

## **Airspace Safeguarding: The Protection and Enforcement of Interests in Aircraft Objects Bill 2022**

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**Abstract:** *The Cape Town Convention, and its associated Protocol, represents pivotal international legal framework facilitating secure financial transactions involving mobile equipment, notably airframes, aircraft engines, and helicopters. Although this Convention has been widely ratified, India remains one of the few nations yet to align its legal framework with its provisions. This paper delves into the complexities of the Cape Town Convention, examining its significance, India's current aviation legal landscape, and the impending Protection and Enforcement of Interests in Aircraft Objects Bill 2022. The leasing framework, typically relied on by the aviation industry, and primarily followed in India, is proving to be a challenge for many international lessors leasing their aircrafts in India, due to the current legislative framework of the country, not giving an opportunity for an easy-exit to lessors in case of insolvency of the lessee. This legislative initiative aims to harmonize India's conflicting laws, aligning them with the Cape Town Convention, reducing uncertainty, and enhancing creditor protection. Furthermore, the paper examines the alternatives presented in the Cape Town Convention's Protocol—Alternative A and Alternative B—highlighting their impact on the discretion of creditors and courts in insolvency proceedings. This paper underscores the urgency for India to align its legal framework with the Cape Town Convention. Such a move would promote creditor confidence as well as bolster India's standing in the global aviation industry, ensuring its continued development and attractiveness to foreign lessors.*

**Keywords:** *The Cape Town Convention, Aircraft Protocol, Aviation, Insolvency, Leasing, Aircraft Equipment, International Security Interests.*

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## Background

The Convention on International Interests in Mobile Equipment signed at Cape Town,<sup>1</sup> also known as the Cape Town Convention was made and negotiated via the International Institute for the Unification of Private Law, also known as UNIDROIT. The Cape Town Convention and its various Protocols have been described to be some of the most commercially beneficial treaties ever adopted. The Convention has been ratified by over 80 countries to date.

The Convention, and the Aircraft Protocol<sup>2</sup> were jointly adopted on 16 November 2001 at a Diplomatic Conference hosted in Cape Town, and enforced in March 2006 in keeping with Article 49(1) of the Convention.<sup>3</sup> Article 49 of the Convention was a novel provision regarding its entry, enforcement, and legality, since it purposefully delays the Convention's introduction until at least one Protocol is implemented. Therefore, in order for the Aircraft Protocol to be implemented, it needed eight ratifications, acceptances, approvals, or accessions.<sup>4</sup>

The term “mobile equipment” means to include –

- a) Airframes, aircraft engines, and helicopters;
- b) Railway rolling stock; and
- c) Space assets.<sup>5</sup>

Three separate Protocols for each of the sub-categories have been adopted in 2001, 2007, and 2012, respectively. However, only the Air Protocol (“**the Protocol**”) has yet been enforced.

This was deemed to be the first major diplomatic conference in Cape Town. The author—who was then the General Counsel and Corporate Secretary of the International Air Transport Association (IATA)—recommended what became known as the “Convention plus Protocols” strategy at a meeting called by the Aviation Working Group (AWG) in Paris, which was presided over by Boeing, at the beginning of 1997. The process entailed disentangling the different properties, formulating a more concise and comprehensive “umbrella” Convention, and engaging in separate negotiations to ensure the ratification of several property-specific

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<sup>1</sup> The Cape Town Convention on International Interests in Mobile Equipment, 16 November 2001, (entered into force Mar. 1, 2006), <https://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf>

<sup>2</sup> Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Cape Town, 16 November 2001, (entered into force Mar. 1, 2006), [https://www.unidroit.org/wp-content/uploads/2021/07/Aircraft-Protocol\\_English.pdf](https://www.unidroit.org/wp-content/uploads/2021/07/Aircraft-Protocol_English.pdf)

<sup>3</sup> Cape Town Convention, *supra* note 1, Article 49 states that-

*1. This Convention enters into force on the first day of the month following the expiration of three months after the date of the deposit of the third instrument of ratification, acceptance, approval or accession but only as regards a category of objects to which a Protocol applies:*

*(a) as from the time of entry into force of that Protocol;*

*(b) subject to the terms of that Protocol; and*

*(c) as between States Parties to this Convention and that Protocol.*

*2. For other States this Convention enters into force on the first day of the month following the expiration of three months after the date of the deposit of their instrument of ratification, acceptance, approval or accession but only as regards a category of objects to which a Protocol applies and subject, in relation to such Protocol, to the requirements of subparagraphs (a), (b) and (c) of the preceding paragraph.*

<sup>4</sup> Aircraft Protocol, *supra* note 2, Article XXVIII.

