

Company Appeal (AT) (Insolvency) No. 707 of 2019

26.09.2019 Pursuant to our directions, the Administrator of ‘Jet Airways (India) Limited’ (Offshore Regional Hub) and the ‘Resolution Professional’ of ‘Jet Airways (India) Limited’ have filed their ‘Terms & Conditions’ of agreement termed as “**Cross Border Insolvency Protocol**’. All the clauses have been accepted by each party except ‘Clause No. 6.1.2’ which relates to participation of the ‘Dutch Trustee’ (Administrator) in the meeting of the ‘Committee of Creditors’. The agreed ‘Terms & Conditions’ of ‘Cross Border Insolvency Protocol’, as excluding clause 6.1.2 reads as follows:

“CROSS-BORDER INSOLVENCY PROTOCOL

THIS PROTOCOL IS DATED [•] AND ENTERED INTO BETWEEN:

- (1) *Ashish Chhawchharia, in his capacity as the Resolution Professional of **Jet Airways (India) Limited**, a company incorporated under the provisions of the Companies Act, 1956, and an existing company under the Companies Act, 2013, and having its registered office at Siroya Centre Sahar Airport Road, Andheri (East) Mumbai 400099, India (the “**Company**”), appointed by the order of the National Company Law Tribunal, Mumbai Bench, India, (“**NCLT**”) dated 20 June 2019 (the “**RP**”);*

and

- (2) *Rocco Mulder, in his capacity as the administrator in bankruptcy of the Company appointed by Noord-Holland District Court, Trade, Sub-district and Insolvency in the Netherlands (“**Dutch Bankruptcy Court**”) by its order dated 21 May 2019 (the “**Dutch Trustee**”),*

*each a “**Party**” and together the “**Parties**”.*

BACKGROUND:

- (A) *The Company is subject to parallel insolvency proceedings in India and in the Netherlands.*
- (B) *In India, the Company has been admitted into a corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (the “**Indian Proceedings**”). Pursuant to the order of the NCLT and resolutions duly passed at the meeting of the committee of creditors of the Company (“**CoC**”) dated 16 July 2019, the RP has been*

appointed, resulting in the powers of the board of directors of the Company being vested with the RP.

- (C) *In the Netherlands, the Company has been declared bankrupt and the Dutch Trustee has been appointed to manage the estate of the Company (the "**Dutch Proceedings**"). The Dutch Proceedings together with the "**Indian Proceedings**": the "**Proceedings**".*
- (D) *On an application made by the Dutch Trustee, appealing the 20 June 2019 order of the NCLT before the Hon'ble National Company Law Appellate Tribunal, New Delhi ("**NCLAT**"), the NCLAT, by its orders dated 12 July 2019 and 21 August 2019 ("**NCLAT Order**"), inter alia, directed the RP, in consultation with the CoC, to consider the prospect of co-operating with the Dutch Trustee so as to have joint "corporate insolvency resolution process of the Company" and further vide its order dated 04 September 2019 directed the RP under the Indian Proceedings to reach an arrangement/agreement with the Dutch Trustee to extend such cooperation to each other, further allowing the CoC to guide the RP to enable him to prepare an agreement in reaching the terms of arrangement of cooperation with the Dutch Trustee in the best interest of the Company and all its stakeholders ("**Proposed Cooperation**").*
- (E) *The Parties wish to facilitate and formulate the Proposed Cooperation with this Protocol.*

THE PARTIES AGREE AS FOLLOWS:

1 CONSTRUCTION

1.1.1 *In this Protocol, unless a contrary indication appears:*

- (a) *any reference to this "**Protocol**" or any other document also refers to any amendment or supplement to it and any restatement or novation of it;*

- (b) any reference to a "**Party**" also refers to its successors in title, permitted assigns and permitted transferees;
- (c) "**the Netherlands**" refers to the part of the Kingdom of the Netherlands located in Europe (and all derivative terms, including "**Dutch**", are to be construed accordingly).

