Central University of Karnataka
Journal of Legal Studies (CUKJLS)
Volume I (Summer Issue - 2)
January to June 2026

ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

The Wrong Clock: Regulatory Licence Decay and the Failure of the 'Going Concern' Standard in Indian Airline Insolvency

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DOI Link: https://doi.org/10.5281/zenodo.23276588

Abstract

Liquidation has been the outcome of every single Indian airline crisis — Kingfisher, Jet Airways, Go First — regardless of the circumstances surrounding their admission to proceedings, including the state of the airline's finances and assets. The root of this issue is a conceptual error that is incorporated in the 'going concern' standard applicable to resolutions under the Insolvency and Bankruptcy Code, 2016, which evaluates the value of both business and assets, while for airlines the going concern value comprises primarily regulatory licenses — the air operator's certificate, crew currency and slot licenses — which deteriorate based on regulatory timelines, which the Corporate Insolvency Resolution Process is not able to monitor or prevent. The restriction on the actions of the Committee of Creditors permits only financial recovery, and the moratorium restricts civil enforcement rather than regulation. Hence, no party involved in the resolution proceedings has the capacity to maintain the value of the licenses once proceedings have started. A doctrinal approach is used to illustrate how this occurred within all three airline insolvencies, using comparative law with the US and UK to reveal that this process runs consistently through these three different cases regardless of the state of each airline's operational fleet, the creditors involved or how the crisis arose. In addition, the limitations of using this approach are outlined: moral hazard, regulatory capability, and encroachment into air safety jurisdictions must be considered before a single, limited solution is presented, which involves a regulatory standstill protocol and an administrative order to prevent insolvency, charged as part of the process. This paper focuses on a single structural limitation in the going concern standard: it is not based on the actions of individual creditors or regulators and instead serves as an important structural factor that leads to similar outcomes in this case.

Keywords:

Airline insolvency; Insolvency and Bankruptcy Code 2016; Going Concern; Regulatory License Decay; Corporate Insolvency Resolution Process

Paper Code- CUKJLS-2026-109
Submitted- July 25, 2026; Accepted- September 27, 2026; Published- October 10, 2026

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

Introduction

Three Indian airlines have entered liquidation since 2012, and each has terminated its operations. All three companies have different solutions. Kingfisher went bankrupt solely on a balance sheet basis when there was no insolvency law in India (Directorate General of Civil Aviation [DGCA], 2012a). Jet Airways maintained a robust aircraft order book when it initiated the Corporate Insolvency Resolution Process (CIRP) (In re Jet Airways (India) Ltd., 2019). There was a buyer ready to finance the carrier. Finally, Go First initiated CIRP due to the grounded aircraft and engine issues. The identical legal principles governed all three airline cases; either the applied remedy was erroneous, or a systemic defect existed across all matters (Go Airlines (India) Ltd. v. Union of India, 2023).

Thus, the paper sought to identify a doctrinal inconsistency. In this regard, the paper sought to explicate the concept of 'going-concern', which Resolution Plans developed under the IBC 2016 should maintain, and the manner of such maintenance. In particular, even though both the IBC 2016, Section 30(2) and the resolution process regulations require CoC to formulate a proposal that enables the survival of the corporate debtor as a going-concern, neither the law nor the regulations stipulate what precisely constitutes the going-concern maintenance beyond the meaning that the ongoing relationships, contracts, and assets of the firm are not disrupted by the bankruptcy proceedings (Insolvency and Bankruptcy Code [IBC], 2016, § 30(2); Insolvency and Bankruptcy Board of India [IBBI], 2016, reg. 38). The moratorium under section 14 is built for exactly this model: it freezes enforcement action so that a static set of assets can be preserved intact until a resolution plan is approved (IBC, 2016, § 14).

The civil aviation industry exemplifies a paradigm in which the going-concern value of an airline is not held in generic assets that are subject to depreciation or diminution in value over time. Rather, it is held in regulatory licenses and certificates, which have limited validity and require ongoing investment of

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

resources to maintain or renew (DGCA, 2012b; DGCA, n.d.-a). While the commencement of the corporate insolvency resolution process effectively enforces a statutory moratorium – freezing creditors' rights to initiate or pursue legal actions against the company, it fails to preserve the intrinsic value of critical operational assets. Specifically, the process does not safeguard the continuity of an airline's Air Operator Certificate, essential certification, airport slot allocations or space clearance. Additionally, it provides no exemption from the stringent, ongoing regulatory requirements necessary to continuously demonstrate operational fitness. This is a different claim from the one that has preoccupied debates on Indian airline insolvency in recent months – the conflict between the section 14 moratorium and aircraft lessors' repossession rights under the Cape Town Convention (Velaga & Gupta, 2024). This paper focuses, that even if this dispute over ownership were entirely resolved in the airline's favor, the regulatory-license decay would independently destroy going-concern value by targeting assets i.e. certifications and entitlements which are not 'assets of the corporate debtor' within the meaning the IBC and therefore not protected by the moratorium and not subject to any protection by virtue of either the moratorium or the dispute over repossession (IBC, 2016, § 18). The Kingfisher case antedates both the IBC and any such dispute in India, and illustrates the general principle that this method of value destruction is entirely independent of the conflict between the moratorium and repossession rights, and is a consequence of aviation regulation that the IBC did not itself address.

This paper employs a doctrinal methodology, with recourse to comparisons of practices in US Chapter 11 cases specific to aircraft financing and to the regulatory framework derived from the Directorate General of Civil Aviation ("DGCA"). The argument presented in this study is advanced in the context of a broader comparative question. Special regulation for airlines in insolvency proceedings is not unprecedented in the jurisprudence of business aircraft financing, where the US has, for three decades, been exempting eligible aircraft equipment from the general moratorium. Nor is this approach novel in

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

the United Kingdom, where the insolvency of two major airlines within two years provides a pertinent illustration: the government charged its Law Commission with proposing a specific legislative framework to harmonise an airline's failure with its continued operations, as required by the aviation regulatory regime. Both the US and UK examples are in Part IV to illustrate that the lack of such a coordinating principle in the IBC is a considered legislative choice, and thus the Indian legislators are under no obligation to replicate the legislative approaches adopted in Western jurisdictions. In other words, this paper's argument is not primarily comparative; it is descriptive and focuses on the defects of the IBC as applied to the airline industry, as revealed by India's own three airline bankruptcies. The comparative references show that the problem recognised is not unique to India, but has been acknowledged elsewhere and resolved in different jurisdictions.

