COMPANIES AND INSOLVENCY LAWS IN INDIA: CONTEMPORARY DEVELOPMENTS

Editors

Dr. Monmi Gohain

Dr. Dipakshi Das

National Law University and Judicial Academy, Assam

2024

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Title Verso Page

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FOREWORD

I feel happy to contribute a foreword to 'Companies and Insolvency Laws in India: Contemporary Developments', a publication that delves into the importance of companies as a driving force for the economic development of the country and also focus on the interface of insolvency laws in increasing the confidence of various stakeholders vis-à-vis the working of the company.

Corporate law, especially through the lens of the Companies Act, 2013, has evolved as a cornerstone of India's economic and legal framework. This legislation, marking a significant shift from the Companies Act of 1956, was conceived to address the expanding needs of a dynamic corporate sector and to foster sustainable growth in line with the Government's vision. With its far-reaching amendments and reforms, the Act has modernized corporate governance standards, promoted transparency, and fostered accountability, paving the way for a robust regulatory environment. The Companies Act, 2013, also emphasizes inclusive development through mandates like Corporate Social Responsibility, underscoring the importance of companies as both economic and social institutions.

In tandem with corporate law developments, the enactment of the Insolvency and Bankruptcy Code (IBC), 2016, represents another pillar of regulatory reform. It establishes a streamlined and efficient framework for resolving corporate insolvency and bankruptcy, a critical factor for a thriving market economy. The IBC has enhanced predictability, transparency, and fairness in handling insolvency cases, protecting the interests of various stakeholders, including creditors, investors, and employees. The code's timely intervention mechanisms enable stakeholders to minimize financial losses, which has strengthened India's position in global financial markets and empowered institutions to manage their assets and liabilities responsibly.

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The interplay between the Companies Act, 2013, and the IBC, 2016, highlights the critical relationship between corporate governance and insolvency laws, forming a comprehensive legal foundation for India's corporate landscape. This interface ensures a balanced regulatory approach that encourages entrepreneurship while safeguarding market stability. Together, these frameworks serve as vital tools for corporate entities, insolvency professionals, and the judiciary alike, guiding India's journey toward becoming a globally competitive economy. This book offers a platform for insightful discourse on these laws, with special focus on their implementation, impact, and evolving significance of the same.

I am confident that 'Companies and Insolvency Laws in India: Contemporary Developments,' will act as an important source of knowledge for academicians, legal practitioners, students etc., to have a re-look into the role and importance of the companies and their interface with insolvency laws.

Chancellor
National Law University and
Judicial Academy, Assam

11th November, 2024
Guwahati

A NOTE FROM THE VICE-CHANCELLOR

It is a pleasure to share my thoughts on the release of *Companies and Insolvency Laws in India: Contemporary Developments*. This book is a meaningful contribution to understanding corporate and insolvency laws and topics that hold immense relevance in today's fast-changing legal and economic landscape.

Corporate law forms the foundation of economic progress and governance, especially in a diverse country like India, where innovation, regulation, and social responsibility come together to shape industries and financial systems. This book thoughtfully examines key topics like the Companies Act of 2013, the Insolvency and Bankruptcy Code, 2016, and their influence on our legal and business ecosystems. The collection of articles and research here is just impressive and also navigating the complexities of these fields.

At the National Law University and Judicial Academy, Assam, we are deeply committed to fostering research that addresses real-world issues. This publication reflects that commitment, offering insights and perspectives that tackle current challenges while encouraging forward-thinking solutions.

My appreciation also goes out to the contributors whose sharp analyses and creative ideas bring richness to this work. Without them this book would never be a success. I extend my heartfelt appreciation to the editors Dr. Monmi Gohain and Dr. Dipakshi Das, for their dedication in bringing this book to life. Their hard work and ability to weave together diverse ideas have made this book truly special.

A heartfelt thanks to the student editorial board for their meticulous efforts, dedication, and commitment in maintaining the highest editorial standards and their role has been vital in ensuring the success of this endeavor.

I hope this book becomes a valuable resource for scholars, professionals, and policymakers. I am certain that this book will spark meaningful discussions and inspire further exploration in corporate governance and insolvency law, paving the way for stronger legal systems and a vibrant corporate sector in India.

Warm regards,

Prof. (Dr.) K. V. S. Sarma
Vice-Chancellor
National Law University and Judicial Academy, Assam

PREFACE

Corporate law is already an important area of law which is growing at an incredible pace in India. The focus of the Central Government to bring in companies to play a key role in economic development of the country is reflected from various schemes undertaken such as the 'Make in India', 'Skill India" etc. All these initiatives have increased the need of dynamic and skilled professionals who can cater to the needs of these companies to smoothly establish themselves and contribute to the overall development of the economy.

The recent Companies Act, 2013 has been enacted to further carry on this initiative of the Government and incorporate the recent trends in the corporate law. It has great prospects of development at the national and international level in collaboration with the government promoting various aspects in relation to the functioning of a company. There have been recent developments in the field of corporate law which paved the way for amendments, and it is very important to focus on the impact and implementation of the same. Special attention should be given to the North-East region as it has rich natural resources and diverse assets creating an ideal environment for the growth of the industrial sector, thereby attracting investments and fastening development of the corporate sector.

Corporate law in the realm of academic discipline offers vast opportunities for scholarly exploration, intellectual enquiry, innovation and advancement through rigorous research. There are various regulatory laws over companies in India, namely Companies Act 2013, Competition Act 2002, Limited Liability Partnership Act 2008, Insolvency and Bankruptcy Code 2016, Chartered Accountants Act 1949, Indian Company Secretaries Act, 1980 and the Security Exchange Board of India, 1992 along with various amendments, notifications, rules and regulations. The Ministry of Corporate Affairs is mainly concerned with the regulation of corporate affairs in accordance with the law. With

the advent of globalization, various other sectors came to be associated with the mainstream corporate law such as cross border business transactions, foreign direct investments, international financial market, international trade in goods and services, etc. Hence, a more holistic approach is essential in corporate law research integrating multiple perspective to reveal its complex dynamics and inter dependencies. This responsibility lies on the academic institutions to draw out different modalities which can develop corporate law as a subject as well as a vibrant discipline of research. At this juncture, it is also important to analyse the decadal experience of the Companies Act, 2013 and how it is catering to the needs of the dynamic and ever-increasing corporate sector in our country.

Lastly, the study of company law cannot be isolated from the study of insolvency laws in India. Alongside the Indian Companies Act, 2013, we have the Insolvency and the Bankruptcy Code 2016, which deals with the promotion of entrepreneurship, ensuring a timely and effective resolution of insolvency and bankruptcy cases, creating a balance between the interests of all stakeholders, including creditors, debtors, and employees of a company which is at the verge of insolvency and bankruptcy. The study of insolvency laws is particularly important because it deals with both the corporate sector and the financial sector. With respect to the financial sector, an effective insolvency law enables financial institutions to monitor the deterioration of the value of their assets by taking appropriate procedures. It also ensures predictable, equitable, and transparent allocation of risk among participants in a market economy.

Editors

ACKNOWLEDGEMENT

The editors extend sincere thanks to all the learned contributors and reviewers for sparing precious hours from their otherwise occupied schedule; followed by all painstaking exercises endured toward compliance to editorial minutes to perfect this manuscript. The editors would like to extend their sincere thanks to Prof (Dr.) KVS Sarma, Vice Chancellor, NLUJA, Assam for his constant support and encouragement to publish the book. Besides, editors place on record their appreciation for proactive administrative patronage provided by Mr. Gunajit Roy Choudhury, ACS, the Registrar, NLUJA, Assam, for timely publication of this book. The editors also extend their gratitude to Dr. Nandarani Choudhury, Assistant Registrar (Academic) cum Finance Officer (In-charge) and Dr. Kankana Baishya, Assistant Librarian, for extending logistic support as and when requested. They also extend their gratitude to Mr. Satyajit Deb, System Operator, assisted the team with technical knowhow of professional format.

DISCLAIMER

The authors carry whole and sole liability for all statements written in their respective chapters. The Editors shall remain indemnified and be held not jointly and severally liable anyway.

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CONTENTS

1.	EMERGING JURISPRUDENCE ON THE ROLE OF COMMITTEE OF CREDITORS UNDER INSOLVENCY AND BANKRUPTCY CODE Preetha S.	1
2.	ASSET CONFISCATION - A LEGAL WEAPON TO COMBAT GROWING FINANCIAL CRIMES IN INDIA Jyotika Bahl & DM Anand	15
3.	COMPANIES AND THEIR ETHICS AND CONSCIENCE N. Vani Shree & Ananya A.	27
4.	COMMON BUT DIFFERENTIATED SHARING OF CREDITOR INTERESTS IN THE RESOLUTION OF INSOLVENCY UNDER THE INSOLVENCY AND BANKRUPTCY CODE (IBC) Ashish Varma, Shalini Saxena & Ashutosh Kumar	41
5.	AN ANALYSIS BETWEEN INSOLVENCY AND BANKRUPTCY CODE AND COMPETITION LAW ABOUT MERGER & ACQUISITION OF COMPANIES Nirmali Devi Kalita	55
6.	SECURITIES EXCHANGE BOARD OF INDIA AND ITS ROLE INREGULATING COMPANY LAW IN INDIA Ra. Madhan	67

7. DIVERTING ATTENTION OF CORPORATES TOWARDS THE DYING RIVERS OF INDIA — 85
Dulung Sengupta & Shinsa P Mathew

8. UNMASKING "GREENWASHING": THE LEGAL AND REPUTATIONAL CONSEQUENCES FOR COMPANIES ENGAGING IN DECEPTIVE ENVIRONMENTAL CLAIMS — 105
Shuma Talukdar

9. EXPLORING THE ROLE AND IMPACT OF THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA — 129
Koppolu Chaitra & Sudarshan G.

10. ROLE OF INSOLVENCY AND BANKRUPTCY CODE IN FACILITATING THE EXPANSION OF THE INDIAN ECONOMY — 139
Dipakshi Das & Nami Saikia

11. CORPORATE SOCIAL RESPONSIBILITY: A DEVELOPMENT 'ALTERNATIVE' TO ACHIEVE COMMUNITY DEVELOPMENT THROUGH WELFARE OF THE ELDERLY AND PERSONS WITH DISABILITY — 157
Preeti Priyam Sharma

12. THE ROLE OF AN AUDITOR AS A WHISTLE-BLOWER OF CORPORATE FRAUD UNDER THE INDIAN LEGAL FRAMEWORK: AN ANALYSIS — 179
Rinita Das

13. JURISDICTIONAL ISSUES IN E-COMMERCE DISPUTES: CONFLICT OF LAWS AND FORUM SHOPPING — 199
Dr. Monmi Gohain & Prerna Das

14. NAVIGATING THE TAX LANDSCAPE: A GUIDE TO MERGERS AND ACQUISITIONS 223
Mayank Parashar & Grace Bhadauria

15. WOMEN DIRECTORS: STORY OF A REVOLUTIONARY MEASURE 235
Jhalak Nandwani

16. GLOBAL GIANTS: RISE OF MNCS AND THEIR INTERACTION WITH HUMAN RIGHTS 251
Monzur Ul Kabir Choudhury

17. UNITED NATIONS CONVENTION ON INTERNATIONAL SALE OF GOODS: OVERVIEW, APPLICABILITY AND CONCEPT OF FUNDAMENTAL BREACH 261
Pranav Gandhi

18. UNMASKING CORPORATE FRAUD: UNDERSTANDING THENATURE, CAUSES, AND CONSEQUENCES 293
Baani Chhibber & Ragini Shekhawat

CHAPTER 1

EMERGING JURISPRUDENCE ON THE ROLE OF COMMITTEE OF CREDITORS UNDER INSOLVENCY AND BANKRUPTCY CODE

Preetha S.

Introduction

The main objective of insolvency law is to prevent a chaotic race by the creditors to enforce their security interests and to ensure a smooth process for orderly collection and realisation of debtor's assets.[1] The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC) was enacted with the objective of facilitating the revival of companies in financial crisis, stimulating the rehabilitation of insolvent companies as a going concern and to balance the interests of all the stakeholders in the event of financial failures.[2] In contrast with the earlier laws on corporate insolvency resolution, IBC provides a market based mechanism for revival of companies to ensure optimum realisation of value for the corporate assets. The problem of business failure is sought to be addressed by replacing the 'debtor in possession' with a new regime of management in which the creditor will be in control over the debtor's assets and property.[3] This encourages value enhancement as the erstwhile board loses control over the company and insolvency professional starts managing the affairs of the corporate debtor on behalf of the creditors.

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[1] VANESSA FINCH, CORPORATE INSOLVENCY LAW, 9 (Cambridge Press, 2009)

[2] Insolvency and Bankruptcy Code,2016, Preamble.

[3] Confederation of Indian Industry, Decoding The Code: Survey on Twenty One Months of IBC in India, 2018, (27 Aug, 2023,3.00 P.M), https://www.pwc.in/assets/pdfs/publications/2018/decoding-the-code-survey-on-twenty-one-months-of-ibc-in-india.pdf.

Corporate Insolvency Resolution Process (CIRP)

IBC provides a unique market-based mechanism for reviving distressed companies. A default committed by the corporate debtor triggers the resolution process.[4] If the corporate debtor defaults in payment of debt, an application can be made by the creditor or the corporate debtor to the Adjudicating Authority. Once the application is admitted by the adjudicating authority, a resolution professional is appointed to conduct the resolution process. The resolution professional shall collect information on all claims against corporate debtor and its financial position. He shall then constitute a committee of creditors. The resolution professional has to invite resolution plans from interested persons which shall be presented before the committee of creditors for its approval. The resolution plan may devise various methods including waiving of debt, rescheduling of debt, debt-equity conversion, capital infusion, takeover or sale of business on a going concern basis.

The corporate debtor which has become a 'distressed asset' may still have a value which could be augmented through better utilisation of resources and better management. The potential return which could be derived from reviving a distressed company could be huge which acts as an incentive for competitors to bid for the distressed company. This market for non-performing assets opened up under the IBC regime is equally a market for gaining control over distressed companies. The initiation of insolvency resolution process under IBC provides an opportunity for entities to acquire distressed assets at discounted prices. It presents an opportunity to expand their capacity cost effectively. The market mechanism provided under the IBC is based on the premise that competitive bidding would ensure better price discovery for the corporate asset. The comparative merits of various resolution plans are assessed by the Committee of Creditors (CoC).

[4] Insolvency and Bankruptcy Code, 2016, S. 3 (12).

Requirements of a Resolution Plan

A resolution plan means a plan proposed for the resolution of insolvency of the corporate debtor on a going concern basis.[5] The content and terms of resolution plan is not stipulated in the IBC and is left to the imagination of the stakeholders. A resolution applicant is a person who submits a resolution plan pursuant to an invitation made by the insolvency professional.[6] A resolution plan may provide for a change in management, marketing strategy, product line, technology, capital structure or it can provide for infusion of capital or sale of undertaking or assets. The resolution plan has to confirm to all the statutory requirements under the code.[7] The statutory requirements include provision for insolvency resolution process costs, provision for management of affairs of corporate debtor after approval of resolution plan, repayment of debts of operational creditors and the implementation and supervision of the resolution plan.

Resolution plans that confirm with the minimum conditions shall be presented to the CoC. CoC shall consider the viability and feasibility of resolution plans and approve a resolution plan by a vote of not less than 66 % of voting share of financial creditors. The resolution professional shall submit the resolution plan approved by the CoC to the Adjudicating Authority (AA). If the AA is satisfied that the resolution plan approved by the CoC meets the minimum conditions provided under section 30 (2), it shall approve the resolution plan. Once the plan is approved by the AA, it becomes binding on the creditor, its members, creditors and employees.

There had been many instances where the specific role of resolution professional, the CoC and the adjudicatory authority in approving the resolution plan was called into question. This

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[5] Insolvency and Bankruptcy Code, 2016, S. 2(26).

[6] Insolvency and Bankruptcy Code, 2016, S.2(25).

[7] Insolvency and Bankruptcy Code, 2016, S.30.

issue was clarified through judicial decisions. The paper will focus on the emerging jurisprudence on the role of Committee of Creditors under IBC and will examine the implications of the judicial approach in upholding the primacy of the Committee of Creditors.

Approval of Resolution Plan

IBC created different institutions with specialised roles in the insolvency resolution process. IBC has assigned different roles to the resolution professional, the committee of creditors and the adjudicatory authority in approving resolution plans. Though the code has demarcated the powers and functions of each authority there had been clashes between the CoC and NCLT as to their respective powers.

Role of Resolution Professional

IBC created a cadre of professional insolvency practitioners, known as resolution professionals for overseeing the resolution process. The resolution professional plays a key role in the management of affairs of the corporate debtor from the time of admission of resolution application till the approval of resolution plan by the adjudicating authority. He collects, collates and admits claims from creditors, invites resolution plans and manages the company as a going concern. He has to ensure that the resolution plan confirm to the requirements under the Code. The resolution plan shall comply with certain minimum conditions. [8] It shall provide for insolvency resolution process costs, repayment of debts of operational creditors which shall not be less than amount paid in the event of liquidation, management of affairs of corporate debtor and implementation and supervision of the resolution plan. Certain persons are ineligible to submit resolution plans. [9] RP should ensure that the resolution applicant does not suffer from any

[8] Insolvency and Bankruptcy Code, 2016, S. 30 (2).
[9] Insolvency and Bankruptcy Code, 2016, S. 29.

disqualification. The primary responsibility of the RP is to ensure that a resolution plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order. The resolution plans which confirm to the statutory requirements are placed before the CoC for its consideration.

Role of Committee of Creditors (COC)

IBC envisages the Committee of Creditors (CoC) as the decision-making institution within the corporate insolvency resolution framework. IBC mandates that CoC shall be constituted with all the financial creditors of the corporate debtor.[10] The Bankruptcy Law Reforms Committee(BLRC) observed that the creditors committee should consist of creditors possessing the ability to assess the viability and willing to make modifications to the terms of existing liabilities during negotiations.[11] BLRC noted that operational creditors lack the authority to make decisions pertaining to the insolvency of an entity and are generally unwilling to defer payments in anticipation of better future prospects for the entity.

The code requires CoC to follow a transparent procedure while approving resolution plans. The code also provides the procedure for conducting meetings of CoC. The members of the CoC, members of suspended Board of directors, representatives of operational creditors and the resolution applicant can attend the meetings of CoC. The CoC shall consist of operational creditors when the corporate debtor has no financial creditors or when all the financial creditors are related parties. Decisions relating to the management of affairs of corporate debtors are taken with the approval of at least 66% of votes of CoC.

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[10] Insolvency and Bankruptcy Code, 2016, S. 21.

[11] Bankruptcy Law Reforms Committee (BLRC) Report, (November 2015) (Aug 22,4.00 PM),https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

CoC is vested with the responsibility of assessing the viability of resolution plans on qualitative and quantitative parameters and determining the way in which the company is to be restructured for resolving the distress. The matters falling within the domain of CoC includes formulation of the elements of the evaluation matrix,[12] evaluation of viability of the resolution plans,[13] classification of creditors, closure of manufacturing units or undertakings owned by the corporate debtor[14] and liquidation of corporate debtor where no resolution plan is received. [15] CoC is required to assess the resolution plans meticulously and then identify the most optimal resolution plan which may be approved with appropriate modifications. The CoC has to record reasons while approving or rejecting a resolution plan.

Role of Adjudicating Authority and Scope of Judicial Review

The statutory scheme under IBC envisages judicial intervention to be kept at the bare minimum so that the autonomy of CoC with respect to commercial decisions are protected. The role of adjudicatory authorities in approving and reviewing the decisions taken by the CoC was discussed in a plethora of cases.

In Arcelor Mittal India Private Ltd v. Sathish Kumar Gupta,[16] the Supreme Court dealt with the powers of NCLT to review the

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[12] MR Metallurgical Resources AG v. Ferro Alloys Corp Company Appeal (AT) (Insolvency) No 272 of 2020 [12], NCLT, New Delhi.

[13] Bhaskara Agro v. Super Agri Seeds (2018) SCC Online NCLAT 340; Sreeram E Techno School v. Beans and More Hospitality Company Appeal (AT) (Insolvency) No 936 of 2019 [5] (6th Sept, 3.00 PM, https://ibbi.gov.in/uploads/order/e486d48eabd00a36c612b66801570559.pdf).

[14] Santosh Walokar v. Vijay Kumar V Iyer Company Appeal (AT) (Insolvency) No 871-872 of 2019 [26] (6th Sept, 3.00 PM,https://ibbi.gov.in/uploads/order/b112ed1108368e2d01639cc796a13b6b.pdf).

[15] Praveen Kumar v. VSL Securities Restoration Application No 01 of 2020 in Company Appeal (AT) (Insolvency) No 308 of 2020

[16]Decided on 4th October, 2018, (7th Sept, 10.AM,https://ibbi.gov.in/webadmin/pdf/order/2018/Oct/33945_2018_Judgement_04-Oct-2018_2018-10-04%2015:36:20.pdf

decision of CoC rejecting the resolution plan. The facts of the case were that a petition for resolving insolvency of Essar Steel India Private Ltd [ESIL] was admitted and Sathish Gupta, the insolvency professional [RP] found that both the resolution applicants, Arcelor Mittal India Private Ltd [AMIPL] and Numetal Ltd were ineligible as they suffer from disqualification provided under section 29A. RP invited fresh plans and three entities AMIPL, Numetal and Vedanta Resources Ltd submitted new resolution plans. The Committee of Creditors [CoC] rejected two applicants. Both AMIPL and Numetal challenged decision before NCLT, NCLAT and the Supreme Court.

The Supreme Court upheld the rejection of both applicants as they are hit by Section 29A (c). However, in order to do complete justice both resolution applicants were given one more opportunity to pay offs their NPA and resubmit the resolution plans. The Supreme Court held that the disapproval of the Committee of Creditors on the ground that the resolution plan violates the provisions of any law, including the ground that a resolution applicant is ineligible under Section 29A, is not final. The Adjudicating Authority, acting quasi-judicially, can determine whether the resolution plan is ineligible as per Section 29A of the Code after hearing arguments from the resolution applicant as well as the Committee of Creditors. NCLT decision regarding ineligibility can be assailed by filing an appeal to the Appellate Authority under Section 61. Thus, the decision of CoC is not final unless approved by the adjudicatory authority.

A change in judicial approach is visible in K. Sashidhar v. Indian Overseas Bank,[17] where the Supreme Court overturned the settled position on the power of judicial review of adjudicatory authorities under IBC. It was an appeal against the order of the NCLAT rejecting the resolution plans of Innoventive Industries Limited (“IIL”) and Kamineni Steel & Power Private Limited

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[17] CIVIL APPEAL NO.10673 OF 2018.

("KSPIPL") and directing the initiation of liquidation process against the corporate debtor. The Supreme Court held that on receipt of a rejected resolution plan, NCLT is not expected to do anything more but is obligated under section 33(1) of the IBC to initiate liquidation process against the corporate debtor. The Supreme Court held that NCLT has no jurisdiction or authority to analyse or evaluate the commercial decision of the CoC.

NCLT cannot examine the justness of the decision rejecting the resolution plan. It further observed that the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed under IBC. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable. Clarifying the specific roles assigned to RP and CoC, the Supreme Court stated that prior approval of the CoC is required for major decisions taken by RP.

Similarly, CoC can consider the resolution plan under section 30(4) after it is vetted and verified by RP as being compliant with all the statutory requirements specified under section 30(2). The Hon'ble Supreme Court emphasised that the resolution professional is not required to express his opinion on matters within the domain of the CoC which is vested with the authority to approve or reject the resolution plan under section 30(4) under the I&B Code. IBC does not envisage resolution professional assuming the role of CoC.

The role of resolution professional, CoC and adjudicating authority in approving resolution plan was elaborately discussed by the Supreme Court of India in the Essar Steel Case. The long-drawn battle in the Essar Steel case was finally put to rest through the judgment of Supreme Court in Committee of Creditors of Essar Steel Ltd v Satish Kumar

Gupta,[18] where it was held that the commercial wisdom of the Committee of creditors shall prevail on the question of approval of resolution plans and the adjudicatory authority (NCLT) and the appellate authority (NCLAT) shall not substitute its wisdom over the decision taken by CoC. The ultimate decision of how much is to be paid for each class of creditors shall be taken by CoC. The scope of judicial review exercised by the adjudicating authority shall not extend beyond the grounds mentioned under section 30 of IBC.

The point of contention was regarding the viability of resolution plans submitted by three applicants namely AMIPL, Numetal and Vedanta Resources Ltd. The resolution plan of Arcelor Mittal provided for upfront payment of 35, 000 crores to resolve debts amounting to 49,000 crores. It was stated that unsecured financial creditors shall be paid an aggregate amount of 5% of their admitted claims. The plan also provided for infusion of INR 8,000 crores of fresh capital. Arcelor Mittal was declared as the highest evaluated resolution applicant. The final negotiated resolution plan of Arcelor Mittal was approved by the Committee of Creditors by a 92.24% majority. NCLT approved the resolution plan with an observation that operational creditors must get at least similar treatment as compared to the dues of the financial creditors on the principle of equity and fair play as well as the Wednesbury Principle of reasonableness and the doctrine of proportionality, so as to avoid disparity in making payments to the operational creditors. Hence a reasonable formula for apportionment was worked out for distribution amongst operational creditors. Operational creditors filed appeals filed before NCLAT which held that financial creditors and operational creditors deserve equal treatment under a resolution plan. CoC filed appeal before Supreme Court arguing that IBC does not mandate equal treatment of creditors. CoC argued that the modification of resolution plan by NCLAT is

[18] AIRONLINE 2019 SC 1494

illegal. The Supreme Court held that the jurisdiction of NCLT and NCLAT is expressly circumscribed and the adjudicatory authorities can examine the challenge only in relation to grounds specified in section 30 and section 61 of the code respectively.

The jurisdiction is limited to matters other than enquiry into the autonomy or commercial wisdom of the dissenting financial creditors. The adjudicatory authorities have been endowed with limited jurisdiction as specified in the Code and it cannot act as a court of equity or exercise plenary powers. NCLT/NCLAT does not have the jurisdiction to reverse or modify decisions coming within the commercial wisdom of CoC. Commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority. The Supreme Court emphasised that the adjudicating authority must not intervene in the commercial decisions of the CoC unless there is any glaring arbitrariness or visible unfairness. Thus, the authority must restrict its judicial powers and must avoid intervention in decisions involving commercial wisdom of the CoC.

In a recent judgement, the NCLT Mumbai bench in Kapil Wadhavan v Administrator, Dewan Housing Finance Corporation Ltd,[19] ordered the CoC to consider a resolution plan submitted by the promoters of DHFL group and to consider the plan on merits. RBI had initiated the insolvency resolution of DHFL. The resolution plan submitted by Mr Wadhavan was rejected by the CoC. After considering the other resolution plans submitted, CoC decided to accept the plan submitted by the largest bidder, the Piramal Group. NCLT directed CoC to consider the resolution plan submitted by Mr Wadhavan on the ground that not considering a settlement proposal which is around 150 % higher value of the resolution plan approved is a procedural irregularity. NCLT observed that Mr Wadhavan's

[19] Company Appeal (AT) (Insolvency) No. 785 of 2020

plan cannot be brushed aside on ground that ex-promoter cannot move a proposal of settlement.

It should be noted that CoC had rejected the proposal submitted by Mr Wadhavan on the ground that there were serious allegations of siphoning of funds, cheating and fraud against him. He was in judicial custody and had approached the Tribunal at the last minute after the voting on the duly submitted resolution plans has commenced. CoC had found that the proposal was filed with unsubstantiated statements, misrepresentations and false statements. CoC had serious doubts on the eligibility of the applicant on account of disqualifications provided under section 29A.

The Insolvency and Bankruptcy Code [Amendment] Act, 2017 introduced section 29A to the code prescribing certain grounds for disqualification of resolution applicant.[20] Section 29A lays down multiple layered and comprehensive grounds for disqualification. The amendment was introduced with an intention to prevent unscrupulous and undesirable persons from participating in the resolution process.[21] Section 29 A intends to prohibit persons who are responsible for the insolvency of the corporate debtor from gaining back door entry at the expense of creditors. This is a case where NCLT overturned the settled position of law that commercial decisions of Coc are non-justiciable. This is an unwelcome trend and it needs to be rectified. The NCLT order directing CoC to consider the resolution plan afresh is an intrusion into the domain of CoC and its commercial wisdom. This decision has again brought up the discussion on the scope of judicial review over the decision of CoC in approving resolution plans. NCLT intervened at the stage when the insolvency resolution was at

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[20] Section 29A was brought into effect from 23rd November, 2017.

[21] Insolvency and Bankruptcy Code [Amendment] Bill, 2017, Statement of objects and Reasons,(27th August, 4.00 PM),https://www.prsindia.org/sites/default/files/bill_files/Insolvency%20and%20Bankruptcy%20Code%20Amendment%20Bill%202017.pdf.

an advanced stage. Such interventions are bound to create a lot of uncertainty and delay in the resolution process. Such interventions would also result in delaying the entire process.

