

# CORPORATE NEWSLETTER

**JUNE, 2023**

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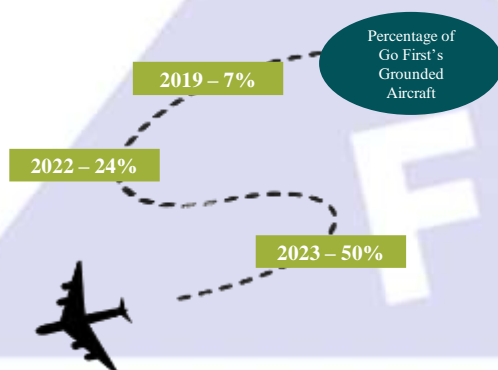
## GO FIRST'S SAGA CONTINUES...

India is witnessing yet another instance of airline insolvency proceedings within the past 5 years, following the case of Jet Airways. This time the airline in question is *Go Airlines (India) Limited* (“Go First”).

### Background:

*Go First*, incorporated on April 29, 2004, took its first flight from Mumbai to Ahmedabad in November 2005, marking the commencement of its flight operations. The fleet of *Go First* consists of 59 aircrafts, including 54 - A320 NEO aircrafts and 5 - A320 CEO aircrafts. Positioned as India's low-cost airline, *Go First* aimed to make air travel affordable and accessible to the masses. Unfortunately, *Go First* seems to have landed itself in a financial distress from which its take-off does not appear to be easy.

*Go First* attributed its financial turmoil to the presence of faulty engines supplied by Pratt & Whitney (“P&W”), which allegedly resulted in the grounding of *Go First* aircrafts and hindering their operations. The number of aircrafts grounded due to P&W's faulty engines has notably increased over time, the details of which are given below:



### The Unfortunate Landing:

On May 02, 2023, *Go First*, owned by the Wadia Group, filed for voluntary insolvency proceedings under Section 10 of the Insolvency and Bankruptcy Code, 2016 (“**IBC 2016**”) before National Company Law Tribunal, Delhi (“**NCLT**”). At the time of filing the petition, *Go First* had a fleet of 54 aircrafts, of which only 26 were operational, while the remaining 28 were

grounded due to faulty engines, anxiously awaiting replacements.

Due to *Go First*'s ongoing struggles with engine problems, it invoked emergency arbitration proceedings against P&W at the Singapore International Arbitration Centre. The emergency arbitrator issued 2 awards on February 3, 2023 and April 15, 2023, ordering P&W to provide 10 serviceable engines by April 27, 2023 and an additional 10 serviceable engines each month until December 2023. However, due to P&W's non-compliance with the orders issued by the emergency arbitrator, *Go First* initiated enforcement proceedings against P&W in Delaware, U.S. as well as other relevant jurisdictions where *Go First*'s engines were/are located.

The extensive grounding of approximately 50% of its aircraft fleet, resulting from the repeated failures of P&W's engines, inflicted heavy losses on *Go First* in terms of lost revenues and additional expenses. Despite the considerable support received from the government, the detrimental impact caused by the faulty engines seem to be immense, rendering *Go First* unable to fulfil its financial commitments.

### Order by National Company Law Tribunal:

#### **VOLUNTARY INSOLVENCY**

A Voluntary Insolvency is a mechanism, as provided under Section 10 of IBC, 2016, wherein Corporate Debtor itself file a CIRP to resolve its debt and revive its operations.

Vide the Voluntary Insolvency Petition No. (IB)-264(PB)/2023, *Go First* prayed for initiation of Corporate Insolvency Resolution Process (“**CIRP**”) in order to prevent lessors from taking control of its aircrafts and to ensure the continuity of its operations and for grant of an interim moratorium.

#### **MORATORIUM**

It has been observed by the Bombay High Court in the case of Shiv Kumar Tulsian and another v. Union of India, 1986 SCC OnLine Bom 351 that the Moratorium implies staying the commencement or continuance of all actions and proceedings against the company for a fixed period of time.

On May 10, 2023, NCLT delivered a lightning-fast order admitting the application of *Go First* under Section 10 of the IBC 2016 and thus allowing the commencement of CIRP (“**NCLT’s Order**”). Along with this decision, NCLT also granted interim moratorium and imposed certain restrictions which include the following;

- a) There can be no initiation of suits or continuation of pending suits including the execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority against *Go First*.
- b) *Go First* cannot transfer, encumber, alienate, or dispose of any of its assets, legal rights or beneficial interests relating to it.
- c) No action can be brought against *Go First* to foreclose, recover or enforce any security interest relating to its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
- d) All lessors or owner of property are prohibited from recovering property from *Go First*.

