

VII. CAPE TOWN CONVENTION AND INSOLVENCY IN THE AVIATION INDUSTRY: A GLOBAL STUDY

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ABSTRACT

The following Research Paper, titled, “Cape Town Convention and Insolvency in the Aviation Industry: A Global Study” aims to understand the juxtaposition of the Cape Town Convention Bill, 2018 proposed to be passed in India, along with the Insolvency and Bankruptcy Code, 2016 which is currently in force. The aviation industry worldwide, including India, typically operates on the model of leasing, with a large number of aircraft carriers in India being leased from lessors offshore. The Cape Town Convention and Protocol, which was signed in 2001 and now has 65 signatories, aims at ensuring predictability and credibility, and contribute to cost savings through the standardization of aircraft financing and leasing globally, especially in the case of insolvency. However, the current law that governs aviation insolvency in India is IBC, which does not provide an easy exit option for lessors of aircraft due the application of the moratorium provision under Section 14 of IBC which demands that the lessor cannot reclaim any property that has been leased as well as prohibits the suspension of supply of essential goods and services during the CIRP. These provisions have become a hurdle towards attracting aircraft financing and investment in India, the current COVID-19 pandemic exacerbating it, and the passage of the Bill will solve this issue and introduce the standard followed in other sophisticated jurisdictions. The paper aims to analyse this issue of law, in light of the previous aircraft insolvency cases and the procedure abided by other signatories, and hence arrive at a holistic conclusion on the present study.

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I. INTRODUCTION

The *Cape Town Convention on International Interests on Mobile equipment and the Protocol on Matters specific to Aircraft Equipment*¹ (“Cape Town Convention”), a UNIDROIT instrument passed in 2001, is perhaps one of the most ambitious and successful international commercial law instruments fashioned, as it helps to promulgate the idea of a new type of secured financing device- a proprietary interest whose existence and validity is not affected by domestic laws,² thus aiding the creditor to achieve peace of mind and in turn lowers the cost of credit for clients.

The principal objective of the Cape Town Convention and Protocol with respect to the aviation industry is to standardise aircraft financing globally, in order to create a legal regime that is universally applicable. The protocol does so by aiming to reduce the level of risk for the intending creditors/lessors, leading to the reduction in the cost of aircraft financing/leasing and thus, eventually benefitting the end consumer, who is

¹ The Cape Town Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285 (entered into force Mar. 1, 2006), <https://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf> [hereinafter *Cape Town Convention*].

² Anton Didenko, *A Historical Overview of the Basic Concepts of the Cape Town Convention (Part I): ‘International Interest’ and ‘Internationality’*, 6 CAPE TOWN CONVENTION JOURNAL 136 (2017).

either the passenger of airlines³ or the shipper of goods, by a reduction in the cost of operations.

The Cape Town Convention and its Protocol on Matters specific to Aircraft Equipment were primarily adopted by the ICAO and UNIDROIT in order to create certainty for financing of aircraft equipment by lending institutions.⁴ This uncertainty arose due to the varying nature of laws regarding securities, title retention agreements, and lease agreements in different legal systems globally. By adopting this Convention, there will not only be certainty but also predictability⁵ in the field of aircraft financing.

India is one of the 65 signatories of the Cape Town Convention and its Protocol and has aimed at discharging its treaty obligations under the same by enacting the Cape Town Convention Bill, 2018. The need for this Bill arises due to the conflict of the provisions of the same with various other laws in force in India including the Code of Civil Procedure, 1908, the Insolvency and Bankruptcy Code, 2016 (“IBC”), the Specific Relief Act, 1963, and the Companies Act, 2013.

The following paper aims to understand the present regime in India with respect to laws applicable to aircraft leasing and the effect that these laws have on the present market scenario. With the moratorium provisions under IBC laying heavily upon the lessors, the Cape Town Bill would be a welcome change that would boost FDI in the Aviation sector. Furthermore, the paper

³ Dr. Vadim Linetsky, *Economic Benefits of the Cape Town Treaty*, ICAO (Oct. 2009), <https://www.icao.int/sustainability/Documents/AnnexC.pdf>.

⁴ Cape Town Convention and Protocol, ICAO, <https://www.icao.int/sustainability/Pages/Capetown-Convention.aspx>.

⁵ Linetsky, *supra* note 3.

also aims to understand the laws applicable to third-party non-consensual rights in the sector and the changes that the proposed Bill would bring to those. Finally, the paper critically evaluates the global scenario as to the implementation of the Cape Town Convention and understands as to which of the two models under the law would be ideal for India.