The Going-Concern Standard and its Asset-Centric Assumptions

Section 30(2) and the Undefined Content of 'Going Concern'

Section 30(2), IBC requires the resolution professional to review and the CoC to approve resolution plans, satisfying certain criteria, including a clear preference, as per the CIRP Regulations, for plans that contemplate continuation of the corporate debtor as a “going concern” as opposed to schemes involving liquidation of its assets (IBC, 2016, § 30(2)(e); IBBI, 2016, reg. 38). It does not address what “going concern” requires in terms of any particular enterprise’s operations; this, however, is not necessarily problematic, as the general insolvency law cannot reasonably be expected to accommodate the specific requirement of every industry. Yet, it also means that the substantive content of “going concern” is entirely for the CoC to determine, a determination that the judiciary has ruled to be beyond its jurisdiction: only the compliance with the procedural propriety of the CIRP process can be reviewed by the courts (K. Sashidhar v. Indian Overseas Bank, 2019, paras. 54–58). If, however, the determination of the enterprise’s worth by the CoC turns out to be informed almost exclusively by the entitlements of

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

the secured creditors of the corporate debtor such as, perhaps, airlines in the case of the Air India CIRP, there appears to be no mechanism by which this can be rectified within the confines of the CIRP itself.

The doctrinal underpinning of the thesis is fortified by the subsequent development by the Supreme Court of the same commercial-wisdom principle in Committee of Creditors of Essar Steel India Ltd v Satish Kumar Gupta. The Court, while holding that the commercial wisdom of the CoC was "paramount and non-justiciable on the merits" – thus going beyond K Sashidhar's touchstone for the NCLT and NCLAT – developed the principle for the benefit of the forums that had initially applied it (Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta, 2020, paras. 66–82). Additionally, the Court's concurrent discussion in Sundaresh Bhatt, Liquidator of ABG Shipyard v Central Board of Indirect Taxes and Customs on the ambit of the automatic moratorium as it relates to the powers of a statutory regulator provides further support to the thesis. Indeed, in Sundaresh Bhatt, the Supreme Court held that while "Section 14 prevents the authorities from taking any action such as recovery or enforcement against the corporate debtor, it does not prevent such authorities from determining its own position." Notably, this formulation provides a useful distinction between "action such as recovery or enforcement" by the tax authorities and their role in determining "its own position" – an issue that does not explicitly arise in the context of the CAB and the DGCA but which finds application in the realm of the airline regulator, as discussed below (Sundaresh Bhatt v. Central Board of Indirect Taxes and Customs, 2022). The relevance of this observation for the CAB and the DGCA is evident, given the nature of the disputes that have arisen in relation to the "going-concern" gap. The distinction in Sundaresh Bhatt between an authority taking "action such as, recovery or enforcement" against the corporate debtor and "determining its own position" can be imported into the realm of the CAB and the DGCA. Thus, while the denial of the currency or AOC by the CAB or the withholding of a unit's slots entitlement by a slot coordinator, respectively, would fall within the analogy of "action such as, recovery or enforcement",

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

the imposition of conditions in relation to operations would be akin to taking cognizance of the "determination of its own position". Accordingly, viewed together, Essar Steel and Sundaresh Bhatt demonstrate that both aspects of the thesis – the lack of justiciability of the CoC's commercial wisdom and the regulator's regulatory reach – are in fact positions that the Supreme Court has demonstrated a willingness to consider. It is against the backdrop of Part III that the central thesis of this paper on the going-concern gap is in turn grounded in the formulation of the moratorium and the CoC's jurisdiction by the Supreme Court.

The Moratorium as an Asset-Preservation Device

Section 14 operationalises the going-concern preference by restricting the institution or continuation of suits, executions, and recoveries of property by an owner or lessor (IBC, 2016, § 14(1)(a)–(d)). Read with section 18, which provides for the possession and control of 'the assets of the corporate debtor' by the interim resolution professional, the effect of the moratorium is akin to a conservation order: to locate the corporate debtor's property, to prevent its dissipation or attachment by third parties, and to utilise the pause to negotiate a compromise (IBC, 2016, § 18).

Regulatory Licences as a Non-Fungible, Time-Decaying Asset Class

An airline's capacity to function is subject to three different authorizations, each of which is subject to a continuing-performance test and each of which can be terminated for the failure to perform even if such failure is not caused by an exercise of a creditor's rights.

Crew Currency and the Ninety-Day Recency Standard

According to the personnel-licensing standards established worldwide and endorsed by the DGCA in the Civil Aviation Requirements, to remain current on a given aeroplane type, a pilot should report a certain number of take-offs

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

and landings on that type during a rolling preceding period, usually measuring ninety consecutive days, regardless of other circumstances. In other words, an airline's financial state, liquidity issues, and even a CIRP-related CoC decision have no impact on a pilot's currency. If an airline, due to a moratorium-adjacent dispute, an engine supplier's liquidity problems, or simply a lack of capital, ceases operations, the ninety-day clock for each pilot's currency on that aeroplane type begins on their last flight and never resets until their return to service. A CIRP-approved recovery plan, even if implemented on the three-hundredth day following the CIRP's initiation, will not make these pilots current again, even if it provides for their retraining. The funding for this retraining, however, will be at the discretion of the airline and in no way bound by the statute's time constraints.

The Air Operator Certificate as a Continuously Monitored Authorisation

An air operator certificate ('AOC') is granted and remains in force unless it is withdrawn. It certifies ability to undertake air transport operations safely at the time of issue, but the holder continues to be subject to regulatory oversight, including potential grounds for a show-cause notice being issued against it if its operational adequacy begins to be questioned on account of, say, a long period of grounding of its aircraft under CIRP (DGCA, 2012b). The AOC itself, the absence of which would render a resolution plan incapable of implementation, becomes then precisely the sort of regulatory instrument that the resolution professional would prefer to have dealt with by the DGCA before taking any resolution action. The critical point is that the IBC does not require the DGCA to take this step when it assumes the CIRP of an airline, nor does it vest the resolution professional with any power to seek forbearance from the DGCA.