1.1.2 Headings do not affect the interpretation of this Protocol.

2 PURPOSE

2.1.1 The Parties acknowledge that while the Indian Proceedings is one that is focused on the revival/resolution of insolvency of the Company and the maximization of the value of its assets for the benefit of all its stakeholders, the main objective of the Dutch Proceedings is to deal with the liquidation of the assets of the Company located in the Netherlands and therefore, agree:

- (a) this Protocol represents a statement of intentions and guidelines designed to minimize the costs and maximize value of assets/recoveries for all creditors of the Proceedings, by promoting the sharing of relevant information among the Parties and the international coordination of related activities in the Proceedings, while respecting the separate interests of creditors and other interested parties to the Proceeding, and the independence, sovereignty, and authority of the NCLT/NCLAT and Dutch Bankruptcy Court.
- (c) in recognition of the substantive differences among the Proceedings in both jurisdictions, this Protocol shall not impose on the RP or the Dutch Trustee any duties or obligations (i) that may be inconsistent with or that may conflict with the duties or obligations to which the Parties are subject under applicable law, or (ii) that are not in the interests of the Company's estate represented by the Parties and/or its creditors. Furthermore, nothing in this Protocol

should be interpreted in any way so as to interfere with (i) the proper discharge of any duty, obligation or function of the Parties, or (ii) the exercise of statutory or other powers otherwise available to a Party under applicable law.

- (d)** *the Parties should coordinate with each other and cooperate in all aspects of the Proceedings in terms of this Protocol. In doing so, the Parties acknowledge and agree that the Parties shall deal in good faith with each other in the interests of maximizing value of assets/recovery for all of the Company's creditors.*

3 AIMS OF THE PROTOCOL

The Parties recognise that the Company being an Indian company with its centre of main interest in India, the Indian Proceedings are the main insolvency proceedings and the Dutch Proceedings are the non-main insolvency proceedings:

- (a)** *Coordination – To promote international cooperation and the coordination of activities in the Proceedings; and to provide for the orderly, effective, efficient, and timely administration of the Proceedings in order to reduce their cost and maximize recovery for creditors.*
- (e)** *Communication – To promote communication among the Parties and the CoC; and to provide, wherever possible, for direct communication among NCLT, NCLAT and Dutch Bankruptcy Court.*
- (f)** *Information and Data Sharing – To provide for the sharing of relevant information and data among the Parties in order to promote effective, efficient, and fair Proceedings, and to avoid duplication of effort and activities by the parties.*
- (g)** *Preservation – To identify, preserve, and maximize the value of the Company's worldwide assets for the*

collective benefit of all creditors and other interested parties.

- (h) Claims Reconciliation – To coordinate an efficient and transparent claims process.*
- (i) Maximize value of assets/recoveries – To cooperate in marshalling the assets of the Company in order to maximize value of assets/recovery for all of the Company's creditors.*
- (j) Comity – To maintain the independent jurisdiction, sovereignty, and authority of NCLT, NCLAT and Dutch Bankruptcy Court.*

4 EFFECTIVENESS

- 4.1.1 The terms of this Protocol shall come into effect upon receiving an approval on its terms from (i) NCLT/NCLAT; and (ii) the Dutch Bankruptcy Court or other appropriate adjudicating authority in Netherlands responsible for overseeing the Dutch Proceedings.*

5 COMMUNICATION AND INFORMATION

- 5.1.1 The Parties undertake to liaise with each other on matters related to the Company in which they have a material interest.*
- 5.1.2 Each Party shall keep the other Party adequately informed as far in advance as possible of any relevant information and material developments in matters in which the other Party has a material interest, (and may require preparation and/or travel by the Parties or the authorized representative of the CoC) including but not limited to any creditors' or shareholders' meetings, statutory or administrative deadlines or court hearings. The Dutch Trustee acknowledges that the RP may be required to and may disclose all information received by it from the Dutch*

Trustee to the CoC, under and in accordance with the Insolvency and Bankruptcy Code 2016.