### Order by National Company Law Appellate Tribunal:

Following the NCLT’s Order, aircraft lessors (“**Appellants**”) who had granted operating leases of aircrafts, filed an appeal against the order issued on May 10, 2023. However, on May 22, 2023 the National Company Law Appellate Tribunal, Delhi (“**NCLAT**”) upheld the NCLT’s Order. The NCLAT held that the absence of notice to creditors or an opportunity for objectors prior to the hearing of *Go First* does not invalidate the procedure or violate the principles of natural justice, particularly when the objectors were heard by the NCLT. NCLAT further held that it cannot be concluded at this stage that application filed by *Go First* was fraudulent or made with malicious intent.

The NCLAT disposed the appeal and ordered in Para 41 which has been reproduced below:

“.... 1) *The order dated 10.05.2023 admitting Section 10 Application is upheld.*

2) *The Appellants(s) are at liberty to file an appropriate Application under Section 65 of the Code with appropriate pleadings and material and*

*Adjudicating Authority while considering the said Application shall not be influenced by any observations made in this order.*

3) *The Appellants(s) as well as IRP are at liberty to make appropriate Application before the Adjudicating Authority for declaration with regard to applicability of the moratorium on the aircrafts with regard to which Leases in favour of the Corporate Applicant were terminated prior to admission of Section 10 Application, which Application need to be considered and decided by the Adjudicating Authority in accordance with law.*

4) *The Appellant(s) and the IRP are also at liberty to make an appropriate Application under section 60, sub-section (5) with regard to claim of possession and other respective claims of both the parties relating to the aircrafts in question, which need to be decided by the Adjudicating Authority in accordance with law.”*

### Turbulence for the Lessors:

As soon as *Go First*’s application for the CIRP was admitted, it became impossible for the lessors to repossess the leased aircrafts. This situation drew attention to the Cape Town Convention (“**Convention**”).

#### The Cape Town Convention

Cape Town Convention is a global treaty created with the aim of promoting the financing and leasing of aircraft, engines, and spare parts. Its purpose is to minimize the risks faced by lessors and improve the legal certainty surrounding these transactions, particularly in situations involving an airline’s insolvency or default. The Convention was concluded in Cape Town in 2001, along with the Protocol on Matters Specific to Aircraft Equipment.

Despite India’s accession to the Convention in 2018, it has not yet been ratified by Parliament. This means that the Convention doesn’t have legal force in the country. Other existing laws, like the IBC 2016, take precedence over the Convention.

However, the Ministry of Civil Aviation had proposed “The Protection and Enforcement of Interests in Aircraft Objects Bill, 2022” (“**Proposed Bill**”) with the aim of implementing

the provisions of the Convention. This Proposed Bill aims to offer the following benefits:

- a) Minimize risks associated with asset-based financing and leasing transactions.
- b) Lower the cost of aviation credit.
- c) Decrease lease rentals for aircraft.

Several lessors of *Go First* have submitted requests to the Directorate General of Civil Aviation (“**DGCA**”) to deregister their aircraft in compliance with the provisions outlined in the Convention. As per Rule 30(7) of the Aircraft Rules, 1937, the DGCA is obligated to complete the deregistration process within 5 working days upon receiving an application from the lessor. However, due to the admission of the application under Section 10 of the IBC 2016 and pursuant to Section 238 of the IBC 2016 (*Provisions of this Code to override other laws*), the DGCA is unable to deregister the aircraft and return them to the lessors.

Meanwhile 8 aircraft lessors have filed a writ before the Single Judge bench of Delhi High Court (“**Court**”) for seeking deregistration of aircrafts. Currently, the Hon’ble Court has reserved the orders on interim relief applications.

### [Flight Ahead:](#)

The recent order by the NCLT and India’s non ratification of the Convention have raised concerns about the future of the country’s aviation market. The implications of these developments are likely to affect the aircraft lessors, international aircraft owners, and the overall leasing industry in general.

As a result of these changes, aircraft lessors and international aircraft owners might become more cautious and hesitant when it comes to doing business in India. They might see India as a less attractive market for leasing aircrafts. This could lead to an increase in lease rental prices, thereby making things even more complicated for Indian airline operators.