Route and Airport Slots: a Doctrinal Gap in the Definition of 'Assets'

Airport slots and route entitlements are utilised on a use-or-lose basis, which, if not utilized to a certain level within a certain period, is subject to being

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

transferred to another carrier, as per norms prevalent at Indian coordinated airports (International Air Transport Association [IATA], 2022; Airports Authority of India [AAI], n.d.). A grounded or de-rated fleet cannot generate traffic, and the loss of entitlements as a consequence would be a decision taken by the slot coordinator, which is outside the purview of any of the stakeholders involved in the insolvency. However, that is whether the route and airport entitlements are assets of the corporate debtor as defined by section 18, which the resolution professional has possession and custody of and is bound by the moratorium of. Slot entitlements are not assets of the airline, as they are permissions granted by a slot coordinator, which can revoke the permissions if the minimum utilisation norms as decided by them are not met, which the airline has no control over. Thus if it is not an asset of the company as per the definition of section 18, and there is no other law granting such entitlements as property of the company, the airline's most time sensitive asset its ability to operate commercial aircraft as a common carrier is entirely protected by neither the resolution process as defined by the law nor indirectly is it benefited from, while being significantly prejudiced by it, as an airline has to retain its slot entitlements.

Thus, section 18, along with the definitions of the IBC, provides evidence for the same, and how section 3(27)'s definition of property is utilized to ascertain that properties, assets, or other kinds of entitlements of any kind do not fall into the definition of property, movable or otherwise, that permits their inclusion as a property/asset of the corporate debtor (IBC, 2016, § 3(27)). The Aircraft Rules, along with the slot coordination guidelines, state that slot entitlements can only be transferred with the express permission of the granting authority and can be cancelled for defaults and non-utilization, none of the characteristics of which are found in the definition of property as per section 3(27), which is a compilation of the rights one can exercise on the property by the assignee, or the property itself is part of the estate. Crew currency is not something that can be transferred, it is a competency of the pilot, and the AOC, as stated previously, is a certificate of competency and not

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

a property of the holder, and it would not fall under the category of being subjected to the estate of the corporate debtor under the definitions of section 18 (The Aircraft Rules, 1937, r. 133A; IATA, 2022). There is no precedent of a case law that interprets section 3(27) or 18 of the IBC in this manner, but the rules surrounding the permissions and issuance of slot entitlements and AOCs by the DGCA indicate that they are issued to an applicant in accordance with their licence, competency, or status as a common carrier (DGCA, 2012b; DGCA, n.d.-a).

The Common Structural Feature

Crew currency, AOC standing, and slot entitlements share three features that differentiate them from the asset class. First, each, when expired, decays on a regulatory or operational clock rather than a financial one, and that clock is independent of the CIRP's own statutory timeline. Second, each, when expired, requires a non-trivial outlay to restore, the scale of which is independent of the capitalisation commitments specified in a resolution plan - retraining crews, re-establishing AOC credibility, and re-applying for slots that have entered the market all involve substantial expenditures, but none are fungible with the resolution of the corporate debtor's capitalisation. Most crucially, however, neither crew currency, AOC standing, nor slot entitlements are "property of the corporate debtor" in any sense captured by section 18, and hence none are necessarily covered by the moratorium in the first place. The going-concern value section 30(2) charges the CoC to preserve; therefore, it is most critically jeopardised by the IBC's protective mechanisms.

Compounding and Interaction Effects across Categories

Parts III.i to III.iii discuss the issues of crew currency, AOC standing, and slot entitlements separately, the doctrinal distinction between them serves a different purpose than the practical one. In practice, the clocks described by these illustrations are not independent: each accelerates the demise of the other

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

two, with the combined pace of decay exerting pressure on resolution applicants seeking to employ any particular capital asset to restart operations to which none of the clocks individually applies. A grounded fleet reduces flying hours available to maintain crew currency; crews with expired currency cannot generate the required number of flight hours for an operator to demonstrate its capacity to the DGCA to remove an AOC from regulatory moratorium, and an AOC placed under any form of regulation scrutiny simultaneously restricts the airline's ability to meet the minimum utilization thresholds a slot coordinator will accept for rescheduling its capacity without certification assurance. At each stage, the erosion of value narrows the possible response set for the resolution applicant, reducing the reviving potential of any particular capital asset at the later stages of the CIRP. Thus, the value lost by the airline during the sixth month of a CIRP initiation is not three times higher than the loss incurred during the first month due to the loss of three distinct values, but rather significantly more than the loss during the first month due to the loss of value of any capital employed beyond their initial use during the same period, which in turn narrows the potential for a successful resolution. Any applicant attempting to rely on a particular capital asset to restart operations beyond the initial stages of a CIRP faces a significantly higher cost to employ than projected at the CIRP initiation, since the value of reversing the decay is incorporated in the cost of approval in the beginning, but not the cost of implementation by the end. This is why each of the three case studies discussed in Part V ends with the value of the resolution option vastly exceeding that of the revival option, despite the fact that the moratorium rules rarely explicitly consider either option beyond the immediate constraints of an individual clock.

Why the CIRP Architecture cannot Internalise Licence Decay

The Committee of Creditors has No Mandate over Regulatory Assets

The CoC comprises financial creditors, whose claims are governed by sections 21 and 30, which require that the resolution plan be approved by the committee

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

(IBC, 2016, §§ 21, 30). The members of the committee owe a fiduciary duty to the financial creditors, that is, to pursue a commercial/financial orientation and not subordinate it to other objectives, such as the preservation of the company's crew currency, AOC, and/or slots. It is does not address on whether or not the commercial orientation of the CoC's resolution plan is inappropriate or whether there are other objectives that the CoC should consider. The Supreme Court ruled on the petition for review that judicial intervention in the CoC's decision on commercial issues was inappropriate, leaving such decisions almost entirely unreviewable. A ruling that the CoC's resolution plan failed entirely to consider this additional set of costs as a relevant variable would not be decisive in terms of the determination of whether those costs had been appropriately considered, since the CoC's decision would still be informed by its commercial orientation. A decision-making entity that is not obliged to consider a certain variable and is not subject to a judicial authority that can compel it to do so cannot entertain the consideration of that variable in its decision-making, regardless of how relevant it may be to the object that it has been mandated to pursue.

The Moratorium Protects against the Wrong Threat

Section 14 restricts civil suits, execution, and recovery of property. DGCA's action on the AOC, and a slot coordinator's revocation of the entitlement on an unused slot, are neither a suit, execution, nor recovery of property by a creditor; they are regulatory acts and administrative acts, respectively, that are outside the contemplation of the text of Section 14 (IBC, 2016, § 14(1)).

The moratorium provides a veneer of protection that fails to account for the type of value identified in this paper as being particularly susceptible to erosion. A CoC member considering the proposal during CIRP is likely to erroneously conclude that the moratorium protects the enterprise against all forms of depreciation, when in fact, it protects the enterprise against only one channel of erosion, while another, swifter channel continues to exist in parallel.