II. INDIAN LAWS PERTAINING TO THE AVIATION INDUSTRY CURRENTLY IN FORCE

A. Insolvency and Bankruptcy

Section 14 of the Insolvency and Bankruptcy Code, 2016 (“IBC”) has detailed the conduct towards the company in question during the period of the moratorium which is meant for restructuring and revival of the said company. Section 14(1)(d) specifically entails that the lessor cannot recover any property that is in possession of the corporate debtor in the duration of the moratorium. Further, Section 14(2) of the IBC mentions that the supply of essential services cannot be suspended or terminated to the corporate debtor while the moratorium is persisting.⁶ Previously, the Indian courts have interpreted electricity, raw materials, real estate as being essential services in various cases. It must be noted that in the case of *Uttarakhand Power Corporation Ltd. v. M/s. ANG Industries Ltd.*, with respect to the continuing supply of essential services, it has been held that when the essential supply of goods and services are provided during Corporate Insolvency Resolution Process (“CIRP”) then the Insolvency Resolution Professional (“IRP”) has to bear the costs within the stipulated time period even when CIRP is ongoing and

⁶ The Insolvency and Bankruptcy Code, 2016, Act No.3, Acts of Parliament, §14.

furthermore, that if dues are not paid for two consecutive months then the supply could be terminated.⁷

Under the Cape Town Convention and Protocol, Article XI deals with remedies in insolvency under two Alternative models, Alternative A and Alternative B have been provided for the benefit of the creditors, who are in many cases lessors of the aircraft. As an interim relief, the lessor can move the registration authorities for de-registering the aircraft in case of a default. Further, this bill will allow the lessor for repossession of the aircraft if the dues are not cleared within two months of the initiation of the insolvency proceedings.⁸ Until then, the IRP is obligated to preserve the aircraft and ensure that it is being maintained as per the terms of the lease agreement. However, if the said defaults under the agreement are cured and an undertaking has been given by the IRP or the lessee that future obligations would be performed and upheld, then the right of possession may be continued even after the expiry of two months.⁹ The Cape Town Convention and Protocol would override the moratorium provisions of IBC. The Insolvency and Bankruptcy Code has a non-obstante clause to override the application of other applicable laws impeding its functioning.¹⁰ Hence it guarantees

⁷ Uttarakhand Power Corporation Ltd. v. M/s. ANG Industries Ltd., 2018 SCC OnLine NCLAT 53.

⁸ *Cape Town Convention Bill, 2018, Declarations lodged by the Republic of India under the aircraft protocol at the time of the deposit of its instrument of accession*, MINISTRY OF CIVIL AVIATION, GOVERNMENT OF INDIA, <https://www.civilaviation.gov.in/sites/default/files/Cape%20Town.pdf>.

⁹ Ashwin Bishnoi, et. al., *Insolvency in Indian Aviation: What Does India's New Cape Town Convention Bill Mean For Recovery And Re-Possession Of Leased Aircrafts?* KHAITAN & CO. (Dec. 3, 2018)

<https://www.khaitanco.com/thought-leadership/Insolvency-in-indian-aviation-what-does-indias-new-cape-town-convention>.

¹⁰ The Insolvency and Bankruptcy Code, 2016, Act No.3, Acts of Parliament, §238.

supremacy to the operation of IBC in comparison to any other law, in case their provisions become inconsistent with that of the Code. This was noted in the case of *Pr. Commissioner of Income Tax v. Monnet Ispat And Energy Ltd.*, where it was held that the non-obstante clause under IBC would override the inconsistency under the Income Tax Act.¹¹

However, it is also to be remembered that the Cape Town Bill under its Section 5 also contains a non-obstante clause to override the effect of other legislations.¹² Since both the legislations contain non-obstante clauses, it is a settled position of law that going by established rules of statutory interpretation, that the statute having the latter non-obstante clause, in this case the Cape Town Bill, would prevail over the older non-obstante clause, i.e., of IBC.¹³ This would mean that the debtor cannot claim for the continuance of lease agreement during the CIRP process, even under the garb of it being an essential service, in case of a default; since the provisions of the moratorium would be overruled by Article XI of the Bill.

B. Non-consensual Rights

India, along with the USA, UK, Ireland has placed priority on certain third-party rights over the rights of the registered international interests, which visibly affects the lessors detrimentally.¹⁴

The issue of non-consensual rights that frustrate the aviation financiers also crops up. Non- consensual rights are those which are derived by the

¹¹ *Commissioner of Income Tax v. Monnet Ispat And Energy Ltd.*, (2018) 18 SCC 786.

¹² Cape Town Convention Bill, §5.

¹³ *Solidaire India Ltd v. Fair Growth Financial Services Ltd*, (2001) 3 SCC 71 ¶10.

¹⁴ SOUICHIROU KOZUKA, ET.AL., IMPLEMENTING THE CAPE TOWN CONVENTION AND THE DOMESTIC LAWS ON SECURED TRANSACTIONS 341 (Springer International Publishing, 2017).

operation of law, and not contractual arrangements, and would include taxes, airport fees, etc. These rights cause the gestation period of cases to increase and the Indian authorities in the past have also demanded that the lessors should first pay off these dues before taking possession, hence, indirectly making the lessors liable for debts they never took themselves.¹⁵ For example, in India, the current Aircraft Rules state that the dues pending with the airport operator three months prior to the date the Irrevocable Deregistration and Export Request Authorisation (“IDERA”) holder sought deregistration from, shall be mailed by the operator to the IDERA holder.¹⁶ This stance of the government is interpreted by the critics to be biased in favour of domestic airlines. The longer the legal tussle for the possession of the aircraft, the longer the grounding period, which would cause substantial capital loss to the value of the engine along with the loss in current receipts due to lack of rental payments.¹⁷

It is also to be noted that the Cape Town Convention permits the creation of non-registrable liens which would have corresponding detention rights in favour of third parties and enabling them to seek possession of the aircraft to enforce the pending dues with the lessee.¹⁸

India has, in its declarations for the Convention, categorically recognised the non-consensual rights of liens in favour of the airline employees with respect to their unpaid wages to the employees and the unpaid charges and taxes liable to be paid to the operator before the default is

¹⁵ *Id.* at 346.

