

# AIRLINE INSOLVENCY IN INDIA: BALANCING INTERESTS BETWEEN THE INSOLVENCY AND BANKRUPTCY CODE AND THE CAPE TOWN CONVENTION

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*The recent voluntary filing for insolvency by Go First Airlines has led to the imposition of a moratorium under §14 of the Insolvency and Bankruptcy Code. This has also affected all of Go First’s fifty-three leased aircraft. In the absence of any specialised framework governing airline insolvency, the moratorium has disabled lessors from repossessing their aircraft, tarnishing India’s image in the international aviation market. In response, the government exempted such leased assets from the moratorium under §14(c) of the Code via a notification dated October 3, 2023. This move also clears space for the passage of the long overdue Cape Town Convention Bill, 2018, aimed at ratifying the Cape Town Convention. More importantly, it poses policy questions regarding the legislative options available to the government with regard to dealing with the impending question of repossession upon insolvency. This article, firstly, provides an overview of the aviation industry itself; secondly, it analyses the extant legal regime governing the repossession of aircraft in the event of airline insolvency, including the recent changes to the law; thirdly, it evaluates available policy alternatives to resolve the conundrum and concludes by suggesting an alternative that suits the Indian aviation sector.*

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## I. INTRODUCTION

On May 3, 2023, Go First filed an insolvency petition before the National Company Law Tribunal (‘NCLT’), making it the latest member to join the club of more than

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fifteen airlines which have filed for insolvency over the past two decades.<sup>1</sup> However, this insolvency petition is merely the tip of the iceberg; the larger problem is the plight of the lessors of Go First's aircraft. After the admission of the petition, a moratorium under §14 of the Insolvency and Bankruptcy Code ('IBC') came into force, preventing any actions that could alter the status of the assets possessed by the Corporate Debtor ('CD').<sup>2</sup> Since Go First's assets are primarily leased, the moratorium disables the lessor from re-possessing these aircraft despite the termination of the Lease Agreements.<sup>3</sup> This would have wide-ranging repercussions for the aviation sector in India, spawning a slew of reactions by stakeholders.

This paper approaches the problem from a policy perspective. It analyses the legal regime governing the insolvency of airlines and the re-possession of leased aircraft. Academic discourse on this aspect pertains mostly to the woes of the lessors in repossessing aircraft upon insolvency and the immediacy of the implementation of the Cape Town Convention ('CTC') through legislative sanction to remedy the same.<sup>4</sup> Contrarily, this paper takes a holistic perspective, arguing that the enactment of the CTC Bill is not the panacea for all the ills plaguing the aviation industry. It dwells upon the available policy alternatives and analyses the feasibility of the CTC for India, keeping the status quo in consideration.

Part II aims to contextualise the problem by providing an overview of the aviation industry itself and the various challenges it has encountered, including the insolvency of airlines. Part III analyses the national, as well as the international legal framework governing the repossession of leased aircraft in the event of insolvency of an airline. It provides an insight into the challenges posed by the current framework and concludes by analysing the recent notification brought out by the government as an attempt to resolve the problem. Part IV continues the analysis by evaluating the policy alternatives to resolve the inconsistency and suggests a feasible policy alternative that would suit Indian needs. The paper concludes by delineating the way forward for the Indian aviation industry.

## II. EVOLUTION OF THE AVIATION INDUSTRY IN INDIA

This section traces the evolution of the aviation industry in India from its inception to the present scenario, which has been marked by increased trouble in recent times. With many airlines struggling to make ends meet and becoming insolvent, it goes on to analyse the reasons behind the phenomenon. This provides an essential backdrop to the recent application for insolvency proceedings by Go First.

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<sup>1</sup> BUSINESS TODAY, *Go First's Insolvency Plea: Here's a List of Air Carriers That Went Bust in the Past*, May 3, 2023, available at <https://www.businesstoday.in/industry/aviation/story/gofirst-latest-airlines-to-go-bankrupt-heres-a-list-of-air-carriers-that-went-bust-in-the-past-379829-2023-05-03> (Last visited on December 4, 2023).

<sup>2</sup> The Insolvency and Bankruptcy Code, 2016, §14.

<sup>3</sup> Arpan Chaturvedi et al., *India's Go First Airline Gains Bankruptcy Protection, Lessors' Woes Deepen*, REUTERS, May 10, 2023, available at <https://www.reuters.com/business/aerospace-defense/india-decide-go-first-bankruptcy-lessors-seeking-planes-fear-impact-2023-05-10/> (Last visited on December 4, 2023).

<sup>4</sup> See generally Rishab Bansal & Ayushmaan Chouksey, *Turbulence on the Ground: An In-Depth Analysis of Rights of Aircraft Lessors and Airline Insolvency in India*, Vol. 2 HPNLU J. FOR L. BUSINESS AND ECONOMICS (2024); INSOLVENCY LAW ACADEMY, *The Aircraft Protocol of the Cape Town Convention and its Applicability Under Indian Insolvency Regime*, available at <https://insolvencylawacademy.com/the-aircraft-protocol-of-the-cape-town-convention-and-its-applicability-under-indian-insolvency-regime/> (Last visited on July 5, 2024); Karan Nimish Vakil, *Go First Insolvency: Exploiting the Lacuna in the Aircraft Rules 1937*, Vol. 3(1) CENTRE FOR AVIATION AND SPACE LAWS NUJS (2023).

### A. AVIATION SECTOR: CHALLENGES FROM GOVERNMENTAL INTERFERENCE

The evolution of the aviation industry can be segmented into clear phases. In the initial phase, all air carriers were nationalised in line with the socialist policies adopted by the Government.<sup>5</sup> However, recognising the need for reform, the liberalization measures were initiated in the 1980s.<sup>6</sup> This began with the repeal of the Air Corporation Act 1953, which had outlawed the running of private carriers.<sup>7</sup> Since then, the industry has been on a steady path of growth and transformation, with a focus on the development of airport infrastructure along with expanding regional connectivity through policy innovation.<sup>8</sup> Presently, the Indian aviation industry ranks third globally in terms of its size, with one hundred and three airports being served by around forty airlines.<sup>9</sup> The industry has also diversified with the entry of Low-Cost Carriers.<sup>10</sup>

While that is a positive outcome, the shift of the market towards an unhealthy duopoly is of immediate concern.<sup>11</sup> The aviation industry is a difficult one; many airlines have shut down operations, unable to compete in the market.<sup>12</sup> Five years ago, Jet Airways, Air India, Vistara, AirAsia India, Go First, SpiceJet, TruJet, Zoom Air and Air Deccan were the major players in the market.<sup>13</sup> The years since have witnessed the exit of Jet Airways, Go First, Zoom Air and Air Deccan and the decline of SpiceJet, which is now almost on the wing.<sup>14</sup> The current market is dominated by Air India, with its subsidiaries Vistara and Air Asia, along with Indigo.<sup>15</sup> Together, they command 81.3 percent of the Indian aviation market.<sup>16</sup> Further

<sup>5</sup> Gautam Chikermane, *As Air India Flies to the Tatas, a Brief History of India's Biggest Policy Failure*, ORF ONLINE, October 9, 2021, available at <https://www.orfonline.org/research/as-air-india-flies-to-the-tatas-a-brief-history-of-indias-biggest-policy-failure> (Last visited on December 19, 2023).

<sup>6</sup> Hooper P., *Liberalisation of the Airline Industry in India*, Vol. 3(3) J. AIR. TRANSP. MGMT., 116 (2017).

<sup>7</sup> See The Air Corporations (Transfer of Undertakings and Repeal) Act, 1994, §11; See generally Arijit Mazumdar, *Deregulation of The Airline Industry in India: Issues, Causes and Rationale*, Vol. 70(2) INDIAN J. OF POL. SCI., 451 (2009).

<sup>8</sup> Sukhchain Singh, *Aviation Sector in Nation Building over The Last 76 Years*, August 8, 2023, available at <https://www.sps-aviation.com/story/?id=3356&h=Aviation-Sector-in-Nation-Building-over-the-Last-76-Years> (Last visited on December 15, 2023). See also National Civil Aviation Policy, 2016.

<sup>9</sup> Air Marshal Anil Chopra (Retd.), *Current Scenario in India*, SP'S AVIATION, April 2020, available at <https://www.sps-aviation.com/story/?id=2758&h=Current-Scenario-in-India> (Last visited on December 28, 2023).

<sup>10</sup> ADMINISTRATIVE STAFF COLLEGE OF INDIA, *Competition Issues in the Air Transport Sector in India*, 4 (2007) available at <https://www.cci.gov.in/search-filter-details/3187> (Last visited on December 28, 2023).

<sup>11</sup> THE TIMES OF INDIA, *Why Airlines Keep Folding In India's Booming Aviation Market*, May 6, 2023, available at <https://timesofindia.indiatimes.com/business/india-business/why-airlines-keep-folding-in-indias-booming-aviation-market/articleshows/100025802.cms?from=mdr> (Last visited on December 28, 2023); See generally Aneesh Phadnis, *IndiGo Gains From Go First Grounding, Logs Highest Ever Market in May*, BUSINESS STANDARD, June 15, 2023, available at [https://www.business-standard.com/industry/news/indigo-gains-big-on-go-first-grounding-posts-highest-ever-61-4-mkt-share-123061500623\\_1.html](https://www.business-standard.com/industry/news/indigo-gains-big-on-go-first-grounding-posts-highest-ever-61-4-mkt-share-123061500623_1.html) (Last visited on December 19, 2023).

<sup>12</sup> THE ECONOMIC TIMES, *Five Reasons Why Private Airlines Fail So Often In India*, May 3, 2023, available at <https://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/five-reasons-why-private-airlines-fail-so-often-in-india/articleshows/99959908.cms?from=mdr>. (Last visited on December 28, 2023).

<sup>13</sup> Manu Balachandran, *Between Air India and IndiGo, India's Skies Are Headed for A Duopoly. What's This New Reality?*, FORBES, September 21, 2024, available at <https://www.forbesindia.com/article/take-one-big-story-of-the-day/between-air-india-and-indigo-indias-skies-are-headed-for-a-duopoly-whats-this-new-reality/88431/1> (Last visited on January 5, 2024).

<sup>14</sup> *Id.*

<sup>15</sup> Sumanta Sen, *Two Airlines Dominate India's Growing Market*, REUTERS, July 24, 2023, available at <https://www.reuters.com/graphics/INDIA-AIRLINES/egpbmkyyqvq/> (Last visited on December 27, 2023).

<sup>16</sup> Sukalp Sharma, *Expect High Competitive Intensity Between Indigo and Air India Group From 2024: CAPA India*, INDIAN EXPRESS, December 31, 2023, available at

concentration of market share in these airlines would not only lower the choice of alternatives available to consumers but also enable these airlines to dictate prices with poor customer service.<sup>17</sup> In this backdrop, the increasing trend of airlines becoming insolvent is worrisome.

