the implementation of IBC, a foreign judgment may be recognized under the CPC,⁴⁸ on the basis of legislative reciprocity.⁴⁹ It was decided by the Bombay High Court in the case of *Sumkin Bussan International vs. King Shing Enterprises Ltd.*⁵⁰ that the model law have no legal basis in India.

IBC also take into consideration the aspect of the Cross-border insolvency. It envisages reciprocity in terms of bilateral agreements between states under Section 234 and 235. However, neither has there been any such bilateral agreements nor have these provisions come into effect. Furthermore, finalizing the treaty between two nations may take a long time and since each treaty will be different depending upon the requirement of different states, it may cause uncertainty among foreign investors.⁵¹

It is also pertinent to mention that the IBC was brought forth to solve, the question of bankruptcy and insolvency purely limited to the domestic scenario of India,⁵². The purpose behind the insertion of Section 234 and 235 was only to allow Indian Administrator (Resolution Professional) to take control of assets of a corporate debtor situated in a foreign country.⁵³

Insolvency proceedings against the Jet Airways faced problem due to the absence of cross border insolvency scheme under the IBC. It has led to the question of jurisdiction of the bankruptcy court in Netherlands to try matters and pass orders for an Indian company. Since there is no law for governing such a situation, the NCLT has sought for cooperation with Netherlands in the matter, which may take several months, making the insolvency resolution potentially useless. Finally, in the Jet Airways case, after through negotiations, a Cross Border Insolvency Protocol was put into place by the National Company Law Appellate Tribunal which basically clarified that the since the COMI of the debtor is in India, it shall be the place of foreign main proceedings while Netherlands would be the place of foreign non-main

⁴⁶ Re Tranvancore National etc. Bank Ltd. (1939) Mad. 318 as per Rao K; In re Frontier Bank Ltd., 1951 Punj, 145

⁴⁷ Usha Holdings LL.C v. Francorp Advisors Pvt. Ltd

⁴⁸ Section 44A, Civil Procedure Code (India), 1908.

⁴⁹ M.V.A.L Quamar v. Tsavliris Salvage International Ltd. [2000] 2 LRI 886.

⁵⁰ 2005 (6) BomCR 240

⁵¹ Government likely to tweak IBC for Cross Border Cases, Business Standard, Available at https://www.business-standard.com/article/companies/govt-likely-to-tweak-ibc-for-cross-border-cases-bill-after-elections-119030400870_1.html.

⁵² Report of the Joint Parliament Committee, 2016.

⁵³ Vishwanathan Committee Report, 2015.

proceedings.⁵⁴

In the absence of cross-border insolvency laws, the doctrine of comity is used.⁵⁵ Comity, in common law and civil law countries,⁵⁶ mandates the serious consideration,⁵⁷ of a foreign court's order. The theory of Conflict of Laws prefers the jurisdiction of the State having most intimate contact with the issues on functional lines to avoid forum shopping.⁵⁸ Thus, the "most intimate contact" or "closest concern" doctrine,⁵⁹ should be applied. However, It is the discretionary power of the court or tribunal in which recognition is being sought,⁶⁰ and comity only demands consideration,⁶¹ of an order,⁶² not blindly follow an order made by a foreign court.⁶³ Weight and persuasive effect of a foreign order depends on the facts and circumstances.⁶⁴ Thus, more often than not, countries are reluctant to leave claim over an insolvency matter and Comity is not a strong enough reason to persuade them.

Much recently, the government has released a set of Draft Guidelines that are roughly based on the provisions of the Model Law but are substantially different. The concept of COMI and reciprocity is kept intact but the Indian draft guidelines do not extend to Individual debtors and thus, covers Corporate debtors only. Furthermore, the same provides for a provision for Joint Hearing with a foreign court in a concurrent proceeding. The government has also reserved its rights to keep an upper hand in these matters by omitting the provision for "Maximum cooperation" with foreign representatives and courts. The fate of these draft guidelines will be clarified soon.

VI. APPARENT CONFLICT WITH IBC

Aviation assets differ significantly from other types of assets due to their high capital investment and the substantial maintenance costs incurred during prolonged periods of grounding. The imposition of a 6-month moratorium under the Insolvency and Bankruptcy Code (IBC) exacerbates this situation, particularly impacting leased aviation assets and leading to a significant depreciation in their value, contrary to the provisions of the Cape Town

⁵⁴ Jet Airways (India) Ltd. v. State Bank of India, Company Appeal (AT) (Insolvency) No. 707 of 2019, Order dated 26.09.2019.