¹⁶ Aircraft Rules, 1937, Rule 32A, Standard Operating Procedure AIC 12/ 2018, MINISTRY OF CIVIL AVIATION, GOVERNMENT OF INDIA, http://164.100.60.133/aic/AIC12_2018.pdf.

¹⁷ SOUICHIROU KOZUKA, *supra* note 14, at 346.

¹⁸ *See* Cape Town Convention, Art. 39 & Art 40.

declared, and the court orders approving attachment of aircraft as award. The same can be registered in a manner similar to that as international interest and would have priority over the latter.¹⁹ For non-consensual rights of the nature of unpaid wages, pending charges with the operator since the time of the default as well as the value-added services to the aircraft performed, these rights would have priority even when they are not registered.²⁰ The Government of India and its agencies continue to have the right to arrest and detain the aircraft for its pending dues even if the same is not registered under Article 39.²¹

This inadequate protection of the rights of the lessors due to India's opt-in declaration under the Convention might be overcome by having SPVs in contracting states that do not have this negative declaration.²²

Arguendo, it can also be said that since non-consensual rights being statutory dues would amount to operational debt as per the present position of law.²³ Hence, in the event of a Corporate Insolvency Resolution Process, their dues would rank lower in the hierarchy compared to that of the lessors who have been considered to be financial creditors.²⁴ However, whether the carve-out mechanism in the Cape Town Bill which gives preference to non-consensual rights, would have a diluting effect on the dues of the lessors still remains a moot point.

¹⁹ Cape Town Convention Bill, 2018, Declaration under Art. 40., Form 6.

²⁰ *Id.*, Declaration under Art. 39(1)(a)., Form 1.

²¹ *Id.*, Declaration under Art. 39(1)(b)., Form 4.

²² SOUICHIROU KOZUKA, *supra* note 14, at 356.

²³ Director General of Income Tax (Admn. & TPS) v. M/s. Synergies Dooray Automotive Ltd. & Ors., 2019 SCC OnLine NCLAT 691.

²⁴ Jindal Steel and Power Limited v. DCM International Limited, 2017 SCC OnLine NCLT 989.

C. Deregistration of Aircrafts

In the present situation, the DGCA requires the consent of the lessee for the deregistration to occur. In addition to this, the Airports Authority of India and its operators can impose lien for non-payment of charges, and other government departments like the customs authorities of India can also demand impounding under Section 142(c)(ii) of the Customs Act, 1962 and Section 87(c) of the Finance Act, 1994 (the Finance Act), which allows attachment of the property under the *control* of the defaulter.²⁵

D. Project Rupee Raftaar

The impetus for implementing the Cape Town Convention and Protocol in India can be attributed to *Project Rupee Raftaar* embarked on by the current Narendra Modi government.

Most scheduled carriers in India operate airplanes leased from Dublin, Ireland, or Singapore.²⁶ In fact, over 70 percent of the aircraft acquisitions which have occurred in the past decade in the country have been on an operating lease basis.²⁷ The ambitious *Project Rupee Raftaar* by the Working Group of Ministry of Civil Aviation (2019), aims to develop aviation leasing and financing in India by promoting the International Financial Services Centre (“IFSC”) in GIFT City, Gujarat (the only IFSC in the country) with

²⁵ Shardul Thacker, *Creating and enforcing security interests in transport assets in India*, THE TRANSPORT FINANCE LAW REVIEW (May 2020), <https://thelawreviews.co.uk/edition/the-transport-finance-law-review-edition-6/1225588/india>.

²⁶ Mihir Mishra, *Plans afoot to base aircraft leasing firms at GIFT city*, ECONOMIC TIMES (Jun. 28, 2018), <https://economictimes.indiatimes.com/news/economy/infrastructure/plans-afoot-to-base-aircraft-leasing-firms-at-gift-city/articleshow/64785531.cms?from=mdr>.

²⁷ Report of the Working Group, *Project Rupee Raftaar: Development of Aircraft Financing and Leasing in India*, MINISTRY OF CIVIL AVIATION 5 (Jan. 10, 2019).

various regulatory and tax reforms in order to make India an Aviation financing hub like Dublin, Singapore or Hong Kong. It is to be remembered that transactions carried out in IFSCs are still considered to be off-shore, but the benefit it provides is that the physical distance is eliminated as an impediment.

This is expected to reduce the costs of air travel and help the growth of low-cost carriers in India, where air travel is still considered to be a luxury by many and has also been catalysed by the fact that India is expected to become the third-largest aviation market by 2022, but the current aircraft leasing ecosystem has several bottlenecks resulting in a low number of operating aircraft.