Considering the increasing cost of leasing and the challenges to be faced by the aviation market, the Government may find it necessary to pass the Proposed Bill to soften the blow and protect its aviation industry.

The provisions of Convention will then carry same weight as the other existing laws, thereby instilling confidence in lessors, lenders, and international aircraft owners. Furthermore, the Government should also consider making amendments in other existing laws to correspond them with the Proposed Bill.

Also, by passing the Proposed Bill, India can align with norm of the Organisation for Economic Cooperation and Development (“**OECD**”) potentially attracting more international investment and participation in its aviation sector.

| OECD   |
|--|
| OECD has set up a norm that offers a 10% discount on processing fees for loans to acquire aircraft to airlines of any country party to the Convention. This discount is contingent upon the country passing implementing legislation for the Convention. |

### [RECENT CASE HIGHLIGHT](#)

#### [Delhi High Court refuses to grant injunction against Striker on plea by Rario:](#)

The Delhi High Court in the case of *Digital Collectibles Pte Ltd. and Others Versus Galactus Funware Technology Private Limited and Another*<sup>1</sup>, held that the use of the name and/or the image of a celebrity along with data with regard to his on-field performances by online fantasy sports platforms is protected by the right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India.

In the said case, the Petitioner i.e., Rario an online marketplace where third-party users sell, purchase and trade officially licensed and NFT enabled “Digital Player Cards” of cricketers, filed a petition seeking injunction against the Defendant i.e., Striker. The Defendant is also engaged in the similar business, the only major difference being that the Defendant did not had a third party authorization or licenses from cricketers to use their names, surnames, initials and images or other attributes of their personality for their NFT enabled digital player cards. The Petitioner argued that since the Petitioner held exclusive license to use

[1] 2023 SCC Online Del 2306

cricketers name and their likeliness for the digital player cards, the Defendant ought to be restricted to use the same.

However, the Delhi High Court refused to grant an injunction against the Defendant while observing that publicly available information cannot be the subject matter of an exclusive license by the player/cricketer in favour of a third party.

## REGULATORY UPDATES

### Central Board of Direct Taxes (“CBDT”) notifies the entities excluded from the provision of ‘Angel Tax’:

On May 24, 2023, CBDT notified the classes of entities from whom the investments will be excluded from the purview of ‘Angel Tax’ under the provision of Section 56(2)(viii) of the Income Tax Act.

As per first notification numbered 29/2023,<sup>2</sup> the CBDT has provided 3 classes of entities, investment from whom will not be covered under the ambit of ‘Angel Tax’ provision. These are (a) government and government related investors such as sovereign wealth fund, central banks etc; (b) banks or regulated entities involved in insurance business and; (c) SEBI registered Category I FPI, endowments funds, pension funds, and Broad-Based Pooled Investment Vehicle or fund where the number of investors in such vehicle or fund is more than 50, being resident, incorporated or established in the 21 countries as listed in the notification (including US and UK).

As per the notification numbered 30/2023,<sup>3</sup> the exemption granted to eligible start-up from the provision of the ‘Angel Tax’ now extends to even investment made over the fair market value by non-resident individual. The said Notification comes into force retroactively from April 1, 2023. It supersedes the earlier CBDT Notification which granted similar exemption to start-ups for issue of shares to only resident investors.

### InvITs and REITs to hold securities of Holding Companies and Special Purpose Vehicles in Dematerialised Form only:

The Securities Exchange Board of India vide circular<sup>4</sup> dated May 22, 2023 have mandated the Infrastructure Investment Trusts (“**InvITs**”) and Real Estate Investment Trusts (“**REITs**”) to hold securities of holding companies and special purpose vehicles in the dematerialized form only and any securities which are being held in physical are required to be converted into dematerialized format on or before June 30, 2023.

### Ministry of Corporate Affairs (“MCA”) Introduces Timelines for Merger Approvals:

On May 15, 2023, the MCA vide notification no. G.S.R. 367 (E)<sup>5</sup> amended the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (“**Companies Rules**”). The amendment, effective from June 15, 2023, focuses on modifying sub rules (5) and (6) of Rule 25 of Companies Rules, by introducing specific timelines for objections or suggestions from the Registrar of Companies (“**ROC**”) and Official Liquidator (“**OL**”) as well as timeline for the confirmation order by the Central government regarding the merger or amalgamation of certain companies as mentioned under Section 233 of the Companies Act, 2013.