It is only natural that the government pulls all stops to prevent a carrier from failing since any further trouble in the sector would dim any hopes of its revival. Moreover, in a concentrated market, the failure of any one player leads to further concentration of market share in the others, leaving little space for adaptive market strategies to be adopted to revive the airline.<sup>18</sup> At the same time, there are airlines which have revived from insolvency. A good example is that of Spice Jet. It was earlier forced to ground its entire fleet due to its inability to pay its dues to local oil companies.<sup>19</sup> However, a change in the management has given hope of its revival.<sup>20</sup> Thus, even though it is justified for the government to not interfere in the process, at the same time, it is not recommended to take a complete ‘hands-off’ approach towards airline insolvency.

### B. AIRLINE BANKRUPTCY: REASONS PROBED

The airline business operates on marginal profits, and survival depends more on the volume while operating without expecting high profits.<sup>21</sup> Costs are a vital factor in determining the survivability of the airline.<sup>22</sup> Inability to meet costs leads to debt. Non-payment of this debt further adds to the costs, ultimately leading to the commencement of insolvency proceedings, which may either be filed voluntarily or by a creditor.<sup>23</sup> Airlines operate on small margins.<sup>24</sup> Hence, any change in the costs may prove consequential for the business.<sup>25</sup>

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<https://indianexpress.com/article/business/aviation/indigo-air-india-group-high-competitive-intensity-from-2024-9088698/> (Last visited on January 3, 2024).

<sup>17</sup> THE WEEK, *Why Duopoly Might Ruin India's Aviation Boom*, October 1, 2023, available at <https://www.theweek.in/theweek/business/2023/09/23/duopoly-in-indian-aviation-sector-risk-analysis.html#:~:text=The%20duopoly,early%202000s%20have%20suddenly%20disappeared> (Last visited on December 29, 2023) (‘The Week’).

<sup>18</sup> See generally Kam To Ng et al., *The Effects of Bankruptcy on Airline Yield and Frequency: The Case of the Duopolistic Domestic Market in Japan*, Vol. 142 TRANSPORT POLICY, 28-36 (2023).

<sup>19</sup> THE ECONOMIC TIMES, *SpiceJet's Turnaround Story: From Forced Grounding to World's Top Airline Stock in 2 years*, June 27, 2017, available at <https://m.economictimes.com/markets/stocks/news/spicejets-turnaround-story-from-forced-grounding-to-worlds-top-airline-stock-in-2-years/articleshow/59333064.cms> (Last visited on December 29, 2023).

<sup>20</sup> THE ECONOMIC TIMES, *Why Airlines Keep Folding in India's Booming Aviation Market*, May 6, 2023, available at <https://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/why-airlines-keep-folding-in-indias-booming-aviation-market/articleshow/100026527.cms> (Last visited on December 28, 2023).

<sup>21</sup> Ashley Lutz & Gus Lubin, *Airlines Have an Insanely Small Profit Margin*, BUSINESS INSIDER, June 16, 2012, available at <https://www.businessinsider.com/airlines-have-a-small-profit-margin-2012-6?IR=T> (Last visited on January 3, 2023).

<sup>22</sup> MCKINSEY, *A Better Approach to Airline Costs*, June 13, 2017, available at <https://www.mckinsey.com/industries/travel-logistics-and-infrastructure/our-insights/a-better-approach-to-airline-costs> (Last visited on January 3, 2023).

<sup>23</sup> Hwa Ryung Lee, *Bankruptcy and Low Cost Carrier Expansion in the Airline Industry* (Working Paper Series/Institute for Empirical Research in Economics, University of Zurich, Working Paper No. 502, 2010).

<sup>24</sup> Lutz & Lubin, *supra* note 21.

<sup>25</sup> INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, *IBC: Evolution, Learnings and Innovation*, 204-07 (2023) available at <https://www.iiipicai.in/wp-content/uploads/2023/10/IBC-Evolution-Learnings-and-Innovation.pdf> (Last visited on December 29, 2023).

Clearly, the chance of survival depends on cash flow and the ability to cover costs.<sup>26</sup> The cost of the imported Airline Turbine Fuel accounts for almost half of the costs.<sup>27</sup> Moreover, such keeps fluctuating, primarily because of a lack of government control on prices,<sup>28</sup> and the taxes imposed by state governments.<sup>29</sup> Compounding this problem is the fluctuation in the value of the Rupee vis-à-vis the Dollar, which is the currency for most of the payments.<sup>30</sup> Any depreciation of the Rupee increases the cost of fuel for Indian operators, thereby putting them at a disadvantage vis-à-vis their international counterparts.<sup>31</sup> Costs are also incurred due to exogenous factors affecting operations; the COVID-19 pandemic, which affected airline operations, is the best example.<sup>32</sup> The industry is estimated to have incurred a net loss of INR 110–130 billion from April 2022 – March 2023.<sup>33</sup> As many as sixty-four airlines went bankrupt globally due to these losses; notably, only a few could be revived.<sup>34</sup>

Nevertheless, these reasons should not be considered in isolation but with all other factors that push an airline towards insolvency. The bottom line, however, is whether there is enough cash to revive them. In the case of Jet Airways, there weren't enough investors to pump in the required capital to keep the airline functional, leading to its insolvency.<sup>35</sup> This makes the role of the corporate insolvency resolution process ('CIRP') critical for the industry as a whole. Even the policies of the government in this sphere may prove to be the requisite catalyst. While the insolvency resolution process is multi-faceted, this article aims to analyse its interplay with the re-possession of aircraft by the lessors in the event of an airline's insolvency.

### III. AIRLINE INSOLVENCY AND REPOSSESSION: THE LEGISLATIVE GAP

This section delves into the issue of re-possessing leased aircraft in the context of airline insolvency. Commencing with an overview of the laws governing airline insolvency and repossession in India, it delves into the recent case of Go First, which forms the centre of our discussion.

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<sup>26</sup> Serevin Borenstein, *Why Can't US Airlines Make Money?*, Vol. 101(3) AMERICAN ECONOMIC REV., 233-37 (2011).

<sup>27</sup> THE ECONOMIC TIMES, *Five Reasons Why Private Airlines Fail So Often in India*, May 3, 2023, available at <https://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/five-reasons-why-private-airlines-fail-so-often-in-india/articleshow/99959908.cms> (Last visited on January 3, 2023) ('ET Article').

<sup>28</sup> Jaap Bouwere et. al., *Why Rising Fuel Prices Might Not be as Bad for the Airline Sector as it Seems*, July 15, 2022, available at <https://www.mckinsey.com/industries/travel-logistics-and-infrastructure/our-insights/why-rising-fuel-prices-might-not-be-as-bad-for-the-airline-sector-as-it-seems> (Last visited on January 2, 2024).

<sup>29</sup> ET Article, *supra* note 27.

<sup>30</sup> CNBCTV18, *Explainer: How Weak Rupee Hurts Airline Profits*, September 18, 2018, available at <https://www.cnbctv18.com/aviation/explainer-how-weak-rupee-hurts-airline-profits-833841.htm> (Last visited on December 28, 2023); *See* Lee, *supra* note 23.

<sup>31</sup> THE ECONOMIC TIMES, *Higher ATF Prices, Weaker Rupee to Drag Aviation Sector Profitability Despite Strong Fares*, July 11, 2022, available at <https://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/higher-atf-prices-weaker-rupee-to-drag-aviation-sector-profitability-despite-strong-fares/articleshow/92801680.cms?from=mdr>. (Last visited on January 2, 2024).

<sup>32</sup> ET Article, *supra* note 27; MCKINSEY AND COMPANY, *Taking Stock of the Pandemic's Impact on Global Aviation*, May 31, 2022, available at <https://www.mckinsey.com/industries/travel-logistics-and-infrastructure/our-insights/taking-stock-of-the-pandemics-impact-on-global-aviation> (Last visited on January 2, 2024).

<sup>33</sup> CRISIL, *Stormy Flight*, July 15, 2020, available at <https://www.crisil.com/content/dam/crisil/our-analysis/reports/Research/documents/2020/07/stormy-flight.pdf> (Last visited on December 28, 2023).

<sup>34</sup> Julia Buckley, *How the Pandemic Killed Off 64 Airlines*, CNN, February 11, 2023, available at <https://edition.cnn.com/travel/article/pandemic-airline-bankruptcies/index.html> (Last visited on January 6, 2023).

<sup>35</sup> Jashim Uddin Ahmed et al., *The Bankruptcy of Jet Airways in India*, Vol. 11(2) IIUM J. OF CASE STUDIES IN MANAGEMENT, 31 (2020).

### A. LAWS GOVERNING AIRLINE INSOLVENCY IN INDIA

Aircraft leasing has become the most popular mode of operation in the aviation industry.<sup>36</sup> Rather than acquiring new aircraft, airline companies bypass these costs and reduce the risk involved by renting aircraft on lease from lessors.<sup>37</sup> With the boom in the aviation industry, aircraft leasing has become increasingly popular. It is an international market valued at over USD 180.08 billion as of 2022.<sup>38</sup> Around eighty percent of commercial aircraft in India are leased as opposed to fifty-three percent globally.<sup>39</sup>

Further, it is only set to grow in importance.<sup>40</sup> This is more so with the government actively developing an effective mechanism enabling aircraft financing and leasing in India.<sup>41</sup> It has the potential to serve as the centrepiece of the Regional Connectivity Scheme (Ude Desh Ka Aam Nagrik Scheme, 2016) that aims to revolutionise air travel by augmenting infrastructure in Tier-II and Tier-III cities and to operationalise flights to smaller regional airports.<sup>42</sup> Furthermore, Project Rupee Raftaar of the Working Group of the Ministry of Civil Aviation (2019) aims to make India a global hub for Aviation financing and leasing.<sup>43</sup> It aims to place India on par with Singapore, Hong Kong and other aviation hubs.<sup>44</sup> Establishment of the International Financial Services Centre ('IFSC') in the Gujarat International Financial Tec-City ('GIFT City') Gujarat and various regulatory reforms further indicate the potential importance of leasing in India.<sup>45</sup> The GIFT City boasts of India's maiden

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<sup>36</sup> Sebastian Wandelt et al., *Is the Aircraft Leasing Industry on the Way to a Perfect Storm? Finding Answers Through a Literature Review and a Discussion of Challenges*, Vol. 111 J. AIR TRANS. MANAGEMENT, 2 (2023); FEDERATION OF INDIAN CHAMBERS OF COMMERCE & INDUSTRY, Knowledge Report on Leasing & Aircraft Financing in India, 3 (February 26, 2021).

<sup>37</sup> PRICE WATERHOUSE COOPERS, *Aircraft Leasing in India: Ready to Take Off*, February 2021, available at <https://www.pwc.in/assets/pdfs/research-insights/2021/aircraft-leasing-in-india-ready-to-take-off.pdf> (Last visited on July 28, 2023).