The Raftaar report has suggested, amongst other regulatory and policy reforms, that the Cape Town Bill, 2018 should be enacted so that the right to detain aircraft has an overriding effect as well as establishes a seamless data connection between the International Registry and the online Register operated by the DGCA.²⁸ The Cape Town Convention is expected to have an overriding effect on the non-consensual rights that have made the lessor liable.

With respect to *SARFAESI*, the current position is that it cannot be applied for security over aircraft for the benefit of the aircraft leasing companies as per Section 31(c) of the *SARFAESI Act*. The Raftaar report suggests the deletion of this exception.

²⁸ Project Rupee Raftaar, *supra* note 21, at 38 & 71.

E. Other legislative instruments

Rule 30(7) of the Aircraft Rules states that within five days of application of the IDERA holder, the aircraft has to be deregistered and the current judicial trend has been known to support the right of repossession by the lessor.²⁹ Rule 30(7) of the same also comes with a proviso that the Central Government's right to detain or attach and sell the aircraft object for its pending dues would not be affected, making way for non-consensual rights.³⁰ Further, Rule 32A of the Aircraft Rules also mandates the aid of the government, and hence its agencies, to facilitate the export of aircraft after the cancellation of IDERA.

The above rules have to be read with the relevant Civil Aviation Requirements issued by DGCA which outlines the procedure for the same.³¹ The 2020 revision to this has also permitted not only the authorised signatory but also the certified designee of the authorised signatory to sign the IDERA application, and even prescribes a format for the application,³² hence, constructing a formal mechanism that was absent previously.

The Airports Regulations also provide the competent authority the right to detain aircraft in the event of non-payment of the fees, unless a general or specific order of the Central Government mandates otherwise.³³

²⁹ See *Corporate Aircraft Funding Company LLC v. Union of India & Ors.*, 2013 SCC OnLine Del 1085.

³⁰ Aircraft Rules, *supra* note 16, at rule 30.

³¹ DGCA, *Civil Aviation Requirements*, Section 2, Series F, Part I, MINISTRY OF CIVIL AVIATION, GOVERNMENT OF INDIA.

³² *Id.* at ¶7A

³³ Airport Authority of India (Management of Airports) Regulations, 2003, Regulation 10, <https://www.aai.aero/sites/default/files/rtdir/gazz13.pdf>.

However, subsequent to this case, via the 2018 amendment, the first proviso was inserted which states that the arrears of dues accrued during the time period comprised of three months immediately preceding the date of declared default and the period subsequent to the date of declared default up to the date of departure of the aircraft from India³⁴ has to be remitted before the deregistration takes place and the plane is allowed to be exported and the balance is to be recovered from the airline. The concerned Airport Authority also has to give notice within 5 days of receiving intimation from DGCA pertaining to the deregistration process, to the lessor about its obligation to clear pending dues.

Hence, in recent years, there has been a legislative thrust to ease out aviation leasing in India and the boons of it can be witnessed in the case of Jet Airways, which declared bankruptcy in 2019, and out of 123 of its fleet, only 11 remained in possession with it. The repossession and releasing of the erstwhile Jet Airways aircraft was a welcome change compared to the Kingfisher fiasco which had occurred just a decade prior.³⁵

III. CASE STUDIES IN INDIA

Before the enactment of the Insolvency and Bankruptcy Code, 2016, India had followed the position as mentioned under the Cape Town Convention with respect to aircraft.

³⁴ *Id.*

³⁵ Rajinder Narain & Co., *Trends and Developments in India: AVIATION FINANCING AND LEASING 202* (Chambers Global Practice Guide ed., 2020).

The famous case of *DVB Aviation Finance Asia PTE Ltd v. Directorate General of Civil Aviation*³⁶ pertained to the Kingfisher Airlines, which was in a debt of USD one billion. In this case, the insolvent lessee claimed that since its lease also had a purchase option therefore it also had ownership rights as well. The DGCA also demanded a No Objection Certificate from the lessee before it could grant clearance to the lessor to acquire its aircraft. In the end, the Delhi High Court opined that the DGCA erred by demanding a No Objection Certificate from the lessee and mandated deregistration to take place. In this case, the court did not examine the Cape Town Convention but it was done so in the subsequent case of *Spice Jet*.

In the 2015 *Spice Jet*³⁷ case, the Delhi High Court categorically ordered the DGCA to deregister the aircraft that had been leased out to SpiceJet by the two Irish lessors. Here, SpiceJet had defaulted in the payment of lease rents and thus, a default and termination notice had been issued upon the airline. Even after the termination notice, SpiceJet had continued to use the leased aircraft for its functioning. This was also held to be illegal by the Delhi High Court. SpiceJet argued that since a scheme of arrangement was underway with respect to the insolvency and restructuring of SpiceJet, it would be of great prejudice to the airline if the default notice was enforced, but the High Court, stating India's international commitments under the Cape Town Convention and Protocol rejected the said argument in favour of the Irish lessors and stated that since there was no dispute regarding the default committed by the debtors, the lessors could, according to their financial

³⁶ *DVB Aviation Finance Asia PTE Ltd v. Directorate General of Civil Aviation* WP (C) 7661/2012, http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=70783&yr=2013.