From the above analysis, the rationale of limiting the power of judicial review over commercial decisions taken by CoC is clear. IBC seeks to provide a robust mechanism for insolvency resolution in a timely manner. The adjudicatory authorities should have the said objective in mind while considering petitions for review of decisions of CoC.

Abuse of Discretionary Powers by CoC

There had been several instances where the adjudicatory authorities raised concerns about the functioning and competence of CoC in corporate insolvency resolution process. In Andra Bank v Sterling Infotech Ltd,[22] the adjudicatory authority rejected the resolution plan approved by the CoC as it was submitted by the promoter who was ineligible as per section 29A.

In Bank of Baroda v Mr. Sisir Kumar Appikatla, & Ors., [23] CoC approved the restructuring plan projected as a resolution plan by the promoter of the company. NCLT rejected the resolution plan stating that it was a ploy to gain control over the corporate debtors by ineligible persons.

In Binani Industries Ltd v Bank of Baroda,[24] the NCLAT, New Delhi bench found that the CoC had extensive negotiations with one resolution applicant Rajputana Properties Ld (RPL) and discriminated against the other resolution applicants. The offer submitted by Ultratech Cement Ltd (UCL)was not considered at all. The resolution plan submitted by RPL discriminated against

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[22] Company Appeal (AT) (Insolvency) No. 601 of 2019, NCLT New Delhi.

[23] Company Appeal (AT) (Insolvency) No. 579 of 2020.

[24] Alivya Sahay and Aditya Parihar,' *Binani Industries Ltd. V. Bank of Baroda and Another – An Analysis,*2018 IJLMH ,Volume 2, Issue 1, ISSN: 2581-5369.

some of the financial creditors who were equally situated. But CoC accepted the plan submitted by RPL. NCLT rejected the resolution plan of RPL on the ground that the CoC failed in balancing the interest of the stakeholders. NCLAT allowed the appeal filed by UCL and approved the resolution plan as it satisfied all the requirements under the IBC.

Acceptance of huge haircuts on company's dues is another instance where the commercial wisdom of CoC was questioned. The incompetency of representatives of financial creditors and delay in getting timely orders from the financial creditors is another problem delaying the resolution process.[25] CoC meetings cannot happen smoothly if members of CoC attend without full mandate from the financial creditors to take a final call during the meetings.

In this context, the IBBI proposed a code of conduct to regulate the functioning of CoC.[26] The proposed code of conduct requires the members of CoC to maintain integrity and objectivity in performing its roles and to ensure that decisions are taken without any bias, undue influence, coercion or conflict of interest. CoC shall maintain transparency in its decisions and is required to act in consonance with the objectives of IBC. The code of conduct seeks to regulate an unregulated environment and to bring in accountability in the discharge of its functions by CoC. Unfortunately, the proposed code does not provide any sanctions for non-compliance of the code of conduct. It is expected that some penalties or sanctions will be provided when the code is enacted in the form of a regulation. Non-compliance with the code of conduct should be made a ground for judicial review of commercial decisions of CoC.

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[25] K Sasidhar v Kamineni Steel and Power India Ltd, 8th Sept,2023,http://164.100.158.181/Publication/Hyderabad_Bench/2017/Others/285.pdf).

[26] IBBI Discussion paper dated 27 August 2021, (6th Sept,2023, 3.00 PM), https://ibbi.gov.in/Discussionpaper-CIRP-27Aug2021.pdf.

Conclusion

Committee of creditors play a pivotal role in corporate insolvency resolution process. It is the institutionalised mechanism through which the creditor-in-control model is implemented under the IBC. The responsibilities of the resolution professional, committee of creditors and the adjudicatory authority in the corporate insolvency resolution process is clearly demarcated in the IBC. The evolving jurisprudence has brought further clarity to the respective roles assigned to the authorities under the Code. Approving a resolution plan or rejecting it is a commercial decision to be left to the commercial wisdom of CoC. If the decision of the CoC is interfered with on grounds not provided for under the IBC, it would scuttle the entire resolution process and we would never be able to resolve the distress within the timelines specified under IBC. The Code of Conduct proposed by IBBI to bring in accountability in the functioning of CoC is to be appreciated as it will enhance the efficacy of the resolution process. Adequate checks and balances in the exercise of commercial decisions by CoC will strengthen the insolvency regime with inbuilt mechanisms of redress to the stakeholders in case of deviation from standards of fair play.

CHAPTER 2

ASSET CONFISCATION - A LEGAL WEAPON TO COMBAT GROWING FINANCIAL CRIMES IN INDIA

Jyotika Bahl and
DM Anand

Introduction

Asset confiscation, aimed to disrupt and dismantle criminal activities and networks, is a legal mechanism that allows the law enforcement agencies to confiscate assets linked directly or indirectly to criminal activities or have been acquired from unlawful means or are the proceeds of crimes. The criminal activities can be drug trafficking, money laundering, corruption, fraud, human trafficking, terrorist funding or any other serious offence.

In this article we shall firstly investigate the growth and effects of financial crimes in India. Secondly, we shall briefly discuss about the types of confiscation regimes and their effectiveness. Thirdly, the article will move to investigate about the efforts of world bodies to combat economic crimes and explore the jurisdictions that have a different confiscation regime than India. Fourthly, we shall analyse the major legislative instruments enacted for asset confiscation in India and their effectiveness. Finally, we shall suggest for a confiscation regime to prevent growing financial crimes in India.

Growth of financial crimes

Financial crimes are spiralling swiftly across the world including India. The Financial Action Task Force (FATF), a global watchdog for money laundering and economic crimes has reported that financial crimes are soaring sharply and generate billions of dollars around the globe. The World Economic Forum has estimated that around $2 trillion of illicit proceeds are

generated from criminal activity every year. The United Nations report on International Financial Accountability, Transparency and Integrity for achieving the 2030 Agenda (also known as FACTI Panel) says that around 2.7% of global GDP is laundered every year.[1]

In Indian context, the Reserve Bank of India has reported that in financial year 2022 around 604 billion Indian rupees of banking frauds were committed. Almost 50% Indians have experienced financial fraud in the last 3 years, and more than two-third of those failed to get their money back.[2] The National Crime Record Bureau in its latest report 'Crime in India 2021' has reported that corruption and economic offences have increased by 20% compared to year 2020.

Consequences of financial crimes

Use of tainted money has serious consequences including losses to legitimate businesses, tax evasion, weaken financial systems, loss of tax revenue, reputation risk for the country, and risks of international sanctions. Above all, it provides increased exposure to organised crime, corruption, and money laundering. People involved in financial criminal activities invest the money generated from their illegal activity to commit future criminal activities. Besides, the government is the greatest victim of financial crimes. They also undermine the legitimacy of the rule of law and breach the laws frequently to increase their illegitimate wealth. To combat it, the government diverts significant resources to fight against white-collar criminals and the damage they have done and are doing to innocent people and the country. Free from financial crimes, the government can

[1] The report was published on 24 September 2020. Available at (18 Nov, 2022,https://factipanel.org/explore-the-report).

[2] As reported in the Mint, 4 August 2022,(21 November 2022, https://www.livemint.com/news/india/42-indians-experienced-financial-fraud-in-last-3-years-reveals-survey-11659536104393.html).

invest its resources for the sustainable development of the society.

International efforts for asset confiscation

World bodies have taken significant steps to curb financial crimes, and asset confiscation. The United Nations Convention against Corruption (UNCAC) was the first international instrument that explicitly addresses recovery of proceeds of crime. It requires States parties to take measures to restrain, seize, and confiscate the proceeds of corruption. The World Bank and the United Nations Office of Drugs and Crime to promote the implementation of the Convention launched the Stolen Asset Recovery (StAR) Initiative, a step to support international efforts to end safe havens for dirty money. The United Nations 2000 Convention against Organised Crime also deals with money laundering. FATF in its 40 recommendations has emphasised the countries to take measures for asset forfeiture in financial crimes. Asset recovery has also been included by the United Nations General Assembly in the 2030 Agenda for Sustainable Development.[3]

Types of confiscation regimes

Let us consider what kinds of asset confiscation exist. Research shows that there are two kind of asset confiscation: convicted-based confiscation and non-conviction-based confiscation. We shall briefly discuss both confiscation regimes.

Conviction-based confiscation

Conviction-based confiscation obviously depends on conviction. It focuses on proving the guilt of a person, and assets can only be confiscated after conviction. It is a part of the criminal charge *in personam* (against the person). For confiscation, a person must be convicted, and the prosecution

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[3] Sustainable Development Goals (Goal 16.4).

must establish the unlawful conduct beyond reasonable doubt. It is imposed as a part of the sentence. In this kind of confiscation, the standard of proof is the highest, beyond reasonable doubt. The prosecution must prove that the unlawful conduct of the suspect was beyond reasonable doubt. We reasonably think that the purpose of confiscation regime will fail considering the offenders, their families and their associates continuously enjoy the benefits of their illicitly generated wealth during the pendency of their trials. It is also likelihood that the offenders would transfer their assets to a third related party or to a business entity that they control directly or indirectly.

Non-conviction-based confiscation

Non-conviction-based confiscation (NCB) confiscation encompasses *in rem (*against the thing*)* action. It is independent of criminal proceedings. The law enforcement can initiate confiscation proceedings before, during or after the criminal proceedings. NCB confiscation proceedings can be overlapping and run parallel with criminal proceedings. It aims to establish that the properties are linked to criminal activities and, as such, are tainted. It focuses on confiscating the tainted properties.

Benefits of NCB confiscation regime

Establishment of NCB confiscation has multiple benefits. First, it deters criminals from using the illegally obtained properties or proceeds of crime for investing in future criminal activities. Second, it helps the government to disrupt and dismantle criminal networks and break the financing of crime enterprises. Third, it helps the victims of the crimes which ultimately encourage infusion of resources for society betterment. Fourthly, it improves public trust and confidence in the rule of law and law enforcement. Fifthly, it gives the message to the society that the crime will never pay. Finally, NCB confiscation is easy to prove compared to criminal conviction.

Standard of proof and Burden of proof under NCB confiscation

For NCB confiscation proof of guilt is not mandatory. The focus is to establish a link between the criminal activity and the property. The standard of proof is normally the balance of probabilities. Further, the burden of proof is on the defendant. A defendant needs to prove that the properties were acquired from legitimate sources, and, as such, are not tainted.

World bodies emphasis on NCB confiscation

Several international bodies have recommended and support the adoption of NCB asset confiscation legal regime. FATF has recommended the countries should enact NCB legislations to confiscate proceeds of crimes.[4] Article 54 of the United Nations Convention against Corruption (UNCAC) urges that countries should consider confiscation of properties without a criminal conviction. The G20 Anti-Corruption Working Group in its Anti-Corruption Action Plan for 2022-2024 agreed to promote fair NCB confiscation. In 2021, the European Union also recommended the use of NCB seizure and confiscation in its report on "The Use of Non-Conviction-based Seizure and Confiscation". The Implementation Review Mechanism (IRM) for UNCAC regularly monitors countries progress regarding implementation of NCB confiscation. In its report in 2021 on the implementation of Chapter V provisions (Asset Recovery), IRM concluded that most states had allowed for confiscation without criminal conviction.

Overseas jurisdictions

We shall now briefly discuss about the NCB confiscation regimes in United Kingdom, Australia and New Zealand.

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[4] Recommendations 4 and 38. FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation "The FATF Recommendations". These recommendations were adopted by the FATF Plenary in February 2012.

The United Kingdom

Under the United Kingdom (UK) laws, criminal conviction is not required for asset confiscation obtained through unlawful conduct. The Proceeds of Crime Act 2002 allows for confiscation without conviction. The law allows the law enforcement to bring civil recovery proceedings where it believes that a person has acquired assets through criminal activity. Considering the proceedings are civil in nature, it does not require proof to a criminal standard.

Australia

Australia Commonwealth, States and Territories have passed laws to curb financial crimes and confiscate assets derived from criminal activities. Each State has its own legislative framework to deal with economic offences. We restrict, in this paper, our brief analysis of the Commonwealth laws only.

At Commonwealth level, the primary legislation for asset confiscation and recovery is the Proceeds of Crime Act 2002. It enables law enforcement to confiscate the assets derived from criminal proceeds. It allows the law enforcement to trace, restrain, and confiscate the assets that are linked to criminal activities or have been purchased with unlawful funds. Conviction is not mandatory for confiscation of asset obtained with illicit money.

Another significant law is the Financial Transaction Reports Act 1988. It operates alongside Australia's anti-money laundering laws. It imposes obligations on cash dealers and reporting entities to report significant cash transactions which is AU$10,000 or more to the Australia Transaction Reports and Analysis Centre, also known as AUSTRAC.

New Zealand

In New Zealand, the main law to confiscate assets that are obtained with illicit money is the Criminal Proceeds (Recovery)

Act 2009 (CPRA). It allows the law enforcement to confiscate the proceeds of crimes of a person who has unlawfully benefited from significant criminal activity. The law enforcement has powers to confiscate tainted assets whether or not the (a) person's conviction has been quashed or set aside; (b) person has been acquitted; (c) person has been charged with or convicted. The law also empowers the enforcement officers to confiscate the tainted assets in the absence of any criminal proceedings. A notable feature of the law is that the tainted property can be confiscated without any restraints as against India's PMLA where the properties must be attached pending confiscation after conviction. Also, the assets can be attached and confiscated on different grounds. The New Zealand Parliament has recently amended CPRA to confiscate legitimate assets of persons who are involved in gang-related activities or have associations with any gang.

The laws of the UK and Australia also have provisions to confiscate the assets on the grounds that an individual's lawfully obtained income would have been insufficient as compared to his existing assets. These are known as Unexplained Wealth Orders (UWO). All kinds of people including public servants, politicians, and companies are covered under the UWO. In New Zealand, the UWO provisions do not exist.

Asset confiscation in India

We shall now consider the asset confiscation laws in India that allows the confiscation of properties that are derived from criminal activities. In this respect, Government of India has enacted several laws that empower the law enforcement agencies to confiscate or forfeit tainted assets. Let us analyse the legal instruments for confiscation in India.

The Prevention of Money Laundering Act 2002 (PMLA) is a primary legislation to prevent money laundering and confiscate properties derived from money laundering offences. PMLA has a

limited scope. It applies to those persons who are convicted of offences as provided in its Schedules. The law allows attachment of properties gained from money laundering offences without conviction, yet it does not allow confiscation of tainted assets until conviction. In majority of cases, the attached properties stay with the persons involved in money laundering activities or with, their families or companies they control. They continue living in and using the attached properties. The only thing that is disadvantageous to the persons is that they cannot transfer the attached properties. However, it is not a certainty considering these people reach and connivance with corrupt revenue officers. As such, confiscation under PMLA is conviction-based.

The Fugitive Economic Offenders Act 2018 (FEOA) was enacted to deter persons who have left India to evade the process of law in India. FEOA allows the law enforcement to attach, after obtaining the permission of the special court, the proceeds of crime and/or benami properties of those persons. The special court, after due process of law and considering the principle of natural justice declares a person fugitive economic offender and allows confiscation of illegally obtained properties of fugitive economic offenders. As such, confiscation of tainted assets of fugitive economic offender can occur only after a special court declares a person fugitive economic offender.

The Smugglers and Foreign Exchange Manipulators Act 1976 (SAFEMA) was enacted to forfeit the properties of smugglers and foreign exchange manipulators. Under SAFEMA a person must be convicted under certain specific laws before forfeiture/confiscation proceedings can be initiated. SAFEMA also prescribes for forfeiture of properties of persons who have been issued a valid detention order under the Conservation of Foreign Exchange and Prevention of Smuggling Activities 1974. As such, to some extent, SAFEMA allows NCB confiscation.

The Narcotics-Drugs and Psychotropic Substances Act 1985 (NDPSA) also allows forfeiture of properties that have been derived from narcotics trade. Chapter VA of NDPSA sets out for forfeiture of illegally acquired properties. Under this chapter, forfeiture proceedings can be initiated against those persons who have been (i) convicted under NDPSA for 10 years or more imprisonment, or (ii) a valid detention order exists, or (iii) they have been arrested or a warrant for arrest under NDPSA has been issued. Still, NDPSA allows forfeiture of properties only after conviction or where a valid detention order exists against a person. As such, NDPSA also allows partial NCB confiscation like SAFEMA.

The Prevention of Corruption Act 1988 (POCA) was enacted to prevent corruption. Under POCA, tainted assets can only be confiscated after the completion of the trial under the Criminal Law Amendment Ordnance 1944. Again, conviction is a pre-requisite for confiscation under POCA.

We strongly believe since corruption is rampant in India and significant numbers of cases are pending in lower and higher courts, a minor amendment incorporating NCB provisions will significantly control this raging problem.

The Wild Life (Protection) Act 1972 (WLPA) was introduced with the purpose of protecting wild animal, birds and plants and related matters to ensure ecological and environmental security of the country. Again, conviction is a pre-requisite for forfeiture of properties under WLPA. Changes including confiscation of assets based not on criminal conviction will assist in the growth of wildlife and control poaching of animals. Also, it will bring a tremendous control on corrupt practices to generate wealth from illegal wildlife activities.

Lokpal and Lokayuktas Act 2013 (LALA) prescribes that a special court can order confiscation of illegally obtained properties if the court is satisfied that assets have been bought

from corrupt practices. Nevertheless, LALA sets out that confiscation is subject to conviction. As such, it doesn't allow NCB confiscation.

Confiscations in last 50 Years

It is significant to consider the numbers and value of the assets that have been confiscated under Indian confiscation laws in the last 5 decades. We believe despite confiscation benefits and international emphasis on preventing and deter people from committing financial crimes, confiscation of properties is an illusion in India. The law enforcement agencies confiscated a miniscule number of assets derived from criminal activities in over two decades. So far, according to the performance of the Enforcement Directorate, the leading agency to oversee money laundering cases, as on 31 January 2023, only 45 people have been convicted for money laundering offence under PMLA which is conviction-based. It has confiscated assets worth only ₹ 36 crore for money laundering in the last two decades. This is despite it has attached properties worth ₹ 115350 crores in 1142 prosecution complaints, a laudable figure. Unfortunately, these properties couldn't be confiscated because of the non-conviction of offenders. These abysmal statistics abundantly infer the ineffective nature of the existing asset confiscation regime in India.

The confiscation figures under other confiscation law are unknown. SAFEMA and NDPSA that are partially based on non-confiscation do not provide any assistance in respect of confiscation numbers. Again, there is no publicly available data that assist us in knowing the numbers where the law enforcement agencies have confiscated properties based on non-conviction. However, we strongly believe that the assets of less than 100 persons are confiscated since 1974 when SAFEMA was enacted. In this background, we argue to establish a centralise publicly available register, online and offline, where all details relevant to confiscated properties are available for public.

Challenges to confiscation

Serious challenges exist in India for the NCB confiscation. Almost all asset confiscation laws do not harmonise with international instruments, declarations, and principles. The legislations that deal with asset confiscation mainly focus on *in personam* confiscation. This is the foremost major challenge. The law enforcement agencies can confiscate criminals' tainted asset only after conviction, which is a kind of mirage in India considering our judicial system. It is not uncommon that during the pendency of trials, criminals sell or transfer their tainted properties. It leads to another challenge for the law enforcement agencies to confiscate illegally derived properties.

Another critical reason is a little knowledge about asset forfeiture provisions among the law enforcement agencies, barring the Enforcement Directorate, who focus on physical punishments. The best police minds are still insensitive to deploy their efforts to weed out financial crimes offenders who are urbane and sophisticated and operate from swanky buildings in an urban set up, using a network of shell companies and computer savvy agents.

Lack of awareness of asset confiscation provisions among the law enforcement is a notable factor that affects NCB. The law enforcement agencies move to other cases once the guilt of the criminal is proved because its officers have little knowledge of asset confiscation provisions which ultimately helps criminals, their families, and networks to enjoy the assets derived from proceeds of crimes despite physical punishments.

Another big challenge for the law enforcement agencies is the lack of resources and specialised skills in their pursuit to confiscate illegally obtained assets. Since assets confiscation involves gathering and analysing voluminous criminal and financial information, and linking it to offenders' criminal activities, it becomes difficult for the ill-equipped law

enforcement officers confiscate tainted assets considering their limited skills in this niche area of law.

Establishing NCB confiscation regime: A Conclusion

We believe that NCB confiscation is urgency in India considering it is spreading like a wildfire and eating our growing economy. NCB confiscation allows to deter and disrupt criminal activities and reduce crimes. It also recognises the government to put more resources on society's development. Upholding the rule of law is critical for the quality of governance and sustainable development of a society, particularly in a country like India, which is now the fifth largest economy of the world and aspiring to be the third largest economy in the next few years. NCB confiscation is a step in the right direction to achieve desired goals and the government must consider realise these objectives. This is a right time to decide what we want: a conviction-based confiscatory regime which permits the criminals to keep using the money derived from illegal activities to fight their criminal cases in the courts and continue committing more financial crimes, or a non-conviction-based asset confiscation regime. We put a question to you: what kind of confiscation regime do you want in India?

CHAPTER 3

COMPANIES AND THEIR ETHICS AND CONSCIENCE

N. Vani Shree and
Ms. Ananya A.

Introduction

The literal meaning of the term Corporate Social Responsibility (CSR) is pretty straight forward. A prudent man would simply assume that it's a kind of social obligation the companies owe to the society. Which is correct, but it doesn't mean the companies are only responsible to the public but they are also responsible to their own employees. From the society's point of view a company can engage in CSR related activities such as producing goods that are organic, safe and sustainable, sourcing ingredients ethically, not promoting child labour, donating to worthy causes etc. But from the point of view of its own labour force, through its CSR initiative a company can improve the overall worker participation in company endeavours. This gives the employees an opportunity to have new learning experiences that's different from their monotonous schedule and allows them to be a part of something weighty.

Some companies have teams that are specifically meant to bring the company's CSR ideology to life. For example, the companies can organise annual athletic meet for employees and their families or sponsor and collaborate with NGOs to raise funds for socio-environmental causes. This is a win-win situation because on one side we have employees, who are eager to participate in these cheerful events which acts like a serotonin boost to them, plus gives them a sense of pride and fulfilment for having contributed to a social cause even if it is indirectly through their employer. It is worth noting here that the new generation of workers is becoming more outspoken and caring about social causes and their own mental well being and are not afraid of

walking out of an unethical work environment. Therefore, CSR often becomes an essential part of a company's core business principles. Then on the other hand, we have the beneficiaries of these fund raisers who greatly benefit from the financial aid. Ultimately, the company which is at the centre of this whole state of affairs gains goodwill.

Apart from obtaining monetary help from companies through charities etc the public, in their capacity as responsible customers/purchasers of products and services from these companies expect them to be virtuous, in the sense respecting the nature while manufacturing their goods, not employing child labour and practising giving of fair wages to their workers, transparency in their operations, making cruelty free, vegan products etc.

Corporate Social Responsibility – Indian Scenario

On March 1st 2014, the Government of India, via the Ministry of Corporate Affairs (MCA) made it compulsory for certain types of companies to start engaging themselves in CSR related activities, making India the first and sole country in the world which has come up with a regulatory framework for CSR by inserting it into the Companies Act, 2013 (hereinafter referred to as the "Act") under section 135. The chosen companies must be registered under the Companies Act, 2013. Way back in 2009 the MCA had issued certain guidelines pertaining to CSR. However, these guidelines were discretionary. But nonetheless, this is considered as the stepping stone to normalising the idea of CSR in the country. This policy was later improved and updated once in 2011 and then again in 2019 under the name 'National Responsible Business Conduct' to align with the guidelines of multinational corporations such as the UN and their Sustainable Development Goals (SDGs), and other international agreements on human rights and climate change.

The policy is applicable to all businesses notwithstanding their size, nature and locale. The Guidelines are expressed in the form

of 9 Principles. These Principles cover a range of topics such as company morals, transparency and answerability of businesses, workers welfare, protecting the interest of all stakeholders especially the feeble ones, customer satisfaction and safeguarding human rights and the environment. The Principles encourage businesses to produce non-hazardous, sustainable commodities and services because a product can have an impact on the people and their environment at all stages of its life cycle. The Principles also incite business to be more inclusive and restate that inclusive growth and equitable development are co-related.[1]

As per Section 135(4) of the Companies Act 2013 every company mentioned under Section 135(1) (company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during (the immediately preceding financial year), has to compulsorily disclose its CSR Policy of the company in the stipulated format under the Companies (CSR) Rules, 2014. The Board of such companies are responsible for making this disclosure and to also make sure that the CSR activities mentioned in the Policy are put into motion.[2] The rationale behind this is to keep a close watch on the companies to make sure they are actually fulfilling their CSR obligation.

A Closer Look at Schedule VII of the Companies Act, 2013

Schedule VII (hereinafter referred to as the "Schedule") of the Companies Act, 2013 goes into detail about the CSR activities companies can undertake. This list is inclusive but not exhaustive. By reading through the listed activities, one can get

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[1] Ministry of Corporate Affairs Government of India, National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business, Home (2011), (June 29, 2023 7.00 PM),https://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf.

[2] TAXMANN'S EDITORIAL BOARD, COMPANIES ACT 2013 BARE ACT 1.162-1.1623 (TAXMANN Publications (P.) Ltd. 7th ed. 2022).

an idea about what the legislation aspires to achieve through CSR. There are a total of 12 activities that are listed in this Schedule. Some of them have been discussed hereunder along with a few real life examples.

The first one being taking up activities to end poverty, hunger and malnourishment and along with promoting hygiene. Some ways companies can contribute towards this is by distributing food, food grains, cooking oil and other edibles, personal care products, hot meals etc to the underprivileged. Especially after COVID-19 where millions have lost their jobs, companies can either try providing employment or partner with NGOs or the government to help these people get back on their feet and rebuild their livelihood. One such recent attempt was made by the Infosys Foundation which devoted INR 120 crores towards COVID-19 relief in the country.[3]

This is also in line with activity No.12 on the Schedule which talks about disaster management, relief, and rehabilitation & reconstruction activities.[4] Over the years companies like Nestle, ITC, Merrill Lynch, Bajaj, L&T, Fidelity Business, etc have made contributions to the Central Government's Swachh Bharat Kosh[5] to promote sanitation in the country.

The second activity in the Schedule focuses more on education, employment of all members of the society and ventures to improve their overall standard of living. One of the best efforts in this regard has been made by Wipro Limited through its

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[3] Jeff Mosier & Aruna C. Newton, *Beyond Ourselves: A Response to COVID-19, Infosys Germany - IT Business Services & Consulting - Overview*, (July 3, 2023, 8.00 PM), https://www.infosys.com/insights/industry-stories/beyond-ourselvesresponse.html#:~:text=Overall,%20the%20Infosys%20Foundation%20has,India's%20Prime%20Minister%20Narendra%20Modi.

[4] TAXMANN'S EDITORIAL BOARD, COMPANIES ACT 2013 BARE ACT 1.624 (TAXMANN Publications (P.) Ltd. 7th ed. 2022).

[5] Moushumi Das Gupta, *Three Years After Kick-Off, Corporate Donations to Swachh Bharat Mission Dwindle, Hindustan Times* (Apr. 21, 2017), (July 3, 2023, 9,00 PM),https://www.hindustantimes.com/india-news/three-years-after-kick-off-corporate-donations-to-swachh-bharat-mission-dwindle/story-Kl3C5h9veNZIgShKPT6nxH.html.

Wipro Foundation which has been focusing on both school and higher education for years now. They have a wide range of programs which focus on areas such as school admissions, nutrition to school kids, counselling for parents, developmental education, etc. most of the students benefitting from this program have been from underprivileged and challenging backgrounds such as differently abled kids, orphans, children from families infected with HIV AIDS, migrant labourers.[6]

Another very important topic in the VII Schedule of the Act is environmental protection and sustainability. Tata Chemicals Limited has been on the forefront of achieving sustainability and environmental protection in the country for a long time now. In fact, they have made it their Moto to line their businesses in unison with the fundamental principles of "Green Sheen" to push sustainability and organisational resilience. They are committed to significantly decreasing CO2 discharge emitting from their operations, becoming 100% plastic free, conserving natural resources, evolving to be strong enough to withstand climate change, and so on.[7]

All in all, a notion that is noticeable throughout Schedule VII of the Act is its inclination towards activities that are based on issues like education, elimination of poverty, sustainability, health, employment, amongst others. The chief inspiration behind this could very well be the 17 SDGs of the UN and various international conventions and agreements on environmental protection, climate change and human rights such as the Paris Agreement, Rio Declaration, the Vienna Convention, The Brundtland Commission, etc. In fact, the second part of activity no.9 of the Schedule explicitly mentions

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[6] Wipro Foundation, *Access to Education Program, Wipro Foundation*, (July 3, 2023,9.00AM),https://www.wiprofoundation.org/grants/access-to-education/.

