

Cape Town in India: Bill gathers dust as implementation falters



Hopes that India could soon introduce the Cape Town Convention into its domestic legislation have been dashed, with unlikely progress on an implementation bill unlikely until at least mid-2019.

While India has acceded to the milestone treaty, which simplifies repossession procedures for lessors should an airline default or miss rent payments, the Indian

Parliament is yet to formalise a law for it to be enforceable – a requirement for all international conventions under Indian law. What this means for lessors is more months of uncertainty at a time when declining yields are putting some of the country's airlines in peril – like Jet Airways.

Further aggravating the situation, the country's 2016 Insolvency and Bankruptcy Code threatens to override Cape Town with a moratorium which could potentially delay aircraft repossession by up to 270 days- four times longer than the convention's 60-day limit for repossessions agreed by India. Ishka speaks to lawyers in New Delhi and Mumbai to get the latest on the bill, its implementation and how its adjournment negatively impacts lessors.

Small steps, but no leap forward

Since India's accession to the treaty eleven years ago, only small changes have been made to the country's aviation laws. The most recent one took place on 28 August 2018, when the 1937 Aircraft Rules were amended to simplify aircraft export procedures for applications made by a holder of an IDERA, an irrevocable deregistration measure that prevents a debtor from flying an aircraft under any jurisdiction and reclaim their aircraft. The changes mandate for the Indian Directorate General of Civil Aviation (DGCA) to deregister an aircraft within five working days on receipt of an application from an IDERA holder. According to Dhruv Khanna, a partner at Wadia Ghandy & Co in Mumbai, the deregistration of a helicopter since the Aircraft Rules were amended took place "in a swifter manner than prior to the amendment," but "no commercial aircraft repossessions have been attempted till date under the amended Aircraft Rules."

But the development every lessor in India is eagerly awaiting is the passing of the Cape Town Convention Act, which would reduce the waiting period for repossessions of aircraft during an airline's bankruptcy to 60 days – longer than in other countries, but better than the six months it took for ILFC to take back aircraft from Kingfisher Airlines after its collapse in 2012. A proposal for the enactment of this bill was presented in October by India's Ministry of Civil Aviation, with a final draft expected to be discussed at the Parliament of India during the December winter session – but that never materialised. "Whatever will happen will happen after the commission of a new government after the general election (between April and May 2019)," says Lovejeet Singh, a lawyer at Clasis Law in New Delhi. "Considering the government could change and considering everything around the corner, I don't think that this bill will see the light of the day at least until August or September," Singh tells Ishka.

Lawyers presage conflict

Khanna and Singh both agreed that existing Indian laws, including the 2016 Insolvency and Bankruptcy Code (IBC) could present a challenge to the enforcement of the proposed Cape Town Bill in its current form. The IBC has overriding effect over other legislation, a rare prerogative to create legal certainty among creditors of Indian

companies – but not necessarily for aircraft lessors. According to a report by Indian law firm Khaitan & Co, bankruptcy courts have not yet had an opportunity to interpret the IBC in the context of aircraft leases. However, one provision of IBC's has been applied to protect lessees from eviction in real estate tenancies, and, as the report notes, "it is likely that the lessors will not be able to regain possession of their aircrafts when a moratorium has been imposed".

"This is the major concern (...) before passing the Cape Town Convention Bill (CTCB), the government should undertake any amendments to the IBC or a suitable amendment to the CTCB so that both are consistent with each other. Otherwise, if the CTCB is passed in its current form, then in my view it may definitely lead to ambiguity," Singh comments. In their current form, an insolvency application filed under the IBC could grant an airline a moratorium on asset repossessions of 180 days extendable by a further 90 days, or over four times the 60-day waiting period agreed by India in its Cape Town declaration. "There may be situations when if a lessor wants to take advantage, it will rely on the CTCB because it may offer better remedies for the lessors, however, in contrast, the lessees may prefer taking the IBC because they know they will have a better time frame then," he adds.

Cape Town's importance

While the lengthy moratorium awarded under India's IBC may be favoured by troubled airlines, the implementation of Cape Town should reduce leasing rates as the cost of doing business in India declines for lessors. "Considering the growth in the aviation industry in India, we will definitely see a surge in this (leasing) industry," remarks Singh. Both Singh and Khanna agree that the interest from lessors on this situation is high. Lessors have faced problems repossessing aircraft leased to Indian carriers in the past, especially with defunct Kingfisher Airlines in 2012. One appeal of implementing Cape Town is that it confers a 10% discount on the premium of export finance provided by Export Credit Agencies (ECAs) to airlines in contracting states under the OECD's Aviation Sector Understanding (ASU) agreement. Moreover, it helps boost investor confidence in a jurisdiction in order

The Ishka View

As lessors are learning in Brazil as part of Avianca Brazil's troubles ([see Ishka's earlier report](#)), the implementation and enforceability of the Cape Town Convention is a key consideration when assessing the risks of any market – but particularly those jurisdictions that offer feeble legal protection for aircraft repossessions during an airline's insolvency. In a best-case scenario for lessors, the Indian parliament will note the existing concerns and make the necessary amendments to the Cape Town Convention Bill to avoid conflict with the IBC or other laws. If that does not happen, and regulatory conflicts end in litigation, lessors have a reason to be concerned. A Supreme Court ruling in favour of IBC's precedence could effectively void India's accession to Cape Town's Article 11 on cases of insolvency.

There is also something to be said about India shooting itself on the foot by delaying Cape Town's implementation. The country's staggering capacity growth to keep up with domestic passenger demand has been largely possible due to the availability of leased narrowbody aircraft. If Cape Town is not implemented fully then these lease rents could in theory increase over the long-term to reflect the increased risk to lessors. India is rapidly adding capacity. Twenty-four million seats were added in 2018 – the equivalent of 65,000 seats or 362 new flights a day. If the Indian government does decide to ignore the Cape Town convention by accepting the Bankruptcy Code's moratorium then the country's airlines could be lumped by more bills in the form of higher rents or larger security deposits as aircraft lessors seek to protect themselves.