<sup>38</sup> POLARIS MARKET RESEARCH, *Aircraft Leasing Market Share, Size, Trends, Industry Analysis Report*, October 2023, available at <https://www.polarismarketresearch.com/industry-analysis/aircraft-leasing-market> (Last visited on December 18, 2023).

<sup>39</sup> CENTRE FOR AVIATION, *Aircraft Leasing in India, Opportunity Knocks for the Indian Lessor*, September 2018, available at <https://centreforaviation.com/analysis/reports/aircraft-leasing-in-india-opportunity-knocks-for-an-indian-lessor-443995> (Last visited on December 18, 2023).

<sup>40</sup> THE ECONOMIC TIMES, *India's Pax Aircraft Fleet to Double to 1,100 Planes by 2027*, July 16, 2018, available at <https://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/indias-pax-aircraft-fleet-to-double-to-1100-planes-by-2027/articleshow/65013460.cms> (Last visited on December 20, 2023); PRICE WATERHOUSE COOPERS, *India: Emergence of a Global Leader in Aviation*, 4 (March, 2022), available at <https://www.pwc.in/assets/pdfs/industries/government-and-public-sector/india-emergence-of-a-global-leader-in-aviation-knowledge-report-on-the-indian-aviation-industry.pdf> (Last visited on December 23, 2023).

<sup>41</sup> WORKING GROUP ON DEVELOPING AVENUES FOR AIRCRAFT FINANCING AND LEASING ACTIVITIES IN INDIA, *Project Rupee Raftaar: Development of Aircraft Financing and Leasing in India, Report of the Working Group* (January 10, 2019) ('Rupee Raftaar').

<sup>42</sup> Ministry of Civil Aviation, Press Release No. 1971506 (Issued on October 26, 2023) ('MCA Press Release').

<sup>43</sup> Rupee Raftaar, *supra* note 41; Ministry of Civil Aviation, Press Release, (Issued on July 28, 2021); PRICE WATERHOUSE COOPERS, *India: Emergence of a Global Leader in Aviation*, 9 (March 2022), available at <https://www.pwc.in/assets/pdfs/industries/government-and-public-sector/india-emergence-of-a-global-leader-in-aviation-knowledge-report-on-the-indian-aviation-industry.pdf> (Last visited on December 23, 2023).

<sup>44</sup> Ministry of Civil Aviation, Press Release, (Issued on July 28, 2023); See generally Jeanette Rodrigues & Subhadip Sircar, *India's Free-Market Oasis Aims to Take On Singapore and Dubai*, BLOOMBERG, November 29, 2022, available at <https://www.bloomberg.com/news/features/2022-11-29/which-city-will-be-next-singapore-or-dubai-new-india-finance-hub-has-big-plans> (Last visited on December 6, 2023); NDTV, *"India Will Become Global Aviation Hub, Like Dubai, In 5 Years": J Scindia*, September 13, 2023, available at <https://www.ndtv.com/india-news/india-will-become-global-aviation-hub-like-dubai-in-5-years-j-scindia-4386462> (Last visited on January 3, 2024).

<sup>45</sup> Mihir Mishra, *Plans afoot to Base Aircraft Leasing Firms at GIFT City*, THE ECONOMIC TIMES, June 28, 2018, available at <https://economictimes.indiatimes.com/news/economy/infrastructure/plans-afoot-to-base-aircraft->

IFSC with an aircraft leasing and financial ecosystem, and various tax incentives to give a boost to the aviation sector in India.<sup>46</sup> While such government programmes and policies to promote aircraft leasing are ambitious, leasing should not be hindered by the mere absence of a conducive environment for lessors. Thus, there is a need to make it easier for lessors to be able to repossess leased aircraft in the event of the insolvency of an airline.

Against this backdrop, the CTC, signed in 2001, assumes importance.<sup>47</sup> It is a treaty that seeks to increase the financing and leasing of aircraft and enhance legal certainty in the process.<sup>48</sup> Recognizing the cross-border nature of the leasing of mobile equipment and the concomitant uncertainty of lessor's interests due to inconsistent national laws,<sup>49</sup> it seeks to create an autonomous framework for such interests.<sup>50</sup> The CTC and its Protocol protect the interests of the lessors by seeking to harmonize the laws relating to aircraft leases and repossession of aircraft.<sup>51</sup> It creates an international registry by creating an international interest in aircraft leased.<sup>52</sup> India acceded to the Convention in 2008. However, only some parts of the Convention have been implemented, like those on the Irrevocable Deregistration and Export Request Authorisation ('IDERA') through the Aircraft Rules, 1937.<sup>53</sup>

Repossession of aircraft by the lessor is as important as the lease itself. It is a two-tiered process which involves de-registration, followed by export of the aircraft.<sup>54</sup> In India, §30(7) and §32A of the Aircraft Rules 1937 provide for this upon default on payments by the lessee.<sup>55</sup> Upon default, the lessor submits a request to the Director General for Civil Aviation ('DGCA'), which must be honoured, and export of the aircraft be facilitated within five days of acceptance of the request.<sup>56</sup> In reality, de-registration gets further delayed due to the

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leasing-firms-at-gift-city/articleshow/64785531.cms?from=mdr (Last visited on January 8, 2024); MCA Press Release, *supra* note 42, at 31; See also LOK SABHA, *India Leasing Summit, 2021*, 905, Session No. V, March 25, 2021, *Unstarred Question* by Shri Anurag Sharma, available at: <https://sansad.in/getFile/loksabhaquestions/annex/175/AU4929.pdf?source=pqals> (Last visited on January 14, 2024).

<sup>46</sup> PRICE WATERHOUSE COOPERS, *Aircraft Leasing in GIFT IFSC* (March 2024), available at <https://www.pwc.in/assets/pdfs/aircraft-leasing-in-gift-ifsc.pdf> (Last visited on June 6, 2024).

<sup>47</sup> ICAO, *Cape Town Convention and Protocol*, available at <https://www.icao.int/sustainability/Pages/Capetown-Convention.aspx#:~:text=The%20Convention%20and%20Protocol%20are,thus%20more%20fuel%2Defficient%20aircraft.> (Last visited on July 23, 2023).

<sup>48</sup> Donal Patrick Hanley, *AIRCRAFT OPERATING LEASING: A LEGAL AND PRACTICAL ANALYSIS IN THE CONTEXT OF PUBLIC AND PRIVATE INTERNATIONAL AIR LAW* (Walters Kluwer, 3rd edn., 2021).

<sup>49</sup> UNIDROIT, *Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Sub-Committee for the Preparation of a First Draft, Study LXXII, Document 16*, August 1994, available at <https://www.unidroit.org/english/documents/1994/study72/s-72-13-e.pdf> (Last visited on December 28, 2023) ('AWG Memo').

<sup>50</sup> Anton Didenko, *A Historical Overview of the Basic Concepts of the Cape Town Convention (Part I): 'International Interest' and 'Internationality'*, Vol. 6 CAPE TOWN CONV. J. (2017).

<sup>51</sup> Protocol to The Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, 2367 U.N.T.S. 517 (adopted on November 16, 2001, entered into force on March 1, 2006) ('Protocol').

<sup>52</sup> Dean N. Gerber & David R. Walton, *De-registration and Export Remedies under the Cape Town Convention*, Vol. 3(1) CAPE TOWN CONV J., 49, 52-53 (2014).

<sup>53</sup> Neha Singh, *India: 20 Years Of Cape Town Convention - Indian Perspective on Aviation's Lynchpin Framework*, Mondaq, July 27, 2023, available at <https://www.mondaq.com/india/aviation/1119112/20-years-of-cape-town-convention---indian-perspective-on-aviations-lynchpin-framework> (Last visited on December 29, 2023); The Aircraft Rules, 1937 ('Rules'), R. 30(7), 32(A).

<sup>54</sup> INSOL INTERNATIONAL, *Aircraft Repossession Upon a Default - a Review of the Issues in the United Kingdom, USA, India and Nigeria*, November 2019, available at <https://brownrudnick.com/wp-content/uploads/2019/12/INSOL-International-Restructuring.pdf> (Last visited on December 28, 2023).

<sup>55</sup> See The Aircraft Rules, 1937, R. 30(7).

<sup>56</sup> *Id.*

frivolous procedural requirements insisted upon by regulators.<sup>57</sup> Surprisingly, there have been instances where the Regulator has insisted on frivolous requirements, like a ‘No Objection Certificate’ from the lessee.<sup>58</sup> It has even exercised its power to detain the aircraft on account of dues pending to the Airports Authority of India or any third parties with regard to services rendered to the aircraft.<sup>59</sup> Though such detention is permitted under India’s declarations to the Convention, courts have nonetheless held that this does not extinguish the lessors’ right to deregistration and repossession of the aircraft.<sup>60</sup> Such delays caused by the Regulator create further impediments in the repossession of aircraft to the detriment of lessors.<sup>61</sup>

However, things take a different turn in the event of the lessee’s insolvency. Article XI of the Protocol provides for ‘Remedies on Insolvency’.<sup>62</sup> Notably, the harmonisation of the remedies on insolvency to provide legal protection to lessors was one of the main pillars of the Convention, considering the cross-border nature of the transactions involved.<sup>63</sup> The Protocol provides flexibility for the states to decide how repossession can take place by choosing either Alternative A or Alternative B provided therein. India, in its declaration under Article 54 of the Convention, has adopted Alternative A under Article XI.<sup>64</sup> It comprises the declaration of a waiting period, after which the aircraft will have to be released to the lessor irrespective of the continuation of insolvency proceedings.<sup>65</sup> India has declared a waiting period of sixty days.<sup>66</sup>

The provisions of the CTC, however, cannot become law in India until the Parliament brings a law to that effect as per Article 253 of the Constitution.<sup>67</sup> India has not adopted the CTC ‘in spirit’ even after fifteen years of signing it,<sup>68</sup> rendering most of its provisions as dead-letter. This creates a legislative gap regarding the question of repossession of aircraft in the event of the insolvency of the airline. This gap is now filled by the general law of the land, i.e., the IBC. This is the genesis of the whole issue that now engulfs Go First, its lessors, and other stakeholders, apart from posing serious policy questions to the government.

### B. GO FIRST: THE GENESIS OF THE PROBLEM

From 2022 onwards, Go First started defaulting on its payments to vendors and aircraft lessors, with the total amount of liabilities owed to lessors pegged at INR 2660 crores as of April 28, 2023.<sup>69</sup> Go First blames the faulty engines supplied by Pratt & Whitney (‘P&W’)

<sup>57</sup> DVB Aviation Finance Asia PTE Ltd v. Directorate General of Civil Aviation, WP (C) 7661/2012.

<sup>58</sup> DVB Aviation Finance Asia PTE Ltd v. Directorate General of Civil Aviation, WP (C) 7661/2012.