[7] TATA Chemicals Limited, *Green Chemistry for Sustainability* - Articles - Tata Chemicals Limited, Tata Chemicals - Serving society through science, (July 3, 2023, 1.00 PM),https://www.tatachemicals.com/News-room/Articles/green-chemistry-for-sustainability.

promoting the SDGs.[8] But as much as we have learnt from these international bodies, there have also been some disasters that shook our nation in the not-so-distant past which have also boosted the need for a responsible framework for companies. Let's take a look at some of those events.

The Bhopal Gas Leak Tragedy (1984), is regarded even to this day as one of the worst environmental and industrial disasters in the world. Poor management, insufficient safety measures, scarce manpower were considered as the chief reasons behind the leakage of a toxic gas known as Methyl Isocyanides from one of the plants belonging to Union Carbide Corporation. This disaster led to the immediate deaths of thousands of people with nearly a half million survivors suffering the side effects of inhalation of the chemical even to this day. This led to the Supreme Court's order to shut down the plant and the arrest of several high-ranking officials and millions of dollars of compensation to the victims.[9]

Another eerily similar incident like the Bhopal tragedy occurred in 1985 at Shriram Foods and Fertilizers Industries, Delhi where one of the units started leaking Oleum Gas followed by one more leak from one of the pipe joints. This mishap led to the death of one person, an advocate who accidentally inhaled this gas enroute to work, with many more injured. The Supreme Court in this case applied the principle of absolute liability replacing the principle of strict liability to determine the company's liability due to its negligence.[10]

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[8] TAXMANN'S EDITORIAL BOARD, COMPANIES ACT 2013 BARE ACT 1.623 (TAXMANN Publications (P.) Ltd. 7th ed. 2022).

[9] The Editors of Encyclopaedia Britannica, Bhopal Disaster | Causes, Effects, Facts,&History, Encyclopedia Britannica (Oct. 24, 2008),(July 4, 2023,2.00 PM) https://www.britannica.com/event/Bhopal-disaster.

[10] Finlawportal Team, *An Analysis of Oleum Gas Leak Case* - Finlawportal, Finlawportal (July 3, 2022), (July 4, 2023, 10. AM),https://finlawportal.com/an-analysis-of-oleum-gas-leak-case/.

One more noteworthy case involving both environmental and human rights violation is the infamous Coca-Cola case in Plachimada. One of the factories belonging to Coca-Cola used groundwater excessively resulting in water pollution and turned the sod toxic which caused loss of agriculture.[11] The factory even distributed its industrial waste in the name of free manure to tribal people living in the surrounding area. The shady activities of the factory ultimately started to deteriorate the health of all those involved. The factory was shut down in 2004 following protests and several litigations.[12] But unfortunately even to this day the victims are still waiting for their compensation from the beverage giant.

Corporate Social Responsibility In The Times of AI

All of the above cases were the direct result of human error and negligence but given the era of Artificial Intelligence (AI) one has to wonder whether a robot can indirectly be the cause of human rights violation? Although this thought seems far-fetched many theories are emerging as to how this is highly probable. A lot of corporate leaders around the world now share the same opinion that AI is crucial for businesses to survive and succeed in today's ever changing competitive world. So, it is quite natural for employees to wonder the fate of their jobs in the future. And those who are yet to begin their professional life are also curious and apprehensive on the impact AI might have on their potential

[11] Zumbish, *Polluter Didn't Pay: Plachimada Awaits Compensation From Coca-Cola, 2 Decades On, Down To Earth*,Latest news, opinion, analysis on environment & science issues,India, South Asia (Oct. 10, 2022), (July 4, 2023,1.00 AM),https://www.downtoearth.org.in/news/pollution/polluter-didn-t-pay-plachimada-awaits-compensation-from-coca-cola-2-decades-on-85357.

[12] Contributors to Wikimedia projects, Plachimada Coca-Cola Struggle - Wikipedia, Wikipedia, the free encyclopedia (Aug. 15, 2018), (July 4, 2023,1.00 AM),https://en.wikipedia.org/wiki/Plachimada_CocaCola_struggle#:~:text=History%20of%20Plachimada%20Struggle,Protest%20camp&text=Continued%20protests%20and%20litigation%20eventually,be%20paid%20to%20the%20villagers.

career options.[13] AI tends to make a lot of tasks easier, faster and less erroneous making it more attractive to the employers. But of course, there are certain jobs which AI can never replace such as jobs which require a level of human emotions mixed with skill such as teaching, or a doctor who can patiently listen to a patient and understand their state of mental health during the course of treatment, basically any job which requires quick on the spot thinking are safe from AI as of now because AI after all can only function on pre-fed commands which may not work during unforeseen events. Now coming back to the main question as to how is AI related to a company's CSR? This can be best understood with a few recent examples. In 2017, a factory in China which was mainly into manufacturing cell phones fired a major portion of their human workers because it was felt robots can deliver better product outcome with less errors and more efficiency.[14] Japan has been replacing waiters at hotels and cafes with robots since 2020 with other prominent Asian countries such as Singapore soon to implement this full time as well. So, the debate is, whether it can be justified for companies that to fire employees and replace them with robots without giving the employees an opportunity to improve their skills and learn to work with robots? Or without giving them alternative employment options and isn't this a form of human rights violation?

Using modern, advance machines in factories, industrial plants, etc isn't something new. Over the years we have been using gadgets to carry out a lot of functions but it was always to ease the workload of humans and to help them do their job but never to completely replace humans and make them unemployed. Therefore, it is a form human rights violation because the kinds

[13] Siddhesh Shinde, *What Jobs Will AI Replace? What Can You Do to Protect Yourself?*, Emeritus Online Courses (May 17, 2023), (July 5, 2023,5.00 PM),https://emeritus.org/blog/ai-and-ml-what-jobs-will-ai-replace/.

[14] Sahajveer Baweja & Swapnil Singh, *Beginning of Artificial Intelligence, End of Human Rights*, LSE Human Rights (July 16, 2020), (July 5, 2023,9.00 AM),https://blogs.lse.ac.uk/humanrights/2020/07/16/beginning-of-artificial-intelligence-end-of-human-rights/.

of workers that are targeted to be replaced are always those with limited skills and educational qualification such as data entry workers, customer service operators, waiters and other ministerial jobs. These workers never felt the need to upgrade their skills because the job description never demanded it. While some might argue that it is good opportunity for them to learn new skills or improve the existing ones, it is not always feasible for them to do so, especially not in a such a short period of time. But on the other hand, we can't completely blame the companies for wanting to cut down costs and improve their overall productivity. The only logical solution to this problem could be that companies before deciding to replace their humans with robots should give a chance for the former to improve them and prove to the organisation they can work just as efficiently as robots. The companies should take it upon themselves to regularly conduct training programs and workshops to help their workers learn new technology.

Only in areas where robots are considered as the best or the only option, they may be allowed to replace humans but not otherwise. Apart from replacing jobs, other safety concerns involving AI should also be considered by companies before using them, such as AI handling sensitive, private or health data of human clients.

CSR – The Way Forward

The future of CSR in India looks bright as India has already made CSR compulsory for companies, inspiring other countries to follow in its footsteps. Schedule VII of the Companies Act, 2013 has been framed in such a way that it will help the nation achieve the SDGs by 2030 with the help of businesses as it is not an easy task for the government to achieve it all on its own. However, there are some problems faced by companies especially the newly established ones and start-ups in implementing their CSR initiatives. There is a lack of awareness about CSR provisions not only amongst the general public but

amongst the companies as well. Keeping themselves updated with new Amendments can be difficult and confusing. Choosing the right type of CSR activity they want to invest in requires knowledge about the area for which they may need to hire experts. A company needs to make an informed decision keeping in mind all the stakeholders involved.[15]

In 2018, the Government of India (GOI) made an announcement that it would formulate a National Action Plan (NAP) on Business and Human Rights in India. NAP is basically a policy document to implement the United Nations Guiding Principles (UNGP) on Business and Human Rights. A draft known as the 'Zero Draft' was also published by the GOI in 2019 but the final NAP which was supposed to be released in 2020 has not been drawn up yet. Once the NAP is finalised and released by the government it will be a guide to businesses on how they can value human rights under a corporate setting in a better way and to check on what are the remedies that are available against them if such human rights are violated. This step is also crucial in achieving SDG no.8 which talks about decent work and economic advancement.

There is also a lot of ambiguity regarding the taxation aspects of CSR which needs to be resolved such as amount spent on CSR not qualifying as business expenditure and therefore deduction for the same cannot be claimed under the Income Tax Act, 1961, the updated provisions under the GST Act which states that input tax credit is not allowed to be claimed for goods and services which are utilized or expected to utilized for CSR projects.[16]

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[15] Kumud Das, *'The Future of CSR in India Looks Very Promising'*, Latest Business News, Finance News, BSE/NSE News, INDIA BUSINESS NEWS LIVE, Share Market & Economy News (Feb. 2, 2023), (July 6, 2023.9.00 AM),https://www.bizzbuzz.news/bizz-talk/the-future-of-csr-in-india-looks-very-promising-1195304.

[16] Input Tax Credit Cannot Be Claimed on Goods/Services Used for CSR Activities: Budget 2023, THE ECONOMIC TIMES (Feb. 1, 2023), (July 6, 2023,10.AM),https://economictimes.indiatimes.com/news/economy/policy/in

Conclusion

Businesses being an integral part and parcel of the society, their role and responsibility in giving back to the society cannot be disregarded. The scope of CSR in India can be widened even more if Governments, companies, NGOs and other social organisations collaborate with each other to undertake projects in areas that are not mentioned in Schedule VII. Right now, a lot of companies are only performing their part in CSR because it is a mandatory requirement. But once this mindset changes, companies can start getting creative and invest in projects that actually mean something to them. Only when companies are truly involved in these projects, they can ensure that they are implemented properly.

While framing their CSR Policy and before incorporating new technology into their business, companies should take all the stakeholders into consideration so that none of their human and environmental rights are harmed.

The governments should also step up their game and help the companies to implement CSR activities efficiently. There are many loopholes in the Indian labour laws which are an obstacle for effective CSR implementation. Knowingly or unknowingly companies sometimes end up violating the human rights of their employees. Like for example, in spite of the fundamental right to form or join any unions, many labourers are unable to do so because of various reasons like lack of awareness, barriers to form unions under the Trade Unions Act, 1926 with the minimum required number for formation of unions being 7 thus discouraging smaller unions from being formed. Also, under this Act all categories of workers are not acknowledged, and most of them belong to the unorganised sphere where there is no proper worker-employer relationship in the first place! So, when the rights of such workers are violated by companies the last resort

put-tax-credit-cannot-be-claimed-on-goods/services-used-for-csr-activities-budget-2023/articleshow/97531289.

for the less educated victims is judiciary which is also, oftentimes slow while dealing with labour conflicts.[17]

Another missed opportunity by the government in recent times to protect human rights in business was the non implementation of NAP as discussed above. During COVID-19 it was opined by many experts that had the NAP been implemented before the Pandemic struck it could have potentially saved a lot of migrant workers who lost their jobs with no protection.[18]

Most of the reputed companies these days aspire to produce sustainable and environmentally friendly products. With more public awareness especially amongst young buyers' sustainability is no longer just a choice. However, the government should also keep an eye on the goods that are coming into the country. A step in this regard has been taken by the centre recently as it is all set to harden the rules around importing low quality goods. The Centre is going to be imposing a new set of Quality Control Orders which will be applicable for both Indian and non-native manufacturers.[19]

Therefore, this paper concludes that the future of CSR in India is headed in the right direction, to keep up this momentum all the stakeholders in an economy should work together for effective CSR implementation. For instance, as already discussed in the Coca-Cola case even to this day the victims have not received the compensation. So, in such cases it is up

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[17] Harshit Singh, *Limited Unionization of Labour Vis-a-Vis Labour Laws in India*, TaxGuru (Apr. 25, 2023), (July 7, 2023,1.00 PM),https://taxguru.in/corporate-law/limited-unionization-labour-vis-a-vis-labour-laws-india.html.

[18] BYJUS, National Action Plan on Business and Human Rights, BYJUS, (July 7, 2023,2.00 PM), https://byjus.com/free-ias-prep/national-action-plan-business-human-rights/.

[19] *Centre Looks to Tighten Policy Noose Around Unregulated Quality Goods - ET Government*, ETGovernment.com (Mar. 6, 2023), (July 7, 2023,10.AM),https://government.economictimes.indiatimes.com/news/governance/centre-looks-to-tighten-policy-noose-around-unregulated-quality-goods/98447484.

to government and judiciary to intervene and make sure that the companies don't default on their obligations. The employees and public in general should educate themselves about their rights and remedies against corporations in case of human and environmental rights violation. And companies should keep themselves updated with the new trends in CSR and the CSR law to formulate better CSR Policies to take up only the most appropriate projects.

CHAPTER 4

COMMON BUT DIFFERENTIATED SHARING OF CREDITOR INTERESTS IN THE RESOLUTION OF INSOLVENCY UNDER THE INSOLVENCY AND BANKRUPTCY CODE (IBC)

Ashish Varma,
Shalini Saxena and
Ashutosh Kumar

Introduction

The IBC was passed in 2016 to speed up India's insolvency procedure and offer a timeline for resolving insolvent firms. The equal distribution of property among creditors is a key goal of the IBC, and it is accomplished through the concept of sharing creditor interests that are common but distinct. This approach tries to secure a fair conclusion for all parties involved while acknowledging the various levels of risk exposure, legal rights, and priority among creditors.

The Insolvency and Bankruptcy Code, 2016 unifies and amends the laws relating to the reorganization and insolvency resolution of corporate persons, partnership firms, and individuals in a timely manner to maximize the value of such persons' assets, to encourage entrepreneurship, the availability of credit, and to strike a balance between the interests of all stakeholders. 'Insolvency' and 'Bankruptcy' are frequently used synonymously but there is a slight distinction between these two.

Bankruptcy is a legal process where a court of law issues orders with respect to an individual's or entity's insolvency and subsequently issues orders for its resolution. Insolvency is a financial situation where an entity or an individual is unable to meet the financial obligations due to an excess of liabilities over assets. In other words, a person or a company can be insolvent without going bankrupt, and insolvency can result in

bankruptcy if the insolvent person or company is unable to recover from the financial crisis.

Under the IBC, the National Company Law Tribunal (NCLT) starts the insolvency resolution process when a business fails to pay its creditors on time. This process is known as the Corporate Insolvency Resolution Process (CIRP). When default has occurred, a financial creditor, an operational creditor, or the corporate entity itself may submit an application to NCLT for the start of CIRP. According to the IBC, the corporate debtor's bankruptcy must be resolved within 330 days starting on the date the NCLT's order was issued. An insolvency professional is appointed as the interim resolution professional by the NCLT. In the first meeting of the COC, the Committee of Creditors (COC) may either nominate another Insolvency Professional or regularize Interim Resolution Professional as Resolution Professional. If the corporate debtor's insolvency cannot be rectified, the liquidation process is started in accordance with Section 33 of the IBC.

Rationale and Significance:

Recognizing the variety of creditors' claims is the basis for the shared but differentiated sharing principle. Different types of creditors have varying degrees of legal protection and negotiating power, including secured creditors, unsecured creditors, operational creditors, and financial creditors. Throughout the settlement process, the concept seeks to maintain a careful balance between the interests of these various creditor groupings. This guarantees that, despite the fact that all creditors share the same goal of maximizing their recoveries, their entitlements are distinct depending on their varied situations.

Different type of creditors under Insolvency and Bankruptcy Code

Any person who is owed money is considered a creditor. Debt is a responsibility or liability related to a claim that is owed by someone. A right to payment or a right to remedy for contract breach, which results in a right to payment, is a crucial component of the word claim. There must be a right to payment for someone to be regarded as the corporate debtor's creditor. A person who seeks performance, an injunction, or any other remedy that does not result in payment is not regarded as a creditor. To put it another way, a creditor is somebody who has a right to recover payment from another person (the debtor). IBC mentions three types of creditors: Financial Creditor, Operational Creditors, Secured Creditors.

According to Section 5(7) of the Insolvency and Bankruptcy Code(hereinafter referred to as IBC), a financial creditor means: "a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred". In order to ascertain whether a person is a financial creditor, the debt owed to such a person must fall within the ambit a 'Financial Debt' as under Section 5(8) of the IBC. A financial debt as defined under Section 5(8) of the IBC is: "a debt along with interest, if any, which is disbursed against the consideration for time value of money and includes-

(a) Money borrowed against payment of interest;
(b) Any amount raised by acceptance under any acceptance credit facility or its dematerialized equivalent;
(c) Any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
(d) The amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting

Standards or such other accounting standards as may be prescribed;

(e) Receivable sold or discounted other than any receivable sold on non-recourse basis;

(f) Any amount raised under any other transaction, including, any forward sale or purchase agreement, having the commercial effect of borrowing;

(g) Any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(h) The amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause"

On the other hand, an operational creditor is defined under Section 5(20) of the IBC as under: "any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred". In order to ascertain whether a person would fall within the definition of an operational creditor, the debt owed to such a person must fall within the definition of an operational debt as defined under Section 5(21) of the IBC. An operational debt is defined under section 5(21) of the IBC to mean: "a claim in respect of the provisions of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority".

Whereas a secured creditor is a person in favor of whom a security interest is created under section 3(30) of the IBC. Additionally, the definition of "Security Interest" is provided in section 3(31) of the Code. It includes a mortgage, charge, hypothecation, assignment, encumbrance, or any other agreement or arrangement securing payment or performance of any obligation of any person. It also refers to a right, title, or interest in or a claim to property created in favor of, or provided

for, a secured creditor by a transaction which secures payment or performance of an obligation. Performance security, however, is not included in the definition of "Security Interest" according to the proviso to section 3(31).

Differential treatment of creditors under IBC

The Code sets forth several distinctions in the treatment of creditors, including, but not limited to, (i) the right to apply to NCLT (scope of adjudication), (ii) the right to participate in the Committee of Creditors (the "CoC"), (iii) the right to receive funds under the Resolution Plan, and (iv) the right to profit from the liquidation of the Corporate Debtor.

The below description shows that how financial creditors and operational creditors are treated differently:

1. Commencement of the corporate insolvency resolution procedure: As per Section 7(1), in any event of default, a financial creditor may submit an application to the Adjudicating Authority to begin the corporate insolvency resolution procedure against a corporate debtor whereas the operational creditor may send the demand notice along with invoice of due amount to the debtor. After 10 days have passed since the date of delivery of the notice or invoice demanding payment under Section 8(1), the operational creditor may submit an application if they do not receive payment from the corporate debtor or notice of the dispute under Section 8 (2).

2. Inclusion of the name of the resolution professionals: As per Section 7(3), the name of the resolution professional who will serve as an interim resolution professional with the application must be included by the financial creditor whereas per Section 9(4), an operational creditor may nominate a resolution professional to serve as an interim resolution professional.

3. Composition of Committee of creditors: According to Section 21(2), the committee of creditors must be made up entirely of financial creditors, including all of the corporate debtor's creditors whereas operational creditors shall not be considered a part of the committee of creditors.

4. Disclosure of financial information: Section 215(2) requires a financial creditor to provide both financial information and information regarding the assets over which a security interest has been created. An operational creditor may provide financial data to the information utility in accordance with Section 215(3).

5. Voting rights: A financial creditor's voting rights are equal to the amount owing to that financial creditor, according to Section 5(28). At least 75% of the voting shares must vote in favour of the creditor committee for it to be approved. At the creditor's committee meeting, the operational creditor won't be able to vote.

As far as the rights of secured creditors are concerned, we can observe the same in the light of the moratorium provision under section 14 of the IBC. A secured creditor is not permitted to pursue its security interest against the corporate debtor during the Corporate Insolvency Resolution Process (CIRP). According to Section 14(1)(c), the Adjudicating Authority shall, by order, declare a moratorium on all actions to foreclose, recover, or enforce any security interest created by the corporate debtor with respect to property, including any action under the SARFAESI Act, 2002, on the date the insolvency commences. Only at the start of the corporate debtor's liquidation proceedings under Section 33 of the Code are the secured creditors' rights restored. A secured creditor may exercise any one of the following remedies to recoup its debt after the start of liquidation proceedings:

(i) Secured creditor can either abandon its security interest to the liquidation estate under section 52(1)(a) or

(ii) The secured creditor can realize the security interest in the manner prescribed under section 52(1)(b).

The order of payment The first provision for Insolvency Resolution Procedure (IRP) and liquidation costs is found in Section 53 of the Insolvency and Bankruptcy Code, 2016 (the "IBC"). Workmen who fall into the first category of the list and secured creditors who fall into the second position in the waterfall mechanism are put on par with "workmen's dues for 24 months before the liquidation commencement date" under section 53 of the IBC after the cost payment. The rule makes it clear that there are several categories, and the priority will be granted in accordance with their order. For instance, secured creditors are given priority in second place, while government obligations are given priority in fifth place.

Each secured creditor has the choice to either give up their claim to the liquidation estate or realize their security interest under Section 52 of the IBC. independently, under the IBC's rules. The secured assets become a part of the corporate debtor's liquidation estate following the secured creditors' surrender of their security interest, and the liquidator may sell such assets in accordance with regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. Additionally, these assets won't be included in the corporate debtor's liquidation estate if the secured creditors decide to realize their interest in the secured assets of the corporate debtor.

According to Section 53 of the Code, the government dues fall within the fifth category of the waterfall system. In the matter of

Technology Development Board v. Anil Goel[1], the Appellant tribunal discussed the waterfall mechanism under Section 53 of 'IBC'. The tribunal held

> *"that when secured creditors have the option between relinquishing their right in favor of the liquidation estate and realizing their security interests individually, once they choose to relinquish interest, the repayment will take place strictly as per Section 53 of IBC, which does not recognize any distinction between different classes of 'secured creditors'".*

After paying the costs of the bankruptcy resolution process and the liquidation costs, secured creditors who waive their security interest pursuant to section 52(1)(a) are paid second under the waterfall mechanism. They are treated equally with "workmen's dues for 24 months preceding the liquidation commencement date" as defined in section 53 of the IBC. According to regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, the secured assets become a part of the corporate debtor's liquidation estate upon the release of the security interest by the secured creditors, at which point the liquidator may liquidate such assets.

Furthermore, these assets do not enter the corporate debtor's liquidation estate if the secured creditors opt to realize their interest in the secured assets of the corporate debtor. The secured creditors have the right to recover their debt by enforcing and realizing their secured interest. However, pursuant to the recently introduced Regulation 37(8) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, in such a case, the secured creditors cannot sell or transfer the secured asset to any person who is not

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[1] Company Appeal (AT) (Insolvency) No.731 of 2020

eligible under the Code to submit a resolution plan for the insolvency resolution of the corporate debtor.

This change is meant to stop resolution candidates who would otherwise be ineligible from taking over the corporate debtor's administration through a back door.

The unpaid portion of the secured debt would be paid out of the liquidation estate at 5th position in the order of priority under Sec 53 of the IBC after the payment to unsecured creditors if the proceeds from the realization of the secured interest are insufficient to pay the debt owed to the secured creditors.

The secured creditors must, however, account to the liquidator for any surplus monies received from the enforcement of such secured assets under section 52(9) of the Code if they have realized their security interest and the proceeds exceed the debt owed to the secured creditors.

Where the secured creditor proceeds to realize its security interest, according to Regulation 21A (2) of the Liquidation Process Regulations, 2016, it shall pay:

(a) The sum that the secured creditor would have had to pay for the Insolvency Resolution Process Cost and Liquidation Costs if it had given up its share to the liquidation estate more than 90 days after the liquidation began.

(b) To the liquidator within 180 days of the liquidation's start date, the excess of the secured asset's realized value over the sum of its accepted claims.

The secured creditor would pay the amount estimated by the liquidator if the amount payable under this sub-regulation was not certain by the due date. The liquidator or secured creditor, as the case may be, would make up the difference as soon as

the amount payable under this sub-regulation was made certain and informed by the liquidator.

Challenges and Concerns:

Creditors will be significantly impacted using the common but differentiated sharing concept. It necessitates a methodical division of creditors into various divisions according to their order of precedence, existence of security interests, and kind of claims. The order in which creditors receive payments and the extent of their involvement in the resolution plan approval process depend on this classification. As the distribution of the resolution value is impacted by their respective positions, the principle also influences negotiations between creditors and the resolution applicant.

Although the approach seeks to balance the interests of creditors, there are difficulties in applying it. It can be difficult and contentious to decide which category of creditors is appropriate, particularly in situations involving hybrid claims. Another difficulty is ensuring that the rights of junior creditors are not excessively sacrificed in favor of senior creditors. Additionally, efficient cooperation between creditors, the insolvency professional, and the resolution applicant is necessary for the practical application of the principle.

The Hon. Supreme Court in the matter of Committee of Creditors of Essar Steel Limited v. Satish Kumar Gupta and Ors[2]. that "though the Code posits a fair and equitable treatment of creditors, it does not mean that all the creditors can be treated equally." Additionally, it is specified in the UNCITRAL Legislative Guide on Insolvency Law that proceeds must be allocated among creditors in accordance with their ranking and interest. The NCLAT fails to recognize this equality principle since it elevates inequality by treating the first charge holders and subsequent charge holders equally.

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[2] CIVIL APPEAL NO. 8766-67 OF 2019

Unfavorable Consequences

The effects of this order on financial institutions will not be favorable. Since banks and other financial institutions make up the majority of secured creditors, it makes sense that giving them inter se priority after relinquishment will encourage them to continue lending.

Additionally, this order opens the door for succeeding charge holders to abuse Section 13(9) of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002.

According to Section 13(9), the first charge holders must obtain the approval of the secured creditors holding at least 60% of the total value of the secured debt in order to realize a security interest in an asset with multiple charges. A combined reading of Section 13(9) and the current NCLAT order leads to the conclusion that because realization gives the first charge holders' claims priority while relinquishment equally satisfies all charge holders' claims, the subsequent charge holders will not support realization, harming the first charge holders' interests.

The development of legal doctrine

Indian courts have issued key rulings that interpret and implement the common but differentiated sharing principle over time. Aspects like the waterfall distribution system and the rights of dissenting creditors in the settlement process have been made clearer by these rulings. A thorough knowledge of the developing jurisprudence pertaining to the principle can be gained by analyzing these court rulings.

The Hon. Supreme Court of India was urged to decide about the disputed unequal treatment and preference given to "Financial creditors" over "Operational Creditors".

The Supreme Court explicitly considered whether Swiss Ribbons violated Article 14 of the Constitution (Protection from

Discrimination) by not having organizational creditors represented on the CoC in the matter of Swiss Ribbons. The Supreme Court's justification for the exclusion of operating creditors from the CoC was based on the Bankruptcy Law Reforms Committee's (hereinafter "BLRC") report, which was the forerunner of the IBC. Financial creditors could evaluate the viability of a resolution plan since staff members were qualified to do so.

The Supreme Court of India in India Resurgent ARC Private Limited v. Amit Metaliks[3] the position of secured creditors under India's developing Insolvency and Bankruptcy Code (2016) (the "IBC") has been weakened. In accordance with the IBC, a committee of creditors ('CoC') is established upon the commencement of insolvency proceedings and is made up primarily of financial creditors (i.e., banks and bondholders). Regardless of whether the lenders' debt is secured or not, a successful resolution plan must have a minimum of 66% of the CoC's vote in favor.

However, the liquidation "waterfall" (i.e., the rules governing priority in the distribution of a realisation proceeds) gives a secured creditors higher priority in the pecking order if the company is not successfully resolved and enters liquidation.

The National Company Law Tribunal (NCLT), India's bankruptcy court, must make sure that dissenting financial creditors—those who fall into the 34% of creditors who vote against a resolution plan being approved—are paid at least the amount they would have received in the event of a liquidation. In order to determine the firm's value in a fictitious liquidation and to determine the minimal payout to dissenting financial creditors, the resolution expert must commission two independent valuation reports of the company. The issue in the Supreme

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[3] Civil Appeal No(s). 1700/2021

Court's order is how much should be given to dissident financial creditors as a minimum payout.

According to decision by the NCLAT in the case of Mr. Srikanth Dwarakanath v. Bharat Heavy Electricals Limited[4] the BHEL (one of the secured creditors) does not have the right to realize its security interest because doing so would be detrimental to the liquidation process and the interests of the remaining secured creditors.

In Technology Development Board v. Anil Goel & Ors.[5], the National Company Law Appellate Tribunal ("NCLAT") ruled that there cannot be an inter se priority among secured creditors who waive their security interest at the time of liquidation under Section 53 of the Insolvency & Bankruptcy Code, 2016 ("the Code"). Furthermore, it noted that holders of the initial charge and any future modifications to the security interest share an equal pedestal with other secured creditors. This remark has led to misunderstandings regarding the secured creditors inter se preference rights.