³⁷ *Ireland Ltd & Ors. v. Directorate General of Civil Aviation & Anr.*, 2015 SCC OnLine Del 8177.

judgement invoke their rights under the Convention and the Court was in no position to question the same. Further, India was under an obligation to uphold its international commitments with respect to the Cape Town Convention and Protocol as per Article 51(c) of the Indian Constitution. This position was also followed in the case of *Corporate Aircraft Funding Company LLC v. Union of India & Ors.*³⁸

The aviation authority's reluctance to deregister was highlighted in both cases, setting out bad precedents for aviation leasing and deterring the lessors.³⁹ This is also exacerbated by the fact that the courts have placed priority on the non-consensual rights of government agencies over that of the lessors.

In *Directorate of Revenue Intelligence v. Corporate Air Craft Funding Co.*,⁴⁰ the previous order of the court mandating the DGCA to deregister the aircraft under Rule 30 of the Aircraft Rules, 1937, was reversed so that the government agency could carry out the investigation for the alleged fraudulent activities.

In *AER Lingus Ltd. v. Airport Authority of India and Union of India*⁴¹ too, the plea of the Airport Authority to detain aircraft till its pending charges

³⁸ *Corporate Aircraft Funding Company LLC v. Union of India & Ors.*, 2013 SCC OnLine Del 1085.

³⁹ Ludwig Weber, *Public and private features of the Cape Town Convention*, 4(1) CAPE TOWN CONVENTION JOURNAL 61 (2015).

⁴⁰ *Directorate of Revenue Intelligence v. Corporate Air Craft Funding Co.*, 2013 SCC OnLine Del 1898, ¶ 22.

⁴¹ *AER Lingus Ltd. v. Airport Authority of India and Union of India*, AIR 2015 SC 1903.

were settled was allowed, thus enabling the non-consensual rights to yet again have a higher preference than that of the rights of the lessor.

*Jet Airways Case Study*⁴²: The Jet Airways Insolvency case, with simultaneous proceedings in India and the Netherlands, has exposed the loopholes existing in the area of Cross Border Insolvency in India. When the consortium of lenders filed a case against the leading airline in India, the question that the lessors raised was with respect to the deregistration and repossession of the aircraft objects that were being operated by Jet Airways. Even though India had acceded to the Cape Town Convention and Protocol, the enabling legislation, that is the 2018 Bill has not been passed. Thus, the provisions of IBC were made applicable to the lease agreements in this case. The status of the lease agreements, in this case, was exposed when the DGCA an application made by the Dutch Company, for the deregistration of a Boeing 777 aircraft, since the moratorium provisions were in force. Currently, more than 100 aircraft that were being operated by Jet Airways have been deregistered by DGCA. However, if the Cape Town Convention Bill, 2018 would have been in force, the process for the lessors would have been swifter and less time-consuming.

India has further made a declaration to adopt the strict timeline route under the Bill, which is given as the Alternative A Model under Article XI of the Convention/ Protocol.

⁴² State Bank of India v. Jet Airways (India) Ltd., CP 2205 (IB)/ MB/2019, <http://www.jetairways.com/insolvencyproceedings/Documents/NCLT-Order.pdf>.

IV. THE USE OF ALTERNATIVE MODEL-A AND GLOBAL STUDY OF IMPLEMENTATION OF THE CAPE TOWN CONVENTION

Under Article XI of the Cape Town Convention Bill, two models of Insolvency Resolution are provided; namely Alternative Model A and Alternative Model B. By the Declaration under the Cape Town Convention Bill, India has planned to adopt the Alternative Model A.⁴³ The key difference between the said two models is the applicability of a strict timeline.

The Alternative A Model is similar to Section 1110 of the U.S. Bankruptcy Code, as it has been derived from the same. Here, the corporate debtor is given two options, where it must either: (a) cure all the defaults and agree to perform all future obligations under the Agreement, or (b) give possession of the aircraft objects to the creditor within the waiting period, which as per the Declaration signed by India, is two months.⁴⁴ Hence, it is evident that the Alternative A Model presents both parties with a strict timeline to carry out the resolution process. It must further be noted that the debtor/administrator of the insolvency process is meant to preserve the value of the aircraft objects until they are repossessed by the creditors/ lessors.

The Alternative A Model provides for a healthy and necessary alternative to the moratorium provisions under the IBC due to the niche nature of the aviation industry as opposed to other industries. Here, it is imperative to understand the macroeconomic significance of the aviation industry, including the fact that the cost of manufacturing and maintenance of aircraft

⁴³ Cape Town Convention Bill, 2018, Article XI.