<sup>59</sup> UNIDROIT, *Declarations Lodged by the Republic of India Under the Cape Town Convention at the Time of the Deposit of its Instrument of Accession*, available at <https://www.unidroit.org/instruments/security-interests/cape-town-convention/states-parties/d-india-ct/> (Last visited on December 29, 2023) (‘Declaration’).

<sup>60</sup> AWAS 39423 Ireland Ltd. & Ors. v. Directorate General of Civil Aviation & Anr., MANU/DE/0832/2015.

<sup>61</sup> *Id.*

<sup>62</sup> Protocol, *supra* note 51, Article XI.

<sup>63</sup> AWG Memo, *supra* note 49.

<sup>64</sup> Declaration, *supra* note 59, Form 23.

<sup>65</sup> Protocol, *supra* note 51, Article XI, Alternative A.

<sup>66</sup> Protocol, *supra* note 51, Article XI, Alternative A; Declaration, *supra* note 59.

<sup>67</sup> The Constitution of India, 1950, Art. 253; Jolly George Vergese v. Bank of Cochin, 1980 SCR (2) 913; State of West Bengal v. Kesoram Industries, (2004) 10 SCC 201.

<sup>68</sup> THE ECONOMIC TIMES, *Go First Crisis: What's the Cape Town Convention? Why Do We Need It?*, May 15, 2023, available at: <https://economictimes.indiatimes.com/industry/transportation/airlines/-/aviation/go-first-crisis-whats-the-cape-town-convention-why-do-we-need-it/articleshow/100252409.cms> (Last visited on July 13, 2024).

<sup>69</sup> In the matter of Go Airlines (India) Limited, Company Petition No. (IB) -264(PB)/2023, National Company Law Tribunal (Special Bench, New Delhi) ¶5; See also INDIA TODAY, *Go First Files for Bankruptcy, Owes Over*



as the reason for grounding twenty-eight of its fifty-four aircraft as of May 2023, causing mounting losses.<sup>70</sup> Additionally, P&W did not honour its obligations pursuant to the Award passed by the Singapore International Arbitration Centre in favour of Go First, for which enforcement proceedings are underway in various jurisdictions.<sup>71</sup>

Go First filed an application for voluntary insolvency resolution before the NCLT under §10 of the IBC on May 2, 2023.<sup>72</sup> The same was admitted on May 10, 2023.<sup>73</sup> Pursuant to Go First's application, a moratorium was imposed under §14(1), prohibiting all suits and actions against Go First, the CD.<sup>74</sup> §14(1)(d) specifically bars the recovery by a lessor of any property in possession or occupation of the CD.<sup>75</sup> This aims to preserve its assets and maintain the business as a going concern while allowing time for the CD to resolve its insolvency.<sup>76</sup> Practically, this implies that lessors will not be able to repossess their aircraft until the CIRP ends, which, in India, typically takes almost two years.<sup>77</sup>

Clearly, should the moratorium be allowed as is, the lessors would be in an unenviable position, causing financial losses, maintenance expenditures, depreciation of asset value and massive opportunity costs.<sup>78</sup> Moreover, India's experience in resolving airline insolvencies has been far from encouraging.<sup>79</sup> Fearing the same, the lessors moved applications

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*Rs 11,000 Crore: Check Debt Breakdown*, May 3, 2023, available at <https://www.indiatoday.in/business/story/go-first-files-for-bankruptcy-liabilities-rs-11463-crore-total-debt-breakdown-2367883-2023-05-03> (Last visited on December 17, 2023).

<sup>70</sup> *Id.*, at 7; Lutz & Lubin, *supra* note 21, at 7, ¶10; See also Arpan Chaturvedi & Tanvi Mehta, *Go First Gone: Engine Troubles, COVID Bring Down India's Third-Largest Airline*, REUTERS, May 4, 2023, available at <https://www.reuters.com/business/aerospace-defense/go-first-gone-engine-troubles-covid-bring-down-indias-third-largest-airline-2023-05-03/> (Last visited on December 27, 2023); See generally Rachayita Siddharth, *CAPA Report Highlights Indian Carriers' Supply Chain and Engine Challenges*, LOGISTICS INSIDER, December 15, 2023, available at <https://www.logisticsinsider.in/capa-report-highlights-indian-carriers-supply-chain-and-engine-challenges/#:~:text=CAPA%20India%20reveals%20that%20the,%2C%20slightly%20behind%20China's%2081%25> (Last visited on December 18, 2023).

<sup>71</sup> In the matter of Go Airlines (India) Limited, Company Petition No. (IB)- 264(PB)/2023, National Company Law Tribunal (Special Bench, New Delhi) ¶8.

<sup>72</sup> The Insolvency and Bankruptcy Code, 2016, §10; THE ECONOMIC TIMES, *NCLT Admits Go First's Voluntary Insolvency Application*, May 10, 2023, available at <https://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/nclt-grants-go-first-bankruptcy-protection/articleshow/100122465.cms?from=mdr>. (Last visited on December 23, 2023).

<sup>73</sup> In the matter of Go Airlines (India) Limited, Company Petition No. (IB)- 264(PB)/2023, National Company Law Tribunal (Special Bench, New Delhi) ¶48; See also SMBC Aviation Capital Ltd. v. Interim Resolution Professional of Go Airlines (India) Ltd., May 10, 2023, Company Appeal (AT) (Insolvency) No. 593/2023, National Company Law Appellate Tribunal (Principal Bench, New Delhi) ¶41.

<sup>74</sup> The Insolvency and Bankruptcy Code, 2016 §14(1)(a).

<sup>75</sup> The Insolvency and Bankruptcy Code, 2016, §14(1)(d); Maharashtra Industrial Development Corporation v. Santanu T. Ray, Resolution Professional & Anr., May 4, 2022, Comp. App. (AT) (Ins.) 1004/2021, National Company Law Appellate Tribunal (Principal Bench, New Delhi) ¶18; Rajendra K. Bhutta v. MHADA, AIR 2020 SC 3274.

<sup>76</sup> Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs, (2023) 1 SCC 472, ¶36; Tata Consultancy Services Limited v. Vishal Ghisulal Jain, Resolution Professional, Civ. App. No(s). 3045/2020, ¶28; SHRI INJETI SRINIVAS, *Report of the Insolvency Law Committee*, 34-36 (February 20, 2020).

<sup>77</sup> THE INDIAN EXPRESS, *Average Time Taken for IBC Resolution at Three-Year High*, August 31, 2023, available at <https://indianexpress.com/article/business/banking-and-finance/average-time-taken-for-ibc-resolution-at-three-year-high-8916823/> (Last visited on December 13, 2023).

<sup>78</sup> BUSINESS STANDARD, *Go First's Insolvency Flight Leaves Trail of Concerns for Aircraft Lessors*, May 14, 2023, available at [https://www.business-standard.com/companies/news/go-first-s-insolvency-flight-leaves-trail-of-concerns-for-aircraft-lessors-123051400756\\_1.html](https://www.business-standard.com/companies/news/go-first-s-insolvency-flight-leaves-trail-of-concerns-for-aircraft-lessors-123051400756_1.html) (Last visited on December 8, 2023).

<sup>79</sup> THE ECONOMIC TIMES, *The Scrap Heap of Billionaires' Failed Airlines is Poised for Another Entry from India*, December 15, 2023, available at <https://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/the-scrap-heap-of-billionaires-failed-airlines-is-poised-for-another-entry-from->

to the Directorate General of Civil Aviation ('DGCA') before the commencement of the moratorium.<sup>80</sup> They availed of the IDERA mechanism to enable repossession of their aircraft.<sup>81</sup> However, the process could not be completed, and the DGCA did not process these applications since the moratorium had already been imposed.<sup>82</sup> The same was also upheld by the Delhi High Court in its order dated July 5, 2023.<sup>83</sup> Recently, in a major win for the lessors, the Delhi High Court directed the DGCA to facilitate the expeditious deregistration and export of aircraft leased by Go First.<sup>84</sup> Though the court upholds the rigours of the legal framework enabling the deregistration of the aircraft, the present situation warrants revisiting the law and policy that undergirds the extant regime in a bid to strike a balance that caters to the interests of all stakeholders. Thus, the impending question that warrants attention is the suitability of the remedies available to lessors in such a scenario and the policy road ahead.

#### IV. LOOKING BEYOND THE CTC: AN EVALUATION OF ITS PROVISIONS AND ALTERNATIVES BEYOND

This section explains and addresses the dichotomy between the CTC and the IBC, in a scenario that has been complicated by the CTC Bill and a notification by the government. Drawing from the global experience with the adoption of Alternative A, it proposes traversing beyond the CTC to strike a balance between the two extremes presented by the present situation.

##### A. THE IBC OR THE CTC?

India's declaration of Alternative A, with a waiting period of sixty days, is still not in force by virtue of the government's inaction.<sup>85</sup> Had this been in force, lessors would have been able to repossess Go First's fifty-three leased aircraft, comprising its entire fleet, roughly two months after the commencement of the moratorium period.<sup>86</sup> However, the lessors have been unable to repossess their aircraft even after the lapse of over eight months from the commencement of insolvency proceedings.<sup>87</sup>

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india/articleshow/106013631.cms?from=mdr. (Last visited on December 29, 2023); Ridhi Kabra, *Adjudication of the Civil Aviation Disputes – The Indian Story*, Vol. 4 INDIAN J. OF AIR AND SPACE L., 54-58 (2017).

<sup>80</sup> DIRECTOR GENERAL OF CIVIL AVIATION, *Regulation and Guidelines / Public Notices*, available at <https://www.dgca.gov.in/digigov-portal/?dynamicPage=publicNotices/0/0/viewAllService> (Last visited on December 14, 2023) ('DGCA'); THE INDIAN EXPRESS, *Lessors Seek Repossession of 20 Go First Planes; NCLT Reserves Insolvency Plea Order*, May 5, 2023, available at <https://indianexpress.com/article/business/aviation/nclt-go-firsts-plea-insolvency-resolution-8591652/> (Last visited on December 8, 2023) ('Indian Express').

<sup>81</sup> For discussion on the IDERA Mechanism, see Protocol, *supra* note 51, Article XIII.

<sup>82</sup> Aditya Kalra & Aditi Shah, *India Stalls Lessors' Requests to Reclaim Go First Planes Due to Asset Freeze*, REUTERS, May 30, 2023, available at <https://www.reuters.com/business/aerospace-defense/india-aviation-watchdog-puts-jet-repo-request-go-first-lessors-hold-2023-05-30/> (Last visited on December 10, 2023).

<sup>83</sup> *Accipiter Investments Aircraft 2 Ltd. v. Union of India & Anr.*, W.P.(C) 6569/2023 and CM Nos. 25806-25807/2023, at 36-37; See, Richa Banka, *Delhi HC Permits Go First lessors to Inspect, Carry Out Maintenance Work*, HINDUSTAN TIMES, July 5, 2023, available at <https://www.hindustantimes.com/india-news/delhi-high-court-allows-leasing-companies-to-access-go-first-aircraft-for-inspections-and-maintenance-101688554223750.html> (Last visited on December 14, 2023).