Conclusion

The IBC's guiding principle that acknowledges the variety of rights and interests of creditors is the common but differentiated pooling of creditor interests. Despite the difficulties in using it, establishing just and effective insolvency settlements still depends on it. Finding the ideal balance between the needs of various creditor classes involves ongoing improvement and adaptation, drawing inspiration from other countries' practices and developing legal doctrine. The success of the principle ultimately rests on its capacity to promote collaboration among creditors, ensuring that the resolution procedure achieves its intended goals while safeguarding the interests of all parties

[4] [2020] ibclaw.in 176

[5] Company Appeal (AT) (Insolvency) No.731 of 2020

CHAPTER 5

AN ANALYSIS BETWEEN INSOLVENCY AND BANKRUPTCY CODE AND COMPETITION LAW ABOUT MERGER & ACQUISITION OF COMPANIES

Nirmali Devi Kalita

Introduction

Restructuring is an inorganic process. Two or more company fusions may result in any such form of restructuring of companies like merger, amalgamation, or absorption, e.g., Facebook and Instagram, Citigroup and Travelers Group, TCS with CMC, Yahoo and Bookpad etc.[1] The transfer to resulting company of any part or undertaking of a company may leads to demerger, e.g., the nutrition division of Pfizer transfer to Nestle. But in case of reverse merger, the small company merged with the large company, as ICICI merged with ICICI Bank. Thus, consolidation leads scope of competitive edge to the companies [2]. There are many provisions, Acts, Rules, forums, bodies under Indian regulatory frame works for the sick companies to revive its positions before the Insolvency and Bankruptcy Code, 2016 (henceforth the IBC, 2016 or IBC) like[3]-

- Sick Industrial Companies (Special Provisions) Act, 1985;
- The Recovery of Debt Due to Banks and Financial Institutions Act, 1993;

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[1] T Mallikarjunappa And Panduranganayak, *A Study Of Wealth Effects Of Takeoverannouncements In India On Target Company Shareholders*, 38, Vikalpa,3,2013

[2] Muhammad Faizan Malik,Et Al., *Mergers And Acquisitions: A Conceptual Review*,4, INTERNATIONAL JOURNAL OF ACCOUNTING AND FINANCIAL REPORTING,2,2014

[3] Kristin Van Zwieten, *Corporate Rescue In India: The Influence Of The Courts*,1, JOURNAL OF CORPORATE LAW STUDIES,44, 2014

- The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- Presidency Towns Insolvency Act, 1909
- Provincial Insolvency Act, 1920
- Along with the Companies Act, 2013 (after this referred to as C Act, 2013)

The result of which issues were settled under different courts, tribunal, or forum like District Courts, High Courts, Debt Recovery Tribunals, Board for Industrial and Financial Reconstruction, Company Law Board depending on jurisdictions. But the enactments of IBC 2016 led to many changes, and the existing laws got consolidated after that. The result of IBC is the intense deliberation of both legal and trade fraternity. The application of such laws becomes limited[4]. The IBC, 2016 provide the scope for the insolvent company to revive [5]. The financially sound company forwarded resolution to revive the insolvent company through merger and acquisition (M & A) [6]. In the case Prowess International Pvt Ltd Vs. Parker Hannifin India Pvt Ltd, where the NCLT held that the IBC, 2016 is not a recovering proceeding of dues to the creditor, but it is for reorganization and provides resolution to the insolvent company.

But this M & A may lead the company to a prevailing position or adversely impact the competition. Thus, it is necessary to regulate the companies. The Competition Act, 2002 (henceforth the Competition Act, 2002) regulated such combination as defined under Sec 5 of the Act.[7] Thus, the Article attempts to

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[4] Report of the Bankruptcy Law Reforms Committee, Vol 1: Rationale and Design (November 2015)12

[5] Abhirami A and Rahul T, *On the Effectiveness of Insolvency and Bankruptcy Code, 2016: Empirical Evidence From India,2* , Scinto, 20-34, 2022

[6] Andy BS Chui and WH Ip, *Improving merger and acquisition decision-making using fuzzy logic and simulation*, 9, INTERNATIONAL JOURNAL OF ENGINEERING BUSINESS MANAGEMENT, 1-18, 2017

[7] Shivam Goel, *Regulations under the Competition Law in India,* ELECTRONIC JOURNAL, 2014

earnest the regulatory framework between IBC 2016 and the Competition Act, 2002 regarding M & A aspects.

Conceptual Framework between IBC 2016 and The Companies Act, 2002:

In 2014, a Bankruptcy Law Reform Committee was formed by Ministry of Finance to draft laws on insolvency. The IBC, 2016, is the result of that draft which resolves twin balance problems for banks and big corporations. It is a draconian legislation. The economy is growing side by side with economic depression. The foreign direct investment is unprecedentedly increasing, where cross-border merger and acquisition are attributed to such growth and mean for such depression.

The IBC and the Competition Act, 2002 both have noteworthy impacts as the former deal the corporate insolvency and later regulating the competition. But both affect the corporate insolvency proceeding. In IBC, the insolvent company's control transfers after approval of resolution plan by NCLT through Corporate Insolvency Resolution Process. On the contrary, the Competition Act, 2002 govern the competition so that such transfer does not result abuse of dominant position (ADP) or any anticompetitive acts [8]. Then another aspect of such proceeding is the settlement of debts. Under IBC, after resolution plan is approved the amount of debt also comes to an end whereas the Competition Act, 2002 observed that such debt settlement does not lead to any anticompetitive process (ACP) or ADP in any relevant market. The Competition Act prevents such settlement after transfer of insolvent company by any dominant player [9]. The interface between both legislations is that settlement done

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[8] Viswanath Pingali "et al.", *Competition Law in India: Perspectives,* 41 (2), Vikalpa, 168-193, 2016

[9] Ankit Srivastava and Abhyuday Yadav, *Regulating Combinations in Platform Markets: An Indian Perspective*, 3, Competition Commission of India, JOURNAL ON COMPETITION LAW AND POLICY, 21-53, 2022

through M & A of company so that the debt can be paid as well as the insolvent company gets the scope of revival.

The result of Resolution Plan (RP) of Corporate Insolvency Resolution Process under IBC possibly comes in two ways: a. successful RP where debt either paid by the stakeholders and the NCLT thereof accept the resolution or b. not provides a positive result, and the company gets liquidated. The company dissolved, and capital received from selling its assets given to the creditors.

The Corporate Insolvency Resolution Process (CIRP):

The CIRP is the course of action which resolves the insolvency process initiated by any operational creditor or financial creditor, or corporate debtor (CD). In this process the Committee of Creditors (COC) determines the insolvency proceeding by approving resolution plan [10]. The CIRP start with applying and concludes with either passed - a. RP or b—liquidation order [11]. The number of applications, nature, status, outcomes, etc. of the CIRP cases depends on various stages—the Insolvency and Bankruptcy Board of India (IBBI) notified these.

Combination under the Competition Act, 2002:

The National Company Law Tribunal (NCLT) approved 180 resolution plans and thereby clocked total amount of Rs51, 424 crores from the stressed assets in 2023 which was 147 in 2022, 121 in 2021, 134 in 2020 financial year respectively. This results from big achievement as it allows the distressed economy to flourish high. But our Indian insolvency regime faced challenge when it touches the threshold limit of

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[10] Akshaya Kamalnath, *Corporate Insolvency Resolution Law in India – A Proposal to Overcome the 'Initiation Problem'*, UNIVERSITY OF MISSOURI-KANSAS CITY LAW REVIEW, FORTHCOMING, 54, 2019.

[11] Ram Singh and Hiteshkumar Thakkar, *Settlements and Resolutions Under the Insolvency and Bankruptcy Code: Assessing the Impact of Covid-19*, 69(3), THE INDIAN ECONOMIC JOURNAL, 568 –583, 2021.

combination under the Competition Act, 2002 (after this stated as C Act, 2002) for its nascent stage. A combination under sec 5 of C Act, 2002 means acquisition by a person with direct or indirect control over competitor enterprise of any control, voting right, and shares [12]. It crosses the threshold limit set under the Competition Act 2002 for merger and amalgamation between or among enterprises. So, the Competition Commission of India ('CCI') has to receive information about such combination vide a notice by the parties. This notice will be prior the COC approving the RP. The trigger event is considered a 'binding document' to send such document to CCI.

The threshold limit for a person or enterprise call a combination should be more than Rupees Two Thousand Crores of total assets and Rupees Six Thousand Crores of total turnover and in case of group after M & A, is Rupees Eight Thousand Crores of total assets and Rupees Twenty-four Thousand Crores of total turnover in India. If the assets have USD value outside India, the part including India has more than USD One Thousand million, which includes a minimum of Rupees One Thousand crores in India and more than USD Three Thousand million which consists of a minimum of Rupees Three Thousand crores in India. In case of the group after M & A's turnover, USD value outside India, including India have more than USD Four billion, which includes minimum Rupees Ten Thousand crores in India, and more than USD Twelve billion, which include minimum Rupees Three Thousand crores in India. The threshold limit now has 'substantial business operation' vide this amendment as the assets and turnover test that require access is not possible in case of the digital market, which elaborated in Sec 64 of the Act.

The resolution professional the COC appoints during CIRP invites the resolution applicant to forward their RP. It then examined whether it conforms with the existing statutory scheme. The resolution professional sent those RP to the COC

[12] Provisions Relating to Combinations, Advocacy series 5, Competition Act 2002-Combinations

for approval. After confirming by the COC, the RP sent to Adjudicating Authority (AA) and the said AA gives a decision supporting the RP.

Time frame:

Under Sec 6(1) of C Act, 2002, a combination is void which effect or causes to affect on competition any ADC within the relevant market of India. Thereby, an application within 30 days has to serve to COC from the day of such development for approval of the merger and amalgamation proposal by the enterprise's board of directors or date of agreement execution for acquisition of control of the enterprise. But no combination can take effect for 210 days or the decision of COC orders on variety, whichever is earlier[13].

The adherence to the compulsory time frame under Sec 12 of IBC, 2016 is maximum 330 days including the time required for a legal proceeding where the CIPR method has to end within 180 days or it extended up to 90 days and thereby within 270 days, whole CIRP has to complete.

In the case Pioneer Rubchem Pvt. Ltd Vs. Vivek Raheja Resolution Professional, *Trading Engineers (International) Limited (2020)* [14], all attempt is made to resolve the case within 270 days by NCLAT; where in the present case two resolution plane was available, but competitive bidding is going to apply the whole CIRP derail from the achieving its purpose and thereby, the appeal was dismissed. There was no provision to modify that mandatory time frame in IBC, 2016.

It is observed by NCLT, Mumbai, in the case SBI Vs. Jet Airways (India) Limited (2019) [15]. Here, the NCLT held that every member

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[13] Analysis Of Time Limit Under Section 12 Of The IBC For Completion Of Insolvency Resolution Process, Chapter-3 : CIRP, Decoding the Code, IBC Laws,www.ibclaw.in

[14] [2020] ibclaw.in 60 NCLAT

[15] Company Appeal (AT) (Insolvency) No. 643 of 2021 & I.A. No.1700 of 2021

of CIRP like Interim Resolution Professional or Resolution Professional, COC, try to expedite the matter to complete within 180 or maximum up to 270 days and finalize the resolution plan.

Under Regulation 40 of CIRP Regulation, 2016, the RP may apply before the AA for an extension [16]. This extension will valid only when it passed by a resolution of members of COC by a sixty six percent vote. The maximum extension is allowed only once, for a full 90 days.

The maximum period of 270 days cannot extend by NCLAT except under Sec 230 of the Companies Act, 2013. The NCLAT, New Delhi held in the case Alliance Projects Vs. RP of Ind-Barath Power (Madras) Ltd [17] that with expecting to fulfill the objective of the IBC code to provide the scope of the revival of CD provide under the option of rearrangement & compromise under Sec 230 of the Companies Act, 2013 or else the AA always has the way to decide as per the Code.

In the case RP of SEL Manufacturing Company Ltd. Vs. Committee of Creditors of SEL Manufacturing Ltd. & Ors. (2019) [18], it was held it any interim order of stay passed by the High Court or Supreme Court then it may bring changes in the mandatory time frame under Sec12 of IBC, Code 2016.

But IBC (Amendment) Act, 2019, stipulates few changes in this time frame. It inserted provision in Section 12 (3) of the Code that mandates the previous time frame, i.e., 330 days and also added that if any CIRP is pending and the issue is pending within that time frame, it will get a further extension of 90 days from such date.

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[16] IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 Regulation 40A

[17] [2019] ibclaw.in 105 NCLAT

[18] [2019] ibclaw.in192 NCLAT

The Hon'ble Supreme Court held in the case Essar Steel India Limited through Authorised Signatory Vs. Satish Kumar Gupta & Ors. (2019) [19] that the mandatory time frame limited the right of the litigant under Art 14 and Art 19(1) (g) of the constitution. But for certain exceptional cases, only 330 days may extend beyond this limit. Under Rule11 and Sec12, NCLAT held that since the mandatory time frame not only jeopardized the litigant's existence, it also affected the related other stakeholders.

Hence, in the case Ritu Rastogi RP of Benlon India Ltd. Vs. Riyal Packers (2020) [20], it was observed that extension may necessary for certain extraordinary circumstances. NCLAT held that on the request made by the resolution professional for extension and the time may extend beyond 330 days or otherwise, the CD declared as liquidated.

In the case of CIRP of Amtek Auto Ltd, case, on 24th July 2017, the CIRP initiated on order of NCLT under Sec7 of IBC, 2016. On 25th July'2018, the RP was the first applicant. But applicant needed to improve in implementation. So, next, RP tried to search to complete the CIRP on time. But it was unsuccessful, and the extension become impossible and the order for liquidation passed on dt 16th Aug 2019. Honorable SC ordered to evaluate further RP and accordingly NCLT approve the second applicant [21].

Cross border merger and acquisition and insolvency related regulatory framework:

The economic transformation creates demand and it leads changes in market potential. Cross-border industry consolidation is one of the essential segments which emerge extraordinarily. But it also increased cross-border litigation

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[19] 2020 8 SCC 531
[20] (2020) ibclaw.in 175 NCLAT Case Name
[21] Insolvency and Bankruptcy Board of India, IBBI Research Initiative, RP-01/2020

insolvency issues. The IBC, 2016, provide a formal platform for dealing with cross-border M & A litigations of distressed assets [22]. Such matters may includes –

1. The creditors want to enforce the assets of the Indian debtor who reside overseas,

2. The foreign creditors wish to enforce the assets of foreign debtor who live in India,

3. The assets of foreign debtor want to enforce by Indian creditor where the foreign debtor resides in foreign. It brings much confusion regarding the enforcement of the debtor's assets, jurisdiction for filing suits and the application of law of different countries. In such cases, the creditors apply to the court where the assets located. India has to enter bilateral treaty for cross border insolvency matters. In this regard, India's entering of UNCITRAL Model Law will be a significant step.

Interface between IBC, 2016 and Competition Act 2002:

An approval is required from CCI for combination of companies if it happens under Sec 5 of C Act, 2002 that the resolution plan which specifies such combination is not the result of any adverse effect on competition. Under Sec 31 (4) of IBC Amendment Act, 2018, such approval has to take before applying for COC permission [23]. It introduced the 'Green Channel Route' (GCR). The combinations defined under Sec 5 get automatic approval for combinations—the anticompetitive effects compared with exiting the CD from the relevant market after the competitor's acquisition. Under Reliance Industries & Alok Industries case[24], the CIRP continued in NCLT, Ahmedabad Bench the resolution plan of Reliance Industries

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[22] Insolvency and Bankruptcy Code, 2016 Section 234

[23] Insolvency And Bankruptcy Code (Second Amendment) Act, 2018 No. 26 Of 2018

[24] (2019) ibclaw.in 520 NCLT

considered where Reliance Industries acquired 37.7% stake in Alok Industries.

This GCR boosts fuel to the CIRP system. It reduces compliance. It is optional to take prior approval from CCI, and it saves time to complete the CIRP within the stipulated time under IBC. But before this insertion, the task of taking a license required to do much compliance. In the case of Adani Wilmar and Patanjali Ayurveda for Ruchi Soya where the bid of Adani Wilmar of around Rs 6000Cr win the vote of COC against Patanjali Ayurveda's offer of Rs 5700 Cr for Ruchi Soya under the CIRP after consuming more time and fillings.

But after the amendment in 2018, Section 31 was added to sub-section (4) in the Act. This provision specified that approval from CCI was required before seeking the support of the committee of creditors.

But Sec 6(4) and Sec 6(5) under the Competition (Amendment) Act, 2023, formally introduced the GCR. It brings the scope where the parties can file for combination directly. The parties submit RP and are approved in CIRP and want to apply under GCR have to inform about its combination considering a few factors, including-

- The said notifying parties must self-assess that it met the condition and thereby declare that the combination does not create any appreciable adverse effect on competition.
- File Form-I, along with the said declaration and a few other disclosures
- The acknowledgment given after that by CCI was deemed as approval for the combination
- The parties do not create any vertical, horizontal, or complementary overlaps.
- The parties can take guide Pre-filing consultations, which help identify areas of competition before M & A.

On the other hand, the Sec 6 (2A) of the C Act, 2023, was reduced from 210 to 150 days from the notice date served for informing about the combination for approval or disapproval of such combination. The show cause notice issued by CCI to the parties was also reduced from 30 to 15 days and, for prime facie opinion, to cause ADC effect on competition to 30 calendar days. Now, the time taken for approval of combination is less before this amendment if the combination is formed without going for GCR.

The Delhi High Court held in the case Binani Cement Ltd. Vs. Ultratech Cement Ltd [25] that while examining the RP submitted by Ultratech Cement Ltd in CIRP, the competition law applies. It was also observed in Bhushan Steel Ltd. Vs. Tata Steel Ltd [26].

Conclusion

The IBC imparts a time-bound settlement of corporate insolvency and bankruptcy matters. The competition law staves off the ACP and ADP. The main purpose of this legislation is to create a fair, competitive market. But the interface of both legislations is very complex. For the cross-border aspect, the governing regulations of both legislations are multifaceted. In many instances, the time-bound motto of IBC was questioned. The Competition (Amendment) Act of 2023 brings this complex path easy by plummeting time and complex compliance filing procedures. The amendment in IBC also facilitates and heightens the scope from the dispersal of probable insolvent companies to solvent companies. The increasing extension of time protects the stakeholders of the CD from their employment.

Although many changes are done for the speedy settlement of insolvency and bankruptcy matters along with maintaining

[25] (2021) ibclaw.in 61 HC
[26] (2021) ibclaw.in 135 SC

measures from exploiting the market from any ACP and ADP, the interface of both legislations needs to catch up in many aspects to fulfill. Many filing facts under GCP are still being determined. The self-assessment stipulated in GCP is a very restrictive term. The divergent overlapping condition may exclude the companies with negligible such effect also. Complementary overlapping also creates obscureness as its exact meaning has yet to be confirmed.

Besides, amendments are made in IBC, but it still has many issues. In the case of cross border insolvency and bankruptcy matters, there is a significantly lower number of bilateral treaties. The assets of the CD, its valuation, transfer, and the due diligence of acquiring the company submitting RP, etc., are very complex issues.

But still, the interface of both legislation endow with a platform to resolve many insolvency and bankruptcy. It upholds ease of doing business in India.

CHAPTER 6

SECURITIES EXCHANGE BOARD OF INDIA AND ITS ROLE IN REGULATING COMPANY LAW IN INDIA

RA. Madhan Krishnan

Introduction:

In the late 1970s and early 1980s, when capital markets emerged as a new phenomenon, many Indians began showing an increased interest in investing in them. An increase in the number of malpractices started occurring. These malpractices include fixing prices, illegal brokers, and companies not abiding by the Companies Act established by the government. It also included the breach of the laws and regulations of capital markets, delay in delivery of share capital, price rigging, and other practices.

Due to these immoral practices, the stock market suffered, and people's confidence in it began to wane. The government founded the SEBI as it felt the need to form a body to regulate working conditions and reduce the incidence of malpractices in the stock market[1].

The Securities and Exchange Board of India (SEBI) is a regulatory body. It was founded on April 12, 1992, under the SEBI Act, 1992. It is responsible for the regulation of Indian securities and capital markets. SEBI is the regulator of the securities and commodity market in India owned by the Government of India.

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[1] *SEBI as a Regulator*,(29th June,2023, 10.00 AM),https://unacademy.com/content/upsc/study-material/commerce/sebi-as-a-regulator/.

SEBI was established with the objective of safeguarding the investor's interest, regulating the capital market, and establishing a transparent market. It safeguards the interests of investors, securities issuers, and market players. Moreover, it has achieved it by introducing rules and regulations, a mandatory revelation of information, etc[2].

Before SEBI came into existence, a regulatory authority called the Controller of Capital Issues controlled the capital market in India. The Controller of Capital Issues derived its authority under Control Capital Issues (Control) Act, 1947. Securities and exchange board of India (SEBI) gets established under *section 3* of the SEBI Act, 1992[3].

Companies Act 2013 viz a viz SEBI

The Companies Act, 2013 governs the company's functioning. It enumerates the rights and duties of a company and its members. It came into force on April 1, 2013, and applies to all companies incorporated under this Act or those whose incorporation has been renewed after April 1, 2013.

The Companies Act, 2013 has been enacted to change how companies are governed by providing a set of rules that govern their functioning and their rights and duties towards stakeholders. The Act was made effective on April 1, 2014, when it came into force after being passed by Parliament in December 2012.

The Companies Act, 2013 is a new law that the Indian government has passed to regulate the business environment in

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[2]Anjana Dhand,*SEBI (Securities and Exchange Board of India)*,(29th June,2023, 11.00 AM), https://scripbox.com/pf/sebi/#:~:text=SEBI%20aims%20to%20monitor%20the,regulation%20of%20the%20securities%20industry.

[3] Ayush Jha, *SEBI Act: Regulating and Monitoring Stock Market(Sebi Act: Regulating and Monitoring Stock Market*(29th June,2023, 1.00 PM),https://getlegalindia.com/sebi-act/.

India. The Act came into effect on April 1, 2014 and included provisions such as:

- A Company shall not make any statement or publish any advertisement which is false or misleading in any material particular;
- A Company shall not make any statement which is disparaging of another person's reputation;
- A Company shall not make any statement which is disparaging of goods or services;
- A Company shall not indulge in unfair practices.
- The Companies Act, 2013 was enacted to address the problems of the business environment and make it more conducive for companies. It is a piece of legislation that the Indian Parliament has passed. It is the first law to be given in India for company incorporation[4].

Constitution of SEBI:

As per sub-clause (3) of section 3, the SEBI has its office established in Bombay. It may establish offices at other places in India. As per section 4 of this act, SEBI incorporates a management board of 9 members, which includes:-

1. A chairman appointed by the Union Government of India
2. Two members belonging to the Union Finance Ministry of India-nominated by the central government
3. One member belonging to officials of India- nominated by the Reserve Bank of India

[4]THE COMPANIES ACT 2013,unacdemy,(29 June,2023,2.00 PM),https://unacademy.com/content/ca-foundation/study-material/business-laws/the-companies-act2013/#:~:text=The%20Companies%20Act%2C%202013%20was%20replaced%20by%20the%20Companies%20Act,%2C%20the%20Companies%20Act%2C%201956.

4. Five members, out of which at least three should be full-time members, are appointed by India's central government[5].

Objectives of SEBI

- Protection of investors- SEBI's main goal is to protect the rights and interests of those who participate in the stock market. In order to achieve its goals, SEBI directs these market players or participants toward a healthy environment and safeguards the money they invest in the market.
- Prevention of malpractices- The major reason SEBI was established was to control stock exchange operations and stop trading-related fraud and misconduct.
- Promoting fair and proper functioning- The aim of SEBI is to ensure that the stock exchange and the capital market function effectively. SEBI aims to monitor the operations of financial intermediaries and effectively control the securities market.
- Establish Balance- SEBI is responsible for ensuring a balance between the statutory regulation and self-regulation of the securities industry.
- Establish a code of conduct- SEBI must aim to develop and regulate a code of conduct in order to prevent fraud and misconduct. The intermediaries such as brokers, underwriters, aggregators, and so on carry out these financial frauds and misconducts[6].

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[5]Supra Note 51
[6]Supra Note 50

Powers And Functions Of SEBI:

Section 24 of Companies Act, 2013: Power of SEBI to regulate issue and transfer of securities

(1) The provisions contained in this Chapter, Chapter IV and in section 127 shall,—

(*a*) in so far as they relate to —

(*i*) issue and transfer of securities; and
(*ii*) non-payment of dividend,

by listed companies or those companies which intend to get their securities listed on any recognised stock exchange in India, except as provided under this Act, be administered by the Securities and Exchange Board by making regulations in this behalf;

(*b*) in any other case, be administered by the Central Government.

Explanation - For the removal of doubts, it is hereby declared that all powers relating to all other matters relating to prospectus, return of allotment, redemption of preference shares and any other matter specifically provided in this Act, shall be exercised by the Central Government, the Tribunal or the Registrar, as the case may be.

(2) The Securities and Exchange Board shall, in respect of matters specified in sub-section (1) and the matters delegated to it under proviso to sub-section (1) of section 458, exercise the powers conferred upon it under sub-sections (1), (2A), (3) and (4) of section 11, sections 11A, 11B and 11D of the Securities and Exchange Board of India Act, 1992 (15 of 1992)[7].

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[7] The Companies Act Ready Reckoner, CAIRR,(29th June, 3.00 PM),https://ca2013.com/power-of-securities-and-exchange-board-to-regulate-

Section 11 of the SEBI Act defines the function of the SEBI to regulate the capital market and protect the interests of investors; SEBI can take up some measures laid in this act.

1. Regulate the businesses in stock exchanges and other stock markets.
2. Register and regulate the work of stockbrokers, sub-brokers, share transfer agents, portfolio managers, merchant bankers, etc.
3. Register and regulate the work of depositories, credit rating agencies, foreign institutional investors, custodians of securities, and other such intermediaries.
4. Regulate and promote self-regulatory organisations
5. Prohibit unfair trade practices relating to the securities market.
6. Promoting investors' education concerning the securities market
7. Training intermediaries in these markets.
8. Prohibit insider trading.
9. Undertaking inquiries and inspection,
10. Calling records for inspection regarding securities transactions from any person, bank, authority, corporation, appointed under any statute made by central government or state government, etc.
11. Furnishing information to any agency, whether internal or external having a similar function as that of the board for the enforcement of securities law and preventing violations
12. Levying penalties for the violations in securities law and ensuring its enforcement
13. Suspend any securities from the trading market or restrain a person from trading in this market.

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issue-and-transfer-of-securities-etc/#:~:text=Section%2024.,Reckoner%7CCompanies%20Act%202013%7CCAIRR.

Besides these functions, SEBI has some power in its hands to prohibit malpractices.

SEBI performs its power in three ways:-

Quasi-judicial Powers: - SEBI has the power to deliver judgements for proceedings of unethical practices to ensure transparency in cases.

Quasi-executive Powers: - It has the power to conduct an inquiry or investigation and check records and books of a company's accounts to extract proper evidence in case of violations.

Quasi-legislative Powers:- It ensures the protection of the interest of investors by issuing SEBI guidelines and rules and regulations for the conduct of various bodies associated with the stock market. These powers are laid from section 11A to 11D.

These are: -

1. To regulate or prohibit the issue of prospectus, offer documents or advertisement, soliciting money for the issue of securities.

2. Power to issue directions for regulation and development of the securities market.

3. Power to conduct an investigation related to securities transactions and in respect of any violation by any intermediary, investor, or company.

4. Power to cease or desist a person from causing or committing any violation of Sebi's guidelines or rules, or provisions under this act.

SEBI Board also has the power to adjudicate and summon a person to enforce the attendance of a person and check the

accounts and records of a company, person or any other intermediary body and conduct an inquiry by a person appointed by the board under section 15I of the act. Any stock broker, sub-broker, share transfer agent, banker to an issue, trustee of a trust deed, registrar to an issue, merchant banker, etc., can obtain a certificate of registration under section 12 of the SEBI Act after satisfying the conditions per this act.

To protect the malpractices in the capital market, section 12A of the SEBI act prohibits insider trade practices, deceptive devices and substantial acquisition of securities. According to this section, no person should

1. Engage in any deceiving or manipulative practice
2. Engage in insider trading
3. Engage any device or scheme to defraud concerning any transaction related to stocks.
4. Deals in securities while in possession of non-public information or communicate such information to someone in contravention of this act.
5. Acquire shares of a company more than the percentage of equity listed on the stock exchange.

PENALTY UNDER SEBI ACT

There are penalties laid for violations of the rules or provisions laid under this act. These penalties are laid from section 15A to 15HB.

Section 15A - Penalty for failure to furnish information, books or other documents, return, etc.

Section 15B - Penalty for failure to enter into any agreement with clients required to get entered.