- 5.1.3 *Each Party shall share such information and data regarding the Company and its assets and liabilities, that is publicly available, and may, where permitted under applicable laws, share non-public information with the other Party, as reasonably requested by the other Party, and subject at any time to applicable law and the Non-disclosure Agreement dated [●] entered into between the Parties (the "**NDA**"). In this regard, the Parties agree that each shall not (and shall direct their respective agents and representatives not to) provide any non-public information received from each other to any third party, unless such information is (i) agreed to be disseminated/shared by the other Party, (ii) required by applicable law, or (iii) required by order of any Court.*
- 5.1.4 *Further, each Party shall co-ordinate in good faith the investigations of any avoidance transactions with the other Party so as to maximise recoveries to the estate of the Company.*
- 5.1.5 *No Party shall have or obtain a right of automatic access to any information from the other Party.*

6 RIGHTS TO APPEAR AND ATTEND

- 6.1.1 *Subject to the applicable laws of each jurisdiction and Clause 7 (Indian Proceedings), the Parties shall have the right to appear, either in person or duly represented, in the Proceedings.*
- 6.1.2 xxx xxx xxx
- 6.1.3 *No Party shall be deemed to have submitted to any other than his own jurisdiction by virtue of being Party to this Protocol or having appeared in any Proceeding.*

7 INDIAN PROCEEDINGS

7.1.1 *The Dutch Trustee in the Indian Proceedings:*

- (a) *In the spirit of cooperation, the Dutch Trustee aims to not take any decision under the Dutch Proceedings that would adversely impact the interests of the Company or the creditors. In the event it becomes necessary for the Dutch Trustee in compliance of the Dutch Bankruptcy Court or any other court, or under any applicable law, to take any decision that might adversely impact the interests of the Company or the creditors, the Dutch Trustee shall give advance intimation of such decision to the RP.*
- (k) *In the event a resolution plan for the Company is submitted to the NCLT, the Dutch Trustee shall facilitate the submission (by the Company) of a consistent reorganization plan in the Dutch Proceedings (“schuldeisersakkoord”) in order to implement the resolution plan in the Dutch jurisdiction incorporating the payout mechanism that is included in such resolution plan so submitted to the NCLT for distribution of various amounts to various stakeholders including the creditors of the Company, in accordance with applicable Dutch laws.*

7.1.2 *The Dutch Trustee shall seek inputs, notify the RP and consult the RP, and will be mindful of the Indian Proceedings prior to any material decision being taken in the Dutch Proceedings, which may, inter alia, include:*

- (a) *matters relating to any proposal or approval of a plan of reorganization or a resolution plan or plan of compromise or any other similar arrangement in the Dutch Proceedings;*
- (l) *matters relating to assuming, ratifying, rejecting, repudiating, modifying or assigning executory*

contracts having a material impact on the assets, operations, obligations, rights, property or business of the Company; and

- (m) matters which are otherwise prohibited under Section 14 of the Indian Insolvency and Bankruptcy Code, 2016, as further specified in Clause 11 below, if it were to apply in Netherlands.*

8 ASSETS

8.1.1 Each Party shall do everything reasonable in its power and capacity, and the Parties shall co-operate, to maintain and preserve the value of the assets of the Company which are located in the Netherlands including, without limitation:

- (a) the economic interest in the aircraft situated on the date of this Protocol at Schiphol International Airport (BOEING 777-35RER, VT-JEW, S/N 35164) (the "**Aircraft**") or its residual value after enforcement by or on behalf of US Exim Bank ("**US Exim Bank**");*
- (n) the spare parts situated on the date of this Protocol being stored on the premises of Koninklijke Luchtvaart Maatschappij N.V. or any of its (in)direct subsidiaries or otherwise related entities (collectively "**KLM**") at Schiphol International Airport;*
- (o) the office inventory, at the date of this Protocol being stored on the premises of "KLM" at Schiphol International Airport; and*
- (p) the value of the flight slots at Schiphol International Airport which the Company was entitled to use immediately prior to 21 May 2019 in connection with all activities required to maintain such value,*