<sup>84</sup> *Accipiter Investments Aircraft 2 Ltd. v. Union of India*, 2024 SCC OnLine Del 3125 (India) ('Accipiter').

<sup>85</sup> See Protocol, *supra* note 51, Article XI, Alternative A; Declaration, *supra* note 59, Form 23.

<sup>86</sup> See generally CH-AVIATION, *Lessors Want to Repossess All of Go First's Fleet*, July 27, 2023, available at <https://www.ch-aviation.com/portal/news/130090-lessors-want-to-repossess-all-of-go-firsts-fleet> (Last visited on December 23, 2023).

<sup>87</sup> BUSINESS TODAY, *Aviation Working Group downgrades India Ratings Amid Go First, Lessors Fight Over Possession of Aircraft*, December 7, 2023, available at

In the past, courts have applied the CTC and its Protocol to allow the repossession of aircraft.<sup>88</sup> However, the introduction of the IBC in 2016 sabotaged the interests of the lessors under the CTC. By virtue of being a general law governing insolvency proceedings, it governs the legislative gap, giving rise to various inconsistencies.<sup>89</sup> Moratorium is imposed on the admission of the application for insolvency, during which the lessors cannot sue Go First for the repossession of their aircraft. As a result, they suffer huge economic losses.<sup>90</sup> Evidently, the IBC is not tailored to suit the market realities of the airline industry.

The CTC is aimed at securing the interests of aircraft lessors and ensuring expedient de-registration and export of aircraft to minimise losses and ensure legal certainty.<sup>91</sup> India's ratification of the CTC and enacting the IDERA provisions signifies its recognition of this approach in principle and the resolve to provide legal certainty in this sphere. However, pending its implementation, the IBC eclipses the rights of the lessors in favour of the debtors during the moratorium period and overrides all inconsistent laws by virtue of the non-obstante clause under §238 of the Code.<sup>92</sup>

After several months since Go First's application for insolvency, the Aviation Working Group ('AWG') downgraded India's compliance ranking for the third time in a year.<sup>93</sup> It further warned that "it would have a direct and material impact on future financing and leases to Indian airlines".<sup>94</sup> In a worrying move, the lessors of Spice Jet's aircraft filed for the export of their aircraft under the IDERA provision despite repeated assurances by the airline that it would not file for bankruptcy.<sup>95</sup>

This does not bode well for the aviation industry in general. Fearing the invocation of an unfavourable insolvency framework, lessors may now invoke the IDERA provisions even on the slightest hint of trouble in an airline. This should especially concern India, which is not unaware of frequent economic woes in the airline market. Interestingly, the average monthly lease rent for an Airbus 320/Boeing 737 is USD 350,000.<sup>96</sup> Consequently, the

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<https://www.businesstoday.in/industry/aviation/story/aviation-working-group-downgrades-india-ratings-amid-go-first-lessors-fight-over-possession-of-aircraft-408553-2023-12-07> (Last visited on December 27, 2023).

<sup>88</sup> *Awas 39423 Ireland Ltd. v. Directorate General of Civil Aviation*, WP(C) 871/2015 ('SpiceJet case'); *Corporate Aircraft Funding Co. LLC v. Union of India*, (2013) SCC Online Del 1085.

<sup>89</sup> See The Insolvency and Bankruptcy Code, 2016, Preamble; See also Insolvency and Bankruptcy Board of India, UNDERSTANDING THE IBC KEY JURISPRUDENCE AND PRACTICAL CONSIDERATIONS, 11 (2020).

<sup>90</sup> Kalra & Shah, *supra* note 82.

<sup>91</sup> ICAO, *Cape Town Convention and Protocol*, available at <https://www.icao.int/sustainability/Pages/Capetown-Convention.aspx> (Last Visited on December 10, 2023).

<sup>92</sup> The Insolvency and Bankruptcy Code, 2016, §238; See generally, Kafaltiya A.B., INTERPRETATION OF STATUTES, 150 (2008); *ICICI Bank Ltd. v. ABG Shipyard Ltd.*, 2017 SCC OnLine NCLT 12031, ¶2.2.

<sup>93</sup> BUSINESS TODAY, *Aviation Working Group Downgrades India Ratings Amid Go First, Lessors Fight Over Possession of Aircraft*, December 7, 2023, available at <https://www.businesstoday.in/industry/aviation/story/aviation-working-group-downgrades-india-ratings-amid-go-first-lessors-fight-over-possession-of-aircraft-408553-2023-12-07> (Last visited on January 2, 2024); Manu Balachandran, *What Does the Aviation Working Groups Downgrade of India Mean*, FORBES, September 26, 2023, available at <https://www.forbesindia.com/article/news/what-does-the-aviation-working-groups-downgrade-of-india-mean/88545/1> (Last visited on January 2, 2024).

<sup>94</sup> Aditi Shah & Aditya Kalra, *Aviation Watchdog Issues Warning on India Over Jet Repo Fight*, REUTERS, May 12, 2023, available at <https://www.reuters.com/world/india/aviation-leasing-watchdog-issues-warning-india-over-plane-repossessions-2023-05-12/> (Last visited on January 2, 2024).

<sup>95</sup> TIMES OF INDIA, *Go First Fallout: Lessors File Plea to Repossess 5 SpiceJet Planes This Week*, May 13, 2023, available at <https://timesofindia.indiatimes.com/business/india-business/go-first-fallout-lessors-file-plea-to-repossess-5-spicejet-planes-this-week/articleshow/100203446.cms?from=mdr> (Last visited on January 2, 2024).

<sup>96</sup> TIMES OF INDIA, *Go First Fallout: India Considers Passing Cape Town Convention Bill to Comfort Foreign Aircraft Lessors*, May 14, 2023, available at <https://timesofindia.indiatimes.com/business/india-business/go-first->

combined monthly loss for approximately 50 lessors amounts to USD 17.5 million.<sup>97</sup> To make up for these potential losses and other risks in repossessing aircraft from India, lessors may stipulate stricter lease conditions,<sup>98</sup> while further increasing lease rents.<sup>99</sup> Furthermore, pending the implementation of the Convention, Indian airlines are also losing out on the ten percent discount set by the Organisation for Economic Cooperation and Development (‘OECD’) on processing fees for loans to acquire aircraft.<sup>100</sup>

This would ultimately hurt the Indian economy and consumers in the long run and substantially add to the difficulties for an already struggling airline, possibly even pushing a viable airline towards bankruptcy.

### B. THE GOVERNMENT NOTIFICATION: A HURRIED MOVE

Jolted to action by the aforementioned circumstances, the Ministry of Corporate Affairs (‘MCA’) issued a notification S.O. 4321(E) dated October 3, 2023 (‘Notification’).<sup>101</sup> The Notification exempts transactions, arrangements or agreements under the CTC and its Protocol relating to aircraft, aircraft engines, airframes and helicopters from §14(1) of the IBC.<sup>102</sup> §14(1) of the Code provides for the imposition of a moratorium at the commencement of the insolvency resolution process.<sup>103</sup> After the Notification, lease agreements concerning aircraft will not be bound by the moratorium.

While this notification is seen as a desperate attempt by the government to address the genesis of the issue, it has still not provided the desired respite. It was unclear whether the notification had a prospective or retrospective effect.<sup>104</sup> with Go First pitching for its prospective application so that its insolvency resolution remains unaffected.<sup>105</sup> However, in

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fallout-india-considers-passing-cape-town-convention-bill-to-comfort-foreign-aircraft-lessors/articleshow/100230569.cms?from=mdr (Last visited on January 2, 2024).

<sup>97</sup> *Id.*

<sup>98</sup> Roy Goode, *The Preliminary Draft Convention on International Interests in Mobile Equipment: The Next Stage*, 4 UNIFORM L. REV., 265-67 (1999); Roy Goode, *From Acron to Oak Tree: the Development of the Cape Town Convention and Protocols*, Vol. 17 UNIFORM L. REV., 601 (2012); TIMES OF INDIA, *Go First Fallout: Lessors File Plea to Repossess 5 SpiceJet*, May 13, 2023, available at <https://timesofindia.indiatimes.com/business/india-business/go-first-fallout-lessors-file-plea-to-repossess-5-spicejet-planes-this-week/articleshow/100203446.cms?from=mdr> (Last visited on January 2, 2024).

<sup>99</sup> INDIA TODAY, *Explained: Why Go First Crisis Could Increase Cost of Air Travel in India*, May 16, 2023, available at <https://www.indiatoday.in/business/story/go-first-crisis-insolvency-impact-on-indian-aviation-sector-flight-tickets-2379755-2023-05-16> (Last visited on December 30, 2023); See also BUSINESS LINE, *Airlines Could Save Around \$1.3 Billion as Leasing Costs Decrease: Civil Aviation Ministry*, October 7, 2023, available at <https://www.thehindubusinessline.com/news/ibc-regime-made-air-carriers-pay-12-13-b-extra-lease-rentals-moca/article67389589.ece> (Last visited on January 9, 2024).

<sup>100</sup> Rashi Shiva, *Airspace Safeguarding: The Protection and Enforcement of Interests in Aircraft Objects Bill 2022*, Vol. 3(1) INFRASTRUCTURE & ENERGY L., 9 (2023); See OECD, *Cape Town Convention (CTC) Contracting Parties Qualifying for a CTC Discount*, August 30, 2018, available at <http://www.oecd.org/tad/xcred/ctc.htm> (Last visited on December 21, 2023).

<sup>101</sup> Ministry of Corporate Affairs, Exemption from provisions of §14(1), S.O. 4321(E) (Notified on October 3, 2023) (‘Notification’).

<sup>102</sup> The Insolvency and Bankruptcy Code, 2016, §14(1).

<sup>103</sup> *Id.*

<sup>104</sup> BUSINESS STANDARD, *Delhi HC Tells DGCA to Clarify Stand on MCA Notification on Moratorium*, October 19, 2023, available at [https://www.business-standard.com/india-news/delhi-hc-tells-dgca-to-clarify-stand-on-mca-notification-on-moratorium-123101901157\\_1.html](https://www.business-standard.com/india-news/delhi-hc-tells-dgca-to-clarify-stand-on-mca-notification-on-moratorium-123101901157_1.html) (Last visited on December 20, 2023).