Section 15C - Penalty for failure to resolve investor's grievances

Section 15D - Penalty for certain defaults in case of mutual funds

Section 15E - Penalty for failure to observe rules and regulations by an asset management company

Section 15F - Penalty for default in case of stockbrokers

Section 15G - Penalty for insider trading

Section 15H - Penalty for non-disclosure of acquisition of shares and takeovers

Section 15HA - Penalty for fraudulent and unfair trade practices in the securities market

Section 15HB - Penalty for contravention where no separate penalty is provided

The minimum penalty for most of the offences laid in these sections is one lakh. The penalty for insider trading and non-disclosure of acquisition of shares and takeover under sections 15G and 15H, respectively, is 10 lakh and will extend up to 25 crores.

The penalty for unfair trade practices under section 15HA is a minimum of 5 lakhs extending up to 25 crores or three times the profit made out of such practices, whichever is higher[8].

SEBI As a Regulator of Companies Act, 2013:

The primary function of the SEBI as a regulator in the Indian financial sector is to ensure that the Indian stock markets operate in a safe and orderly way. India's Securities and Exchange Board was established to defend the investors' interests and brokers in the Indian stock market.

[8] Supra Note 51

As a regulator of the capital market, SEBI aims to create an atmosphere that encourages the integrated and convenient operation of the securities market. As a result, it can ensure the satisfaction of the three key stakeholders in the financial market: asset issuers, investors, and intermediaries of financial services. As a market regulator, SEBI also plays a significant role in the Indian economy.

- Securities issuers

  These business entities raise cash from many sources to support their operations. The SEBI ensures that they have a safe and transparent environment to conduct their operations.

- Investor

  For markets to remain afloat and function, investors must continue to participate. The mission of the Securities and Exchange Board of India (SEBI) as a market regulator is also to maintain an atmosphere free of misconduct and restore the general public's confidence.

- Money brokers and other financial intermediaries

  These are the individuals who act as go-betweens between issuers and potential investors. They ensure that financial transactions are seamless and secure.

The following are the key three functions of the SEBI:

- Protective functions
- Regulatory function
- Development function

Protective Functions

As the name implies, the SEBI carries out these tasks to safeguard the interests of investors and other financial players in the financial markets. It consists of the following elements:

- Price manipulation examination by SEBI
- Stopping insider trading
- Encouraging the use of ethical behaviours
- Informing investors
- Prohibiting trade practices that are deceptive or unfair

The Role of Regulatory Functions

The primary purpose of these activities is to ensure that a firm's operation in the financial markets is monitored and controlled. These features are as follows:

- Making standards and a code of conduct for the correct operations in the stock market
- Regulating takeovers
- Inquiries about audits
- Registration of intermediaries like brokers, sub-brokers, merchant bankers, and others
- Penalising companies for violations
- Registering credit rating agencies

Developmental Functions

SEBI also conducts some development duties, which may include, but are not limited to, those listed below:

- Training the intermediaries
- Encouraging fair business and reducing malpractices
- Conducting research into the benefits of encouraging self-regulating groups
- Transaction of MFs directly through a broker
- Carrying out research

Role of Securities and Exchange Board of India

The Securities and Exchange Board of India plays a very dynamic role it has to perform different roles at different time. With the advent of time Securities Market of India is growing as the market is growing misconducts are also growing like insider trading, delivery of share lately, price ragging and violation of statutes. However, to promote the efficient working of the market and to protect the interest of the shareholders SEBI plays an active role:

Protective Role

Insider trading States that no person shall do Act of counselling about procuring or communicating directly or indirectly any non-public price-sensitive information to any person as defined under Section 195 of the Companies Act. Now, if a person contravenes such provision, he shall be punishable. To be stricter and to stop such unfair practice, SEBI has its regulation named SEBI (Insider Trading) Regulation,1992. Strict punishment is provided by SEBI in such cases, further chapter 4A of the SEBI act provides for that Section 15(G)(1) if an insider either on its own or on behalf of any person has dealt on the behalf on the company has published any information he may be fined or charged with Rs.25 crores or three times the profit made whichever is higher.

Section 15(G)(11) if an insider has given any price sensitive information then he may be fined with 25 crores or 3 times the profit made. Now, according to Section 15(G)(iii) if an insider has procured any other person to deal in Securities of anybody corporate based on published information then he may be fined with 25 crores or three times the profit made whichever is higher.

Also, Section 11 of the SEBI act empowers the board to investigate upon the matters which looks doubtful or

suspicious. Every Director at the time of his appointment has to furnish the details about his shareholding in the company. Moreover, the director must lay down in the meetings in which they have their interest.

In the case of Dilip Pendse vs SEBI[9], Nishkalpa was a wholly-owned subsidiary of TATA Finance Ltd (TFL) which was a listed company. The Managing Director of TFL ltd. was Dilip Pendse. On March 31 2001, a huge loss of Rs 79.37 crores was incurred by Nishkalpa and this was going to affect the profits of the company. This was, however, an unpublished price sensitive information of which Pendse was aware of. The information regarding this was published to the public on April 30, 2001.

Thus, any further transaction by an insider between March 31, to April 30, 2001, would impliedly fall within the scope of Insider Trading. This information was passed by Dilip Pendse to his wife who had sold shares of TFL ltd amounting 2,90,000 in her name as well as in the name of the Companies controlled by her father in law.

- SEBI also attempts to prohibit unfair trade practices, for example, it doesn't allow the company to make misstatements in the prospectus and raise any kind of money from the public.

- A prospectus needs the approval of the SEBI before hitting the market than only the concerned company can issue its prospectus.

- The Companies Act 2013 provides for misstatements in prospectus i.e. Section 34 which provides for criminal liability, section 35 provides for civil liability and there is

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[9] Ambuja Cement Corporate Legal Team, Kotak Committee's Recommendations on Corporate Governance,(29th June,2023), http://www.legaleraonline.com/articles/kotak-committees-recommendations-on-corporate-governance)vISITED.

also a general provision for punishment in case of fraud prescribed in section 447[10].

SEBI has also formed two advisory committee these committees consists of the market player investors association and expert persons who have crucial knowledge regarding capital. These committees are formed to provide important advice and guideline to form Sebi's policies.

Insider Trading with Related Case Laws

Insider trading involves trading in a public company's stock by someone who has non- public material information about that stock for any reason. In a company's when persons working in for eg. its directors, executives they have the strategic information about the company and when such information is shared by any other outsider for their benefit it is called insider trading . It is an unfair and illegal practice and highly violative against the rules and regulations of SEBI.

SEBI provides regulation to issue and transfer of securities, provisions related to the issue and transfer of securities and non payment of dividend by listed companies or those companies which are intended to get their securities listed on a recognised stock exchange in India will be managed under the guidelines of SEBI.

In Hindustan Unilever limited vs SEBI[11] is in relation to the unpublished price sensitive information (UPSI) that arised from the insider trading from big company Hindustan Unilever limited in its purchase of shares of Brooke bond Lipton India limited (BBLIL).

The facts of the case focuses on the purchase of shares by Hindustan Unilever Limited (HLL) of 8 lacs on 25th march 1996

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[10] www.indianlawportal.co.in/role-of-sebi/.

[11] 1998) 18 SCL 311 MOF.

of Brooke Bond Lipton India Limited (BBLIL) from the Unit Trust of India (UTI). The two companies HLL and BBLIL were proposed to be merger and the purchase was done two weeks prior to public announcement of merger.

On investigation by Sebi's order on date march 11, 1998 SEBI found that HLL was an insider as under section 2(e) of the 1992 of the 1992 regulations at the time of the purchase of shares of BBLIL from UTI. And HLL has all the unpublished price sensitive information was available with them. Sebi also stated that both the companies have common directors due to which information shared between the two , and it is also stated that both the companies are in same management control, so Sebi stated that HLL directors have prior knowledge about merger, HLL was covered under definition of insider.

HLL appealed against the Sebi order before the Securities Appellate Authority and said that the information of merger was not unpublished, it was published and was available to different platforms like in media and in newspapers and secondly, they stated that there was a merger of two healthy companies due to which there is no violation. But the appellate authority however noted that even in the merger of two healthy companies there are synergistic possibilities which could lead to price sensitivity for either company, thus the appellate authority agreed with Sebi's conclusion that information of the merger was price sensitive (though not unpublished).

Punishment To Distribute Failure Of Dividend

Provisions related to the issue and transfer of securities and non payment of dividend by listed companies or those companies which are intended to get their securities listed on a recognised stock exchange in India will be managed under the regulations of Sebi and in other case by the central government.

The section also explains that all the matters related to

prospectus, written off on allotment , redemption of preference shares be authorised by central government, tribunal or the registrar. Sebi in respect of matters specified above and the matters delegated to it under provision of section 458(1) exercise the power conferred upon it under sub section 1(2A), (3) and (4) of section 11 of SEBI Act.

Whereas any obstacle emerged regarding this in confirmity with the section 24, 58,59 of the companies act 2013.They relate to exercise of certain powers by the tribunal during the period , it is duly constituted under 2013 act, ministry of corporate affairs with respect to it issued order called the companies removal of difficulties order 2013.

The ministry clarified until the date is notified by central government under section 434(1) of the companies act for the transfer of all the matters proceeding or cases to the tribunal constituted the power of tribunal under section 24 , 53 , 59 in pursuance of the second proviso to subsection (1) of 465 of said act.

The case of Sahara Vs SEBI[12], involving the Sahara group , Sahara work in multi segment such as infrastructure, sports retail and finance. Under this case the two companies of Sahara group issued OFCD (optional fully convertible debenture) in public, in 2009 another company approached to Sebi for listing of shares. And after analysation of whole Sahara group the Sebi came to know about the two companies who issued optional fully convertible debenture and on this Sebi claimed jurisdiction as they issued securities without sebi's guidelines and regulations and in defence the companies claimed that the securities were issued with the compliance of the companies act and sebi has no jurisdiction over it.

Sebi conflicts with the Sahara, as the Sahara violates the

[12] AIR 2012 SUPREME COURT 3829, 2012 (10) SCC 603

regulations of Sebi, the case undergo several rounds of stays, court proceedings and hearings etc and finally appeared before Supreme Court , which favoured the Sebi and ordered the Sahara company to repay the money raised by breach of guidelines and regulations of Sebi[13].

Conclusion

From the above matters it has been concluded that before the establishment of Sebi people started investing less in stock market as they lost the trust due to unfair practices in stock market, to regain the faith of people in stock markets government took the step for establishment of Sebi to monitor and supervise the activities of stock market.

To prevent undesirable, fraudulent trade practices in the securities market, various legislation got required to regulate this market and keep a check on substantial acquisition of shares, manipulative practices or any other sort of violation. SEBI Act 1992 played a significant role in curbing malpractices in the securities market and protecting the interests of investors. These investors are the backbone of the market, and their capital is substantial in corporate governance.

Protecting the rights of small investors is one of the main purposes of the SEBI, it also prohibits Insider Trading and also provides for various penalties in the case where there is a breach of any provision. SEBI has two-fold function i.e. Protective as well Progressive.

Even though there is a company law, without SEBI the management, functions, executions of company does not occur in a lawful manner which acts as a regulator for lawful functioning of companies. Without SEBI there is no company

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[13] Pragya Saini, Sebi And Its Power To Regulate Issue And Transfer Of Securities Under Companies Act 2013,(29th June,2023, 10.00 AM),https://www.legalserviceindia.com/legal/article-5983-sebi-and-its-power-to-regulate-issue-and-transfer-of-securities-under-companies-act-2013.html.

law without company law there is no company. However, the punishments should be imposed strongly without any excuses otherwise unlawful acts will not be destroyed fully.

CHAPTER 7

DIVERTING ATTENTION OF CORPORATES TOWARDS THE DYING RIVERS OF INDIA

Dulung Sengupta
Shinsa P Mathew

Introduction

The United Nations Guiding Principles (UNGP) place responsibility on the State and the corporates for the protection of basic human rights. The role and power of the business enterprises in positively impacting human rights and communities where they operate was recognised by the United Nations.[1] The UN endorsed the 'Protect, Respect and Remedy Framework' for business and human rights.[2] It also emphasized that it is the State's duty to protect the human rights of people within their territory and have effective laws and regulations in place to ensure that everyone is having access to the same.[3] The states must set clear expectations for the companies operating in their territories such that they operate ethically and have respect for human rights and the environment. India had taken an early step towards delineating the social, environmental, and economic responsibilities of companies by introducing the National Voluntary Guidelines in 2011. Ministry of Corporate Affairs reviewed it in 2015 to keep up with the global developments and subsequently, the National Guidelines on Responsible Business Conduct was drafted in 2018. The guidelines place the responsibility on the companies to respect

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[1] The UN Guiding Principles on Business and Human Rights An Introduction, (Jul 13, 2023,10.AM),https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf.
[2] *Id.*
[3] *Id.*

and protect human rights[4] and the environment and make efforts to restore it[5].

Though not expressly stated, environmental responsibility is an integral part of Corporate Social Responsibility under the Companies Act. The Companies Act, 2013 has made a meaningful shift from the shareholder model to the stakeholder model of corporate governance which extends the horizon of the fiduciary duties of directors and makes them legally responsible towards the community and the environment. Under Schedule VII of the Companies Act, which enlists the activities that might be considered by corporates for CSR expenditure, activities related to the promotion of human rights and environmental protection and conservation have been explicitly mentioned.

The Securities and Exchange Board of India mandates the first 500 companies in terms of market capitalization to prepare Business Responsibility Reports mentioning their initiatives from an environmental, social, and governance perspective. Even with efforts for speedy and effective redressal of environmental suits, India is one of the torchbearers globally as it is the only country after Australia and New Zealand to have a specialized environmental tribunal (National Green Tribunal).[6] Despite the constant efforts to strengthen corporate environmental responsibilities, as per the 2014-17 reports, Environment was not in the top three sectors that got the maximum attention through CSR activities. Provided the vulnerable state of natural resources owing to rampant pollution, population growth and climate change, the Corporates must conduct their activities in a more environmentally responsible manner and consider higher CSR spending towards environmental conservation and restoration.

[4] Principle 6, National Guildelins on Responsible Business Conduct (2018), (Jul 12, 2023,11.00 AM),https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf.
[5] *Id.* Principle 6
[6] National Action Plan on Business and Human Rights, Zero Draft (2018) https://www.mca.gov.in/Ministry/pdf/ZeroDraft_11032020.pdf

It can aid the State in its policies and programmes initiated for environmental protection and restoration and also in the protection of the human rights of people. Industrial activities have time and again burdened the rivers of India and as an outcome, most of the rivers are highly polluted.

The two most polluted rivers in India, the Cooum and Sabarmati[7] flow through Tamil Nadu and Gujarat, the two states having the maximum number of industries. Industrial pollution coupled with the discharge of untreated sewage and agricultural run-offs has contaminated major rivers which are important for the sustenance of millions of people who are dependent on them for their basic needs. Many cities in India are finding it difficult to cater safe drinking water to their inhabitants owing to contamination of groundwater. The problem is more prevalent in larger cities with more industries.[8] Ensuring basic human rights to all is a central theme of sustainable development and the corporates must take responsibility along with the national governments and UN for achieving the same.

The Water (Prevention and Control of Pollution) Act, 1974 aims at maintaining and restoring the wholesomeness of aquatic resources.[9] The wholesomeness is evaluated in terms of the protection of human uses.[10] Therefore, protecting the water bodies from pollution is an essential part of water quality management taken up by the environmental regulatory authorities. The Central and State Pollution Control Boards have been making incessant efforts since the enactment of the Water Act and Rules to make the industries compliant and behave responsibly towards the water bodies. The Central

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[7] River Stretches for Restoration of Water Quality, Central Pollution Control Board, Ministry of Environment, Forests & Climate Chance (2022).
[8] Status of Groundwater Quality in India-Part I, Central Pollution Control Board (2007) (Jul 12, 2023,10 AM),https://cpcb.nic.in/openpdffile.php?id=UHVibGljYXRpb25GaWxlLzc3NF8xNTQ0NDI3NjQ3X0dXUVMtMS5Wzgy=.
[9] Parivesh, (2012).
[10] *Id.*

government initiated the river pollution abatement programme in 1985 and launched the Ganga Action Plan, followed by pollution abatement plans for Yamuna and Gomti which were the major tributaries of River Ganga.[11] These abatement programmes were further expanded and merged with the National River Conservation Plan (NRCP) which aimed at reducing river pollution and enhancing their water quality.

At present, the NRCP is working on reducing the pollution load of 33 rivers over 15 States of India excluding River Ganga and its tributaries as they fall within the scope of the Ministry of Water Resources, River Development and Ganga Rejuvenation. Considering the emissions and discharges into water bodies, 64 types of industries were identified as significantly polluting.[12] After three and a half decades since the first river pollution abatement programme was launched, in a study conducted by the CPCB in 2022, out of the 603 rivers that were assessed, 311 polluted stretches were identified in 279 rivers in the country.[13]

The Need to divert the Attention towards the Dying Rivers

The State has taken conscious efforts through legislation, judicial pronouncements, proactive participation by Pollution Control Boards and national-level programmes such as The Ganga Action Plan and National River Action Plans for water quality management. On the brighter side, there is a decline in the number of polluted river stretches in the country from 2018 to 2022 [14] but still major rivers in the country are receiving large quantities of untreated sewage and industrial wastes.

It has garnered the attention of various NGOs, public-spirited persons, the State and Central Pollution Control Board and the

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[11] National River Conservation Plan, National River Conservation Directorate, Ministry of Environment Forest & Climate Change, Government of India, (Jul 12,2023,10.AM),https://nrcd.nic.in/writereaddata/FileUpload/23617950NRCP%20Backgrpund.pdf.

[12] Parivesh, *supra* note 9.

[13] *Supra* note 4.

[14] *Id.*

NGT who have taken measures to assess the water quality of the rivers, probable polluting sources, the status of Sewage Treatment Plants and other infrastructure necessary for controlling pollution and ways to restore and rejuvenate the rivers to their pure form. There have been several applications for rejuvenating rivers polluted due to industrial activities made to the NGT over the years based on studies conducted by different interested parties, a few of which have been highlighted hereunder:

Tributaries of River Ganga- Kali-East and Ram Ganga between Haridwar and Kanpur[15]

746 grossly polluting industries have been identified in Uttar Pradesh unto Kanpur out of which 565 are operational and 110 have been closed by the Uttar Pradesh Pollution Control Board. Industrial pollution control was considered indispensable for the restoration and rejuvenation of the tributaries in this region. The colour of the water of the Chhoya drain had changed due to the disposal of industrial effluents by a paper industry, a petrochemical industry and a Distillery.

The industries were made liable for bearing the costs of cleaning the drain and making it colourless. It was also suggested that the Common Effluent treatment plants in the region should be upgraded. Emphasis was drawn on the role of State Pollution Control Boards ensuring pollution control compliance by industrial units, maintenance of proper system re-utilisation of effluents and preventing their discharge into any drain or tributary of River Ganga.

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[15] Restoration/Rejuvenation of River Ganga, suggestions and Proposals for Phase-I, Segment B (Haridwar to Kanpur), Central Pollution Control Board, submitted Before the National Green Tribunal (2016), (Jul 12, 2023,12.00PM),https://cpcb.nic.in/displaypdf.php?id=TkdUL1Jlc3RvcmF0aW9uX1JlanV2ZW5hdGlvbl9vZl9SaXZlcl9HYW5nYS5wZGY=.

River Yamuna[16]

River Yamuna is the largest tributary of River Ganga and flows through a distance of 1376 km till it confluences with River Ganga in Prayagraj. Substantial amounts of industrial wastes and sewage flow from multiple cities identified as polluted stretches such as Vrindavan, Mathura, Agra, Firozabad, Prayagraj, Etawah etc. River Yamuna hosts 300 water-polluting industries along its catchment area that are grossly polluting in nature. These industries also consume a lot of groundwater in the region and due to over-extraction, the status of groundwater in some regions is critical. Although the treatment of sewage is a pressing need for the restoration of the river, industrial pollution also remains a major concern. It had been anticipated by the Pollution Control Board that the actual quantity of industrial effluents might be much greater than the estimates due to over-discharge by the units and the presence of illegal units in the catchment area.

River Daman Ganga[17]

Around 500 industrial units situated in the Vapi Industrial Cluster, Gujarat discharged untreated and partially treated wastes into River Damanganga, which flows into the sea near Daman. The majority of the industries were in the red category and among them, 64 were large industries. The Vapi Industrial Cluster is managed by the Gujarat Industrial Development Corporation (GIDC). The Corporation provided an underground drainage network meant for carrying the industrial wastewater to a Common Effluent Treatment Plant (CETP). The CETP was subsequently taken over by M/s Vapi Green Enviro Limited. It was found by the Gujarat Pollution Control Board and the

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[16] Action Plan for Restoration of Polluted Stretch Of River Yamuna From Asgarpur (G. B. Nagar) to Etawah & Shahpur to Prayagraj (Balua Ghat), Uttar Pradesh Pollution Control Board, (Jul 12, 2023,11.20 AM),http://www.uppcb.com/pdf/RIVER-YAMUNA.pdf.

[17] Aryavart Foundation v M/s Vapi Green Enviro Ltd. & Ors, Original Application No. 95/2018.

Central Pollution Control Board that the CETP was not adhering to the inlet and final discharge norms largely which has adversely affected the water quality of the river. The NGT in this matter ordered the extension of discharging point by laying the pipeline at a distance of 4.5 km from the existing discharge point of CETP to Vapi Environment Ltd.[18] In 2019, the U T Administration of Daman & Diu formulated Action Plan for the Damanganga River identifying the issues and drawing up solutions and plans[19].

River Bhadar

A writ petition was filed bringing into light the discharge of pollutants comprising of hazardous chemicals into River Bhadar by the dyeing and printing units in Jetpur, Gujarat.[20] It was also revealed that a larger proportion of industries were extracting groundwater without prior permission from the Central Groundwater Authority. The PIL was transferred to NGT Principal Bench in Delhi by the Gujarat High Court[21]. The Gujarat Pollution Control Board had recorded the presence of 1818 industrial units, out of which 1729 small-scale, 4 medium-scale and 2 large-scale units fall in the Red category. The effluents generated from the industrial units are sent to the Common Effluent Treatment Plants (CETP).

On inspection, it was found that out of 13 units from which the primary treated effluent sample was collected, only one unit was complying with the CETP inlet norms which would naturally hamper the functioning of the effluent treatment plant. In 2019, the samples collected by the pollution control board reflected that the concentrations of the monitored parameters from the

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[18] The Collector, Daman v Tarun Patel and ors Original Application No. 109/2014 (WZ).

[19]https://www.daman.nic.in/websites/Pollution-Control-Committee/2019/Action-Plan-on-Damanganga-River-03-04-2019.pdf

[20] Ramdevbhai Samatbhai Sanjva v. State of Gujarat & Ors. Writ Petition (PIL) No. 114 of 2018.

[21] Original Application No. 616/2019.

effluent treatment plants did not align with the prescribed norms. NGT after receiving the reports from Gujarat Pollution Control Board (GPCB) and Jetpur Dyeing and Printing Association (JDPA), ordered not to discharge the effluents to the C-channel but to carry the effluents through a tanker to the CETP of JDPA which should be tracked using GPS by the GPCB. As per the order of the Tribunal, after converting the Sewage Treatment Plant of JDPA only for treating the industrial effluents and other wastes were diverted to the new Sewage Treatment Plant of Jetpur- Navagadh Nagarapalika, the report was submitted to NGT on November 23, 2020.

River Varuna[22]

River Varuna flows through a length of 200 km and in its course, it traverses through the textile clusters of Bhadohi and Varanasi. There are 118 water-polluting industries located in its catchment area out of which 60 are operational and 29 have been closed by the Uttar Pradesh Pollution Control Board. Industrial activities and sewage dumping were identified as the largest polluting factor in river Varuna in Varanasi. It was noticed that the industries were operating at a lower scale and not adopting cleaner technology which was generating high quantities of effluents. Due to the lack of efficient effluent treatment systems, partially-treated and untreated effluents were drained into the river. The matter was put before NGT in Saurabh Tiwari v Union of India and Ors[23]. The Tribunal, for the restoration of the rivers, ordered to constitute an independent Committee to monitor the rejuvenation process with members of CPCB, SPCB, National Mission for Clean Ganga (NMCG) and District Magistrate. The Committee was supposed to prepare an action plan and monitor the rejuvenation. 'Action Plan for the

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[22] Action Plan for the Rejuvenation and Restoration of River Varuna and Assi, Original Application No. 128/2021, (Jul 12, 2023,12 AM),https://cpcb.nic.in/NGT/Action-Plan-Rej-River-OA-No-368-2021.pdf.

[23] O.A. no. 128/2021. The same issue was raised in Ritam Tripathi vs State Of U.P Original Application No. 145/2023.

Rejuvenation and Restoration of River Varuna and Assi'[24] was thus formulated and it is being carried out.

River Bharalu

River Bharalu in Assam is becoming narrower and shallower over the years due to widespread encroachment and pollution.[25] The drains carrying untreated municipal and industrial wastes are the major pollutants of the river. After the NGT directed the State Pollution Control Boards to take measures for the restoration of polluted rivers, the Assam Pollution Control Board submitted an action plan for the restoration of the Bharalu River. Assam has 10 polluted river stretches and Bharalu remains to be one of the critically polluted rivers in the country[26].

Periyar River

River Periyar is the longest river in the State of Kerela and flows through a length of 244 km and has six tributaries.[27] The river bifurcates into two branches namely the Mangalapuzha branch and the Marthandam branch. The Marthandam branch further bifurcates and one of those branches flows through the Eloor-Edayar industrial belt. One-fourth of the industries in the State of Kerala are placed on the banks of the river and most of them are concentrated in the Eloor-Edayar area. Angamaly to Kochi are the most industrialised zones while looking at the Periyar river basin which houses more than 50 large and medium industries and over 2500 small-scale industries. The Greater

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[24] Final action Plan for the Rejuvenation of River Varuna and Assi,(12 Jul,2.00 PM), https://greentribunal.gov.in/sites/default/files/news_updates/Action%20Taken%20Report%20in%20OA%20No%20128%20of%202021%20(Saurabh%20Tiwari%20Vs.%20Union%20of%20India%20&%20Ors.).pdf.

[25] Action plan for Bharalu River near Pragjyothish College- Priority I, (Jul 12, 2023,6.00PM,https://www.pcbassam.org/RRC%20Action%20Plan%20Final/Priority%20I/Action%20plan_Bharalu.pdf).

[26] *Supra* note 4.

[27] Action Plan for Rejuvenation of Stretch of River Periyar- Alawaye- Eloor to Kalamassery (2019)., (Jul 12, 2023.6.30 PM),https://kspcb.kerala.gov.in/assets/uploads/widget/action_plan/final_action_plan_periyar.pdf).

Kochi area has about 83 red-category industries out of which 79 are in the Eloor-Edayar and Ambalamugal region. The river had become dead and barren in several pockets. The major polluting units are functioning in the lower stretch of the river. These industries are highly dependent on the river for both the intake of water as well as discharge of effluents.

In Shibu Manuel, Secretary, Green Action Force v The Government of India and Ors[28] and another case of K Muhammed Iqbal v Kerala State Pollution Control Board and Ors[29] the NGT directed the government to form a Joint Committee and formulate an Action Plan and further to submit the report of its implementation to the Tribunal. Even after the NGT ordered the State government to implement the Periyar River Action Plan in 2022, inhabitants of the Eloor-Edayar region have expressed that new industries have been established in the region that are draining their effluents directly into the river.[30]

There are a lot of lags in the implementation of the plan and in many instances, the Pollution Control Board Officials have been even denied entry by the companies when they went there for inspection. Due to a lack of coordination among the stakeholders, the river remains to be highly polluted and discoloured[31] longing to be rejuvenated, while the local communities continue their struggle against pollution.[32]

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[28] Original Application No. 395/2013/SZ (THC)

[29] Original Application No. 242 of 2016 (SZ)

[30] Periyar Pollution: Action Plan Likely to Miss NGT Deadline | Kochi News - Times of India, TIMES OF INDIA, (Jul 12, 2023,1.00 PM),https://timesofindia.indiatimes.com/city/kochi/periyar-pollution-action-plan-likely-to-miss-ngt-deadline/articleshow/99351244.cms?from=mdr.

[31] And quiet flows the polluted Periyar river as neglect stagnates action plan- The New Indian Express, (Jul 12, 2023,4.00 PM,https://www.newindianexpress.com/states/kerala/2022/apr/22/and-quiet-flows-the-polluted-periyar-river-as-neglect-stagnates-action-plan-2444914.html).