<sup>5</sup> Cape Town Convention, *supra* note 1, Article 2(3).

Protocols to the Convention. Both UNIDROIT and the AWG members approved and welcomed this idea.<sup>6</sup>

To briefly understand how this Protocol works, this Protocol allows security interests, title reservation agreements, and equipment leases to be registered in an online international registry when the debtor is based in a nation that has ratified both the Convention and the applicable Protocol. In the event of a debtor's default or insolvency, these "international interests," once registered, take precedence over other interests. The international interest is still in existence even if the asset travels across international borders. Even though the rules of the debtor country may indicate otherwise, this gives high-value and movable assets greater security for foreign creditors.

The main goal of the Cape Town Convention and Protocol, which was concluded back in 2001, is to address the difficulty of acquiring specific and unassailable rights to high-value assets like airframes, aircraft engines, and helicopters that are mobile by nature. Despite India's 2008 accession to the Convention, several of its provisions are incompatible with the bankruptcy laws of the nation. It is interesting to note that India is currently one of just three countries, along with Afghanistan and South Africa, whose legal systems are not in line with it.<sup>7</sup>

## **Indian Legislation in Case of Default in the Aviation Sector**

Before passing the Insolvency and Bankruptcy Code 2016 (“**IBC**”), the Companies Act 1956, and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (“**SARFAESI**”) predominantly oversaw the insolvency and bankruptcy proceedings in the country, along with the Provincial Insolvency Act 1920 to some extent.

The aviation industry mainly works on the model of leasing of aircrafts from offshore in India. However, in case of Corporate Insolvency Resolution Process (“**CIRP**”), the lessors become operational creditors as the agreements are usually operational leasing agreements, and thus have a limited decision-making power with the Committee of Creditors during the CIRP.

Furthermore, because of the moratorium time clause found in Section 14 of the Code, the IBC does not offer these lessors a simple way out.

Other hurdles imposed upon the lessors of these aircrafts are seen under the Customs Act 1962 which can demand impounding under Section 142(c)(iii), as well as the Finance Act 1994 which provides for property in control of the defaulter to be attached.<sup>8</sup>

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<sup>6</sup> Clarke, L., *The 2001 Cape Town Convention on International Interests in Mobile Equipment and Air Equipment and Aircraft Equipment Protocol: Internationalising Asset-Based Financing Principles for the Acquisition of Aircraft and Engines*. 69 *Journal of Air Law and Commerce* 3 (2004).

<sup>7</sup> Pant, *Mayday! How Go First insolvency could dent India's aviation sector*. *Business Today Magazine* (2023). <https://www.businesstoday.in/magazine/deep-dive/story/mayday-how-go-first-insolvency-could-dent-indias-aviation-sector-385181-2023-06-12>

<sup>8</sup> Thacker, S., *Creating and enforcing security interests in transport assets in India*. *The Transport Finance Law Review* (2020). <https://thelawreviews.co.uk/edition/the-transport-finance-law-review-edition-6/1225588/india>.

According to the Convention, if a lessor has invoked the Irrevocable De-registration and Export Request Authorisation (IDERA), then the plane concerned has to be deregistered in five working days.

The Aircraft Rules of 1937 underwent modifications due to industry influence, which resulted in the incorporation of Rule 30(7). This rule enforces the Convention and its Protocol, making it mandatory for the Central Government to deregister an aircraft within five working days if they receive an application from the IDERA holder before the lease's expiration. This application must also include a certification confirming the discharge of all other registered interests with priority or consent from their holders, along with export documentation.<sup>9</sup> Nevertheless, there's a provision that preserves the Central Government's authority to hold, seize, and sell the aircraft object to recover outstanding debts, allowing for non-consensual rights to be upheld.