*collectively referred to as the "**Dutch Assets**".*

- 8.1.2 *In the interest of having a joint insolvency Proceeding for the administration, preservation and enhancement of the estate of the Company, and in the spirit of Clause 2 and 3, and the Proposed Cooperation, the Dutch Trustee and the RP shall cooperate to preserve and enhance the value of assets of the Company wherever located in the Netherlands, subject to Dutch Law.*
- 8.1.3 *In the spirit of Clause 2 and 3, and the Proposed Cooperation, the Dutch Trustee shall not, without consulting the RP:*
- (a) sell, transfer, encumber, alienate, abandon or dispose of any asset of the Company in or outside the Netherlands or any legal right or beneficial interest therein and make all reasonable attempts and efforts, at all times, in preventing any third party/creditor from undertaking any such action anywhere during the course of the Proceedings; or*
 - (q) commence any judicial or non-judicial proceedings affecting any asset of the Company in or outside the Netherlands.*
- 8.1.4 *In the event, the Dutch Trustee conducts a sale of any of the assets of the Company, subject to Dutch Law, the Dutch Trustee shall hold the sale proceeds of the sale of any assets of the Company in a Bankruptcy Account: IBAN NL76KASA0222622202 "Ten name van Mr R Mulder qq curator in het faillissement van Jet Airways (India) Limited". The distribution of such sale proceeds shall be made in consultation with the RP.*
- 8.1.5 *If in the course of the Proceedings, the Dutch Trustee learns or believes that a creditor or a third party having material interest in a particular asset whose value and/or recovery is at risk, is intending to sell, dispose off or foreclose a particular asset of or belonging to the Company or its beneficial interest therein in Netherlands, then the Dutch Trustee shall immediately make all reasonable attempts to*

gather information relating to the purported transaction and soon after shall provide/convey any and all such information relating to the transaction in question to the RP. Where practicable and consistent with his duties under applicable laws, the Dutch Trustee shall consult with the RP about possible steps and measures, including obtaining appropriate direction(s)/ a prohibitory injunction from the appropriate court of law, if required, for preventing/ prohibiting any such other third party from (i) selling, abandoning, or disposing of such asset; (ii) terminating, suspending, or other transitioning of any employees managing such asset; or (iii) the commencing of any judicial, or non-judicial, proceeding affecting such asset.

9 CLAIMS

- 9.1.1 *In order to ensure a complete and effective overview of claims and to enable each Party to fulfil his obligations, creditor claims should be submitted by the respective creditors in each Proceeding in accordance with the relevant applicable law.*
- 9.1.2 *The Dutch Trustee shall collate all claims received by him and shall forward these claims to the RP, who shall then verify and admit such claims in accordance with the Indian law.*
- 9.1.3 *Also on behalf of the creditors involved, the RP shall forward the list of creditors and details of all admitted claims under the Indian Proceedings to the Dutch Trustee, which claims shall be provisionally recognized and admitted by the Dutch Trustee in accordance with Dutch Law.*
- 9.1.4 *The Parties agree that the RP might be best placed to investigate the admissibility of claims that were first submitted in the Indian Proceedings and the Dutch Trustee might be best placed to investigate the admissibility of claims that were first submitted in the Dutch Proceedings.*

Each Party is authorized to randomly or otherwise, but not unreasonably, verify claims that were admitted by the other Party.

- 9.1.5 *With regard to each Claim that were first submitted in the Indian Proceedings, the RP shall represent to the Dutch Trustee whether and on which basis, he has admitted or denied the Claim in the Indian Proceedings. Similarly, with regard to each Claim that were first submitted in the Dutch Proceedings, the Dutch Trustee shall represent to the RP whether and on which basis, he has admitted or denied the Claim in the Dutch Proceedings. In this respect, the Dutch Trustee and RP shall verify such claims in accordance with applicable laws.*

10 COSTS

- 10.1.1 *On behalf of the CoC, the RP represents vis-à-vis the Dutch Trustee that it is the intention of the CoC to include the fees and costs incurred by the Dutch Trustee and any advisor/professional engaged by him for the purposes of the Dutch Proceedings as part of the insolvency resolution process costs (as defined under Section 5(13) of the Indian Insolvency and Bankruptcy Code, 2016) for the same to be paid in accordance with the Indian law, subject to verification by the RP and approval by the CoC, provided that:*

- (a) such fees and costs have not already been recovered by the Dutch Trustee from proceeds of the sale of any assets of the Company in the Netherlands;*
- (r) the claims of the members of the CoC filed in accordance with Clause 9 and admitted by the RP will be provisionally recognized by the Dutch Trustee as being submitted in the Dutch Proceedings.*