[32] As pollution plagues Periyar river, experts urge anti-industrial stance at Eloor, The News Minute,(Jul 12, 2023,11.00 AM),

Nakkavagu, a Tributary of River Manjira, River Musi and other rivers of Telangana

The Nakkavagu River is highly polluted by the pharmaceutical and drug companies around it. The Government of Andhra Pradesh had encouraged the setting up of medium and large industries in the Patancheru-Bollaram industrial areas around the 1980s.[33] Most of these industries are chemical and pharmaceutical and are water-polluting in nature. Most of their toxic effluents are discharged in the Nakkavagu which confluences with River Godavari. Many of the industries in these regions were not covered by the Common Effluent Treatment Plants and some were even found to be unlisted. [34]

Since 1989 there has been a saga of suits regarding the tremendous water and air pollution in this region owing to industrial discharges. There have been various orders by the Judicial bodies, and committees have been formed for addressing the issues related to the Nakkavagu and finding ways to improve the water quality. Although the water quality has improved as per reports, Nakkavagu continues to be one of the most polluted river stretches in Telangana.[35]

River Musi is the most polluted river in Telangana[36] and the 22nd most polluted in the world. [37]The NGT has stated that the pharma and chemical industries that are located in the south

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https://www.thenewsminute.com/article/pollution-plagues-periyar-river-experts-urge-anti-industrial-stance-eloor-137597.

[33] Esha Rana, Courts on Polluting Industries Patancheru & Bollaram Industrial Area Did the Polluter Pay, Vidhi Centre for Legal Policy (2020), (Jul 12, 2023,5.00 PM),https://vidhilegalpolicy.in/wp content/uploads/2020/12/Case_Brief_An_Unequal_Fight_Dec_2020_VCLP.pdf

[34] Indian Council for Enviro-Legal v Union of India JT 1998(2) SC 668, 2000 (3) SCALE 415

[35] *Supra* note 4.

[36] *Id.*

[37] *Lifeline Musi 22nd most toxic river in the world*, virtual drug lab, THE TIMES OF INDIA, May 17, 2022, (Jul 12, 2023,5.10 PM),https://timesofindia.indiatimes.com/city/hyderabad/lifeline-musi-22nd-most-toxic-river-in-world-virtual-drug-lab/articleshow/91605392.cms.

and west of Hyderabad are the major sources of river pollution as they discharge effluents into the rivers[38]. They have also identified that the river is also polluted in regions where mining activities are undertaken. The Tribunal directed to investigate the health hazards due to this pollution and directed the government to establish Super Speciality Hospital and other health care facilities for this area. The NGT has emphasized the need to control river pollution as it can also have adverse impacts on lakes and groundwater.

Rivers of Maharashtra

Maharashtra has the maximum number of polluted river stretches in the country.[39] The CPCB has noticed that there has been an increase in the number of polluted river stretches in the State and untreated sewage and industrial wastes are the major pollutants.[40] The NGT had directed the State Pollution Control Board to take measures for the restoration of rivers Mithi, Waduli, Ulhas and Patalganga in 2014.[41] Several applications have been filed with the NGT for addressing the pollution of the Mula, Mutha, Pawani and Indrayani rivers which are tributaries of the Bhima River. Based on an application filed in 2022 regarding the pollution of River Panchganga, a committee has been formed. The committee expressed that illegal and accidental discharges of effluents by sugar industries and distilleries might also be probable sources of river pollution

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[38] Kasala Malla Reddy and Others VS State of Andhra Pradesh & Others Application Nos. 69 to 72 of 2013 and Batch cases.

[39]S*upra* note 4.

[40] 55 polluted river stretches in Maharashtra, highest in India, THE TIMES OF INDIA, Jan. 22, 2023, (Jul 12, 2023,5.30 PM) https://timesofindia.indiatimes.com/city/pune/55-polluted-river-stretches-in-maharashtra-highest-in-india/articleshow/97215603.cms.

[41] Subash Ramakrishna Patil v MPCB and ors Original Application No. 55/2015/WZ; Vinay Balasaheb Ghule v The Commissioner Pune Municipal Corporation and ors Original Application No. 26/2016/WZ; Shewalewadi Grampanchayat through its Sarpanch & Anr v The Commissioner Pune Municipal Corporation & Ors. Original Application No. 37/2016/WZ. https://timesofindia.indiatimes.com/city/mumbai/green-tribunal-orders-restoration-of-mithi-ulhas-rivers/articleshow/28863418.cms

along with untreated sewage.[42] At present also, as per the CPCB report on polluted river stretches in India, Bhima, Mithi and Mutha continue to be the most polluted in the State.

Judicial Interpretation of the Right to Clean Environment and Water as Basic Human Rights

India is one of the biggest democracies in the world, encompassing basic human rights in the Constitution of India under Part III. The right to a "Healthy Environment" is considered to be a third-generation right (solidarity right) and considered to be a human right internationally but lately. The Indian Constitution at its inception did not contain any provisions related to environmental protection. To fulfil the commitment under Stockholm Declaration[43] certain provisions on environmental protection were incorporated into the Constitution through the 42nd amendment[44] of the constitution.

Judicial activism played a role in giving rights related to the environment, and the status of fundamental rights (the 42nd Amendment incorporated environmental provisions in Part IV and Part IV A which are as such not enforceable).

In Subash Kumar v State of Bihar,[45] while dealing with the issue of the pollution caused to the river Bokaro due to the discharge from industries, the Supreme Court entertained the writ petition under Art. 32 of the Constitution considering that the " Right to live includes right to the enjoyment of pollution free water and

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[42]Joint Committee report in Compliance with the Order of Hon'ble NGT New Delhi in the matter of O.A. No. 563 of 2022 (2023). https://greentribunal.gov.in/sites/default/files/news_updates/JOINT%20COMMITTEE%20REPORT%20IN%20OA%20NO.%20563%20of%202022%20(Vrinda%20Basu%20Vs.%20State%20of%20Maharashtra).pdf.

[43] United Nations Conference on the Human Environment, U.N. General Assembly Resolutions 2994/XXVII, 2995/UVII, and 2996/XXII of 15 December 1972.

[44] The Constitution (Forty Second Amendment) Act, 1976. (Article 48A and Article 51 A (g)).

[45] AIR 1991 SC 420.

air"[46]. Indian judiciary has relaxed the rule of Locus standi and proof of injury[47] and thus the poor and downtrodden could be represented by public-spirited persons or organisations. Water is considered to be a basic need of life under Art. 21 of the Constitution[48].

To protect the water bodies and the right of people to consume and have access clean water, the judiciary exhibited its active role in many litigations. Pollution of River Ganga due to industrial and human waste was addressed in the 1980s[49]. The Supreme Court in the Ganga Water Pollution case found that the tanneries discharging industrial effluents into Holy River Ganga were not having primary treatment plants. The argument that the industries are not having the financial capacity to install and maintain treatment plans was not considered and the apex court thus ordered the closure of such tanneries.

Life, health and ecology were considered to be of prior importance in this case. River Khari got contaminated due to the industrial untreated effluents from Gujarat Industrial Development Corporation Estates. It had adversely impacted agricultural production as the irrigation canals got polluted which damaged the fertile land in Kheda District[50]. In this case, the Court held that the Pollution Control Board and State government should take necessary actions against the polluters

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[46] *Id.*

[47] Municipal Council, Ratlam v. Vardichand (1980) 4 SCC 162; M. C. Mehta v. Union of India AIR 1988 SC 1115; Rural Litigation And Entitlement ... vs State Of U.P. & Ors 1985 AIR 652; Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1446; M.C. Mehta v. Kamal Nath, AIR 2000 SC 1997; Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664; Vellore Citizens Welfare Forum v. Union of India AIR 1996 SC 2721; S. Jagannath v. Union of India, AIR 1997 SC 811; M.C. Mehta v. Union of India, AIR 1999 SC 3192

[48] A P Pollution Control Board v M V Nayudu and ors 1999(2) SCC 718.

[49] M C Mehta v Union of India 1988 AIR 1115.

[50] Narula Dyeing and Printing Works v Union of India AIR 1995 Guj 185**;** *see* also Deepak Nitrite Ltd vs State Of Gujarat & Ors Appeal (civil) 1521 of 2001

and observed the balance to be obtained between developmental activities and environmental protection.

In M C Mehta v Union of India & Ors[51], better known as the Badkhai and Surajkund Lake's case, the stone crushers functioning within the radius of 2-5 km of Badkhal Lake were ordered to obtain no objection certificate from the Haryana Pollution Control Board as well as Central Pollution Control Board. In this case, the lake and nearby water bodies were monsoon fed and the mining activities were affecting the quantity and quality of the water. In M.C Mehta v Union Of India & Ors[52] (Calcutta Tanneries case) addressed the issue of discharge of untreated waste from around 550 tanneries in the city of Calcutta. The Supreme Court imposed a fine on the tanneries and ordered the authorities to deposit the fine in Environment Protection Fund and use the same for rejuvenation purposes. Bhavani River in Tamil Nadu got contaminated due to the untreated effluent drains from distilleries reaching the river.

The Supreme Court ordered the closure of the polluting industry till it would properly line its lagoons and maintain treatment plants[53]. Similarly in Uttar Pradesh Pollution Control Board v M/S Mohan Meakins Ltd and Ors,[54] the untreated effluents from the liquor company polluted the river Gomti in impermissible limits. Even regarding the pollution of river Yamuna, where directly and indirectly industries were dumping their wastes into the river, notice was issued to 1142 industries and the concerned departments were issued notice to stop the water and electricity supply. The Supreme Court took suo motu

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[51] 1996 AIR 1977.
[52] (1997) 2 SCC 411.
[53] In Re Bhavani River Air 1998 SC 2578.
[54] SLP (crl.) 3978 of 1999.

cognizance in this matter when it was found that the pollution continues despite the legal actions[55].

Pollution is not the only issue to be addressed while considering water as a human right of people. The diversion of river Beas for the construction of the motel was stayed by the Court to avoid further flooding and landslides[56]. Likewise, in S Jagannath v Union of India,[57] the writ petition was upheld to stop prawn farming in the ecologically fragile coastal areas to protect marine life and mangroves[58].

Corporate Responsibility and Protection and Restoration of Rivers

In democratic countries, the corporates like all other persons are bound by the laws of the land and have to respect the same in both letter and spirit.[59] The companies should adhere to the laws and regulations of the jurisdictions in which they operate.[60] The directors, who run the company have fiduciary duties towards the community and the environment and they must take positive efforts to fulfil them to the best of their abilities. Corporate Social Responsibility (CSR) enhances the long-term sustainability of companies. CSR urges businesses to integrate social and environmental concerns into their business models.[61] While shifting from a pure shareholders model of governance, more businesses have recognized the need to fulfil their social

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[55] News Item, Hindustan Times AQFM Yamuna v Central Pollution Control Board (2000) 10 SCC 587.
[56] M C Mehta v Kamal Nath and Ors. (1997) 1 SCC 388.
[57] (1997) 2 SCC 87.
[58] Bombay Environmental Action Group ... vs The State of Maharashtra Public Interest Litigation No.87 OF 2006
[59] Graham Bradley, Corporate Responsibility and Climate Change, 73 J. Int. Aff. 155 (2019).
[60] Id.
[61] What is CSR?,UNIDO, (Jul 12, 2023,6.10 PM https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr).

obligations towards the people, planet and society and are adopting sustainable business strategies.[62] In most of countries, the governments have enacted laws for environmental protection and conservation and the corporates must abide by the same and cooperate with the national governments for the restoration of the polluted stretches. Environmental responsibility is a part of social responsibilities and companies recognise the need to take up 'environmental stewardship'.[63]

The basic idea behind CSR is to ensure Companies have made efforts to participate in different ways to protect the community, and environment and promote sustainability. Sustainability is essential for the preservation of the environment and human rights. Access to a healthy environment and water is considered a basic human right[64] and thus has been included in the Sustainable Development Goals. Sustainable Development Goal 7 advocates for access to safe water sanitation and effective management of freshwater ecosystems.[65] It considers these as indispensable for maintaining human health and environmental sustainability.[66] The SDGs have recognized the potential of the private sector as a key partner in fulfilling the global development agenda for protecting human lives and the environment.[67]

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[62] Types of Corporate Social Responsibility to Be Aware Of, Business Insights, Harvard Business School Online (Jul 12, 2023,7.00 PM https://online.hbs.edu/blog/post/types-of-corporate-social-responsibility).

[63] *Id.*

[64] *In Historic Move, UN Declares Healthy Environment a Human Right*, UNEP (2022),(Jul 12, 2023,8,00 PM) http://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right (l).

[65] Advance Unedited Version Progress Towards Sustainable Development Goals: Towards a Rescue Plan for People and Planet, Report of the Secretary General (Special Edition) (2023), (Jul 12, 2023,6.20 PM) https://sdgs.un.org/sites/default/files/2023-04/SDG_Progress_Report_Special_Edition_2023_ADVANCE_UNEDITED_VERSION.pdf).

[66] Id.

[67] Id.

The Report of the Secretary General of the UN General Assembly highlights that billions of people do not have access to safe water and water pollution poses a significant threat to human health and the environment in many countries.[68] Infrastructural developments and cross-structural coordination should be prioritised to achieve the desired goals. There have been massive changes in our natural environment and if they are not addressed properly, it will lead to unfathomable suffering for future generations, especially among the poorest and the most vulnerable sections.

It has been accepted over the years that the social and environmental issues faced across the globe cannot be solved by any one sector and it has led to a higher expectation from the businesses to step in and enhance the sustainability of the community where they operate.[69] The private sector business units are expected to give due importance to sustainability factors and align their corporate governance models with the objectives of sustainable development.[70] The SDGs place a responsibility on the States for developing policies and regulatory frameworks for ensuring good corporate governance models for private sector business units. It can be done through proper disclosure and compliance requirements in consonance with sustainable development objectives.

Conclusion

In India, the Companies Act, of 2013, makes it mandatory for companies covered within the scope of Section 135 to take up CSR activities. Schedule VII of the Companies Act provides a list of activities where the companies can make CSR spending. It includes efforts made towards enhancing the availability of safe drinking water, environmental sustainability, conservation of

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[68] Id.

[69] Edward E Potter & Marika Mccauley Sine, Human Rights and Sustainability: A Corporate Perspective, HUM. RIGHTS 181.

[70] Supra note 60., Potter and Sine, supra note 68.

natural resources and maintaining water quality within its ambit. The Ganga rejuvenation projects were included within the ambit of CSR activity under the Companies Act, of 2013. As a result, many corporates have increasingly participated in the projects undertaken by the government in this area such as Namami Gange and have made contributions to the Clean Ganga Fund.[71]

The government has also sought participation from the corporates for the restoration of River Yamuna.[72] Similarly, the government can make efforts to attract more CSR expenditure towards the restoration of rivers by specifically including the river action plans that have been submitted to the NGT within Schedule VII. This could attract funds and participation from the corporates which would be beneficial for expediting the restoration of the polluted rivers. The right to water includes the right to maintain access to existing water supplies and the right to be free from contamination of water supplies.[73] If the water supplies on which people are dependent are contaminated, it is a threat to their health and sustenance. It is the primary responsibility of the state to ensure that no person should be deprived of their basic human rights. Most of the rivers are highly polluted and need restoration. Many of these rivers receive humungous amounts of untreated or partially treated industrial effluents which leads to discolouration and contamination.

The functioning of illegal units and the unauthorised extraction of groundwater are also major problems expressed by the pollution control boards and NGT. The status of the Sewage Treatment Plants in most states needs an upgradation for

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[71] Corporates undertake Namami Gange Projects as part of their CSR activity, PRESS INFORMATION BUREAU, GOVERNMENT OF INDIA, MINISTRY OF WATER RESOURCES (2018), (Jul 13, 2023,9.00 AM),https://pib.gov.in/newsite/PrintRelease.aspx?relid=181307.

[72] *Id.*

[73] Audrey Gaughran, *Business and Human Rights and the Right to Water*, 106 AMERICAN SOCIETY OF INT. LAW 52 (2012).

catering for the huge quantities of waste that are being generated. Effective waste management can undoubtedly save the rivers from loads of untreated sewage and industrial effluents. Lack of Coordination among stakeholders such as the Pollution Control Boards and Industries also remains a concern in the effective implementation of the orders of the NGT in many cases. These impediments can cause further deterioration in the condition of rivers in the country and it will have a direct impact on the people who are dependent on these water sources for their sustenance.

Not just through monetary contributions and participation but the companies can promote sustainability by designing their governance models and operations in a manner that will reduce the negative environmental impacts. It can be done by being compliant with the legal and regulatory framework provided and making proper environmental disclosures. Companies can conduct their activities in an environmentally sound manner, help in devising cleaner technology, adopt the same for reducing pollution and respect human rights as per the National Guidelines on Responsible Business Conduct and UNGP. Reiterating the pillars of the United Nations Guiding Principles, the State and the Corporates must respect human rights and work together to address the business-related human rights violations caused by the massive pollution of rivers and water bodies in the country, help in their restoration and provide clean environment and access to water to the persons dependent on these water bodies for their sustenance.

CHAPTER 8

UNMASKING "GREENWASHING": THE LEGAL AND REPUTATIONAL CONSEQUENCES FOR COMPANIES ENGAGING IN DECEPTIVE ENVIRONMENTAL CLAIMS

Shuma Talukdar

Introduction

In 1986, a prominent environmentalist Jay Westerveld claimed that the hotel industry falsely promoted the reuse of towels as part of a broader environmental strategy, despite the fact that the act was intended to cut costs. Thus he coined the term "greenwashing."[1]

The term "greenwashing" refers to the practice of falsely promoting an organization's efforts to protect the environment or of allocating more resources to promoting the organization as "green" than are actually used to implement environmentally responsible practices. Therefore, "greenwashing" is the dissemination of misleading or false information regarding the environmental strategies, objectives, motivations, and actions of an organization.[2]

Oxford learner's dictionary defined "greenwash" as "activities by a company or an organization that are intended to make people think that it is concerned about the environment, even if it's real business actually harms the environment".[3] "*The misleading*

[1] E. Orange & A.M. Cohen, From eco-friendly to eco-intelligent, 44(5) The Futurist 28, 32 (2010).

[2] K. Becker-Olsen & S. Potucek, Encyclopedia of Corporate Social Responsibility, 1318 (S.O. Idowu et al. eds, 1st, 2013) https://doi.org/10.1007/978-3-642-28036-8_104.

[3] Oxford Learner's Dictionaries (July 10, 2023, 10:04 PM), https://www.oxfordlearnersdictionaries.com/definition/english/greenwash#:~):text=%2F%CB%88%C9%A1ri%CB%90nw%C9%94%CB%90%CA%83%2F,business%20actually%20harms%20the%20environment.

information by organizations to portray an environmentally responsible image to the public with false claims" is "greenwashing".[4] Misleading information also extend to the claim of reaching "net-zero" target within a particular timeframe. Twenty-five largest companies of the word claim to reach "net-zero" by varied timeframe, but were found neglecting their own "net-zero" target. They include Nestle, Amazon, Google, and IKEA.[5]

Gilles Dufrasne from Carbon Market Watch says "*Misleading advertisements by companies have real impacts on consumers and policymakers. We're fooled into believing that these companies are taking sufficient action when the reality is far from it*".[6] The majority of businesses only offset rather than reduce emissions.

When discussing "greenwashing", some academics distinguish it from "bluewashing", which refers to social issues, by focusing solely on environmental issues. "Greenwashing" is regarded as a social and environmental phenomenon by other researchers who fail to distinguish between the two.[7] There is currently no accepted general definition of "greenwashing" due to its multidisciplinary nature. Researchers from the fields of business, communication, economy, production engineering, social sciences, environmental management, and law have discussed the phenomenon.[8] It is a "*deliberate corporate action with the presence of misleading elements, focused on the*

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[4] C Francis et al., *Greening of agriculture: Is it all a greenwash of the globalized economy?* 19(1–2) J. Crop Improv. 193, 220 (2007). https://doi.org/10.1300/J411v19n01_10.

[5] Business India Editorial, *Big companies and the art of greenwashing*, BUSINESS INDIA (July 10, 2023, 10:15 PM), https://businessindia.co/climatechange/big-companies-and-the-art-of-greenwashing.

[6] Ibid.

[7] S Vieira et al.. Concepts and forms of greenwashing: A systematic review. 32(1) Environ. Sci. Eur. 1, 12 (2020), https://doi.org/10.1186/s12302-020-0300-3.

[8] Ibid.

deception of stakeholders".[9] The various acts that are categorized as "greenwash" are illustrated in the table that follows.

Table 1: Act of "Greenwashing"

Companies	Sector	Act
Adidas[10]	Footwear	➢ Its classic Stan Smith shoe made false and misleading sustainability claim "50 per cent recycled".
Amazon[11]	Technology	➢ Misleading "net-zero" announcements.
Banana Boat[12]	Cosmetic	➢ Mislead consumers by labelling as "Reef Friendly". ➢ Contain avobenzone and octocrylene — chemicals toxic to the development of coral reefs.

[9] Ibid.

[10] ILM, Ethics jury finds Adidas ad is greenwashing, INTERNATIONAL LATHER MAKER (July 12, 2023, 15:40 PM), https://internationalleathermaker.com/ethics-jury-finds-adidas-ad-is-greenwashing/).

[11] Patrick Galey, 'Net-zero' promises from major corporations fall short, climate groups say, NBC NEWS (July 10, 2023, 10:20 PM), https://www.nbcnews.com/science/environment/net-zero-promises-major-corporations-fall-short-climate-groups-say-rcna14460).

[12] Abraham Jewett, Banana Boat 'Reef Friendly' Sunscreens Toxic to Coral Reefs, Marine Life, Says Class Action, TOP CLASS ACTIONS (July 10, 2023, 10:40 PM), https://topclassactions.com/lawsuit-settlements/consumer-products/beauty-products/banana-boat-reef-friendly-sunscreens-toxic-to-coral-reefs-marine-life-says-class-

Coca-Cola[13]	Beverage	➢ World's top polluter. ➢ "Greenwash" over packaging.
Google[14]	Technology	➢ Makes millions from "greenwash" ads.
H&M[15]	Fashion	➢ Claimed that its "Conscious Collection" feature sustainable clothing. ➢ Found making 96% false and misleading claims. ➢ One out of every five items of H&M was found to be made completely of synthetic materials derived from fossil fuels.

action/#:~:text=Plaintiff%20Mary%20Condreay%20claims%20Edgewell%20Personal%20Care%20Brand%2C,chemicals%20toxic%20to%20the%20development%20of%20coral%20reefs.

[13] Sandra Laville, Coca-Cola among brands greenwashing over packaging, report says, THE GUARDIAN (July 11, 2023, 19:40 PM), https://www.theguardian.com/environment/2022/jun/30/coca-cola-among-brands-greenwashing-over-packaging-report-says).

[14] Meera Navlakha, Google Makes Millions From Greenwashing Ads, Report Says, MASHABLE INDIA (July 11, 2023, 19:50 PM), https://in.mashable.com/climate-change/41220/google-makes-millions-from-greenwashing-ads-report-says.

[15] Matthew Stern, H&M Case Shows How Greenwashing Breaks Brand Promise, FORBES (July 12, 2023, 20:47 PM), https://www.forbes.com/sites/retailwire/2022/07/13/hm-case-shows-how-greenwashing-breaks-brand-promise/?sh=8fbfd171171a.

IKEA[16]	Furniture	➢ Largest consumer of wood in the world. ➢ Got its illegal logging certified. ➢ Illegally sourced wood from the forests of Ukraine's Carpathian region.
Innocent[17]	Beverage	➢ Misleading TV advertisement.
Johnson & Johnson[18]	Consumer Health	➢ Purchase palm oil from companies responsible for deforestation.
McDonald's[19]	Food	➢ Claimed first "net-zero" restaurant.

[16] W Andrew et al., Ikea likely to have sold furniture linked to illegal logging in forests crucial to Earth's climate, report says, NBC NEWS (July 12, 2023, 18:47 PM), https://www.nbcnews.com/science/environment/ikea-likely-sold-furniture-linked-illegal-logging-forests-crucial-earth-n1273745.

[17] Helena Horton, Activists accuse drinks firm Innocent of 'greenwashing' with ad, THE GUARDIAN (July 12, 2023, 18:18 PM), https://www.theguardian.com/environment/2022/feb/02/activists-accuse-drinks-firm-innocent-greenwashing-plastics-rebellion-advertising-tv-advert.

[18] Palm Oil Detective, Palm oil deforestation and species extinction sponsored by Johnson and Johnson, PALM OIL DETECTIVE (July 10, 2023, 10:47 PM), https://palmoildetectives.com/2021/02/09/johnson-johnson/#:~:text=Johnson%20%26%20Johnson%20has%20a%20high,deforestation%3A%20Peputra%20Group%20and%20Jhonlin.

[19] Abigail Jane, McDonal's Net Zero Location Accused of Greenwashing, ONE GREEN PLANATE (July 10, 2023, 10:55 PM), https://www.onegreenplanet.org/environment/mcdonalds-net-zero-location-accused-of-greenwashing/.

Nestlé[20]	Food	➢ Deceptively labelled chocolate products as “sustainably sourced”. ➢ Use child and slave labour. ➢ The company’s supply chain has no environmental standards.
HSBC[21]	Banking	➢ Finances fossil fuel companies and carbon-heavy industries like thermal coal mining.
Royal Dutch Shell[22]	Energy	➢ Misleading investors by classifying its investments in natural gas as spending on renewable energy.
Ryanair[23]	Airline	➢ Branded itself as Europe’s “lowest emissions airline”.

[20] Walker v. Nestle USA, Inc. et al. 3:19cv723 https://www.classaction.org/media/walker-v-nestle-usa-inc-et-al.pdf.

[21] Leasing Life, HSBC penalised over greenwashing, LEASING LIFE, (July 13, 2023, 14:12 PM), https://www.leasinglife.com/comment/hsbc-penalised-over-greenwashing/#catfish.

[22] Maxine Joselow and Vanessa Montalbano, Oil giant Shell accused of 'greenwashing' and misleading investors, THE WASHINGTON POST (July 10, 2023, 10:55 PM), https://www.washingtonpost.com/politics/2023/02/01/oil-giant-shell-accused-greenwashing-misleading-investors/.

[23] Mark Sweney, Ryanair accused of greenwash over carbon emissions claim, THE GUARDIAN (July 11, 2023, 15:22 PM, https://www.theguardian.com/business/2020/feb/05/ryanair-accused-of-greenwash-over-carbon-emissions-claim).

Sea World[24]	Logistic	➢ Mistreating Killer Whales.
Starbucks[25]	Beverage	➢ Alleged of using use and throw plastic cups but endorse reusable cups.
The Allliance to End Plastic Waste (AEPW)[26]	NGO	➢ Alleged of "sophisticated greenwashing" in the form of "greencrwoding".[27] ➢ Financial commitments not matching.
Unilever[28]		➢ Unclear environmental claims.

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[24] Eric Koons, Greenwashing Examples 2022: 10 Companies That Greenwash, ENERGY TRACKER ASIA (July 10, 2023, 11:00 PM), https://energytracker.asia/greenwashing-examples-10-companies-that-greenwash/.

[25] Ethan Freedman, TikTok user accuses Starbucks of 'greenwashing' with reusable cups, THE INDEPENDENT (July 10, 2023, 11:00 PM), https://www.independent.co.uk/climate-change/news/tiktok-plastic-starbucks-greenwashing-b2084100.html.

[26] Louis Gore-Langton, Alliance to End Plastic Waste refutes accusations of "sophisticated greenwashing" from think tank, PACKAGING INSIGHTS (July 10, 2023, 11:10 PM), https://www.packaginginsights.com/news/alliance-to-end-plastic-waste-refutes-accusations-of-sophisticated-greenwashing-from-think-tank.html.

[27] "Greencrowding" is when brands stay hidden within the crowd to avoid having their unsustainable practices spotted.

[28] Sara George, Greenwashing: Unilever laundry detergent ad campaign banned in the UK, EDIE (July 13, 2023, 13:10 PM), https://www.edie.net/greenwashing-unilever-laundry-detergent-ad-campaign-banned-in-the-uk/.

Volkswagen[29]	Automobile	➢ Cheated on pollution emissions tests. ➢ Installed software that could recognize emissions test and change the performance to lower the emissions level.
Walmart[30]	Retail	➢ False recyclable claim.
Windex[31]	Household	➢ Falsely claimed that its bottles were made from 100% "ocean plastic".

Source: Processed by author, 2023

According to the examination of the table above, "Greenwashing" = corporate deliberate misleading act + endorse or finance own/third party product + consist deceptive sustainability element(s) + may consist non-disclosure/partial disclosure + to deceive stakeholder(s).

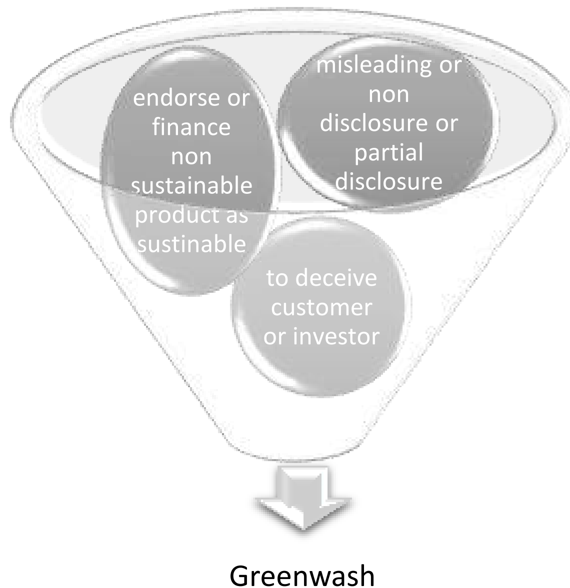
Thus, we can define "Greenwash" as the deliberate misrepresentation of a business as environment friendly in spite of the fact that it endorses or finances unsustainable business practices and products and/or employs tactics of non-

[29] Russell Hotten, Volkswagen: The scandal explained, BBC NEWS, (July 13, 2023, 14:17 PM), https://www.bbc.com/news/business-34324772.