The Government also introduced Rule 32A which provides for the export of an aircraft upon an application made by an IDERA holder after cancellation of registration. To facilitate such an export, the Government also issued the Standard Operating Procedure for implementing Rule 32A.<sup>10</sup>

The Airports Regulations grant the competent authority the ability to hold aircraft if fees go unpaid, unless overridden by a general or specific directive from the Central Government.<sup>11</sup>

## Indian Judiciary and Aviation Sector

In the case of the then third largest airline in the country, Kingfisher airlines, which owed a loan of USD 1 billion by 2012, leasing companies and financiers faced numerous hurdles in deregistering<sup>12</sup> and repossession of aircrafts which they leased to Kingfisher. When the lessor applied for deregistration and acquisition of its aircrafts, the lessee claimed to be the owner since the leasing agreement had a purchase option, and the Directorate General of Civil Aviation (“DGCA”) required No Objection Certificates before the deregistration could

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<sup>9</sup> Aircraft Rules, 1937, Rule 30(7), Standard Operating Procedure AIC 12/ 2018, Ministry of Civil Aviation, Government of India. Available at: [http://164.100.60.133/aic/AIC12\\_2018.pdf](http://164.100.60.133/aic/AIC12_2018.pdf).

<sup>10</sup> Standard Operating Procedure AIC 12/ 2018, Ministry of Civil Aviation, Government of India, [http://164.100.60.133/aic/AIC12\\_2018.pdf](http://164.100.60.133/aic/AIC12_2018.pdf).

<sup>11</sup> Airport Authority of India (Management of Airports) Regulations, 2003, Regulation 10.

<sup>12</sup> Provision of requirement of registration of an aircraft is given in the Aircraft Act 1934 read with the Aircraft Rules 1937 which states that –

Subject to the provisions of rule 33, no person shall fly, or assist in flying, any aircraft unless –

(a) it has been registered, and

(b) it bears its nationality and registrations marks and the name and residence of the owner affixed or painted thereon in accordance with rule 37 or, in the case of aircraft registered elsewhere than in India, in accordance with the regulations of the State in which it is registered:

Provided that the prohibition imposed by this rule shall not apply to aircraft flown in accordance with the special permission in writing of the Central Government and subject to any conditions and limitations which may be specified in such permission.

effectuate.<sup>13</sup> Hereafter, DVB, who was the lessor, filed an application in the court which asked the DGCA to deregister the aircrafts and stated that NOCs were not required.<sup>14</sup>

Three years later, the lessor of Spicejet Ltd also filed a petition in the High Court against the DGCA as well as the airline for deregistration due to defaults in the payments of lease rents, triggering a default under the Aircraft Lease Agreement. There was a brief mention of the lessors having a "bad experience," similar to other companies, with another Indian airline, namely, Kingfisher. As a result, they were apprehensive about becoming entangled in a protracted aircraft repossession procedure. The Delhi High Court issued an order instructing the DGCA to deregister the aircraft that had been leased by two Irish lessors.<sup>15</sup>

In a different instance, the question of whether the petitioner, who was the lessor in this case, may use an irrevocable Power of Attorney to request that the aircraft be deregistered following the lease's expiration arose. Even though the POA expressly gave the petitioner the authority to choose, in its exclusive discretion, when it was appropriate to use the deregistration power, the DGCA blocked the petitioner's attempt to do so. The Court reasoned that no authority, including governmental authority, would question "whether an event of default has occurred under the lease or whether the lease has been terminated" if such power is used.<sup>16</sup> However, this decision was overturned to disallow deregistration so that the investigation for alleged fraudulent activities could be carried out. In all these cases, DGCA has, time and again, been seen as a roadblock for the foreign lessors, who in turn had to take recourse to courts.