⁵⁵ UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, ¶7.

⁵⁶ Joel R. Paul, Comity in International Law, 32 HARV. INT'L L.J. 1, 4 (1991).

⁵⁷ McKee v. McKee, 1951 AC 352

⁵⁸ Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 698.

⁵⁹ Chandan Mishra v. Union of India & Ors., W.P. (CRL) No. 1088 of 2015.

⁶⁰ Securities and Exchange Commission v. Stanford International Bank, Ltd., Civil Action No. 3:09-cv-0298.

⁶¹ McKee v. McKee, 1951 AC 352.

⁶² Surya Vadanam vs. State of Tamil Nadu, (2015) 5 SCC 450.

⁶³ Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112.

⁶⁴ Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42.

Convention (CTC)/Protocol.

The crisis faced by Jet Airways was primarily driven by defaulting on lease payments to various aircraft lessors. A considerable portion of Jet's fleet, approximately 100 out of 119 Boeing planes, was leased from companies like Avolon, GE Capital Aviation Services, and Aercap Holdings. Following the airline's grounding, numerous lessors sought de-registration and repossession of their aircraft from the Directorate General of Civil Aviation (DGCA) to recover outstanding dues. This process is disrupted by insolvency proceedings and the ensuing moratorium, raising concerns among international lessors about engaging in future leasing agreements with Indian airlines.

India, under the Aircraft Protocol, has committed to implementing Article XI, Alternative A, which entails a waiting period of two calendar months for all types of insolvency proceedings. However, Section 14(1)(d) of the IBC restricts property recovery by lessors during the corporate debtor's possession. The conflict between the waiting period under Alternative A and the 180-day (extendable by 90 days) moratorium under IBC impedes the repossession rights granted by the Protocol.

The Cape Town Convention Bill, 2018, and Section 238 of the IBC establish overriding provisions, necessitating legislative or judicial intervention to resolve conflicts between the two. The author argues that prioritizing the CTC/Protocol over the IBC would better serve the interests of creditors and the aviation industry by exempting it from the moratorium.

Lease rentals for aviation equipment are treated as operational debt under the IBC, relegating aircraft lessors to a lower priority for payment. However, invoking Alternative A for de-registration and repossession would offer a more viable recourse for lessors under the proposed Bill. Despite the possibility of continuing lease payments during insolvency, the prolonged grounding of aircraft during the moratorium undermines the IBC's objective of maximizing asset value.

In summary, the conflict between the CTC/Protocol and the IBC regarding the treatment of aviation assets during insolvency necessitates legislative or judicial resolution to protect the interests of creditors and ensure the efficient operation of the aviation industry.

VII. BENEFITS OF IMPLEMENTING CTC

The rapid growth of India's aviation sector underscores the vital need to build trust among creditors and lessors in the domestic aviation industry. The Cape Town Convention (CTC)/Protocol plays a crucial role in reinforcing this trust by providing expedited interim

measures for creditors in cases of lessee default on lease payments. These measures, such as swift de-registration and export of aircraft, help mitigate risk for creditors and lessors, thereby reducing the overall costs associated with aircraft financing and leasing. Ultimately, this reduction in costs benefits consumers by making air travel more affordable.

Furthermore, the Organisation for Economic Cooperation and Development (OECD) has established guidelines stipulating that airlines from countries that adopt the CTC and Protocol are entitled to a 10 percent discount on export credit premiums.

VIII. CONCLUSION AND RECOMMENDATIONS

The Government's intention of not implementing the Cape Town Convention Bill any time soon and keeping it in the pipeline may prove fatal for the aviation industry in India as aircraft creditors or lessors would be dismayed to be not able to recover the maximum value as possible under the CTC/Protocol. At present, it becomes imperative to implement the Bill with necessary amendments in the IBC to set up a harmonious interaction between the two frameworks. The implementation of the Bill would be a major overhaul in the aviation industry.

- In July 2018, the Airline Insolvency Review published its Interim Report, which set out the Review's initial views on potential options for meeting the immediate repatriation requirements following the failure of an airline, which can be implemented in India.

In terms of repatriation of passengers, Self-organised repatriation or Organised charter, may be used. Further, an orderly wind-down involving the short-term continuation of the airline's own flight schedule using its existing fleet and resources can be done.