[30] Christine LaFave Grace, FTC Hits Walmart With $3 Million Greenwashing Penalty, WINSIGHT GROCERY BUSINESS (July 13, 2023, 15:25 PM), https://www.winsightgrocerybusiness.com/retailers/ftc-hits-walmart-3-million-greenwashing-penalty).

[31] Manatt Phelps & Phillips LLP, S.C. Johnson settles Windex "greenwashing" suits, LEXOLOGY (July 13, 2023, 16:44 PM), https://www.lexology.com/library/detail.aspx?g=aa25309e-e0c2-4db8-b0dd-3491e6f92e87.

disclosure or partial disclosure to deceive the stakeholders of sustainability.



Source: processed by author, 2023

Growing concern over "greenwashing" practices

The concept of environmental thinking existed from the primitive society and in the religious practices.[32] It is difficult to trace the exact time; however, the modern environmental movement begin in mid-to late 1960s.[33]

As sustainability and eco-consciousness have become prominent global issues, many businesses have seized the opportunity to capitalize on the growing consumer demand for environmentally friendly products and services. However, some

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[32] M Saha & G Darnton, Green companies or green companies: Are companies really green, or are they pretending to be? 110(2) BUS. SOC. REV. 117, 157 (2005). https://doi.org/10.1111/j.0045-3609.2005.00007.x.
33 Rachel Carson's book "SILENT SPRING".

companies resort to “greenwashing”, employing superficial or unsubstantiated environmental claims to give the impression of being environmentally responsible while failing to make substantial changes to their operations.

In addition, companies also engage in green businesses, such as renewable energy, to deceive customers. The fact that these kinds of businesses do not require Environmental Impact Assessment (EIA) for initiation; it is profitable for the participating companies. It has a single window clearance process, and once a company is levelled as "go green," the EIA process becomes more relaxed. However, these kinds of businesses also have a significant impact on society as well as the environment. When it comes to putting big renewable projects into action, a lot of land is needed. This often means moving a lot of people and cutting down trees, leaving significant social and environmental footprints.

The Worldwide growing awareness and regulatory guidelines are progressively calling for consumption and investments to be more sustainable, with this the potential for “greenwashing” too developed.[34] Companies have been compelled to adopt environmental laws and environmental trends as a result of consumers’ increased environmental awareness.[35] “Greenwashing” as a marketing tool is used by the company for making undue profit by falsely presenting itself as environmentally responsible. This form of fraud by the company came up as the consumer grew conscious of environmental impacts of the products they consume.

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[34] Felicity Spors, How to spot greenwashing – and how to stop it, WORLD ECONOMIC FORUM (July 10, 2023, 11:18 PM), https://www.weforum.org/agenda/2021/05/how-spot-greenwashing/.

[35] Rubab Tahir et al., The impact of greenwashing practices on green employee behaviour: Mediating role of employee value orientation and green psychological climate, 7(1) COGENT BUS. MANAG., (2020) doi:10.1080/23311975.2020.1781996

With the popularity of green management in the form of green innovation, green production, green design, green products, and green marketing, it is now common practice to align business goal with environmental goals.[36] In order to convince the environmentally conscious consumers, companies often falsely project that they are environmentally responsible. This misleading practice has led to a loss of trust among consumers and the wider public, emphasizing the need for stricter regulations, transparent reporting, and independent certifications to ensure genuine sustainability efforts and combat "greenwashing".

Legal Consequences of "Greenwashing" in India

Though India does not have any specific law addressing "greenwashing," the country's legal framework aims to protect consumers and prevent misleading advertising. The Consumer Protection Act, 2019, includes provisions that empower consumers to take legal action against companies engaged in deceptive practices, such as "greenwashing".[37] The act considers "greenwashing" as an unfair trade practice. The Advertising Standards Council of India (ASCI), the Environment (Protection) Act, 1986, the Indian Penal Code, 1860, the Bureau of Indian Standards (BIS), SEBI (Securities Exchange Board of India), and Companies Act, 2013 are the other regulations prohibiting "greenwashing".

The ASCI is a self-administrative body that screens advertising and has set up rules for green promoting. These rules express that green advertising should be honest, precise, and not misrepresented. The guidelines of ASCI make it obligatory for

[36] Ibid.

[37] The Consumer Protection Act, 2019, § 89, The Gazette of India, pt. II sec. 1, (Aug. 9, 2019).

companies to provide scientific evidence in support of environmental claims made by them in their advertisements.[38]

The Environment (Protection) Act, 1986, does not specifically mention "greenwashing" practices; however, it establishes the legal basis for regulating and preventing false or misleading environmental claims made by businesses. Under the Act, the central and state pollution control boards are empowered to monitor and enforce compliance with environmental standards and regulations. These boards have the authority to take legal action against companies engaging in deceptive practices, including "greenwashing", if such practices lead to environmental harm or violation of prescribed environmental standards. The Act serves as a broad tool to safeguard the environment and can be utilized to address instances of "greenwashing" by imposing penalties and taking legal action against the offenders.

The Indian Penal Code, 1860, while does not specifically address "greenwashing" practices, certain provisions of the Indian Penal Code can be relevant in cases involving fraudulent or deceptive environmental claims. For instance, Section 420 of the Indian Penal Code deals with the offense of cheating, which encompasses dishonestly inducing a person to deliver property or engage in any action based on false representations. If a company or individual engages in "greenwashing" by making false environmental claims to deceive consumers or investors, it could potentially be prosecuted under Section 420.

Similarly, Section 405 and 406 of the Indian Penal Code addresses the offense of criminal breach of trust, which involves dishonestly misappropriating or converting property entrusted to someone's care. If a company misuses funds or resources collected on the basis of misleading environmental claims, it

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[38] ASCI – Code of Self Regulation (July 13, 2023, 16:30 PM), https://www.ascionline.in/wp-content/uploads/2022/11/asci_code_of_self_regulation.pdf.

may be liable under this provision. Moreover, if the "greenwashing" practices involve forgery or falsification of documents, Section 463 (Forgery) and Section 464 (Making a false document) of the Indian Penal Code may come into play.

The Bureau of Indian Standards (BIS) sets standards and certifications that promote authenticity and credibility in environmental claims.[39] Standards like the Indian Green Building Council (IGBC) rating system for green buildings provide guidelines for assessing environmental performance and ensuring verifiable sustainability claims.[40] By adhering to BIS standards and obtaining relevant certifications, businesses can demonstrate their genuine commitment to environmental sustainability, reducing the risk of "greenwashing". Consumers can rely on BIS-certified products and services to make informed choices, while complaints about misleading claims or non-compliance can be addressed by the BIS and other regulatory bodies, promoting transparency, accountability, and consumer confidence in environmental claims.

SEBI (Securities Exchange Board of India) vide a circular[41] on 3 February 2023 has issued guidelines for bond issuers to avoid "greenwashing" by not using misleading labels, hiding trade-offs, making false claims, maintaining the highest standard associated with green debt securities, and monitoring green operations. Issuers must also notify investors and permit early redemptions if money is being invested outside of asset classes.

Section 166 of Companies Act, 2013 elaborates the duties of the directors. Subclause (2) discusses explicitly the director's duty towards the environment, society, and stakeholders. In case of

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[39] Bureau of Indian Standard (July 13, 2023, 16:30 PM), https://www.bis.gov.in/the-bureau/about-bis/.

[40] IGBC Rating System (July 13, 2023, 17:20 PM), https://igbc.in/.

[41] SEBI/HO/DDHS/DDHS-RACPOD1/P/CIR/2023/020 (July 13, 2023, 17:32 PM), https://www.sebi.gov.in/legal/circulars/feb-2023/dos-and-don-ts-relating-to-green-debt-securities-to-avoid-occurrences-of-greenwashing_67828.html.

failure to perform under this section, the director can be punished with a fine. The amount of the fine can range anywhere from one lakh to five lakhs.

Global Regulatory Overview on "Greenwashing"

At COP26, the United Nations climate conference that took place in Glasgow in November 2021, the need to combat "greenwashing" came into the spotlight. There, the UN Secretary-General made the announcement that a new "High-Level Expert Group" would be formed to establish precise standards for measuring and analyzing non-state actors' net-zero commitments.[42] A Worldwide Maintainability Guidelines Board is formed, to foster a worldwide gauge of maintainability divulgence principles to meet financial backers' data needs.[43] Additionally, a consultation paper on sustainability disclosure requirements and investment labels was released by the UK Financial Conduct Authority to ensure that asset managers do not deceive investors regarding the "greenness" of their investment products.[44] These actions came as a result of growing pressure from a variety of stakeholders who have pledged to hold businesses, banks, asset managers, and insurers accountable for their climate change claims and targets.[45]

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[42] António Guterres, Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions, UNITED NATIONS (July 13, 2023, 16:30 PM), https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf.

[43] IFRS, ISSB issues inaugural global sustainability disclosure standards, IFRS FOUNDTION TRUST (July 13, 2023, 17:47 PM), https://www.ifrs.org/news-and-events/news/2023/06/issb-issues-ifrs-s1-ifrs-s2/.

[44] FCA, CP22/20: Sustainability Disclosure Requirements (SDR) and investment labels, FINANCIAL CONDUCT AUTHORITY (July 13, 2023, 18:00 PM), https://www.fca.org.uk/publications/consultation-papers/cp22-20-sustainability-disclosure-requirements-sdr-investment-labels.

[45] Akriti Bhargava et al., CSSN Research Report 2022:1: Climate-Washing Litigation: Legal Liability for Misleading Climate Communications, CLIMATE SOCIAL SCIENCE NETWORK, (July 11, 2023, 05:25 PM, https://cssn.org/wp-

In Canada the CSA published staff guidance on Environmental Social Governance (ESG)-related investment fund disclosure, covering investment objectives, fund names, strategies, proxy voting, shareholder engagement, risk disclosures, suitability, sales communications, changes to existing funds, and terminology. Only funds that reference ESG in their investment objective can use "ESG" in the fund name.[46]

In the European Union the EU Sustainable Finance Disclosure Regulation (SFDR) and the EU taxonomy regulation are core components of EU regulation designed to provide more transparency of investment products, financial advisers and firms creating investment products. The SFDR requires financial market participants to disclose how they integrate and consider ESG risks and adverse sustainability impacts, and specifies three categories of investment products. It also sets a definition for sustainable investment outside of the EU taxonomy.[47]

In United Kingdom the Financial Conduct Authority (FCA) rules on the Sustainability Disclosure Requirements (SDR) focused on four broad categories. The categories are sustainable investment label, disclosures requirement, marketing rules including anti-greenwashing, and rules for distribution. Additionally, His Majesty's Treasury also launched the Transition Plan Taskforce (TPT) to develop a gold standard for such plans. SFDR requires extensive disclosures regarding investment strategy, criteria, and use of the EU taxonomy for

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content/uploads/2022/01/CSSN-Research-Report-2022-1-Climate-Washing-Litigation-Legal-Liability-for-Misleading-Climate-Communications.pdf).

[46] OSC, CSA Staff Notice 81-334 - ESG-Related Investment Fund Disclosure, ONTARIO SECURITIES COMMISSION (July 11, 2023, 05:38 PM), https://www.osc.ca/en/securities-law/instruments-rules-policies/8/81-334/csa-staff-notice-81-334-esg-related-investment-fund-disclosure.

[47] European Union, Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability related disclosures in the financial services sector, OFFICIAL JOURNAL OF THE EUROPEAN UNION (July 11, 2023, 05:43 PM, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R2088&from=EN).

defined categories of products with sustainable investment objectives or ESG characteristics.[48]

Asia-Pacific too saw a trend of regulatory practice to control "greenwashing". The Securities and Futures Commission (SFC) of Hong Kong has issued a circular and amended the Fund Manager Code of Conduct, introducing requirements for asset managers to consider climate-related risks.[49] In Singapore Monitory Agency of Singapore (MAS) released Environmental Risk Management Information papers to require asset managers to make climate-related financial disclosures and consider ESG-specific requirements for ESG-advertised retail funds.[50] And in Australia Australian Sustainable Finance Institute (ASFI) announces expert group to help develop green economy.[51]

Worldwide a potential ascent is seen in focusing on "greenwashing". Due to the different regulatory approaches taken by different jurisdictions, global financial market participants will likely face regulatory fragmentation in globalized markets. Fund managers and advisors face a challenging environment as a result of this reality and the associated legal, financial, and reputational risks.[52]

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[48] FCA, DP21/4: Sustainability Disclosure Requirements (SDR) and investment labels, FINANCIAL CONDUCT AUTHORITY (July 11, 2023, 05:50 PM), https://www.fca.org.uk/publications/discussion-papers/dp21-4-sustainability-disclosure-requirements-investment-labels.

[49] SFA, Circular to licensed corporations Management and disclosure of climate-related risks by fund managers, SECURITIES AND FUTURES COMMISSION (July 14, 2023, 14:50 PM), https://apps.sfc.hk/edistributionWeb/gateway/EN/circular/intermediaries/supervision/doc?refNo=21EC31.

[50] MAS, Information Papers on Environmental Risk Management, MONETARY AUTHORITY OF SINGAPORE (July 11, 2023, 06:25 PM), https://www.mas.gov.sg/publications/monographs-or-information-paper/2022/information-papers-on-environmental-risk-management.

[51] ASFI, Reshaping Autralia's Finance System, AUSTRALIAN SUSTAINABLE FINANCE INSTITUTE (July 11, 2023, 06:25 PM, https://www.asfi.org.au/).

[52] Subodh Mishra, Regulatory Solutions: A Global Crackdown on ESG Greenwash, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (July 11, 2023, 06:25 PM),

Reputational Damage Caused by "Greenwashing"

Loss of consumer trust**:** When consumers discover that they have been deceived or misled by companies engaging in "greenwashing", it erodes their confidence and leads to a loss of trust. Here's an exploration of the reasons behind the loss of consumer trust as a result of "greenwashing".

Firstly, "greenwashing" undermines the authenticity of a company's environmental efforts. When businesses make misleading claims about sustainability, consumers feel betrayed and deceived. Trust is built on the foundation of transparency and honesty, and when companies fail to deliver on their promises, it creates a sense of skepticism and disillusionment among consumers. They become more skeptical of environmental claims made by other businesses, making it harder for genuine sustainability initiatives to gain credibility.

Secondly, "greenwashing" compromises consumers' ability to make informed choices. When false or exaggerated environmental claims are made, consumers may base their purchasing decisions on inaccurate information. They may invest in products or services that do not align with their environmental values or contribute to their desired sustainability goals. This breach of trust leaves consumers feeling deceived and robbed of their ability to make conscious, informed decisions, leading to frustration and a loss of confidence in the company.

Furthermore, the loss of consumer trusts due to "greenwashing" can have long-term effects on a company's reputation. Trust is a fundamental aspect of brand loyalty, and when consumers feel deceived, they are less likely to continue supporting that brand. Negative word-of-mouth spreads, impacting the company's image and potentially deterring new customers. In the age of

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https://corpgov.law.harvard.edu/2022/06/23/regulatory-solutions-a-global-crackdown-on-esg-greenwash/.

social media and online reviews, the damage to a company's reputation can be swift and far-reaching.

Moreover, the loss of consumer trust in one company due to "greenwashing" can have ripple effects across industries. As consumers become more vigilant and skeptical, they demand greater transparency and evidence of genuine sustainability efforts. This shift in consumer behavior forces businesses to adapt and become more accountable for their environmental claims. Companies that engage in "greenwashing" risk being left behind, as consumers increasingly seek out brands that demonstrate genuine commitment to sustainability.

To regain consumer trust, companies must prioritize accurate environmental claims and ethical marketing practices. Transparency, honesty, and consistency are essential in rebuilding trust. By taking genuine steps toward sustainability, providing clear evidence of their efforts, and engaging in ethical marketing practices, businesses can restore confidence, rebuild their reputation, and foster a loyal customer base.

***Negative media attention and public scrutiny*:** "Greenwashing" can also lead to negative media attention and public scrutiny. When companies are exposed for engaging in "greenwashing" practices, it can result in significant reputational damage and public backlash. Here's an exploration of the reasons behind the negative media attention and public scrutiny associated with "greenwashing".

Firstly, media outlets are increasingly covering stories related to sustainability and environmental issues. When a company is discovered to be engaging in "greenwashing", it becomes newsworthy due to the public's growing concern for the environment. Journalists and media organizations play a critical role in uncovering deceptive practices and exposing companies that prioritize image over genuine environmental responsibility. Negative media attention can lead to investigative

reporting, public exposure, and extensive coverage, amplifying the negative impact on a company's reputation.

Secondly, social media platforms provide a powerful avenue for consumers to voice their opinions and share information. When consumers discover instances of “greenwashing”, they often take to social media to express their disappointment and raise awareness. This grassroots activism can quickly spread, creating a viral backlash against the company. Social media platforms enable the rapid dissemination of information, facilitating public scrutiny and increasing the visibility of “greenwashing” practices. The collective outrage and public pressure generated through social media can significantly damage a company’s reputation and affect its bottom line.

Furthermore, public scrutiny intensifies as consumers become more environmentally conscious and demand greater accountability from businesses. With heightened awareness of sustainability issues, consumers are more discerning and skeptical of green claims. They are quick to detect inconsistencies or false information, and they actively engage in scrutinizing companies that engage in “greenwashing”. This increased public scrutiny creates a more informed and critical consumer base, leading to a greater emphasis on transparency and genuine environmental responsibility.

Moreover, non-governmental organizations (NGOs), environmental activists, and watchdog groups actively monitor and expose instances of “greenwashing”. These organizations play a vital role in raising awareness, conducting investigations, and holding companies accountable for their misleading environmental claims. They utilize various channels, including reports, publications, campaigns, and public advocacy, to shed light on “greenwashing” practices and ensure that businesses are held responsible for their actions. To avoid negative media attention and public scrutiny, companies must prioritize

genuine environmental responsibility, transparency, and ethical marketing practices.

Impact on brand image and equity**:** Firstly, “greenwashing” tarnishes a company’s brand image. Brands are built on trust, authenticity, and delivering on promises. When consumers discover that a company has been deceptive in its environmental claims, it damages their perception of the brand’s integrity and honesty. “Greenwashing” undermines the credibility of a brand, making it appear insincere and motivated by profit rather than genuine commitment to sustainability. This negative perception can spread rapidly through word-of-mouth, social media, and media coverage, leading to a diminished brand image.

Secondly, “greenwashing” erodes consumer trust, a critical component of brand equity. Trust is an intangible asset that directly affects the value of a brand. When companies engage in “greenwashing”, they breach the trust that consumers place in them. Consumers feel deceived and misled, leading to a loss of faith in the brand's claims and environmental efforts. This erosion of trust undermines the brand's equity, which is the perceived value and goodwill associated with the brand. A tarnished brand equity can lead to decreased customer loyalty, decreased sales, and negative financial implications for the company.

Furthermore, “greenwashing” can result in backlash from environmentally conscious consumers and advocacy groups. In an era where sustainability is a key concern for many, consumers are increasingly discerning and demand authenticity in environmental claims. When “greenwashing” practices are exposed, it can trigger widespread public criticism and activism. Negative publicity, boycotts, and social media backlash can significantly damage a brand’s reputation, leading to long-lasting harm to its equity. Companies that engage in “greenwashing” risk losing the support of environmentally

conscious consumers, who may shift their loyalty to brands that demonstrate genuine sustainability efforts.

Moreover, the impact of “greenwashing” extends beyond immediate consequences. It can create a lasting stain on a brand's reputation, making it difficult to regain consumer trust and rebuild brand equity. Consumers may associate the brand with deceit, causing long-term damage to its image. Rebuilding trust and repairing brand equity after “greenwashing” requires significant effort, including genuine commitment to sustainability, transparent communication, and a track record of responsible environmental practices.

Courts on ‘Greenwashing”:

Though “greenwashing” is an important legal and ethical issue, surprisingly there are very few case laws popped up on this ground. USA has only two cases related to it, City of Hoboken v. Exxon Mobil Corp. (2021)[53] and Richardson v. Edgewell Pers. Care (2023).[54]

India too has just two cases, Kapila Hingorani v. State Of Bihar (2003), where Supreme Court judgment mentions the perils of sustainable development and how Sustainable development becomes an instrument of policy for the promotion and protection of corporate governance practices of ‘greenwashing’[55]and Association for Protection of Democratic Rights & Anr. v. The State of West Bengal & Ors (2017). Here the plaintiff said “compensatory afforestation” in India is a pseudo-environmental excuse for neo-liberal land grab and enclosure, encroaching upon forest commons and depriving communities of their legal and constitutional rights. It also gives a “greenwash” to corporate projects that destroy forests and

[53] City of Hoboken v. Exxon Mobil Corp., 558 F. Supp. 3d 191 (D.N.J. 2021).
54 Richardson v. Edgewell Pers. Care, 21-CV-08275 (PMH) (S.D.N.Y. Jan. 30, 2023).
[55] Kapila Hingorani v. State Of Bihar, 2003 Supp(1) SCR 175 (India).

cause irreparable damage to environment. No structural changes and monitoring can set the process right. However, the court's permitted the cutting down of trees and the construction of public projects, relying on "compensatory plantation."[56] In both the cases the word "greenwashing" just found a mention in the judgement and not addressed directly.

Couple of potential reasons why "greenwashing" do not find much mentioning in the courts could be. Firstly, "greenwashing" is a relatively recent phenomenon, and legal systems often take time to catch up with emerging ethical issues. Secondly, proving "greenwashing" can be challenging as it requires establishing intent and demonstrating the deceptive nature of the claims. And, lastly, lack of awareness, of existing legal frameworks that could be applied to address deceptive advertising practices, including "greenwashing". However, as awareness of "greenwashing" grows and public demand for accountability increases, it is possible that we may see more specific case laws or legal precedents in the future.

Importance of Accurate Environmental Claims and Ethical Marketing

Building consumer trust and brand credibility is a core task for successful business. Accurate environmental claims and ethical marketing play a crucial role in building consumer trust and establishing brand credibility. When companies make accurate and transparent environmental claims, they demonstrate a commitment to sustainability and responsible business practices. These fosters trust among consumers who are increasingly seeking eco-friendly and socially responsible products and services.

[56] Association for Protection of Democratic Rights & Anr. v. The State of West Bengal & Ors (2017) WP 12788(W) of 2017 (India).

By providing truthful and substantiated information about their environmental efforts, businesses can empower consumers to make informed choices, knowing that their purchasing decisions align with their values. This trust leads to stronger customer relationships, increased brand loyalty, and positive word-of-mouth recommendations, ultimately benefiting the company's reputation and bottom line.

Moreover, ethical marketing practices go beyond making accurate claims; they ensure that companies adhere to ethical principles in their marketing strategies. This involves avoiding deceptive tactics, misleading information, or manipulative messaging. By practicing ethical marketing, companies build credibility and authenticity, which are essential components of a strong brand identity. When consumers perceive a brand as ethical and trustworthy, they are more likely to engage with the brand, recommend it to others, and develop a long-term relationship. Ethical marketing not only attracts socially conscious consumers but also enhances the overall perception of the brand, distinguishing it from competitors and contributing to its long-term success in the marketplace.

Final Remark

"Greenwashing" can have significant legal and reputational consequences for businesses. Misleading environmental claims not only violate consumer protection laws but also erode trust and damage a company's reputation. The legal consequences can range from penalties and fines under relevant legislation, such as consumer protection and competition laws, to potential civil and criminal liability. Moreover, regulatory bodies and authorities have increasingly taken a proactive stance against "greenwashing", imposing stricter regulations and investigating deceptive practices.

However, the importance of accurate environmental claims and ethical marketing practices extends beyond mere compliance

with the law. Businesses that prioritize transparency and authenticity in their environmental communications can build trust, foster consumer loyalty, and enhance their brand reputation. By providing accurate and substantiated information, companies enable consumers to make informed choices aligned with their values. Ethical marketing practices, such as avoiding deceptive tactics and respecting consumer well-being, demonstrate a commitment to social responsibility and contribute to a more sustainable marketplace.

It is crucial for businesses to recognize the legal and reputational risks associated with “greenwashing” and prioritize accurate environmental claims and ethical marketing practices. By doing so, they can not only comply with regulations but also build trust, establish strong customer relationships, and contribute to a more transparent, responsible, and sustainable business ecosystem.

CHAPTER 9

EXPLORING THE ROLE AND IMPACT OF THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Koppolu Chaitra
Sudarshan Ganeshan

Introduction

The concept of insolvency and its legal framework has been a source of debate and growth. Insolvency is defined as the inability to pay one's due and owing debts. Historically, insolvency was considered a criminal offence, and debtors were frequently imprisoned. Later, the emphasis switched to rehabilitating bankrupt persons and providing them with a fresh start. Individual and business entities are now included in the definition of bankruptcy. Insolvency laws are important because they provide a framework for debt resolution, safeguard creditors' interests, and enable efficient and timely resolution of debt disputes. Insolvency laws also aid in the effective allocation of resources by allowing failed enterprises to be liquidated promptly and their assets to be redistributed to productive businesses. the presence of a strong insolvency framework might promote entrepreneurship and risk-taking by providing a safety net for individuals who fail to take risks.

In 2016, India implemented the bankruptcy and Bankruptcy Code (IBC), which established a comprehensive framework for bankruptcy and debt resolution. The IBC's goal is to simplify the insolvency and bankruptcy processes and to establish an effective framework for resolving distressed firms and facilitating recovery. The implementation of IBC was a key reform in India's regulatory landscape, aiding in the ease of doing business and boosting entrepreneurship. The law has undergone several amendments and changes to keep up with the developing and evolving financial aspects and provides its effectiveness of debt resolutions. The significance of insolvency

law and its impact on the economy and business cannot be magnified, and making this as an essential aspect for the policymakers, financial experts, investors etc.

Insolvency and Bankruptcy Board of India

The history of the Insolvency and Bankruptcy Code (IBC) in India can be traced back to a fragmented and inefficient insolvency framework. Prior to the enactment of the IBC in 2016, multiple laws governed insolvency, resulting in inconsistencies and delays. Efforts to reform the insolvency regime began with committees and initiatives aimed at streamlining the process. The IBC was formulated to establish a modern and comprehensive framework that would promote efficiency, protect creditor rights, and encourage entrepreneurship. Its enactment marked a significant milestone in India's insolvency history, providing a unified and time-bound resolution mechanism for distressed entities. The Insolvency and Bankruptcy Code (IBC) was enacted in 2016 with the goal of creating a comprehensive legal framework for the settlement of insolvencies and bankruptcies in India. It established a time-bound framework for insolvency resolution with the goal of encouraging entrepreneurship, ease of doing business, and creditor rights.[1]

Establishment of the IBBI: In October 2016, the Insolvency and Bankruptcy Board of India (IBBI) was constituted as part of the IBC. The Insolvency and Bankruptcy Board of India (IBBI) is a legislative agency in charge of regulating insolvency practitioners, insolvency professional agencies, and information utilities. It serves as the controlling authority for regulating how the IBC and its related procedures are put into practise. The IBBI plays an important role in numerous parts of the

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[1] S.Chatterjee, G,Shaikh, & B.Zaveri (2018). An Empirical Analysis Of The Early Days Of The Insolvency And Bankruptcy Code, 2016. NATIONAL LAW SCHOOL OF INDIA REVIEW, 30(2),2018, 89–110. https://www.jstor.org/stable/26743938

insolvency and bankruptcy process. Its primary roles are as follows:

- Insolvency professionals (IPs), insolvency professional agencies (IPAs), and information utilities (IUs) are regulated and registered.
- Setting and enforcing professional conduct rules for IPs and IPAs.
- Oversight of the insolvency resolution process.
- In the realm of insolvency and bankruptcy, we facilitate and promote capacity growth and knowledge dissemination.
- Disciplinary matters and appeals stemming from its rulings are adjudicated.