As per the amended rules, if no objections or suggestions are received within 30 days from the ROC and OL by the Central Government, and the Central Government deems the scheme in the public interest or beneficial for creditors, a confirmation order may be issued by the Central Government within 15 days after the 30-days period. However, as per the amended rules, if objections or suggestions are raised by ROC and OL, but found unsustainable by the Central Government and the Central Government believes the scheme is in public interest or beneficial for creditors, a confirmation order may be issued within 30 days after the initial 30-day period.

[2] <https://incometaxindia.gov.in/communications/notification/notification-29-2023.pdf>

[3] <https://incometaxindia.gov.in/communications/notification/notification-30-2023.pdf>

[4] <https://www.sebi.gov.in/legal/circulars/may-2023/dematerialization-of-securities-of-hold-cos-and-spvs-held-by-real-estate-investment-trusts-reits-71448.html>

[5] <https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=MzE3MzkzNTgy&docCategory=Notifications&type=open>



Alternatively, if the scheme is found not in the public interest or beneficial for creditors, application can be filed by the Central Government within 60 days before Tribunal to consider the scheme. Failure to issue a confirmation order or application within 60 days in both the scenarios will be deemed as no objection and confirmation order shall be issued accordingly.

## **INDUSTRY INSIGHT**

### ***Bumpy ride for EV two-wheeler Companies:***

On March 8, 2019 the Ministry of Heavy Industries (“MHI”), Government of India introduced the much celebrated Scheme for Faster Adoption and Manufacturing of Electric Vehicles in India Phase II (“**FAME II**”) outlaying INR 10,000 crores of subsidies for EV companies effective from April 1, 2019.

FAME II outlined various eligibility criteria including localisation norms and upper limit on the price of the EV (i.e., INR 1,50,000/-), which recently several EV companies have been found flouting. As per the news reports, the MHI upon receiving anonymous whistle-blower complaint, found that multiple EV companies were charging the customer for the charger separately, in order to price their EVs below INR 1,50,000/- and thus qualify for the subsidies.

However, after MHI’s scrutiny, many EV companies such as OLA Electric and Ather will be issuing charger refunds. Additionally, MHI also identified non compliance with localisations norms, as many EV companies wrongfully declared imported components as locally sourced after routing it through local companies who imported such components and sold to EV companies without little to none value addition. As per the news report, MHI had paused subsidies of such EV companies such as Okinawa, Hero Electric and further served letter to such companies seeking payment of penalty for violating the localisation norms. In view of the above, as per the news report, the MHI had also recently slashed the number of beneficiary two-wheelers under FAME II, indicating an uncertain future for the scheme beyond FY24.

## **CORPORATE BUZZ**

1. LegalPay, a New-Delhi based alternative-investments platform specialising in legal and debt financing assets, recently flouted \$3 million to finance sports disputes with aim to protect athlete’s rights.
2. Agilitas Sports, a sports wear brand founded by ex-executives of Puma India, raised a whopping INR 450 Corers as its maiden funding round from Convergent Finance LLP and angel investors.
3. Recently, Godrej Consumer Products Limited acquired the FMCG business of Raymond Consumer Care Limited that includes brands like Park Avenue (for the FMCG category only), KS, KamaSutra and Premium, through a slump sale.
4. DMI Finance, a NBFC of the DMI Group, and Ampverse, a leading esports entertainment company, formed a joint venture to co-develop esports intellectual properties, as well as data-driven, tech-enabled products and services for gamers.
5. Mukesh Ambani owned Reliance Retail has entered into a partnership tie-up to reintroduce the popular Chinese fast fashion retailer "Shein" to the Indian market. The brand's app was previously banned in India three years ago following heightened border conflicts with China.
6. Papa John’s, a popular US based Pizza chain, is all set to make a comeback in India after expanding its partnership with PJP Investments Group, one of its international franchisees partners. It has ambitious plan to launch 650 outlets across the country.

**AWARDS & RECOGNITIONS**



*About the Firm*

AKS Partners (formerly known as A.K. Singh & Co) is a law firm based in New Delhi (India) that provides a comprehensive range of legal services and solutions to domestic and international clients. The Firm offers a unique blend of the local knowledge to apply the regulatory, economic, political and cultural context to legal issues and develop case strategies. We regularly handle technically challenging and complex multi-jurisdictional matters. Our team is spearheaded by one of the highly recognised lawyers with extensive experience in international dispute resolution and strong government and diplomatic backgrounds. This experience gives us the deepest understanding of the key decision points that are critical in navigating complex & complicated matters and managing government regulations.

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