- (s) *the amount of any legal and professional fees incurred by the Dutch Trustee has been approved by the Dutch Court;*

10.1.2 *In the spirit of cooperation, the Dutch Trustee and the RP shall be treated equally.*

11 STAYS OF PROCEEDINGS

11.1.1 *The Dutch Trustee takes note of the order passed by the NCLT on 20 June 2019 as detailed out in the Background above, which imposes a moratorium on, inter alia, the following actions under Section 14 of the Indian and Bankruptcy Code, 2016:*

- (a) *the institution of suits or continuation of pending suits or proceedings against the Company, including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
- (t) *transferring, encumbering, alienating or disposing off by the Company of any of its assets, including the Dutch Assets, or any legal right or beneficial interest therein;*
- (u) *any action to foreclose, recover or enforce any security interest created by the Company in respect of its property; and*
- (v) *the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Company.*

11.1.2 *The Dutch Trustee agrees to make reasonable endeavour to implement the terms of the moratorium imposed by the said order in respect of the Dutch Assets, and to take all reasonable action under applicable Dutch laws to ensure that the order is complied with in this respect, including, without limitation, actions that the Dutch Trustee is bound to undertake under Clause 8.1.5 of this Protocol.*

11.1.3 *The provisions of Clause 11.1.2 shall not preclude the Dutch Trustee from taking such steps as may be required to protect and preserve the value of the assets of the Company in his possession or control to maximise the value of such assets of the Company for the benefit of its creditors, in accordance with Clause 8.1.5.*

12 MISCELLANEOUS

12.1 Signing

12.1.1 *Subject to Clause 4 of this Protocol, this Protocol does not have any legal effect until each Party has validly signed this Protocol.*

12.1.2 *If this Protocol is signed in counterparts, these counterparts will count as one Protocol.*

12.2 Validity

12.2.1 *Unless otherwise agreed this Protocol shall remain valid until:*

- (a) *approval of the resolution plan in accordance with the Insolvency and bankruptcy Code, 2016 in respect of the Company which has become final or approval of the reorganization plan under Dutch law ("schuldeisersakkoord"), which has become final, whichever is later, unless agreed otherwise before such date; or*
- (b) *the passing of a liquidation order against the Company by the NCLT.*

12.2.2 *In this respect, it should be noted that in the event of the liquidation of the Company, the liquidators appointed for the Company both in India and in the Netherlands may enter into a similar arrangement as this Protocol, for purposes of coordinating the liquidation of the Company in both jurisdictions.*

12.3 ***Rights cumulative***

12.3.1 *The rights and remedies of each Party provided in this Protocol are cumulative and not exclusive of any rights or remedies provided by law.*

12.4 ***Amendments and waivers***

12.4.1 *The terms of this Protocol shall not be waived, amended, terminated orally or in any other manner (including, without limitation, pursuant to a resolution plan) except by a written agreement signed by each Party, and such waiver, amendment or termination shall not come into effect unless approved, where applicable, by both the NCLT/NCLAT and the Dutch Courts after notice and a hearing.*

12.5 ***No deemed waivers***

12.5.1 *No failure to exercise, nor any delay in exercising, by a Party, any right or remedy under this Protocol will operate as a waiver. No single or partial exercise of any right or remedy will prevent any further or other exercise or the exercise of any other right or remedy.*

12.6 ***Third party rights***

12.6.1 *Except where this Protocol expressly provides otherwise:*

- (a) *it contains no stipulations for the benefit of a third party (derdenbedingen) which may be invoked by a third party against a Party; and*
- (w) *where this Protocol contains a stipulation for the benefit of a third party, this Protocol (including the relevant third party's rights under this Protocol) may be terminated, amended, supplemented or waived (in each case either in its entirety or in part) without that third party's consent.*

12.7 **No rescission; errors**

12.7.1 *No Party may fully or partly rescind (ontbinden) this Protocol.*

12.7.2 *If a Party has made an error (heeft gedwaald) in relation to this Protocol, it shall bear the risk of that error.*

12.8 **No suspension**

12.8.1 *No Party may suspend (opschorten) performance of its obligations under or in connection with this Protocol on any ground whatsoever.*