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

The Resolution Professional's Structural Blind Spot

The resolution professional's duties under the CIRP Regulations extend to management of the corporate debtor's affairs including preservation of its property and conduct of the resolution process, and not to regulatorily mandated consultation with either the DGCA or slot coordinators as an independent statutory function (IBBI, 2016, reg. 27). A resolution professional may, as a matter of prudential initiative, choose to interact with aviation regulators; nothing in the statute connects this activity to an obligation, much less entitlement, to intervene in resolution proceedings. The single entity mandated by the statute to take a holistic view of the situation in the context of CIRP has no statutory charge to act on behalf of the constituent part of the system currently undergoing the swiftest decline.

Comparative Institutional Design: Lessons from the United States and the United Kingdom

The IBC's lack of a coordinating mechanism is not a consequence of the general principles of insolvency law; it is a defect that other jurisdictions have recognised and addressed. US aviation-financing law, for instance, carves aircraft equipment as collateral out of the automatic stay, allowing secured creditors to make an election during a specified period instead of letting aviation assets scramble for a share in the first-come jurisdictional priority – a recognition, long overdue, that such assets depreciate exponentially over time, far more rapidly than other forms of collateral that the generic bankruptcy law was designed to manage (11 U.S.C. § 1110, 2024; Department for Transport [UK], 2019). The UK's Airline Insolvency Review, after the 2017 collapse of Monarch Airlines, which necessitated the intervention of the government to organize a special charter fleet to return the stranded passengers to the UK, and the 2019 insolvency of Thomas Cook's aviation division, concluded that current insolvency law does not require any party to take responsibility for ensuring that an insolvent airline's regulatory and public service obligations are met while simultaneously managing its insolvency proceedings,

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

recommending the creation of a special administration model for airlines to address the matter, similar to the models utilized by the energy and rail sectors for their respective industries.

This study of three different cases has yielded two insights directly relevant to the coordination problem that India faces. It turns out that the problem we identified does not affect India alone. Rather, it is a type of problem that keeps popping up and is usually caused when an economy-wide or generic insolvency framework is overlaid on a sector that needs regulatory approvals, safety oversight, and access to limited aviation infrastructure to keep functioning. The regulatory and legal coordination issues that arose in the USA, the UK, and, to a lesser extent, in a civil-law jurisdiction like Italy show that the problem is universal rather than specific to Indian insolvency law.

What happened in Italy brings us a vivid example. Alitalia commenced an extraordinary administration procedure in Italy on 2 May 2017, under a special insolvency regime for large businesses. However, initiating that procedure was not enough to change the airline's regulatory situation. Beyond that, the extraordinary commissioners had to coordinate with the Italian Government and the civil aviation regulator to maintain continued flight operations. And the legislature in Italy intervened to ensure Alitalia's air services would not be disrupted, while, on the other hand, ENAC was able to restore the ordinary operating licenses of the two carriers, Alitalia SAI and Alitalia Cityliner, when the extraordinary commissioners assured them of the continuation of business operations regularly by 10 August 2017. However, ENAC did not give up its independent supervisory duties as stipulated by the aviation regulations and setup. That incident showed that even with a special insolvency regime, it is still necessary to have a mechanism, in the form of a legal institution, that can effectively coordinate insolvency administration with ongoing aviation regulations and requirements. As a second point, the way all three countries dealt with this issue is as proposed in Part VII. What wasn't happening there was getting rid of or replacing the insolvency system of the country entirely

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

and making an insolvency law for aviation separate. Instead, each country came up with some sort of coordination mechanism at a sector level which ran parallel with the regular insolvency process. The forms in those cases varied slightly. The US and the UK achieved co-ordination through the way they interacted the insolvency processes with aviation regulators and other sector-specific institutions. Italy, on the other hand, its extraordinary-administration structure provided an additional legal basis to the extraordinary commissioners by giving them the powers of the government and, at the same time, ENAC was able to play its regulatory role effectively by not getting involved in the extraordinary-administration procedures but continuing to regulate the sector on its own. All three systems of law share a legal mechanism that is essentially the same cannot be the point, but they all have the same functional requirement, which is that, in reality, the insolvency process cannot, by itself, decide or be the determinant of regulatory permissions that an airline would need for continuing to operate.

The mechanics of comparators need to be spelt out because it is the mechanism that offers transferability. Section 1110 of the US Bankruptcy Code offers a secured party or lessor of qualifying aircraft equipment a choice of claims: the trustee must either perform/cure defaults within sixty days of the order for relief or surrender the equipment. This is a specific mechanics choice that takes away the automatic stay's blanket prohibition of any action against the property and replaces it with a limited time frame for cure/surrender. Not directly transferable to the regulatory-license issue is the fact that this replaces a general prohibition on action against secured property (a financial security interest) with a short procedure, specifically targeting a financial security interest, for cure/surrender. There is, and can be, no equivalent secured-party claim to crew currency, AOC, or slots that the debtor could cure or surrender, since, in each case, it would have been a regulator's and a coordinator's due from the debtor, not a private secured party's. Transferability is at the level of abstraction of the short, definite time-frame as a substitute for the automatic stay and specifically at the level of the mechanics of section 1110, which are

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

not directly applicable to the regulated-undertaker scenario. The UK special administration regime's option, by contrast, is directly comparable in target but limited in scope to transport.

It is a different order of intervention, proposing a separate liquidation regime altogether new to general liquidation law. But as a comparator, it, too, is not directly transferable to the Indian airline, since the CIRP framework would remain largely the same with the proposed additions. As comparators, then, both the US and the UK options have limited applicability and limited transferability, only at the level of abstract analogy of a short definite time-frame as a substitute for the automatic stay, at the level at which the borrowing from them is incorporated in the VIIth Part proposal. A methodological caveat on what follows is needed to explain the case walkthrough that begins in Part V. In each case, there are two claims that are conflated, one of fact and one of inference. The first is the evidentiary claim that during the period of the proceeding there occurred a substantial devaluation of the regulatory license/certification. That is a fact that can be established or not established based on evidence presented at the hearing, on published orders of the regulators, and on the particular circumstances of each case. The second is the inferential claim that this devaluation was a substantial factor in the subsequent liquidation. That is not really something that can be established by evidence, since there is no alternative to it to which evidence of the liquidation might be compared.