<sup>105</sup> THE ECONOMIC TIMES, *Moratorium Notification Will Apply Prospectively: G First*, November 4, 2023, available at <https://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/moratorium-notification-will-apply-prospectively-go-first/articleshow/104952258.cms?from=mdr> (Last visited on December 27, 2023).

a major relief for aircraft lessors, the Delhi High Court has upheld the retrospective application of the Notification, paving the way for the application of the CTC in India.<sup>106</sup>

Irrespective of the applicability of the notification, the authors opine that it creates more problems than it solves. Before this Notification came into effect, the lessors could not repossess their aircraft pending the moratorium period. While this led them to serious economic troubles, it favoured the viability of the airline operators and hence, furthered national interest. Conversely, after the notification has taken effect, lessors can take immediate repossession of aircraft, which would reduce the assets of the airline and hence, threaten the economic viability of airlines as a going concern.<sup>107</sup> More importantly, it would undeniably push Go First towards liquidation. If the airline fails to complete its CIRP by February 4, 2024, the NCLT will initiate its liquidation proceedings.<sup>108</sup> This would seriously prejudice the resolution of airline insolvencies, the viability of airlines and hence, a healthy aviation market.

Evidently, the government has chosen one extreme for the other, creating a problem for insolvency regulators in a bid to please the lessors. While it is important to consider the interests of lessors, it is not recommended to completely deny the debtor an opportunity to resolve the insolvency. The IBC, being a general legislation, might not cater to the unique challenges of the aviation sector; nevertheless, the overarching aim of insolvency resolution remains unaltered.<sup>109</sup> This requires restructuring, preservation and maximisation of the asset value of the CD.<sup>110</sup> Clearly, the notification does not help in this regard. It is viewed as merely a temporary measure to iron out issues with the insolvency of Go First and a prelude to the introduction of the CTC Bill. However, contrary to popular opinion, even the CTC Bill is not an end for all problems.

### C. CTC BILL: THE PANACEA TO ALL PROBLEMS?

Undoubtedly, India needs an insolvency regime that specifically caters to the needs of its airline industry. However, it is naïve to expect the CTC Bill to solve all problems of aircraft repossession in India.

Like many other countries, India has declared Alternative A under the Convention,<sup>111</sup> which stipulates that after the end of the waiting period, the aircraft will have to be mandatorily deregistered and exported without any lengthy court procedures.<sup>112</sup> By providing for a fixed time for deregistration, generally sixty days, this alternative adopts a lessor-friendly approach.<sup>113</sup> However, before evaluating its suitability for India, it is pertinent to evaluate the application of Alternative A in other jurisdictions.

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<sup>106</sup> Accipiter, *supra* note 84.

<sup>107</sup> See DGCA, *supra* note 80.

<sup>108</sup> BUSINESS TODAY, *NCLT Extends Go First's Moratorium Period till Feb 4, Demands Resolution Plan Within 90 Days*, November 2023, <https://www.businesstoday.in/industry/aviation/story/nclt-extends-go-firsts-moratorium-period-till-feb-4-demands-resolution-plan-within-90-days-406839-2023-11-23> (Last visited on December 16, 2023).

<sup>109</sup> Binani Industries Ltd v. Bank of Baroda & Another [CA (AT) (Ins) 82/2018 & Others], ¶17; Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta, 2021 SCC OnLine SC 194, ¶135, at 115.

<sup>110</sup> *Id.*

<sup>111</sup> Protocol, *supra* note 51.

<sup>112</sup> Protocol, *supra* note 51.

<sup>113</sup> Mark J. Sundahl, *The Cape Town Approach: A New Method of Making International Law*, Vol. 44 COLUMBIA J. OF TRANSNATIONAL L., 353 (2006).

## 1. ALTERNATIVE A: A GLOBAL PERSPECTIVE

Alternative A has been adopted by a majority of the jurisdictions that have ratified the CTC.<sup>114</sup> This widespread ratification of the provision is seen as a testament to its success. Even countries like Dubai and Singapore, which are the models for the Indian aviation industry, have adopted alternative A.<sup>115</sup> The waiting period is thirty days in Singapore,<sup>116</sup> while it is sixty days in UAE.<sup>117</sup> China, with only a third of its aircraft financed through leasing, has also adopted a sixty-day waiting period.<sup>118</sup>

Australia has also adopted Alternative A.<sup>119</sup> Interestingly, it has been the centre of recent developments.<sup>120</sup> The Australian Court, in the case of *Virgin Australia*, recognised the applicability of the provisions of the CTC.<sup>121</sup> The Federal Court, in the *Wells Fargo* judgment, gave the first authoritative ruling on Article XI(2) of the Protocol, observing that the CTC is not a “reworking of generally accepted principles of insolvency law”.<sup>122</sup> The obligation to “give possession” does not obligate the lessee to bear the costs of delivering the aircraft objects to the lessors and merely extends to removing impediments, including a stay under the local insolvency law.<sup>123</sup> Even in other common law jurisdictions that have adopted Alternative A, such as Canada, courts have recognised the primacy of the CTC provisions over the general principles of domestic insolvency laws.<sup>124</sup>

Notably, Alternative A has been modelled on §1110 of the US Bankruptcy Code, wherein the CD must either cure all defaults and agree to perform all future obligations or give possession of the aircraft to the creditor within the waiting period.<sup>125</sup> This waiting period may be extended by the creditor for a resumption of payments after the court’s approval

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<sup>114</sup> See generally, Jeffrey Wool & Andrew Littlejohns, *Cape Town Treaty in the European Context: The Case for Alternative A, Article XI of the Aircraft Protocol*, AIRFINANCE ANNUAL, 1 (2019).

<sup>115</sup> Lohmann et al., *From hub to tourist destination – An Explorative Study of Singapore and Dubai's Aviation-Based Transformation*, Vol. 15(5) J. OF AIR TRANS. MANAGEMENT (2009).

<sup>116</sup> UNIDROIT, *Declarations Lodged by the Republic of Singapore Under the Aircraft Protocol*, available at <https://www.unidroit.org/instruments/security-interests/aircraft-protocol/states-parties/d-singapore/> (Last visited on January 5, 2024).

<sup>117</sup> Kristin van Zwieten, *The Insolvency Provisions of the Cape Town Convention and Protocols: Historical and Economic Perspectives*, Vol. 1 CAPE TOWN CONVENTION J., 74 (2015).

<sup>118</sup> For a brief into China’s aircraft leasing industry, see PRICE WATERHOUSE COOPERS, *Leveraging China’s Strength in the Aviation Financing and Leasing Industry*, September 2023, available at <https://www.pwccn.com/en/industries/aircraft-leasing.html> (Last visited on January 10, 2024).

<sup>119</sup> UNIDROIT, *Convention on International Interests in Mobile Equipment (Cape Town, 2001) – States Parties*, available at <https://www.unidroit.org/instruments/security-interests/cape-town-convention/states-parties/> (Last visited on January 6, 2023).

<sup>120</sup> NORTON ROSE FULBRIGHT, *High Court of Australia Decision in the Virgin Australia Administration: A World First Under Alternative A of the Cape Town Convention and Aircraft Protocol*, available at <https://www.nortonrosefulbright.com/en/knowledge/publications/914f32ee/australia> (Last visited on January 5, 2024).

<sup>121</sup> Strawbridge, in re *Virgin Australia Holdings Ltd. (administrators appointed)*, (No 4) (2020) FCA 726 (Federal Court of Australia); Noel Mcoy, *High Court of Australia Decision in the Virgin Australia Administration: A World First Under Alternative A of the Cape Town Convention and Aircraft Protocol*, available at <https://www.nortonrosefulbright.com/en/knowledge/publications/914f32ee/australia#1> (Last visited on December 22, 2023).

<sup>122</sup> *Wells Fargo Trust Company, National Association (trustee) v. VB Leaseco Pty Ltd (Administrators Appointed)*, (2020) FCA 1269.

<sup>123</sup> *Id.*

<sup>124</sup> David B Kierans, *First Court Decision in Canada implementing the Insolvency provision of Cape Town Convention*, GOWLING WLG, available at <https://gowlingwlg.com/en/insights/resources/articles/2019/insolvency-provisions-of-the-cape-town-convention/> (Last visited on December 23, 2023).

<sup>125</sup> The United States Code: Title 11, 1978, §1110 (U.S.A.).

of a stipulation under §1110(b).<sup>126</sup> As experience suggests, the provision has been of great benefit.<sup>127</sup> By securing lessors' repossession even after the commencement of insolvency proceedings, it prevents them from de-registering the aircraft in anticipation of bankruptcy. This has reduced the risk involved in financing aircraft and resultantly, the cost of aircraft leases.<sup>128</sup>

Despite this, US insolvency law allows airlines to bypass §1110 and file for a reorganisation bankruptcy under Chapter Eleven.<sup>129</sup> Unlike §1110, §365<sup>130</sup> under Chapter Eleven does not obligate the CD to cure all defects or enter into an agreement with the lessor on the expiry of the waiting period.<sup>131</sup> Furthering the interest of debtors, it allows the debtor to choose between assuming or rejecting certain executory contracts and unexpired leases.<sup>132</sup> Therefore, the possibility of prioritising the interest of debtors and the restructuring of the airline over the repossession of the aircraft has not been foreclosed, even in the US.

Contrarily, the UK ratified the CTC in 2015, adopting Alternative A.<sup>133</sup> This is now a part of its domestic insolvency regime.<sup>134</sup> The Corporate Insolvency and Governance Act ('CIGA') was introduced in 2020, which puts a widespread ban on *ipso facto* clauses.<sup>135</sup> These clauses allow the termination of the contract on the commencement of insolvency proceedings, thus prejudicing the status of the company as a going concern.<sup>136</sup> Despite this, an exception has been carved out for aircraft leases to ensure compliance with the sixty-day waiting period under Alternative A.<sup>137</sup>

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<sup>126</sup> Alexander Hewitt, *Should the UK Adopt Cape Town's Alternative A Insolvency Regime? Lessons from the US and Canada*, DENTONS, December 2014, available at <https://www.dentons.com/en/insights/articles/2014/december/11/should-the-uk-adopt-cape-towns-alternative-a-insolvency-regime> (Last visited on December 22, 2023); Zwieten, *supra* note 117, at 50.

<sup>127</sup> *Id.*; Franklin H. Top III et al., *Bankruptcy and Aircraft Finance*, April 2020, available at [https://www.chapman.com/media/publication/1011\\_Chapman\\_Bankruptcy\\_and\\_Aircraft\\_Finance\\_0420.pdf](https://www.chapman.com/media/publication/1011_Chapman_Bankruptcy_and_Aircraft_Finance_0420.pdf) (Last visited on December 24, 2023).

<sup>128</sup> Jason Kilborn, *Thou Canst Not Fly High with Borrowed Wings: Airline Finance and Bankruptcy Code Section 1110*, Vol. 8 GEO. MASON L. REV., 63-64 (1999); Alexander Hewitt, *Helicopters, UK Cape Town Ratification and English Insolvency Law – Best Leave Well Alone?*, DENTONS, February 16, 2015, available at <https://www.dentons.com/en/insights/articles/2015/february/16/helicopters-uk-cape-town-ratification-and-english-insolvency-law-best-leave-well-alone> (Last visited on December 22, 2023); Gray, Gerber & Wool, *The Cape Town Convention Aircraft Protocol's Substantive Insolvency Regime: A Case Study of Alternative A*, Vol. 5 CAPE TOWN CONVENTION J., 123-30 (2016).