12.9 **No assignment**

12.9.1 *No Party may fully or partly assign or encumber rights and obligations under this Protocol without the other Party's prior written consent. Without this consent, no assignment or encumbrance is effected.*

12.10 **Communications in writing**

12.10.1 *Any communication to be made under or in connection with this Protocol must be made in writing and sent by regular mail or e-mail.*

12.11 **Addresses**

12.11.1 *The address and e-mail addresses of each Party for any communication to be made under or in connection with this Protocol are:*

- (a) those identified with its name in Schedule 1; or*
- (x) any substitute address or officer as the Party may notify to the other Party by not less than five days' notice.*

13 COMITY

13.1.1 *The parties hereto agree that each Court is an independent, sovereign Court, entitled to preserve its independent jurisdiction and authority with respect to matters before it and the conduct of the RP and the Dutch Trustee.*

13.1.2 *Each Court shall have sole jurisdiction and power over the conduct of the Proceeding in that forum; the appointment of the RP and the Dutch Trustee and their professionals, their retention, tenure in office, and compensation; and the hearing and determination of matters arising in that forum.*

13.1.3 *Nothing in this Protocol is intended to interfere with the exercise of jurisdiction by each of the Courts in the Proceedings, or to interfere with the natural rules or ethical principles by which the RP of the Dutch Trustee is bound according to applicable national law and professional rules.”*

2. Clause 6.1.2 of the aforesaid Agreement (Cross Border Insolvency Protocol) suggested by the Administrator reads as follows :

“6.1.2 [The Dutch Trustee shall be invited to participate in the meetings of the CoC as an observer but shall not have a right to vote in such meetings.]”

3. The said clause 6.1.2 as suggested by the ‘Resolution Professional’ at the instance of the ‘Committee of Creditors’ reads as follows:

“6.1.2 The Dutch Trustee shall not entitled to participate in the meetings of the CoC”

4. In the present case, we make it clear that the 'Committee of Creditors' have no role to play as the agreement reached between the 'Dutch Administrator' and the 'Resolution Professional' of India is on the basis of the direction of this Appellate Tribunal. In spite of the same, unfortunately the 'Committee of Creditors' interfered with the matter and put its view to the 'Resolution Professional' resulting into difference of the suggestions.

5. 'The Dutch Trustee' is equivalent to the 'Resolution Professional' of India, therefore, as per law he has a right to attend the meeting of the 'Committee of Creditors'. However, as we do not want to overlap the power between one and other, we are of the view that the suggestion given by the 'Dutch Trustee' (Administrator) as shown in its 'Clause 6.1.2' should be part of the Agreement – 'Cross Border Insolvency Protocol'. Therefore, we direct to insert 'Clause 6.1.2, as suggested by the 'Dutch Trustees', which reads as follows:

“6.1.2 *[The Dutch Trustee shall be invited to participate in the meetings of the CoC as an observer but shall not have a right to vote in such meetings.]”*

6. We make it clear that the 'Dutch Trustee (Administrator)' will work in co-operation with the 'Resolution Professional of India' and, if any, suggestion is required to be given, he may give it to the 'Resolution Professional'. The draft of 'Cross Border Insolvency Protocol' clause is made final as above. It should be treated as a direction of this Appellate Tribunal and it would be mandatory to

comply with the order of this Appellate Tribunal subject to the other procedures which are to be followed in terms of the 'Insolvency and Bankruptcy Code, 2016'.

7. In view of the aforesaid observations, we set aside part of the impugned order dated 20th June, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in so far it relates to the observations that the 'Dutch Court' has no jurisdiction in the matter of 'corporate insolvency resolution process' of 'Jet Airways (India) Limited, (Offshore Regional Hub) and the consequential directions as given to the 'Resolution Professional' in respect of 'Offshore proceedings.

8. However, it is made clear that we have not interfered with the order of admission of application under Section 7 of the I&B Code filed by the 'State Bank of India' against 'Jet Airways (India) Limited', therefore, joint 'Corporate Insolvency Resolution Process' will continue in accordance with 'Insolvency and Bankruptcy Code, 2016.

The appeal stands disposed of with aforesaid observations and directions.
No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

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