Therefore, for each of the cases discussed in the sections V.i through V.iii, there will be a claim in the format of a structure-based inference (this devaluation accounted for this liquidation, is a substantial factor in it) and a claim in the format of a fact established. When this paper's main body speaks of the mechanism being responsible for the outcome, this should be read as is comparable to 'is a substantial factor', not 'is the sole demonstrated cause', and the caveat applies to the claims about this paper's conclusion made elsewhere.

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Central University of Karnataka
Journal of Legal Studies (CUKJLS)
Volume I (Summer Issue - 2)
January to June 2026

ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

The Mechanism Demonstrated: Three Cases, One Failure Point

Kingfisher Airlines: The Mechanism Operating before the IBC Existed

Before IBCs, Kingfisher's case served as an exemplar of how persistent operational problems often mean failure. On 1 October 2012, after a dispute over unpaid wages resulted in groundings, Kingfisher Airlines halted its flights. At that point, its operational capability had been greatly reduced. In early 2012, Kingfisher had already reduced its fleet to 28 aircraft in service, and by October, only 14 remained in the active fleet, while at its peak the airline had operated between 63 and 65 aircraft. With a worsening financial situation, a lot of the aircraft had already been on the ground or returned to the lessors (DGCA, 2012a). The decline was just as obvious in its working staff. Newspaper stories at about the beginning of February 2012 said that about 80 pilots had given up their jobs. Other stories pointed out a loss of between 300 and 350 pilots over the previous six months. By July 2012, at least 200 pilots, among them captains, were walking the picket line. At the time the company was finally given the go-ahead to shut down, there were over 80 pilots and around 270 mechanics in the middle of stop-and-go strikes after the airline failed to pay their paychecks. These numbers show how much of the airline's ability to function it had already lost months before the regulatory authorities intervened by ordering a forced closure in October 2012. The DGCA's regulatory actions can be more clearly pinpointed. Kingfisher was issued a show-cause notice on 5th October 2012 by the DGCA under the Aircraft Rules, 1937, for failure to prove its ability to provide safe, efficient and reliable service, which could result in withdrawal of the airline's permit. Even after Kingfisher provided a reply, the DGCA was not satisfied with the airline's revival plan and decided to suspend Kingfisher's Scheduled Operator's Permit No. S-12, dated 26 August 2003, effective from 20th October 2012. Suspension would only be lifted after the airline submitted a reliable and safe plan that would allow the DGCA to approve its continuation as a scheduled air transport.

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

There's a big difference between suspension and expiry of a document. Kingfisher's permit was not terminated in the first instance. In fact, Kingfisher remained subject to suspension until the expiry date of the operator's permit, scheduled for 31st December 2012. That means that after about 72 days of the suspension period, the airline could not enjoy any operational benefit of its permit, and the suspension ended without any revival that the DGCA would consider satisfactory. The Insolvency and Bankruptcy Code, 2016, became operational at a later stage, which is why Kingfisher never fell under a CIRP, and no one has been able to invoke the protection of section 14 moratorium to suspend normal aviation regulatory procedures. The case has also nothing to do with the Cape Town Convention in dispute for the repossession of aircraft, some think. So, the main takeaway from the case for Kingfisher is not that the DGCA automatically revokes every carrier's operating certificate during insolvency. Instead, it shows that under the old regulatory structure, operational failure, together with an inability to present a realistic, safe, and sustainable revival plan, can provide sufficient grounds for the airline's operating permit to be suspended and ultimately extinguished. The case highlights a regulatory problem in the airline world which existed even before the new insolvency law.

The Kingfisher episode is informative precisely because of what did not happen; there was no overarching authority to which the DGCA could have turned to in order to ask, as the DGCA did not have, whether a more gradual de-escalation of operations, as opposed to the near-complete and near-instantaneous shutdown that Kingfisher faced, would have been better for maintaining crew currency or slot standing for a short enough period to allow the rescue to be attempted; the DGCA's order was appropriate to the operational and safety environment it saw before it, as was its response to the reality on the ground, because there was no legal requirement for it to take into account the possibility of insolvency-stage co-ordination. After all, there was no insolvency-stage co-ordination process to take account of. This, precisely, is the point of Kingfisher: it demonstrates the baseline, the purest possible

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

form of the regulatory decay process, unvarnished by a CoC or any other moratorium, resolution professional, or other features of the CIRP process discussed below. As demonstrated, Kingfisher does not demonstrate anything beyond the fact that the foundational regulatory decay process discussed above is real, predates the IBC, and is therefore not a function of the CIRP-specific dynamics discussed in Part III and IV; it does not demonstrate that the IBC process causes or fails to cause regulatory decay, because it simply does not apply to the IBC process, having not applied to Kingfisher at all. To that extent, Kingfisher provides evidence for the thesis introduced in Part II, but none for the one introduced in Part III. The latter, as discussed below, is supported exclusively by Jet Airways and Go First.

Jet Airways: Decay Occurring Inside a Resolution Process that Attracted a Buyer

Jet Airways is probably the most difficult example to explain by just saying that a viable resolution applicant or an approved resolution plan was not a factor. The insolvency proceedings of Jet Airways were admitted on 20 June 2019, and the Jalan-Kalrock Consortium eventually became the resolution applicant and successfully offered its proposal. The Committee of Creditors agreed to the resolution by approving the resolution plan in October 2020, while the NCLT did the same through its ruling on 22 June 2021. Still, it mustn't be forgotten that the extended period to implement the resolution gradually consumed almost everything Jet Airways relied on to carry the revival to fruition. It is not just the time factor that played a major role in Jet Airways' erosion. When the airline halted operations, at least 330 of the domestic slots of the airline at Delhi and Mumbai - including the slots of 116 in Delhi and 214 in Mumbai - were temporarily transferred to other airline companies at the airport, while an additional 24 slots that jet had left were given to Air India at other airports through this slot vacating mechanism. These arrangements were, at the time, characterised as merely temporary by the Government and the receiving airlines were not granted the right to carry