⁴⁴ *Supra* note 8.

objects are very high in value and largely susceptible to depreciation. Furthermore, the difficulty in the mobility of aircraft and finally the vulnerability of airlines to insolvency lead to this kind of differential treatment. Another factor to consider would be the amount of cross-border financing and leasing in this industry which thus, calls for streamlining of laws across nations with a fixed timeline.⁴⁵

As opposed to this, the model proposed under Alternative B undertakes a discretion-based approach, which allows the judiciary to carry out any additional steps in order to cure the insolvency in the form of an additional guarantee. Here, no rule of a fixed timeline is applicable, hence there exists a large scope for countries to interpret insolvency on a case-to-case basis, weakening the position of the Cape Town Convention. Therefore, due to the lack of a timeline, most countries have preferred to adopt the Alternative A model over Alternative B.⁴⁶

A. United Kingdom

The United Kingdom has recently passed the Corporate Insolvency and Governance Act, 2020 which has made several noteworthy changes in the insolvency regime of the country, particularly in terms of the duration of the moratorium period for the corporate debtor in order for it to have time to analyse alternate models to make itself a viable going concern as well as extending protection to the suppliers of goods and services, only drawing out an exception for those providing financial services. This ban on termination

⁴⁵ Jeffrey Wool & Andrew Littlejohns, *Cape Town Treaty in the European Context: The Case for Alternative A, Article XI of the Aircraft Protocol*, AIRFINANCE JOURNAL, <http://awg.aero/wp-content/uploads/2019/10/capetowntreatyinthe-europeancontext.pdf>.

⁴⁶ *Id.*

clauses in supply contracts is very vital for our current research paper in terms of what it reflects for the aviation industry.

The language of the bare provision of the new Amendment states that there would be a prohibition on terminating contracts of supply for goods and services or ‘doing any other thing’ to a company because of the corporate debtor commencing an ‘insolvency procedure.’⁴⁷ This puts forward a widespread ban on *ipso facto* clauses. In fact, even if the right to terminate the contract arose prior to the insolvency procedure, the supplier would temporarily lose the right during the ongoing insolvency procedure. The only redressal would be to approach the relevant office holder like the liquidator or receive the corporate debtor’s consent or approach the court of law citing immense hardship caused by the same.⁴⁸ Hardship has not been defined in the Act and hence, future court rulings awaited for interpretation.

It is noteworthy to mention that while pre-insolvency breaches and insolvency procedure as a reason cannot be cited for termination, non-payment of dues during the insolvency process by the corporate debtor can be a ground for termination in case of continued supply. However, in terms of repossession of the aircraft, the interests of the Cape Town creditors continue to be distinguished and protected to a superior extent in comparison to the general aircraft lenders and lessors. Much like the erstwhile position, a Cape Town

⁴⁷ Insolvency Act, 1986, §233B, <https://www.legislation.gov.uk/ukpga/2020/12/crossheading/termination-clauses-in-supply-contracts/enacted>.

⁴⁸ *Id.* at § 233B(5).

creditor has the ability to repossess the aircraft within the first 60 days of the insolvency process as the Convention stipulates.⁴⁹

B. Canada

Even in other sophisticated common law jurisdictions like Canada, Alternative A under Article XI of the protocol has been enacted in the national insolvency legislation. Hence, the possession of the aircraft has to be given if the defects are not cured and future obligations are not promised to be performed by the insolvent company within 60 days and in a recent ruling, the Canadian courts recognised this application for the first time.⁵⁰

C. Australia

In the recent insolvency case of *Virgin Australia*,⁵¹ the Australian court recognised that the provisions of the Cape Town Convention would be applied, which has been enacted in the Australian domestic law via the International Interests in Mobile Equipment (Cape Town Convention) Act, 2013, and will take precedence over other domestic laws. This was substantial as out of the 144 aircraft of the airline, 142 were leased with 73 different lessors or financiers. The lessors of Virgin Australia had to abide by the waiting period applicable till 19, 2020, within which an agreement had to be arrived at between the lessees and the lessors otherwise the IDERA would

⁴⁹ Cape Town Protocol, Article XI.

⁵⁰ David B Kierans, *First Court Decision in Canada implementing the Insolvency provision of Cape Town Convention*, GOWLINGWLG, <https://gowlingwlg.com/en/insights-resources/articles/2019/insolvency-provisions-of-the-cape-town-convention/>.)

⁵¹ Strawbridge, in re *Virgin Australia Holdings Ltd* (2020) FCA 726 MIDDLETON J (25 May 2020) (reasons published 27 May 2020); Brown, David, *Aircraft Leases: International Convention takes Australian Courts into Virgin Territory*, U. OF ADELAIDE LAW RESEARCH PAPER NO. 2020-72 (Jun. 29, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3637670.

apply, causing the aircraft to be deregistered and exported back, whose authorisation could not be affected by the local courts of Australia.⁵²

Australia has also adopted the Alternative A model of Article XI of the Protocol. The Virgin Airline insolvency also gave rise to a significant ruling in terms of the Convention as in *Wells Fargo Trust Company, National Association (trustee) v. VB Leaseco Pty Ltd (Administrators Appointed)*.⁵³ Australia became the first jurisdiction amongst the ratifying states to interpret Article XI(2) of the Protocol. The Federal Court held that the leased engines had to be transported by the corporate debtor back to the lessors' place of business in Florida at its own costs as required by the terms of the lease agreements. The corporate debtor had argued that the term "give possession" of the article would just mean making available the engines for the creditors to take over and not delivering them. The Court read Article XI(2) with Article XI(3) to arrive at a conclusion that the intention was to give possession in a commercially reasonable manner.⁵⁴

It is also interesting to note that Virgin Australia's sister-company Virgin Atlantic has also filed for Chapter 15 Bankruptcy, which allows foreign

⁵² Anthony J Cordoto, *Where do aircraft lessors stand after the insolvency of Virgin Australia Airlines?*, LEXOLOGY (May. 31, 2020), <https://www.lexology.com/library/detail.aspx?g=7c9d5730-e6e1-45f8-90da-d46ef6a37c98>.