<sup>129</sup> The United States Code: Title 11, 1978, Chapter 11 (U.S.A.); UNITED STATES COURTS, *Chapter 11 - Bankruptcy Basics*, available at <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> (Last visited on January 7, 2024).

<sup>130</sup> The United States Code, 1978, Title 11 §365(e) (U.S.A.).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Kenneth Gray, *CTC in Europe: Assessment of Ratifications to Date and Implications of Brexit on the Ratification by the UK*, Vol. 5(1) CAPE TOWN CONVENTION J., 12-13 (2016).

<sup>134</sup> John Pearson & Gavin Hill, *CIGA and Cape Town Convention: insolvency and aviation*, LEXOLOGY, NOVEMBER 18, 2020, available at <https://www.lexology.com/commentary/aviation/united-kingdom/vedder-price-pc/ciga-and-cape-town-convention-insolvency-and-aviation> (Last visited on January 2, 2024).

<sup>135</sup> The Corporate Insolvency and Governance Act, 2020, §233B (U.K.); *See also* Belmont Park Investments Pty Ltd & Ors. v. BNY Corporate Trustee Services Ltd & Anr., [2011] 3 W.L.R. 521.

<sup>136</sup> Akaant Kumar Mittal & Ritik Khatri, *Validity of Ipso Facto Clauses in Indian Insolvency Regime*, SCC ONLINE, April 5, 2021, available at [https://www.sconline.com/blog/post/2021/04/05/validity-of-ipso-facto-clauses-in-indian-insolvency-regime/#\\_ftn6](https://www.sconline.com/blog/post/2021/04/05/validity-of-ipso-facto-clauses-in-indian-insolvency-regime/#_ftn6) (Last visited on January 7, 2024).

<sup>137</sup> Ketan Mukhija & Karishma Singh, *India: 'Ipso Facto' Termination in India: Valid or Invalid*, MONDAQ, May 14, 2021, available at <https://www.mondaq.com/india/insolvencybankruptcy/1068156/ipso-facto-termination-in-india-valid-or-invalid> (Last visited on January 6, 2024).

Interestingly however, the United Nations Commission on International Trade Law and the World Bank recommend the conditional invalidation of such *ipso facto* clauses and the recognition of the primacy of ‘going concern’ in the insolvency resolution process.<sup>138</sup> Even countries such as the US, Australia,<sup>139</sup> France,<sup>140</sup> Canada,<sup>141</sup> Singapore<sup>142</sup> consider these clauses invalid.<sup>143</sup> Though the IBC remains silent on the issue,<sup>144</sup> their invalidation has been proposed.<sup>145</sup> This is because *ipso facto* clauses prejudice the maintenance of the CD as a going concern during the CIRP, endangering the very objective of the IBC.<sup>146</sup>

Though these clauses are different from Alternative A of the CTC, both involve similar concerns. While *ipso facto* clauses allow the termination of agreements on the commencement of insolvency proceedings, Alternative A allows the repossession of aircraft on the expiry of merely two months. It is uncertain how the status of the airline as a ‘going concern’ would be maintained after the repossession of most of its aircraft.

## 2. NATIONAL INTEREST V. LESSORS’ INTEREST: THE BALANCE

It is clear that giving effect to Alternative A means that on the lapse of the waiting period, lessors could terminate their leases and export aircraft objects regardless of the stage of insolvency proceedings, which would predictably be far from their conclusion.<sup>147</sup> Notably, resolution of insolvency in India takes more time than in countries like the US, UK, Australia, and Singapore, which have adopted Alternative A of the CTC.<sup>148</sup> Further, India even lags behind in the Ease of Resolving Insolvency Index, being ranked at a low of one hundred and eight out of one hundred and ninety countries.<sup>149</sup>

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<sup>138</sup> For discussion on the UNCITRAL recommendation, see The United Nations Commission on International Trade Law [UNCITRAL], LEGISLATIVE GUIDE ON INSOLVENCY LAW, ¶118, (United Nations Publications, 2005); For discussion on the World Bank recommendation, see THE WORLD BANK, *Principles for Effective Insolvency and Creditor/Debtor Regimes*, April 22, 2021, Report No. 158476, 25, available at: <https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf> (Last visited on January 10, 2024).

<sup>139</sup> Corporations Amendment (Stay on Enforcing Certain Rights) Regulations, 2018, Schedule 1, §5.3A.50 (Australia).

<sup>140</sup> BAKER MCKENZIE, *The “Ipso Facto” Prohibition In The Corporations Act Applicable to Corporate Insolvency*, November 2022, available at [https://www.bakermckenzie.com/en//media/files/insight/publications/2022/11/flyer--ipso-facto--nov-2022.pdf?sc\\_lang=en&hash=EC9C96D54A7B5F6235C8521D775BEDE0](https://www.bakermckenzie.com/en//media/files/insight/publications/2022/11/flyer--ipso-facto--nov-2022.pdf?sc_lang=en&hash=EC9C96D54A7B5F6235C8521D775BEDE0) (Last visited on January 6, 2024); Noel McCoy & Laura Johns, *Ipso Facto Law Reform*, NORTON ROSE FULLBRIGHT, July 2018, available at <https://www.nortonrosefulbright.com/en-fr/knowledge/publications/6702e782/ipso-facto-law-reform#section4> (Last visited on January 8, 2024).

<sup>141</sup> Chandos Construction Ltd v. Deloitte Restructuring Inc., 2020 SCC 25; See Adrienne Ho, *The Treatment of Ipso Facto Clauses in Canada*, Vol. 61(1) MCGILL L. J. 139 (2015).; Bankruptcy & Insolvency Act, 1985, §§65.1102, 66.34103, 84.2104 (Canada).

<sup>142</sup> Insolvency, Restructuring and Dissolution Act, 2018, §440 (Singapore).

<sup>143</sup> See also MONDAQ, *India: ‘Ipso Facto’ Termination in India: Valid or Invalid?*, May 14, 2021, available at <https://www.mondaq.com/india/insolvencybankruptcy/1068156/ipso-facto-termination-in-india-valid-or-invalid> (Last visited on January 6, 2024).

<sup>144</sup> Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta, 2021 SCC OnLine SC 194, ¶135.

<sup>145</sup> DR. J. J. IRANI, *Report of the Expert Committee on Company Law*, 15-16 (May 2005).

<sup>146</sup> Hanley, *supra* note 48.

<sup>147</sup> Indian Express, *supra* note 80.

<sup>148</sup> WORLD BANK, *Doing Business 2019: Training for Reform*, October 31, 2018, available at: [https://archive.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report\\_web-version.pdf](https://archive.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf) (Last visited January 25, 2024).

<sup>149</sup> WORLD BANK, *Doing Business 2020*, October 24, 2019, available at: <https://openknowledge.worldbank.org/server/api/core/bitstreams/75ea67f9-4bcb-5766-ada6-6963a992d64c/content>. (Last visited January 25, 2024).



This would be to the detriment of lessors' interest, disabling them from repossessing their aircraft until the CIRP ends. Considering that leased aircraft constitute a large part of the assets of the CD,<sup>150</sup> this measure would also prejudicially affect the CIRP since the asset structure of the airline might change substantially after the waiting period. Hence, by preserving the value of the assets of the CD, the imposition of a moratorium essentially achieves the primary objective of the IBC, i.e., the resolution of the insolvency of the CD in a time-bound manner.<sup>151</sup>

However, it must be noted that merely ensuring that the aircraft are not de-registered will not ensure the revival of the airline. Nevertheless, chances of the same increase greatly by virtue of the buffer of the CIRP, before which liquidation of assets is not permitted.<sup>152</sup> This is exemplified by the case of the revival of Japan Airlines ('JAL'), which had become bankrupt in Japan's duopolistic market. The insolvency proceedings initiated therein provided space to reconfigure the market strategy in terms of served routes and their yields, due to which JAL was able to stay in business. This increased the yield of JAL by 16.3 percent on such routes post-bankruptcy and had a ripple effect on the market by providing newer routes for other airlines to service.

Furthermore, it is critical to resolve the insolvency of Go First, the third-largest airline in India.<sup>153</sup> Its liquidation will make an already oligopolistic airline market more concentrated in terms of market share, giving rise to potential competition concerns and consumer harm.<sup>154</sup> Conversely, an unending imposition of a moratorium will unduly burden the lessors of Go First, who would incur losses and suffer opportunity costs. Moreover, as noted above, the voluntary insolvency application by Go First may set a bad precedent as an easy method to prevent the deregistration of aircraft.<sup>155</sup> This could have a cascading effect on the whole industry.<sup>156</sup>

Here, it is pertinent to note that the notification by the government is being posited as India's adoption of the CTC.<sup>157</sup> However, this is far from the truth. Alternative A under the CTC provides a two-month buffer to authorities to allow the resolution of insolvency

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<sup>150</sup> See Protocol, *supra* note 51, Article XI, Alternative A; Declaration, *supra* note 59.

<sup>151</sup> Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India, (2019) 4 SCC 17.

<sup>152</sup> BUSINESS TODAY, *Jet Airways' Renewed Hope: Is the Bankrupt Airline Ready to Fly Again?*, October 10, 2023, available at <https://www.businesstoday.in/interactive/photo-essay/jet-airways-renewed-hope-is-the-bankrupt-airline-ready-to-fly-again-113-10-10-2023#:~:text=But%20alas%2C%20that%20has%20seldom%20happened%20in,the%20industry%20simply%20doesn't%20allow%20for%20it.> (Last visited on January 2, 2024).

<sup>153</sup> Balachandran, *supra* note 13; THE HINDU BUSINESSLINE, *Go First Insolvency: Making Promoter's Bid Count*, May 21, 2023, available at <https://www.thehindubusinessline.com/business-laws/go-first-insolvency-making-promoters-bid-count/article66876873.ece> (Last visited on December 27, 2023).

<sup>154</sup> The Week, *supra* note 17; For discussion on the oligopolistic nature of the Indian aviation market, see *supra* note 14; See also Nathan Economic Consulting India, *Research Study of the Civil Aviation Sector in India*, January 24, 2012, available at [https://iica.nic.in/images/sclmr\\_research/Civil%20Aviation%20Sector.pdf](https://iica.nic.in/images/sclmr_research/Civil%20Aviation%20Sector.pdf) (Last visited on January 8, 2024).

<sup>155</sup> Jinit Parmar, *Will Go First's Voluntary Insolvency Set a Precedent for Future IBC Cases? Here's What Experts Say*, MONEYCONTROL, May 11, 2023, available at <https://www.moneycontrol.com/news/business/will-go-firsts-voluntary-insolvency-set-a-precedent-for-future-ibc-cases-heres-what-experts-say-10568131.html> (Last visited on January 5, 2024).

<sup>156</sup> See *supra* Part IV.A on "The IBC or the CTC?".