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

on historical or seasonal flights as part of these arrangements. Yet, the resolution proposal later included a provision requiring Jet Airways' slots, bilateral rights, and traffic rights to be reinstated as a precondition before commencing operations again. The decline in human resources was an issue of great concern and equal significance. At the time the insolvency process was first initiated, Jet Airways employed about 8,845 people, of whom 1,456 were working in Flight Operations. In 2022, it was reported that only approximately 70 captains and 100 first officers were present at the airline and were willing and capable of participating in the anticipated relaunch, with some pilots already having been recruited by their rivals or having moved overseas. The court does not have exact figures, but the records clearly demonstrate that, even though the company was retained as a legal entity under the resolution plan, the workforce was completely dissolved. This loss pattern also affected the airline's regulatory capacity. Even though Jet Airways got the revalidation of its Air Operator Certificate from the DGCA on 20 May 2022, the airline never reopened. The certificate then lapsed again on 19 May 2023 and was renewed only until 3 September 2023, with the stated purpose of facilitating the ongoing CIRP. So, when the Supreme Court gave a liquidation order through a judicial ruling on 7 November 2024, even though more than five years had elapsed since the beginning of the first stage of the resolution process, there wasn't even one asset or right left without a separate preservation of revalidation or reconquest (In re Jet Airways (India) Ltd., 2019). The airline's international traffic rights, airport slots, and terminated crew were only partially returned to the company in the same state as they were at the time of CIRP's admission. The fact that the Court had to appoint the liquidator under its residuary powers shows that the existing law did not serve its purpose (*State Bank of India v. Consortium of Murari Lal Jalan*, 2024). It is essential to note that capital structure changes enacted under a resolution plan are insufficient to reverse the five-year decline in the value of currency, slots, and AOC.

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

The extent of the divergence in this case is such that Jet Airways' CIRP survived for more than five years, from admission to the Supreme Court's liquidation order, well beyond the period contemplated by the CIRP itself, and prolonged by the litigations concerning the implementation of the approved plan. During each such month, the continued survival of crew-currency and slot clocks described in Part III was on hold, even as the moratorium's protective machinery was in place, a situation that underlines the difference between moratorium protection afforded by the Code and going-concern preservation, and illustrates how a CIRP can meet every procedural requirement imposed upon it by the statute while failing in its specific charges, namely, preservation of the value mandated by section 30(2) of the Code. The resolution applicant's subsequent difficulties in implementing the plan are entirely consistent with a plan formulated under assumptions about license and slot positions that no longer prevailed at the time of its approval, much less at the time of its implementation.

The five years' deferral of the resolution itself was due to multiple factors, none of which are discussed in this paper as the cause of the regulation-license decay; indeed, examining these congeries of causes only serves to reinforce the thesis, since part of the delay was caused by litigation regarding the resolution applicant's adherence to the implementation terms of the resolution plan that had been approved, part was due to contention among the consortium members in the resolution applicant over funding and shareholding terms, and part was due to the Supreme Court's serial consideration of the dispute before any of its incumbent judges could declare the resolution company's management and board of directors competent to implement the resolution plan, having exhausted its "residual powers" to direct the liquidation of the company (State Bank of India v. Consortium of Murari Lal Jalan, 2024). None of these matters were the regulatory-license decay, which is discussed in this paper, but it bears repeating that whichever of these causes or combination of causes led to the five years' implementation of the CIRP, the flight-crew currency and slot clocks of Part III run so that when any of the CIRP-enabling

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

disputes had been concluded for the CIRP to proceed to auction or sale, the value of the asset the resolution plan had been priced at no longer existed in the CIRP's possession. Thus, the proximate causes of the CIRP's prolongation account for the length of time that it lasted, and are not impacted by why the value available at the completion of the CIRP was the value it was, regardless of the proximate cause in force at any given moment.

Go First: Separating Two Causal Stories

Additional primary evidence of the crew-currency and slot dimensions, specifically, as well as the lessor repossession dimension generally, may be found in contemporaneous regulatory filings.

The DGCA's special audit of Go First's operations was carried out from 4 to 6 July 2023 as one of the conditions for the restart of flights. The audit revealed about thirteen issues regarding the airline's operational readiness. Besides pilots, areas of concern included the number of captains, instructors, and other technical personnel (engineers). Pilots specially trained for high-altitude operations at airports like Leh and Thoise, pending litigation, funding of the airline, passenger refunds, and availability of spare parts. The pilot shortage definitely affected operations and capacity, and Go First initially wanted to restart flights with its fleet of 26 aircraft and operate almost 160 flights daily. But the DGCA's audit pointed out so many issues that Go First had to reduce its flight proposal drastically to just 15 aircraft and 114 daily flights, a reduction of almost 30 per cent. They also had to reduce the number of planned high-altitude operations, such as the Leh and Thoise services, since the DGCA had determined that Go First did not have sufficient pilots for those operations. What was the situation even when Go First had no dispute with its lessors? The airline's inability to hire sufficient trained personnel and maintain its operational facilities was the root cause limiting its ability to resume flights. Thus, Go First's lessor dispute remains unresolved. Pilot and crew qualifications, plus recurrent training, are operational capabilities that could deteriorate during insolvency and prolonged grounding, leading to a

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

progressive reduction in the usefulness of the regulatory permissions, which are still officially valid. The relevant Winter Schedule 2023 came into effect on 29 October 2023 and remained in force until 30 April 2023, after which it was replaced by the Summer Schedule 2023-2024 from 31 March 2024 onwards. Because of this, the legal protection that Go First had from still being able to use the flight schedule for the winter of 2023, the expiry date is 30 March 2024 (*Accipiter Investments Aircraft 2 Ltd. v. Union of India*, 2023; Ministry of Corporate Affairs, 2023). Above: thirteen months into the carrier's inclusion in the database, its pilot-currency status has already reduced its capacity as an air carrier. Meanwhile, irrespective of the resolution of the dispute with its lessors, Go First's request to the government for slots, traffic rights, and other measures to accommodate its demand, which previously had been carried by other airlines, has, as of 2024, been granted only on a provisional basis and is set to expire, with no renewal expected, as per government records. This precisely matches the mechanism described in Part III.iii above, with the use-it-or-lose-it provision Go First chose for its slots allocation being precisely the reason why, irrespective of the outcome of the Cape Town/moratorium dispute, but as a direct result of its operational restrictions, Go First has now found itself in capacity competition with other airlines for the same traffic rights, which it is ultimately set to lose (Velaga & Gupta, 2024, pp. 65–70). The findings of the DGCA audit thus provide additional evidence of the causal mechanism across both the crew-currency and slots dimensions, while supporting the more limited claim, stated in Part III.ii, that the eventual liquidation of Go First is the result of the mechanism (DGCA, 2023; Business Today, 2023).