In the Jet Airways fiasco, the company, Jet Airways India Ltd was undergoing a parallel insolvency resolution process in India and the Netherlands. Since the Cape Town Convention and its consequent Protocol was not adopted, the insolvency procedure was carried out under the IBC, which led to the DGCA rejecting the lessors' application for deregistration. This brought to light the difficulties in the current regime of cross-border insolvency in case of mobile equipment and the disadvantageous position of the foreign lessors and financiers.

Four years later and the current ongoing issue of Go First has yet again proven the need for the Convention to be implemented into a statute. The airline filed an application for voluntary insolvency which was approved by the NCLT. The Delhi NCLT order of May 2023 of a moratorium period disallowed the lessors of the airlines to take their aircraft back from Go First which is in contravention to the provisions of the Cape Town Convention. An Appeal to NCLAT concluded with the same result. The reissued moratorium period once again resulted in the detention of the lessors' aircraft. The lessors have approached the DGCA to request the deregistration of certain Go First planes. These requests were submitted for aircraft whose leases had been terminated before the imposition of the moratorium period. India has been placed on the watchlist by the Aviation Working Group (AWG). To ease the lessors' distress,

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<sup>13</sup> The Director General of Civil Aviation is a regulatory body empowered by the Central Government under Section 5A, primarily dealing with safety issues, and is also responsible for regulation of air transport services, and for enforcement of civil air regulations, air safety, and airworthiness standards. [https://www.civilaviation.gov.in/sites/default/files/moca\\_000945\\_0\\_0\\_0.pdf](https://www.civilaviation.gov.in/sites/default/files/moca_000945_0_0_0.pdf)

<sup>14</sup> DVB Aviation Finance Asia PTE Ltd v. Directorate General of Civil Aviation, WP (C) 7661/2012 (Del.)(Unreported).

<sup>15</sup> Ireland Ltd & Ors. v. Directorate General of Civil Aviation & Anr., 2015 SCC OnLine Del 8177.

<sup>16</sup> Corporate Aircraft Funding Company LLC v. Union of India & Ors, 2013 SCC OnLine Del 1085.

a recent inspection of the aircraft revealed missing components, corrosion on some parts, and a greenish deposit on a grounded plane. This prompted the lessors, including Dubai Aerospace Enterprise (DAE) Capital, ACG Aircraft Leasing, and BOC Aviation (Ireland) Ltd., to file a plea before the Delhi High Court. The Court issued notice to the Resolution Professional on plane maintenance. ACG Aircraft went a step further and asked for constant security for its aircrafts.

A lack of intervention by either the civil aviation or the law ministries will increase risk and signal the end of Indian aviation's development phase. Then, it would be reasonable to wonder why foreign lessors would ever take a chance on India.

## **The Protection and Enforcement of Interests in Aircraft Objects Bill 2022**

### **Objectives and Importance**

The Convention and the Protocol are interdependent and cannot exist independently of each other. This is due to the fact that an interest must relate to an item specified in one of the Convention's Protocols in order for it to be applicable.<sup>17</sup> Furthermore, the Protocols by themselves do not represent exhaustive regulations. India ratified the Convention and Protocol together in 2008.

The Bill was first presented in the Parliament in 2018 but it was not passed. The Bill has been reworked, and a new draft Protection and Enforcement of Interests in Aircraft Objects Bill 2022 was published by the Ministry of Civil Aviation of India in April 2022. The objective of the Bill is to implement the provisions of the Cape Town Convention and the Protocol on matters specific to aircraft equipment ("the Protocol"). This was done after the Ministry realised the conflicting positions of various laws in the country with the Convention as well as the need for a separate legislation. The purpose of the Bill is to harmonise the contradictory provisions of a few other Indian laws, including the Insolvency and Bankruptcy Code of 2016, the Specific Relief Act of 1963, the Companies Act of 2013, and the Civil Procedure Code of 2008. This will lessen the uncertainty and growing concerns that international financiers and creditors have regarding the Indian jurisdiction's growing risk factor when it comes to high-value mobile equipment, especially airframes, helicopters, and engines.

### **A. Jurisdiction**

Chapter VI of the Bill specifically allows contracting parties to mutually specify, in writing, the courts in another contracting state that would handle their disputes. It is immaterial whether the selected court or jurisdiction has any connection to the transaction or the involved parties.