⁵³ *Wells Fargo Trust Company, National Association (trustee) v. VB Leaseco Pty Ltd (Administrators Appointed)*, (2020) FCA 1269.

⁵⁴ John Canning, *Wells Fargo v Virgin: the first clarification on an insolvency administrator's obligation to "give possession" under the Cape Town Convention*, KINGS & WOOD MALLESONS, <https://www.kwm.com/en/au/knowledge/insights/insolvency-administrators-obligation-to-give-possession-cape-town-convention-20200831>.

companies to file for bankruptcy in the USA if they have assets there. The UK-based Virgin subsidiary also aims to pass a restructuring plan for survival.⁵⁵

D. United States of America

The most important provision of the Cape Town Convention and Protocol, Article XI, is fashioned after Section 1110 of the United States Bankruptcy Code. The US was one of the first countries to recognise the need for a differential treatment to be given to Aviation insolvency.

Under Section 1110, the corporate debtor is required to perform all the obligations and cure all existing defaults within 60 days of the insolvency petition and by the end of this period has to agree to perform the agreement, otherwise, repossession would occur.⁵⁶ This said agreement is not permanent recognition of the lease and the same can be rejected later. US case laws have also held, differing from the Australian Federal Court, that the repossession does not need to happen as stipulated in the agreement and hence, maintenance can be waived off.⁵⁷

However, in the past, airlines have bypassed this provision by filing a Chapter 11 Bankruptcy (known as the reorganisation bankruptcy), giving US courts the jurisdiction and causing instead of Section 1110, Section 365 to operate, which too has a 60-day waiting period but does not obligate the

⁵⁵ *Virgin Atlantic warns it is running out of money*, BBC (Aug. 5, 2020), <https://www.bbc.com/news/business-53659844>.

⁵⁶ Donald G. Gray et. al., *The Cape Town Convention aircraft protocol's substantive insolvency regime: a case study of Alternative A*, 5 CAPE TOWN CONVENTION JOURNAL 115 (2016),

<https://doi.org/10.1080/2049761X.2016.1290517>.

⁵⁷ Mark Lessard, et. al., *USA Law and Practice: AVIATION FINANCING & LEASING* (Chambers Global Practice Guide ed., 2019).

corporate debtor to enter into an agreement and remove all defects by the expiry of the term. A possible defence of the creditor might be existent if its home jurisdiction has also adopted Alternative A and, in that scenario, the application of the Convention may be sought. However, this argument has not been witnessed in the courts before and without a doubt, the lessors have less bargaining power in this scenario.⁵⁸

Apart from the benefits accrued under the insolvency process, the Cape Town Convention has also aided the above-mentioned jurisdictions in availing advantages with respect to creating an aviation-finance-friendly environment. The two major methods in which this is made possible are through the discounts under Cape Town Convention and its domestic application.

V. FURTHER BENEFITS UNDER THE CAPE TOWN CONVENTION: IN TERMS OF DISCOUNT AND DOMESTIC APPLICATION

A. Discount

The Organisation for Economic Cooperation and Development (“OECD”) has set a norm that a ten percent discount shall be provided in the processing fee for a loan to acquire aircraft to airlines of any country which is a party to the Cape Town Convention/Protocol provided legislation that has been passed and implemented by that country.⁵⁹ Thus, it can be said that one of the benefits that India would gain by the passing of the Cape Town

⁵⁸ Todd K. Wolynski & Oliver Althoff, *Tips for aviation and aerospace professionals on navigating a business transformation*, WHITE & CASE (Jun. 22, 2020), <https://www.whitecase.com/publications/insight/take-it-us-tips-aviation-and-aerospace-professionals-navigating-business>.

⁵⁹ The Cape Town Convention Bill, 2018, Explanatory Note, 8, ¶.4

Convention Bill would be to avail such a discount. This would align with the ideals set forth under *Project Rupee Raftaar* which aims at making India a more aviation finance-friendly jurisdiction, modelled after the leader in the aviation industry, Ireland. The most admirable feature of Ireland's lessor model that India aims to employ in the future through this Project is the swift repossession of aircraft from a financially-strained airline and redeployment elsewhere in the world. This has been aided through Ireland being a part of the Cape Town Convention and Protocol since its very inception, in 2001.⁶⁰

The availing of the Cape Town Discount is a major impetus for any jurisdiction wanting to boost its aviation industry, and *Project Rupee Raftaar* cements such an intent from India. Further, India has also made the requisite declarations under the Cape Town Convention, which grants it heightened economic benefits under the Convention.⁶¹

B. Domesticity

The application of the convention on transactions that are purely domestic in nature, where both the lessor and lessee are Indian parties, leads to the question of internationality *conundrum*, which was mitigated by the insertion of Article 50 thereby allowing the States to disallow the application of the Cape Town Convention in cases of transactions which are entirely

⁶⁰ Project Rupee Raftaar, *supra* note 21, at 16.