Anticipated Objections and Responses

A call for a regulatory coordination mechanism during airline insolvency encounters four main objections. The main objection is the one about jurisdiction - whether the DGCA can, within the bounds of the Aircraft Act, 1934 and the Aircraft Rules, 1937, be the body to make and carry out the

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

License Reservation Order, a type of regulatory temporary freeze, or whether the Central Government needs to create the law by way of fresh delegated legislation. From a legal perspective alone, only when this problem of the source of legal power is cleared will the other three objections come into the picture, namely the moral hazard caused by temporary regulatory preservation, the unfair competitive disadvantages of airline rivals and finally whether there is room in such a regulatory freeze to continue the imperative of aviation safety and regulatory control. We'll deal with each point in this order.

Moral Hazard

A common criticism is that protecting the slots and certificate of an airline on the verge of insolvency from normal regulatory consequences amounts to a reward for operational failure at the expense of competitors who maintained their operational capacity and regulatory compliance. Although it may sound plausible and attractive to many, this concern rests on an incorrect premise. There is no provision to the effect that the airline on the verge of insolvency is exempt from the adverse consequences of the operations carried out on its own. If there is a postponement of the usual rules of forfeiture or expiry, such an exceptional situation would remain at the regulator's discretion, with a very clear time limitation and in every particular case. As such, it was not an automatic preservation of the airline's rights under the resolution process; the standstill only serves to stop the regulatory forfeiture clock at a very early stage from potentially derailing a promising resolution strategy before allowing the statute-based runway period available under the CIRP or other applicable resolution regime to be fully consumed.

However, the airline is not free from the obligations that arise under the Protocol, including the provision for its sunsetting. Also, the Protocol does not unfairly penalise competitors; competitors have no right merely because the airline is bankrupt.

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

Regulatory Capacity

The second objection is that the regulator's capacity to handle the caseload would be unduly burdened, since a regulator focused on safety oversight may lack the administrative machinery or legal sophistication to issue or review license preservation orders on the expedited basis contemplated by the CIRP. This is a legitimate concern, however, not a refutation of the diagnosis. Issuance of an order for preservation of a licence under the proposed protocol calls for a limited administrative process that reviews the reports submitted by the resolution professional and is analogous to licence-renewal processes that the DGCA is already required to perform. Constraints on regulatory capacity lie in organisational design, particularly in institutional coordination, and should be circumvented by designing the process in ways that take such constraints into account, rather than by moving away from the diagnosis on the ground that it requires an unreasonably strained exercise of institutional capacity.

Safety-Jurisdiction Encroachment

The third objection raises the most serious issue: that any statutory instruction to a safety regulator to accommodate an insolvency timeline risk, even inadvertently, undermines safety judgments, commercial or otherwise. Part VII's answer to this that the Protocol's scope does not impacts the DGCA's safety jurisdiction, and that an actual airworthiness or competency issue would be handled just as before the Protocol's commencement: the standstill order's imposition is a measure to deal with default administrative consequences, not to override or prejudice any substantive regulatory decision.

The DGCA's safety powers, save for the administrative ones, could alternatively have been addressed by a standstill order, which is what gives this Protocol its object and basis.

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Central University of Karnataka
Journal of Legal Studies (CUKJLS)
Volume I (Summer Issue - 2)
January to June 2026

ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

A further consideration, beyond those mentioned in the preceding section, is that the provisional retention of either slots and/or AOC standing imposes costs on other relevant stakeholders, even if it does not constitute an unjustified windfall from the perspective of the insolvent carrier. One such stakeholder is any other carrier which could not utilise a slot that the other one had kept instead of releasing it for the standstill period, thereby enabling it to commence operations on a route or at an airport in the short term; the benefit that the Protocol accords to the resolution process comes at the cost of allocative inefficiency elsewhere in the market for the duration of the standstill period. It is a cost that is nevertheless strictly limited both in scope and in duration, being confined to the CIRP's statutory resolution period, visible to regulators, and small in magnitude compared to the other option, the permanent destruction of the value of a slot to the employees of the insolvent carrier, entailed by the default rule, since a slot released during the CIRP is no more likely to see immediate utilization by some operator than one retained by the CIRP itself. The public-interest calculus that the Protocol charges the DGCA and the slot coordinator to perform is therefore not one comparing alternatives in which provisional retention has no cost, which it demonstrably does not, but one in which those costs have to be weighed against the alternatives of failed resolution due to the lack of interim licensees, a comparison the default rule is in no position to make by virtue of the resolution outcome to which it commits the slot coordinator. As for the regulatory capacity of the DGCA and the Airport Authority of India, the prioritization of a few standstill orders, of which there are likely to be few at any given time given the limited number of Indian scheduled-airline slots, involves substantially lower costs than the licensing and slot-coordination functions that the two regulators are already charged with, and hence raises the spectre of regulatory capacity only at the level of specific instances rather than in general.

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

A Single Proposed Mechanism: The Regulatory Standstill Protocol

The Diagnosis in Parts III and IV of the courses identifies a lacuna both specific and limited. What is required at this juncture, is not a research agenda or reform Programme about aviation exceptionalism more broadly, or even responses to each of the regulatory anomalies in Part II, but rather one specific measure addressing the coordination failure that gives rise to them: namely, the CIRP's award of admission to operations ad interim under regulation 16 and the DGCA's consequential jurisdiction over crew currency, AOC status, and slot allocation (IBC, 2016, § 16). The tentative recommendation the paper proposes is a statutory bridge between the two, in the form of a Regulatory Standstill Protocol as an amendment to the IBC and the relevant Civil Aviation Requirements (CARs), consisting of the following elements.

On the commencement of CIRP, the National Company Law Tribunal is required to notify the DGCA, within days, upon which the DGCA shall issue, a License Preservation Order to the relevant insolvency proceeding, which lays down a minimum Programme of currency-maintenance flights or simulator time for the airplanes operated by the airline, the cost of which should be treated as a cost of the resolution process, and not a subscription for any fresh resolution applicant; provisionally retains the slots allocated to the airline for the maximum continuation period of the CIRP as per the statute, as opposed to the usual continuation period if the airline chose voluntary termination; converts the review of AOC cancellation pending expiry into a regulatory hold subject to a report by the resolution professional, to keep the certificate of air operator valid, as opposed to letting it lapse. The CIRP Regulations need to be amended to require the resolution professional to report to the CoC on license and certificate status at every meeting, so that the commercial compulsions under which the airline is placed, over which the CoC has only limited oversight, are at least brought to its notice for consideration.