<sup>157</sup> Andrew Curran, *India aligns its Repossession Laws with Cape Town Convention*, CH-AVIATION, October 20, 2023, available at <https://www.ch-aviation.com/news/133173-india-aligns-its-repossession-laws-with-cape-town-convention> (Last visited on January 10, 2024); Deepanshi Gupta and Rajat K. Mittal, *Aligning IBC with Cape Town Convention: A Relief for Aircraft Lessors?*, FINANCIAL EXPRESS, October 14, 2023, available at <https://www.financialexpress.com/business/airlines-aviation-aligning-ibc-with-cape-town-convention-a-relief-for-aircraft-lessors-327s1002/> (Last visited on January 10, 2024).

before repossession. On the other hand, the notification by the government completely exempts lessors from the moratorium,<sup>158</sup> thus disregarding insolvency resolution in favour of the interest of lessors.

In this dichotomy, ultimately, the civil aviation sector is set to suffer.<sup>159</sup> The impending question boils down to striking a balance between the interests of international lessors and that of domestic insolvency resolution. The creditor-friendly approach of Alternative A seems the most suitable.<sup>160</sup> However, as highlighted above, it has its own set of problems.<sup>161</sup> Furthermore, neither has its suitability been tested, nor do its prospects look promising, considering the situation at hand. The other alternative presented by the CTC is Alternative B.<sup>162</sup> It requires the creditor to apply to the court for repossession after the end of the waiting period without any fixed timelines, thus watering down the creditor's rights to a great measure.<sup>163</sup> Subjecting the repossession of aircraft to court approval would frustrate the object of the provision by entangling lessors in lengthy court proceedings in a foreign jurisdiction. Moreover, it gives wide discretion to the judiciary and other national authorities to resolve the insolvency on a case-to-case basis, diluting the provisions of the CTC in effect.

Neither of these approaches is suitable for the vagaries of the Indian aviation industry. Considering the socio-economic dimensions of the aviation sector, there is a need to find a balance between the two extremes. Notably, even the US has relaxed the rigours of Alternative A by allowing airlines to bypass §110,<sup>164</sup> which is similar to Alternative A. Such that airlines can focus on restructuring rather than the repossession of aircraft by the lessors.<sup>165</sup> The question now boils down to striking a balance that is 'just right' for the Indian aviation market.

#### D. FINDING ALTERNATIVE C: LOOKING BEYOND CTC

It is pertinent to look at the Luxembourg Protocol to the CTC, a counterpart of the Aircraft Protocol, regulating railway-rolling stock.<sup>166</sup> Similar to the Aircraft Protocol, it seeks to provide a stable legal framework for creditors and lessors of railway-rolling stock and entered into force on March 8, 2024.<sup>167</sup> However, the Protocol eludes applicability to the Indian

<sup>158</sup> Ministry of Corporate Affairs, Exemption from provisions of §14(1), S.O. 4321(E) (Notified on October 3, 2023) ('Notification').

<sup>159</sup> PRICE WATERHOUSE COOPERS, *Aircraft Leasing in India: Ready to Take Off*, February 12, 2021, available at <https://www.pwc.in/assets/pdfs/research-insights/2021/aircraft-leasing-in-india-ready-to-take-off.pdf> (Last visited on January 3, 2024); CENTRE FOR AVIATION, *Attracting Low Cost Airline Funding: Leasing is Pleasing*, February 12, 2019, available at <https://centreforaviation.com/analysis/reports/attracting-low-cost-airline-funding-leasing-is-pleasing-458750> (Last visited on January 3, 2024).

<sup>160</sup> Jun Hyon 'Henry' Nahm, *Cape Town Convention in US Bankruptcy Courts: How Foreign Creditors May Seek Greater Protection in US Bankruptcy Courts through Enforcement of Article XXX (4) of the Aircraft Protocol*, Vol. 8(1) CAPE TOWN CONVENTION J., 47, 55-56 (2022).

<sup>161</sup> Didenko, *supra* note 50.

<sup>162</sup> Protocol, *supra* note 51, Article XI, Alternative A.

<sup>163</sup> Kristin van Zwieten, *The Insolvency Provisions of the Cape Town Convention and Protocols: Historical and Economic Perspectives*, Vol. 1(1) CAPE TOWN CONVENTION J., 53, 67 (2012).

<sup>164</sup> Hewitt, *supra* note 126.

<sup>165</sup> Kilborn, *supra* note 128.

<sup>166</sup> UNIDROIT, *Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock*, February 23, 2007, available at <https://www.unidroit.org/instruments/security-interests/rail-protocol/> (Last visited on January 4, 2024). ('Luxembourg Protocol').

<sup>167</sup> WATSON FARLEY & WILLIAMS, *The Luxembourg Protocol – What Do You Need To Know?*, November 21, 2023, available at <https://www.wfw.com/articles/the-luxembourg-protocol-what-do-you-need-to-know/> (Last visited on December 27, 2023).

aviation industry since it applies only to the railway-rolling stock, and in any case, India has not yet ratified its Protocol.<sup>168</sup> Nevertheless, the remedies for insolvency remain largely the same as the Aircraft Protocol, apart from the provision of an additional Alternative C under Article IX therein.<sup>169</sup> This allows us to borrow jurisprudence while recommending solutions to our conundrum.

Alternative C allows the debtor to apply to the court to suspend its obligations and the deregistration of the aircraft for a specified time, which is decided by the court on a case-to-case basis.<sup>170</sup> Further, the creditor is entitled to receive its dues from the debtor during such suspension period and enforce other interim measures in court.<sup>171</sup> This measure ensures that the debtor's interest in the assets is preserved while assuring the creditor of its minimum dues, striking a fair balance. Case-based determination by the courts under Alternative C also overcomes the rigid approach taken by Alternative A, which provides for instant repossession at the end of the same stipulated waiting period in all cases of insolvency, thus prejudicing debtors' interests.<sup>172</sup>

However, given the involvement of court proceedings, which may, admittedly, be lengthy, this approach also risks causing heavy losses to creditors pending litigation. Time is of the essence in the enforcement of such remedies and is critical for the successful realisation of the objectives of the IBC.<sup>173</sup> The remedies for the lessors should not be delayed indefinitely. Consequently, courts must be provided a fixed time to adjudicate on such disputes. We propose a limit of three hundred and thirty days, corresponding to the statutory limit for completion of the insolvency resolution process under §12 of the IBC.<sup>174</sup> This would largely align with the timeline of the court proceedings with the parallel insolvency resolution proceedings and pave the way for faster realisation of insolvency remedies than under the extant regime. This approach could prove to be a feasible one for India since it provides scope to balance national interest by not relegating the revival of airlines and, at the same time, does not burden the lessors by promising certainty in the repossession of aircraft. This could have adverse effects on the overall health of the airline industry.<sup>175</sup>

Admittedly, Alternative C has not been provided under the Aircraft Protocol, which mainly aims to reduce the risk of creditors in transactions.<sup>176</sup> However, this is not a reason enough to discard the possibility of making modifications to Alternatives A and B before their adoption in the Indian scenario. Given the aforesaid advantages of adopting a hybrid approach, the government must adopt a modified form of Alternative A, adding suitable provisions in the CTC Bill that is yet to be adopted. In sum, the government's policy intervention would be consequential for the whole aviation industry. However, the urgent need to fill the legislative void does not warrant hurried decision-making.

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<sup>168</sup> Luxembourg Protocol, *supra* note 166, Article IX.

<sup>169</sup> Luxembourg Protocol, *supra* note 166, Article IX, Alternative C.

<sup>170</sup> See generally Howard Rosen, *The Luxembourg Rail Protocol: A Major Advance for the Railway Industry*, LEGALEASE, 2007, available at <https://www.legalease.ch/wp-content/uploads/documents/R0152.pdf> (Last visited on December 28, 2023).

<sup>171</sup> Wool & Littlejohns, *supra* note 114, at 70.

<sup>172</sup> Gerber & Walton, *supra* note 52.

<sup>173</sup> Dr T. K. Viswanathan, *The Report of the Bankruptcy Law Reforms Committee, Volume I: Rationale and Design*, 27 (November 2015); *Innoventive Industries v. ICICI Bank*, (2018) 1 SCC 407, at 17; *Arcelor Mittal (India) (Pvt.) Ltd. v. Satish Kumar Gupta*, (2019) 2 SCC 1.

<sup>174</sup> The Insolvency and Bankruptcy Code, 2016, §12.

<sup>175</sup> For an analysis of the potential adverse effects on the aviation industry in general, see *supra* Part IV.A on "The IBC or the CTC?"

<sup>176</sup> Protocol, *supra* note 51, Art. IX, Alternative A.

The authors recommend a careful analysis of the policy alternatives, learning from international experiences and looking beyond the CTC for innovative policies that suit India before taking any action. At the same time, with the evolution of the aviation industry, the government must inch towards ensuring shorter and more certain waiting periods, reducing the time taken to resolve airline insolvencies and, hence, the need for judicial intervention. Further, the non-policy front deserves equal attention to streamline the process of deregistration and repossession process and reduce regulatory roadblocks. Thus, a thoughtful and practical approach is the need of the hour to protect the interests of all stakeholders.

## V. CONCLUSION

The Indian aviation industry has been plagued by systemic failures in the past and is not unknown to ups and downs.<sup>177</sup> The recent insolvency of Go First is just another manifestation of the same. This case has brought to the forefront a lingering conflict between the IBC and the CTC, between national interest and the lessors' interest. The legislative gap concerning the repossession of aircraft upon insolvency proceedings not only affects the lessors adversely but also has an overall impact on the health of the aviation market. The government's attempt to salvage the situation through its notification, though temporary, may create more problems than it solves.

In this scenario, considering the needs of the Indian aviation industry and the available policy alternatives, the government must be flexible in its approach. To strike a balance between national interest and lessors' interest, a modified version of Alternative C of the Luxembourg Protocol promises a suitable policy alternative for India.<sup>178</sup> At the same time, it is critical to remember that the existence of the Protocols itself does not guarantee their efficacy. A resilient legislative framework must be matched by an adaptive institutional framework. This is especially needed to cater to expedient deregistration of the aircraft upon the completion of the waiting period to avoid any delay due to the roadblocks posed by the Regulator. Such delays in execution would vitiate the very purpose of time-bound remedies in case of insolvency. Clearly, formulating a robust framework for expedient deregistration and repossession of aircraft is a tough balancing act, with numerous other considerations involved. This should provide further impetus for the government to actively work towards this cause and set on a path toward making India a global aviation hub.

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<sup>177</sup> Srinath Sridharan, *Why India's Aviation Sector has Aborted Take-offs for Decades Now*, DECCAN HERALD, May 9, 2024, available at <https://www.deccanherald.com/opinion/why-indias-aviation-sector-has-aborted-take-offs-for-decades-now-3015079> (Last visited on June 5, 2024).

<sup>178</sup> Luxembourg Protocol, *supra* note 166.