⁶¹ Thomas Traschler, *The significance of Qualifying Declarations under the Cape Town Convention*, 24 OXFORD UNIVERSITY PRESS ON BEHALF OF UNIDROIT 42–57 (2019).

domestic in nature although the same has not been utilised by any State presently, including India.⁶²

It is also to be noted that in the current market scenario, there are little to no domestic lessors in the Indian context. The *Project Rupee Raftaar* initiative also plans to bring in foreign lessors in India for better accessibility which is expected to help in the growth of complementary domestic industries associated with aircraft leasing.

The present laws and regulations, in general, do not make a differentiation between a domestic and foreign lessor, and neither will the Cape Town Convention Bill if enacted. However, Rule 32A of the Aircraft Rules, 1937 does mandate the Central government to aid the process of export in case of a foreign lessor.

The proviso to Regulation 10 of the Airports Authority of India (Management of Airports) Regulations, 2003, reads as:

Provided that in respect of an aircraft which is to be exported under rule 32A of the Aircraft Rules, 1937, the current and accumulated dues shall include only such dues that accrued in respect of that aircraft and in relation to flights operated by that aircraft during the period comprised of three months immediately preceding the date of declared default and the period subsequent to the date of declared default up to the date of departure of the aircraft from India.

⁶² Anton Didenko, *A Historical Overview of the Basic Concepts of the Cape Town Convention (Part I): 'International Interest' and 'Internationality'*, 6 CAPE TOWN CONVENTION JOURNAL 136 (2017).

The proviso creates confusion if the Rule in the nature of non-consensual right would have precedence over the domestic lessors' rights as it would have on a foreign lessor.

Thus, it is seen that apart from the improvement made to Airline Insolvency laws, the Cape Town Convention and Protocol would provide other benefits as well. This has become especially pertinent in the current scenario, where the aviation industry needs a tremendous boost.

VI. CONCLUSION

The current pandemic has made the aviation industry its biggest victim with airlines all around the world on the verge of insolvency like the Virgin group as discussed above.

In the present scenario, due to the significant impact of COVID-19 on the aviation industry, the Aviation Working Group ("AWG"), a group of leading aircraft manufacturers, suppliers, administrators, and lessors, including but not limited to Airbus and Boeing, has released a statement⁶³ on Airline Restructuring Principles where it has categorically recognised that it is ready to engage with all Cape Town Convention contracting states to work through their issues and ensure compliance, including in the insolvency context.⁶⁴ Although the statements made by this group are not binding in nature upon its members, it has created a strong resolution in adopting such

⁶³ Aviation Working group, *Covid 19 Air Transport Disruption Statement on airline restructuring principles*, <http://awg.aero/wp-content/uploads/2020/10/AWG-statement-on-airline-restructuring-principles-22-October-2020.pdf>.

⁶⁴ Aviation Working group, *COVID 19 Action*, <http://www.awg.aero/project/covid-19-action-and-involvement/>

guidelines which enables its members to opt-out of a jurisdiction that has not complied with the Cape Town Convention Alternative Model A. Furthermore, it has ensured compliances and it would be appointed as an administrator in insolvency proceedings of Airlines in jurisdictions compliant with Alt Model A of Cape Town Convention.⁶⁵ This can be viewed as a major benefit of adopting the Cape Town Convention Bill.

In India, to restore the aviation industry to its previous might, there is a need to have a seamless supply of goods and services like aircraft, which is a market trend to be leased by the airlines due to its heavy costs and is mostly done in India from foreign countries. This has caused the Cape Town Convention Act to come into the limelight once again- whose passage was stilled, even though its draft was out for public comments, after the Jet Airways fiasco of 2019.

It is observed that in the case of Uttarakhand Power Corporation Ltd, it was stated that during CIRP if the costs of the essential supply of services were due for two months continuous, then the supply of the same could be terminated.

After analysing the position of other common law countries like the jurisdictions of USA, UK, Australia, and Canada, it is opined that on the passage of the Cape Town Convention Act, there would not be much difference in the position except that the registered lessors would have the

⁶⁵ Aviation Working group, Pro Forma Letter – On Commencement Of Insolvency, <http://awg.aero/wp-content/uploads/2020/03/ctc-insolvency-compliance-letter-from-awg-covid19.pdf>.

right of repossession within two months of the insolvency being declared if the default in pending payments is not cleared.

Hence, it is the position of the authors that though *prima facie* the Cape Town Act seems to be in conflict with the IBC, on a deeper understanding of its application, both the statutes are in harmony and if passed will help to fulfil their common objective of making India an investor and business-friendly destination internationally.

In fact, after analysing the application of the Bill in a holistic manner, especially in the context of other prevalent laws, it is observed that its passage would have multiple positive impacts on the aviation industry, not only aiding the insolvency process but also building confidence in the aircraft financiers to participate in the leasing process by giving them incentives like availing Cape Town Discount. The numerous timelines provided in the various legislative instruments pertaining to the Aviation sector would also be streamlined and superseded if the Bill is passed and hence, will also help in making the process of aircraft acquisition less cumbersome. Thus, it is concluded that the Cape Town Convention Bill, 2018 which brings in significant improvements to the aviation insolvency law in India, needs to be brought back into the limelight for the swift revival of the Airline Industry in India.