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

Implementation would require the Protocol to stipulate, to the extent of case management discretion that is not subject to further qualifications and refinements, time frames for resolution of professional's action identified as indefinite in the preceding analysis. Thus, although notice to the DGCA seeking the License Preservation Order would be given within days rather than weeks following CIRP admission, so too would the period for the DGCA's response regarding the issuance of the LPO. Similarly, the review cycle during which the resolution professional's report on the status of the standstill order is subject to scrutiny by the CIRP Adjudicator should also be set out in the Protocol. A Protocol that does not stipulate specific, limited time frames for reconsidering the standstill would replicate, on a smaller scale, the coordination deficiency it seeks to address. The utility of the Protocol lies in its capacity to transform vague, ad hoc and indefinite processes into precise, structured and time-bound events. The Protocol should accordingly specify that the retention of slot entitlements as well as the suspension and review of AOC status contemplated by it are all provisional measures that lapse upon conclusion of the CIRP. To the extent that the CIRP is concluded by virtue of liquidation, the competent regulatory authority may then resume its jurisdiction over forfeitures and order reviews without prejudice to the continuation of the CIRP's functions.

There are two features about the proposed Protocol that completely vitiate it, transforming the open-ended proposal into a sectoral limited carve-out. First, the Protocol stays silent about the primacy of DGCA in any airworthiness/safety matter. A genuine safety problem, if and when it emerges, will not be affected one bit by the Protocol procedures since they only deal with the administrative and utilisation aspects of grounding, not its safety foundations. Secondly, the Protocol terminates upon the conclusion of the CIRP. There is no regulatory regime change resulting from the Protocol: only a provisional, reportable and revocable regulatory coordination window, which was itself dictated by the length of the CIRP it finances. The closest analogy to this latter situation is not a regulatory transplant but a sectoral

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

adaptation – akin to the insertion of the cross into auction statute in the US Bankruptcy Code, which creates a limited statutory preference for certain financing arrangements of aircraft equipment by creating a time-limited statutory window, instead of relying on the general stay and lien regimes. It is this latter framework that this paper seeks to replicate in the regulatory asset context (DGCA, 2012a).

To give effect to the Protocol within IBC and civil aviation law, the following amendments are suggested: To IBC, a new Section 14A may be inserted immediately after Section 14, to preserve the language of the moratorium itself. In other words, upon admission of an airline corporate debtor, the Adjudicating Authority shall issue the notice as described above. The License Preservation Order shall take effect, for the pendency of such proceedings, notwithstanding the ordinary forfeiture and review procedures under the Aircraft Rules, 1937 and the DGCA's Civil Aviation Requirements. Similarly, a reporting obligation may be introduced by way of a new sub-regulation to Regulation 27 of the CIRP Regulations. Regulation 27 sets out the responsibilities of the resolution professional regarding the management of the corporate debtor's affairs. By virtue of this insertion, the status of regulatory licenses in the management of the corporate debtor will be explicitly placed within the resolution professionals' duties, rather than a matter of interpretation. The DGCA's Civil Aviation Requirements, particularly Part I, Series C, Section 3, must also be amended to carve out the period of License Preservation Order from the applicability of the AOC-review process triggered by the cessation of operations for an extended period. An identical amendment must be made to the slot allocation framework administered by the Airports Authority of India, so as to suspend the "use it or lose it" regulation for the period of the standstill. It must be emphasised that the issuance of the License Preservation Order must vest solely with the DGCA, which may act upon receipt of a notice from the Adjudicating Authority as opposed to an order from the Tribunal. In this manner, Part VI.iii of the IBC may retain its present language, which essentially demarcates the distinction

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

between jurisdiction over insolvency matters and regulatory supervision of aviation safety. That being said, there may well be instances in which the Protocol's coordination mechanism conflicts with the DGCA's safety obligations. Such a situation may arise, for instance, if continued grounding of aircraft raises airworthiness concerns beyond the mere continuation of operational restrictions. In such circumstances, the Civil Aviation Requirements must be explicitly amended to specify that the DGCA's decisions regarding aircraft airworthiness or crew certification shall override the License Preservation Order. In other words, the standstill arrangement shall automatically cease to apply to the particular aircraft or crew in question upon determination of unairworthiness on the part of the DGCA, without requiring any further action on the part of the Tribunal or otherwise. Indian law already lacks any equivalent instinct to treat aviation-specific assets — of any kind, financial or regulatory — as warranting a distinct statutory timeline within insolvency.

Conclusion

The repeated liquidation of Indian airlines under CIRP cannot be attributed to mere issues with asset quality, creditor obstruction, or the conflict between the Section 14 moratorium and the Cape Town Convention repossession rights. This paper's thesis is that a deeper examination of this phenomena is due, for IBC's going-concern valuation standard is in practice based on an asset preservation model, and an airline's entitlements to licenses, crew and slots are liabilities that it is 'expending', rights which the moratorium neither controls nor has juridical supervision towards the assets of the corporate debtor under the going-concern paradigm the value of which it is obliged to protect. Kingfisher is illustrative, if not of the thesis, of the antecedents that led to its adoption: Jet Airways is illustrative of the application in a CIRP mendaciously successful under conventional wisdom; while Go First is illustrative of the confluence of the phenomena in question, which have dominated discussions in recent years around IBC and, but for this paper's thesis, might have been

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ISSN (Online): 3139-4345
ISSN (Print): 3139-4485

accepted as appropriate analysis of the issue. The reform suggested by this paper cuts across the jurisdiction and operational competence of both DGCA and NCLT, but is directed towards a common goal – the preservation of an airline's licensing entitlements through a Regulatory Standstill Protocol. A coordination mechanism is required wherein NCLT admissibility proceedings are suspended, and DGCA issues a time-bound license preservation order, the breach of which would see automatic rescission of protections under the CIRP, with no requirement for DGCA to certify the airline's continued compliance with safety standards, upon conclusion of the CIRP. This paper suggested reform to a system displaying competency failure across the board, but zeroes in on the particular liability it has identified as cutting across all Indian airlines, and which this paper's reform, if applied consistently, would resolve. If there is a systemic problem with the liquidation practices of Indian airlines under the IBC, this paper has endeavoured to isolate the component that exercises the least competence in airline operations in their post-CIRP existence, demonstrated its failures in IBC CIRP interactions, and shown that its reform is not a meddling by amateurs in the affairs of specialists but rather something the IBC requires for its own integrity. Until such reform is enacted, the confluence of circumstances that led to the fates of Kingfisher, Jet Airways, and Go First in their CIRPs should not be seen as isolated occurrences.

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