Likewise, regardless of any connection between India and the transaction or the parties, contracting parties can agree, through written agreement or other means, that Indian courts will

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<sup>17</sup> Cape Town Convention, *supra* note 1, Article 2(2).

have jurisdiction over claims brought by either party under the Convention and its Protocol. They have the option to establish exclusive jurisdiction in this regard. The legislation governing the rights and obligations of the contracting parties, whether entirely or partially, can also be determined as part of this process.

However, nothing stated in the preceding paragraphs applies in the case of insolvency proceedings, which are to be governed under Chapter III of the Bill.

The Court, which is to have jurisdiction over matters concerned under the Bill, is the High Court having respective territorial jurisdiction.<sup>18</sup>

## **B. Applicability**

The Bill is applicable, as per Clause 3, to:

- (a) a debtor who, at the time of the conclusion of the agreement creating or providing for an international interest in an aircraft object, is situated in India;
- (b) a seller who, at the time of the conclusion of the contract of sale creating or providing for sale of an aircraft object, is situated in India; and
- (c) an aircraft object having an international interest, which is located in India or pertains to an aircraft registered in India.

To clarify, situated in India means to include where a debtor is formed or incorporated under any Indian law, where it has a registered office, statutory seat, centre of administration in the country, or its place of business is India.<sup>19</sup> But the place where the creditor is located has no effect on the applicability.

Clause 30 of the Bill states that it shall be applied in tandem with other laws of the country, but, in case of any inconsistency with any other law, the provisions of the Bill will prevail.<sup>20</sup> This comes as a relief to lessors to repossess their aircrafts leased in India in case of bankruptcy proceedings and the imposition of the moratorium period. The provisions of fast-track interim measures to repossess the aircrafts will prevail over the provision for moratorium provided under the IBC. International interest would lie with a lessor under a leasing agreement. However, it is provided in the Bill that such an international interest needs to be registered with the International Registry.

## **C. Default and Remedies**

In case of a default<sup>21</sup> by the lessee, after prior intimation to the DGCA, the lessor would be entitled to:

- a. terminate the agreement and take possession or control of the aircraft object to which the agreement relates; or

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<sup>18</sup> The Protection and Enforcement of Interests in Aircraft Objects Bill 2022, Cl 2(18).

<sup>19</sup> Cape Town Convention, *supra* note 1, Article 4.

<sup>20</sup> The Protection and Enforcement of Interests in Aircraft Objects Bill 2022, Cl 31.

<sup>21</sup> “default” under the Bill, and according to Chapter III, would mean a default which substantially deprives the creditor of what it is entitled to expect under the agreement.

- b. alternatively, apply to the court for an order authorising or directing either of the acts as specified in clause (a).<sup>22</sup>

The remedies provided thereunder would have primacy over the moratorium period as mandated by Section 14 of the IBC.

The remedy provided for aircraft export and deregistration has been given as a request to be submitted for the same to the DGCA along with a certification of the fact that any other interest taking priority to the applicant has acceded to the same or that their interests have been discharged first. The DGCA is bound to make this remedy available to the applicant within 5 working days.

An additional interim remedy is also provided by the Bill which states that pending final adjudication of the claim, the creditor has the option to seek a court order to secure the aircraft and its worth, take possession, assume control, retain custody, immobilize the aircraft, or claim the proceeds from the sale of said aircraft. If the leased aircraft is currently in use, this also extends to the income generated from its operations. This is especially beneficial in the current scenario of Go First where the lessors are claiming degradation and theft of the various parts of the aircraft. The Aircraft Protocol provides that this speedy interim remedy shall be made available within the period of time that the contracting state determines. The Bill states that such an application is to be disposed of by the court within 10 or 30 days, depending on the type of relief sought. This interim remedy is not provided in the current legislative landscape of the country, and this is yet another major reason for this Bill to be passed.

The Protocol provides two alternatives, Alternative A and Alternative B, for the contracting state to select from as remedies in case of insolvency. The key point of difference between the two is the discretion of the creditor versus the court. Section 1110 of the US Bankruptcy Code inspired Alternative A of Article XI of the Aircraft Protocol. Alternative B is referred to as the 'soft' or 'discretion-based' version.<sup>23</sup> Option A grants the creditor the opportunity to exercise his right of repossession of the aircraft object if the insolvency officer or the debtor cannot cure all defaults and agree to fulfil all future obligations within a "waiting period"—a term that is determined by the state that contracted and, in this case, is two months from the start of insolvency proceedings or, the date on which the creditor would have been entitled to take possession of the aircraft object—if this clause is not fulfilled, whichever is earlier. This alternative additionally stipulates that the administrator or debtor shall protect the aircraft object's value and safeguard it till such an opportunity is granted. This does not, however, prohibit the use of an aircraft object. As seen here, this alternative provides for minimal court interference and approval.

While with Alternative B, that enables the creditor to reclaim the aircraft item, which offers the debtor or administrator the option to either cure all defaults or fulfil all agreement-related responsibilities. In case of repossession, the courts of the specified jurisdiction are given the discretion to impose conditions on or require additional guarantee from the creditor before it

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<sup>22</sup> The Protection and Enforcement of Interests in Aircraft Objects Bill 2022, Cl 12.

<sup>23</sup> Gray, Gerber & Wool, *The Cape Town Convention aircraft protocol's substantive insolvency regime: a case study of Alternative A*, 5 Cape Town Convention Journal 115 (2016).



could reclaim possession, in turn requiring the creditor to first furnish evidence and proof of its claims and international interests' registration.

Due to the wording of Alternative B, although it may appear quite similar to Alternative A in many aspects, it effectively resembles the existing laws in many countries because it preserves the idea of judicial discretion, which Alternative A eliminates. The introduction of discretion-based rules has resulted in a high degree of uncertainty, making it a rare and unusual choice. To date, only one contracting state, Mexico, has opted for this approach (and Mexico is currently contemplating a shift to Alternative A). All the contracting states that seek to accomplish the primary objectives of the Cape Town Convention have opted for Alternative A.<sup>24</sup>

## Conclusion

According to data from the Insolvency and Bankruptcy Board of India, the process often takes more than 600 days to complete as opposed to the 270-day limit set by the IBC. Unnecessary delays brought on by the moratorium's implementation and the resolution of claims would increase the risk associated with the lease rent component for leased aircraft. The lessors might even demand increased deposits, processing costs, and interest rates, which would further impede the expansion of the nation's aviation industry.

Other jurisdictions of the world have successfully adopted Alternative A of Article XI of the Aircraft Protocol, some of them being Canada, Australia, United Kingdom, with special emphasis on Australia which became the first to interpret Article XI(2) of the Protocol, in the insolvency case of *Virgin Australia*.<sup>25</sup>

The problems faced by the lessors of Kingfisher Airlines in 2012, and 11 years later, by the lessors of Spice Jet today, emphatically advocate the need for the Bill to become law. The Bill seeks to align India's aviation law with that of the Convention. There has been a pressing need for simplification of repossession procedure and insolvency process for quite some time. A streamlined procedure will provide the international lessors with increased security of their investment. Reducing risk will lead to a decrease in the cost of aviation credit, resulting in lower lease payments. Minimized risk will also encourage lessors to export larger quantities at reduced expenses, further reducing the overall cost. Additionally, the Organisation for Economic Cooperation and Development (OECD) has established a standard practice of offering a 10% discount on loan processing fees for aircraft acquisition to airlines in any country that is a party to the Cape Town Convention or the Aircraft Protocol, provided that the country has passed implementing legislation.

Nevertheless, the government needs to issue a clarification that the Bill takes precedence over the Insolvency and Bankruptcy Code (IBC). Section 238 of the Code specifies that its provisions override other laws, which directly conflicts with Clause 30 of the Bill, which also addresses the same issue in case of inconsistency.

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<sup>24</sup> *Id.*

<sup>25</sup> Strawbridge, in the matter of *Virgin Australia Holdings Ltd* (administrators appointed) (No 3) [2020] FCA 726.