Regulatory Framework

The IBBI has been actively involved in the development of India's regulatory framework for insolvency and bankruptcy. Numerous parties participating in the process to ensure transparency, efficiency, and accountability. The IBBI has been given substantial powers and responsibilities to regulate insolvency proceedings in India. It develops regulations, standards, and codes of behaviour for insolvency professionals, professional agencies, and information utilities. The procedures for initiating, resolving, and liquidating insolvency proceedings are defined in these regulations. The IBBI has also built a comprehensive framework for the registration and regulation of insolvency practitioners and information utilities, assuring the competence, integrity, and responsibility of the insolvency ecosystem's stakeholders.[2]

Effectiveness Of The IBBI's Role: The IBC's implementation and the establishment of the Insolvency and Bankruptcy Board

[2] S.Malik, and S.Malik,Supreme Court on Insolvency and bankruptcy laws (since 1950 to date). Lucknow, UP: Eastern Book Company, 2022

of India (hereinafter referred to as IBBI) have resulted in significant changes in India's insolvency landscape. With the implementation of the corporate insolvency resolution procedure (CIRP), corporations now have a time-bound and transparent mechanism for addressing financial hardship. The IBBI's supervisory and regulatory functions have aided in increasing the efficiency and consistency of insolvency processes, promoting creditor rights, and reducing delays. The creation of information utilities has increased the availability and accessibility of critical financial information, improving the transparency and dependability of the insolvency process.

The formation of the bankruptcy and Bankruptcy Board of India (IBBI) has resulted in a number of favourable developments in India's bankruptcy landscape. The establishment of the corporate insolvency resolution procedure (CIRP), which provides a systematic and time-bound framework for corporations facing financial difficulties, is one of the noteworthy developments. This has allowed businesses to deal with financial difficulties in a more efficient and transparent manner. This has not only increased stakeholders' confidence, but it has also permitted a fair and equal division of assets among creditors. Furthermore, the IBBI's implementation of information utilities has considerably increased the availability and accessibility of essential financial information. These utilities act as financial data repositories, allowing stakeholders to make informed decisions during the insolvency process. This greater transparency and dependability have built faith in the system and permitted more efficient operations. Overall, the IBBI's involvement in enforcing the bankruptcy and Bankruptcy Code has helped to streamline and enhance India's bankruptcy process. The IBBI has promoted efficiency, transparency, and creditor rights through its supervisory and regulatory functions, minimising delays and encouraging a more robust insolvency

ecosystem in the country[3]. The IBBI's supervision and regulatory activities have been critical in improving the efficiency of insolvency proceedings. The IBBI has promoted consistency and accountability in resolution procedures by establishing and enforcing professional conduct rules for insolvency practitioners and agencies.[4]

Impact Of The IBBI's In Indian Economy: It looks at how instituting a deadline-driven resolution process has boosted creditors rights and lightened the load on the judicial system. In order to resolve insolvencies, encourage entrepreneurship, and improve the ease of doing business in India, the study evaluates the efficiency and efficacy of the IBBI's actions. The IBBI has built a framework that supports quick settlement and maximises value for creditors by creating stringent timetables for insolvency proceedings. This has not only improved creditors' chances of recovery, but it has also instilled trust in the business community, attracting additional investment and encouraging entrepreneurship. The accelerated resolution process has aided in releasing the value of distressed assets, allowing them to be transferred to more efficient and capable hands, and preventing their worth from eroding over time. Because of the rapid resolution process, it is now easier for enterprises to exit non-viable ventures, allowing entrepreneurs to make swift decisions and reallocate their resources to more productive pursuits. This has encouraged a culture of entrepreneurship and risk-taking, as entrepreneurs are now more eager to embark into new companies without fear of getting imprisoned in lengthy insolvency proceedings. The IBBI has also been instrumental in fostering transparency and fairness in the insolvency environment. The board ensures

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[3] A. B. Debasis Rout, Kaushiki Brahma, and Mayank Tiwari, *Contemporary issues in international arbitration and Mediation: The fordham papers 2012*. LUCKNOW, UP: Eastern Book Company,2013

[4] N.K.Pahwa,*Corporate Insolvency: Its Operations And Emerging Problems*. NATIONAL LAW SCHOOL OF INDIA REVIEW, *30*(2), 2018, 111–118. https://www.jstor.org/stable/26743939

compliance with the provisions of the IBC through regulatory oversight, preventing fraudulent or unscrupulous acts. This has enhanced stakeholder trust since they have better assurance of a level playing field and equitable treatment in insolvency procedures. Furthermore, the IBBI's emphasis on capacity building and competency standards for insolvency practitioners has increased the overall professionalism and quality of India's insolvency resolution processes. This has increased the effectiveness and efficiency of insolvency processes, resulting in better outcomes for all parties concerned.[5]

Overall, the IBBI has had a considerable impact on the Indian economy. It has produced a favourable climate for timely resolution of insolvencies, protection of creditor rights, promotion of entrepreneurship, and improvement of the ease of doing business. As a result, India's insolvency ecosystem has grown stronger and more efficient, drawing both domestic and foreign investment and contributing to the country's overall economic growth and development.

Impact On Stakeholders: The IBBI's role and regulatory framework have had a considerable impact on the insolvency ecosystem's many stakeholders. Creditors, both secured and unsecured, have benefited from a systematic and time-bound resolution process, which has allowed them to collect their debts more quickly. Debtors have also benefited from the IBBI's intervention by having the option of restructuring and revival rather than abrupt liquidation. The creation of a professional framework for insolvency practitioners has resulted in increased expertise and professionalism in handling insolvency matters.

Amendments In IBBI: Since its passage in 2016, India's Insolvency and Bankruptcy Code (IBC) has undergone

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[5] A.Burman,Conclusion: Reassessing the IBC in the Context of India’s Economic Recovery. In India’s Sustained Economic Recovery Will Require Changes to Its Bankruptcy Law (pp. 10–12). .2021,Carnegie Endowment for International Peace. http://www.jstor.org/stable/resrep31120.7

substantial changes. The identification of homebuyers as financial creditors, restrictions on failing promoters' participation, and immunity for successful resolution applicants are among the key improvements. The implementation of a minimal threshold for beginning bankruptcy proceedings, as well as the pre-packaged insolvency resolution procedure and the "pre-packs" structure, are all noteworthy. These changes are intended to speed the resolution process, boost investor confidence, and address implementation issues. The modifications show the government's commitment to making the IBC more efficient and responsive to the changing needs of the insolvency landscape.[6]

- **Improving the insolvency resolution process:** Amendments may aim to streamline and expedite the resolution process, ensuring strict timeline adherence and promoting effective insolvency settlement. Clarifying and refining the duties and responsibilities of the main stakeholders involved, such as insolvency professionals, creditors, and the IBBI itself, could be part of this.

- **Enhancing transparency and accountability:** Amendments could place a stronger emphasis on transparency and accountability measures, encouraging increased disclosure and information exchange among stakeholders. This could include efforts to avoid fraud, assure accurate financial data reporting, and provide systems for effective monitoring and supervision.

- **Extending the scope of insolvency proceedings:** Amendments could target specific regions or industries that were not fully covered by the present framework. Amendments could, for example, include rules for group

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[6] E.Cirmizi, L.Klapper, & M.Uttamchandani, (2012). The Challenges of Bankruptcy Reform,THE WORLD BANK RESEARCH OBSERVER, 27(2), 185–203.,2012 http://www.jstor.org/stable/23262829

insolvency or address issues connected to insolvency in the banking sector.

- **Addressing cross-border insolvencies:** businesses and investments are global in nature, modifications may focus on creating a complete framework for dealing with cross-border bankruptcy cases, including measures for cooperation and coordination with other authorities.[7]

Conclusion

The Insolvency and Bankruptcy Board of India (IBBI) is responsible for administering and regulating India's insolvency and bankruptcy processes. The IBBI has made significant changes to the insolvency landscape by establishing and implementing the Insolvency and Bankruptcy Code (IBC), affecting many stakeholders and the overall ease of doing business in the country. The IBBI's key problems and limits include difficulties in successfully handling and resolving complicated bankruptcy cases, ensuring regulatory compliance, and dealing with cross-border insolvencies. These challenges necessitate ongoing assessment and future adjustments in order to strengthen the insolvency framework and improve the IBBI's ability to accomplish its tasks. While the IBBI's bankruptcy framework has made significant progress in addressing stakeholders' concerns and interests, such as creditors, debtors, and investors, there are still areas for improvement. Creditor rights have been improved, transparency and fairness have been encouraged, and fast resolution processes have been supported by the framework. However, further improvements could focus on speeding up the settlement process, resolving debtor concerns, and ensuring that all stakeholders' interests are effectively protected.

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[7] R.Chakrabarti,KEY ISSUES IN CROSS-BORDER INSOLVENCY. NATIONAL LAW SCHOOL OF INDIA REVIEW, 30(2), 119–135,2018, https://www.jstor.org/stable/26743940

The IBBI's rules and recommendations have improved the overall ease of doing business in India. The time-bound resolution process has boosted investor and entrepreneur confidence, attracted investments, and stimulated entrepreneurship. However, there may still be important holes that must be filled, such as addressing operational issues and improving operating efficiency of IU's and to develop the IR process. The IBBI's involvement and impact in managing insolvency and bankruptcy processes in India have played a significant part in altering the insolvency landscape. The IBBI can further enhance the insolvency framework, attract investments, and help to India's economic growth and development by addressing the major difficulties and limits, fulfilling stakeholders' concerns and interests, and continuously increasing the ease of doing business. It is critical to focus on capacity creation, training, and continual professional development of insolvency practitioners in order to overcome the IBBI's fundamental difficulties and limits.

Strengthening the regulatory framework and enforcing compliance with regulations can assist the IBBI's oversight be more effective and ensure proper administration of insolvency processes. To address the concerns of debtors and guarantee a fair resolution process for all parties concerned, clear rules and regulations can be established. Additionally, establishing channels for stakeholder feedback and good communication will assist pinpoint problem areas and guarantee that their views are heard. By offering a planned and time-bound settlement process, the IBBI's norms and guidelines have improved the convenience of doing business in India. Addressing operational issues and streamlining collaboration amongst numerous entities participating in insolvency processes are nevertheless necessary. The effectiveness of the insolvency framework can be further improved by using digital solutions and encouraging technology breakthroughs, which will also help to create a more favourable business environment. These areas of development can be addressed in order for the IBBI which strengthens its role.

CHAPTER 10

ROLE OF INSOLVENCY AND BANKRUPTCY CODE IN FACILITATING THE EXPANSION OF THE INDIAN ECONOMY

Dipakshi Das

Nami Saikia

Insolvency is about financial death and…

…financial rebirth

-Elizabeth Warren

Introduction

Insolvency implies a financial state wherein an individual, entity, or institution is unable to pay off their debts as they become due. There can be numerous reasons for insolvency such as business failures, unrestricted borrowings, economic fluctuations, mismanagement of finances, etc. On the other hand, bankruptcy refers to a legal status or process that follows insolvency, wherein the individual, entity, or institution formally declares that it is unable to repay its debt and therefore seeks legal protection and assistance for debt resolution. Over the course of many years, the potential of India as a fertile market for economic expansion has been acknowledged all over the globe.[1] However, the economic downturns caused by the COVID-19 pandemic were very severe and badly affected the Indian economy. In such a precarious environment, one of the most important necessary conditions for economic recovery in India is the effective transfer of capital from businesses that are inefficient to efficient businesses. Even before the pandemic, the banking sector in India has gone through a challenging period

[1] Shivam Goel, *The Insolvency and Bankruptcy Code, 2016: Problems & Challenges*, IMPERIAL JOURNAL OF INTERDISCIPLINARY RESEARCH (IJIR), 241, 255-256 (2017)

in recovering the dues on time thus worsening the problem of non-performing assets (NPAs). In this matter, bankruptcy legislation for dealing with problems like economic insolvencies can prevent the economy's resources from going to waste.[2] The introduction of the Insolvency and Bankruptcy Code (IBC), 2016 in the year 2016 marked a significant development in the history of Indian legislation as it evolved as an engine for economic progress, offering a procedure that was both efficient and effective for resolving insolvencies. This mechanism released India's economic potential and established a platform for growth that is sustainable.

The concerns of insolvency and bankruptcy were not covered by a single legislation before the enactment of the Insolvency and Bankruptcy Code (IBC). These issues were addressed by several legislation, such as the Sick Industrial Companies (Special Provisions) Act, 1985[3]; the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002[4]; Financial Institutions Act, 1993[5] and the Companies Act, 2013[6]. Following the passage of all of these laws, several organizations, including the Board of Industrial and Financial Reconstruction (BIFR), the Debt Recovery Tribunal (DRT), and others, as well as their separate Appellate Tribunals, were established to deal with instances of this kind. The High Courts regulated the liquidation of enterprises. Consequently, the previous framework for insolvency and bankruptcy was characterized by a lengthy, insufficient, and inefficient system, resulting in substantial delays in the resolution process.

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[2] Rajeswari Sengupta and Harsh Vardhan, Banking Crisis Impedes India's Economy, East Asia Forum (October 3, 2019) https://www.eastasiaforum.org/2019/10/03/banking-crisis -impedes-indias-economy/.

[3] Sick Industrial Companies (Special Provisions) Act, 1985, No. 01, Acts of Parliament, 1986 (India).

[4] Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, No. 54, Acts of Parliament, 2002 (India).

[5] Financial Institutions Act, 1993, No. 51, Acts of Parliament, 1993 (India).

[6] Companies Act, 2013, No.18 , Acts of Parliament, 2913 (India).

Without comprehensive laws, enterprises often persist in difficult circumstances for extended periods, leading to substantial losses for creditors, suppressing economic activity, and eventually causing assets to depreciate significantly with no maintenance.

The adoption of the Insolvency and Bankruptcy Code (IBC) was an effort to provide a standardized and time-bound mechanism for the resolution of bankruptcy, which would provide stakeholders with an unambiguous path. Its major objective is to consolidate and reform the rules that govern the reorganization and resolution of insolvency of corporate organizations, partnership businesses, and individuals within a certain amount of time to optimize the value of their assets.

Background of the Study:

For an organization to become financially stable within a certain time frame, a robust insolvency and bankruptcy system should provide options for resolution or reorganization. If this is not feasible, then it is necessary to establish a rapid bankruptcy or liquidation process to allow for the seizure and sale of assets and the distribution of the resulting funds to creditors.[7] The Insolvency and Bankruptcy Code 2016[8] (IBC) is a vast piece of legislation that India passed to address the liquidation and insolvency of corporations as well as of individuals and small businesses. The Insolvency and Bankruptcy Board of India is an independent regulatory organization that governs the process and the businesses that participate in it, such as registered valuers, information utilities, insolvency professional agencies and professionals, and so on. Two specialized courts in India deal with corporate insolvency and bankruptcy: the National Company Law Tribunal and the National Company Law

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[7] Adegbemi Babatunde Onakoya and Ayooluwa Eunice Olotu, Bankruptcy and Insolvency: An Exploration of Relevant Theories ,7(3) INTERNATIONAL JOURNAL OF ECONOMICS AND FINANCIAL ISSUES ,706-712 (2017).

[8] Insolvency and Bankruptcy Code 2016, No. 31, Acts of Parliament, 2016 (India).

Appellate Tribunal. The procedure for dealing with corporate bankruptcy is already in place, but the parts of the Code that pertain to people and businesses will be put into effect gradually. By passing and implementing the Insolvency and Bankruptcy Code (IBC), the government has established the framework, regulatory, institutional, and capacity building to manage insolvency and bankruptcy via a unified law.[9] As a result of this substantial change, India has improved a lot in the World Bank's rankings in Ease of Doing Business and resolving bankruptcy.[10] With the help of IBC, distressed organizations have been able to reorganize and get their money back via the sale of their assets and the acquisition of other businesses. Several issues with efficient settlement and liquidation need further changes to the legislation.

Bankruptcy and insolvency may have different societal and economic effects depending on the country's circumstances and the details of the case. Bankruptcy and insolvency, in general, may affect the economy as a whole and the parties involved enormously.

Creditors may incur financial losses if a debtor becomes insolvent or declares bankruptcy, leading to the non-repayment of their owing funds. Small creditors, such as individual investors or small enterprises, may have more difficulty in recovering their losses, which may have a particularly negative impact.

The process of insolvency or bankruptcy can put significant financial and emotional strain on debtors. It may lead to the forfeiture of assets, such as dwellings or vehicles, and can

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[9] Vijay Kimar Singh, *Modern Corporate Insolvency Regime in India: A Review* 7(1) NATIONAL LAW SCHOOL BUSINESS LAW REVIEW ,23-57 (2021).

[10] Daizy Chawla and Himanshu Dubey, *Unlocking India's economic promise: Can IBC act as a catalyst for expansion*?, THE ECONOMIC TIMES (Jul. 22, 2023, 09:04 AM), https://economictimes.indiatimes.com/small-biz/legal/unlocking-indias-economic-promise-can-ibc-act-as-a-catalyst-for expansion/articleshow/102029772.cms.

impair their credit rating, thus increasing the difficulty of obtaining future loans.

Insolvency and bankruptcy may have major impacts on the whole economy, affecting both its development and stability. The occurrence of corporate bankruptcy may result in unemployment and a decline in economic productivity. This phenomenon may generate a series of consequences, affecting other enterprises and possibly resulting in an economic decline. It is crucial to acknowledge that these are broad generalizations, and the precise consequences of insolvency and bankruptcy might differ based on the unique circumstances of each situation.

Literature Review

The impact of insolvency and bankruptcy in India has been a topic of significant interest and study in recent years. The introduction of the Insolvency and Bankruptcy Code (IBC) in 2016 has resulted in a substantial transformation in the field of insolvency and bankruptcy in the nation.

As far as the present research on the "Role of insolvency and bankruptcy code in facilitating the expansion of Indian economy" is concerned, the existing literature has been thoroughly reviewed. The literature demonstrates an increasing concern in recognizing the significant effect of the Insolvency and Bankruptcy Code on India's financial environment. Here is a literature review on the impact of insolvency and bankruptcy in India.

Sharma and P. K. Jain (2018) in their research paper "Insolvency and Bankruptcy Code: A Game Changer" examines the influence of the Insolvency and Bankruptcy Code on the Indian economy, with a specific emphasis on its capacity to diminish non-performing assets (NPAs) in the banking industry, enhance corporate efficiency, and foster a credit-oriented environment.

In another study by K. Vaidyanathan (2017) *"Insolvency and Bankruptcy Code: A Panacea for Stressed Assets?"* analyses the possible influence of the Insolvency and Bankruptcy Code on addressing distressed assets in India, emphasizing the difficulties and possibilities linked to its execution.

"Insolvency and Bankruptcy Code: Impact on the Indian Economy" by *S. Chakraborty and A. Chakraborty (2019)* studies the effects of the Insolvency and Bankruptcy Code on the Indian economy, specifically its influence on business restructuring, creditor rights, and general economic development.

The influence of the Insolvency and Bankruptcy Code on the corporate debt market in India is examined by *A. Kumar and M. Gupta (2020* in their study "Impact of Insolvency and Bankruptcy Code on Corporate Debt Market" The study analyses its effects on bondholders, credit rating agencies, and the overall market dynamics.

"Insolvency and Bankruptcy Code: A Paradigm Shift in Corporate Debt Restructuring in India" by *S. Dhingra and R. Singh (2018)* in their research study evaluates the influence of the Insolvency and Bankruptcy Code on the restructuring of corporate debt in India, emphasizing its capacity to shorten the process of resolving financial difficulties and improve the ability of creditors to collect their funds.

Singh et al. (2021) examined the fluctuations in the Insolvency and bankruptcy process amidst the COVID outbreak. They constructed a model to assess the influence of the pandemic on the number of conflicts arising between debtors and creditors, the frequency of conflicts reaching the National Company Law Tribunal (NCLT), the number of conflicts resolved outside of court, and the recovery rate of disputes settled through litigation compared to those settled amicably.

Thus the above studies indicate that IBC has been a significant development for India's insolvency landscape and thus has created a conducive environment for entrepreneurship, enhanced creditors' rights thereby generating a culture of responsibility and good governance.

Data Sources and Methodology

The data sources used in the present study are obtained from secondary sources which includes various government statistics and organizational databases. To gain and retain knowledge and support it in the field of study, the researchers have also consulted a variety of written books, legal statutes, law journals, online and offline articles, and publications. An exploratory type of research has been used in the study to gain insight on the role of IBC on the expansion of economy.

Objectives of the Study

This study has been undertaken to contribute towards the following objectives:

1. To examine the distinctive characteristics and regulatory structure of the Insolvency and Bankruptcy Code, 2016.
2. To analyse the economic and non-economic effects of the Insolvency and Bankruptcy Code on India's economic growth.

Findings And Analysis

The distinctive characteristics and regulatory structure of the Insolvency and Bankruptcy Code, 2016.

The Insolvency and Bankruptcy Code, 2016 (IBC) is the name of the legislation that regulates bankruptcy in India. The fundamental goal of this legislation is to provide a unified law that covers both insolvency and bankruptcy. The purpose of this legislation is to bring together the existing framework. The main

objective of the Code is to provide a time-bound reorganization and insolvency resolution process for businesses, to maximize the value of the assets of the company in question, encourage entrepreneurial endeavours and the availability of financing, and strike a balance between the interests of all of the company's stakeholders. The primary purpose is to achieve resolution. The primary purpose of the second order is to maximize the value of the firm's assets, while the third order objective focuses on stimulating entrepreneurship, ensuring credit availability, and balancing various interests.

The introduction of the Insolvency and Bankruptcy Code in 2016 has had a significant influence on India's insolvency and bankruptcy system, resulting in enormous changes. The procedure has become more clear, efficient, and consistent as a consequence of this, which has made it easier for businesses to make peace with their financial issues.

India’s legislative and institutional framework for addressing loan defaults has not yet aligned with global standards. The efforts made by the creditors to recover their debts, either through the Contract Act, 1872[11] or through specific laws such as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993[12] and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002[13], have not yielded the intended results. Moreover, the implementation of the Sick Industrial Companies (Special Provisions) Act, 1985[14] and the winding up provisions of the Companies Act, 1956[15]/Companies Act, 2013[16] has been ineffective in facilitating the recovery for lenders or assisting in

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11 Contract Act,1872, No. 09, Acts of Parliament, 1872 (India).
12 Recovery of Debts Due to Banks and Financial Institutions Act,1993, No. 51, Acts of Parliament, 1993 (India).
13 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, No. 54, Acts of Parliament, 2002 (India).
14 Sick Industrial Companies (Special Provisions) Act, 1985, No. 01, Acts of Parliament, 1985 (India).
15 Companies Act, 1956, No. 01, Acts of Parliament, 1956 (India).
16 Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

the restructuring of organizations. The laws pertaining to individual bankruptcy, including the Presidential Towns Insolvency Act of 1909[17] and the Provincial Insolvency Act of 1920[18], have been in existence for over a century. Over a period of time, this has made it more difficult for lenders to have faith in the borrower.

The Insolvency and Bankruptcy Code, 2016 is regarded as one of the most significant economic reforms, second only to the Goods and Services Tax (GST). The Insolvency and Bankruptcy Code 2016[19] is a significant law that brings together the rules and regulations that regulate the process of restructuring and winding up of individuals and organizations, both incorporated and unincorporated.

The primary goal of the new legislation is to encourage entrepreneurship, facilitate access to credit, and ensure a fair and equitable outcome for all parties involved. The present laws that apply to the reorganisation and resolution of insolvency for corporate entities, partnerships, and individuals will be revised and streamlined in order to accomplish this goal within a certain amount of time. The objective is to maximise the value of the assets that belong to these businesses and to handle any challenges or concerns that are connected to this situation. The aim is to unify the legislation pertaining to the bankruptcy of corporations and limited liability entities (including limited liability partnerships and other entities with limited liability) unlimited liability partnerships and individuals, presently contained in several legislations, into a single legislation. In light of this unification, the law will become more transparent, and it will be easier to apply standards that are consistent and fair to the many stakeholders who are impacted by the collapse of the

[17] Presidential Towns Insolvency Act of 1909, No. 03, Acts of Parliament, 1909 (India).
[18] Provincial Insolvency Act of 1920, No. 05, Acts of Parliament, 1920 (India).
[19] Supra note 2.

firm or the individual's inability to pay the debt. This will be a result of the unification.[20]

The profound influence of the Insolvency and Bankruptcy Code (IBC), 2016 remains a fundamental aspect of its triumph, guaranteeing its superiority over competing laws and contributing to a more robust and resilient Indian economy. This is despite the ongoing emergence of impediments.

Thus, the distinctive characteristics and regulatory structure of the IBC can be examined as follows:

Distinctive Characteristics-

1. The IBC places significant importance on time-bound resolution as one of its main characteristics. The law establishes a stringent schedule for the resolution procedure, guaranteeing that insolvency cases are handled promptly and effectively.
2. The Insolvency and Bankruptcy Code (IBC) sets a framework where creditors have the authority to commence bankruptcy proceedings against debtors who have defaulted on their payments. This transition from a focus on debtors to a focus on creditors is a substantial difference from the former bankruptcy system in India.
3. The Insolvency and Bankruptcy Code (IBC) provides the notion of licensed insolvency professionals (IPs) who have a vital responsibility in overseeing the insolvency procedure. These specialists are accountable for carrying out the procedure of insolvency resolution, safeguarding the interests of all parties involved, and guaranteeing adherence to the rules of the code.
4. Another notable characteristic is the creation of the Insolvency and Bankruptcy Board of India (IBBI) which functions as a regulatory authority. within the framework of the IBC. The IBBI supervises the

[20] Abhiman Das, Anurag Agarwal, Insolvency and Bankruptcy Reforms: The Way Forward 45(2) Vikalpa: The Journal for Decision Makers 115-131 (2020).

operations of IPs, insolvency professional agencies, and information utilities, therefore guaranteeing the efficient execution of the code.

5. The IBC includes regulations about cross-border insolvency, facilitating collaboration and synchronization with other jurisdictions in situations of insolvency and bankruptcy.

Regulatory Structure:

1. The Insolvency and Bankruptcy Board of India (IBBI) is the principal regulatory body formed under the Insolvency and Bankruptcy Code (IBC). It supervises the operations of several entities participating in the method of resolving insolvency issues and assures adherence to the rules of the law.
2. The National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) are two judicial bodies. The NCLT (National Company Law Tribunal) and NCLAT (National Company Law Appellate Tribunal) have been assigned the role of adjudicating authority for resolving corporate insolvency cases under the Insolvency and Bankruptcy Code (IBC). They have a crucial function in resolving insolvency matters and reviewing appeals that result from rulings made by the NCLT.
3. Bankruptcy professionals, who are accountable for administering the bankruptcy process, are required to get licenses and be regulated under the Insolvency and Bankruptcy Code (IBC). It is the responsibility of the regulatory body to guarantee that these professionals conform to the mandated standards of competence and behaviour.
4. The IBC allows for the development of information utilities that are responsible for the upkeep of a complete database of the financial information pertaining to debtors of the organization. One of the most important roles that these utilities perform is to provide information that is both fast

and reliable to make the process of insolvency resolution easier.

6. As adjudicating authorities for various parts of insolvency resolution and bankruptcy procedures, the IBC designates a few distinct bodies, such as the National Company Law Tribunal (NCLT), the National Company Law Appeal Tribunal (NCLAT), and the Debt Recovery Tribunals.

Thus, combining these particular traits with the regulatory framework in India results in the creation of an effective system for dealing with problems connected to insolvency and bankruptcy in the country.

The economic and non-economic effects of the Insolvency and Bankruptcy Code on India's economic growth

The occurrence of insolvency and bankruptcy might result in substantial economic consequences in India. When an organization becomes insolvent or bankrupt, it is unable to fulfil its financial responsibilities, such as debts, wages, and other expenses. This may result in a cascading impact on the economy, since the company's creditors, employees, and suppliers may experience adverse consequences.

An important economic consequence of insolvency and bankruptcy is the possibility of employment losses. If a corporation is unable to meet its financial obligations to its employees, they may be terminated from their positions or compelled to seek other job opportunities. One of the outcomes that might occur as a consequence of this is a decrease in the overall employment rate and a rise in the number of those seeking employment.

Investors are often hesitant to make loans to companies or individuals in a market that has a substantial incidence of insolvency and bankruptcy, which has a negative influence on the creditworthiness of a country. Insolvency and bankruptcy

are two of the most common causes of persons filing for bankruptcy. Consequently, this results in a reduction in investment and a slowdown in economic growth.

The implementation of IBC has effectively transferred the control of power in financial transactions from the debtor/borrower to the creditor, resulting in a notable economic transformation. It has implemented more stringent fiscal and credit measures to enhance the protection of economic value. The outcomes of the Code have enhanced India's standing internationally in terms of how simple it is to resolve bankruptcy.

Finally, both insolvency and bankruptcy can end in a reduction in the worth of a company's assets since they might need to be liquidated in order to settle outstanding obligations. This might adversely affect the overall valuation of the firm and the financial prosperity of its owners. In India, insolvency and bankruptcy may result in substantial economic consequences such as unemployment, a decrease in creditworthiness, and a devaluation of assets.

According to the Economic Survey 2020-21, based on data from the Reserve Bank of India (RBI), Scheduled Commercial Banks (SCBs) have successfully recovered 45.5% of the total amount involved through the Insolvency and Bankruptcy Code (IBC) during the financial year 2019-20. The recovery rate of this methodology surpasses that of other methods and rules. The World Bank Group, in its 'Doing Business 2020' report, has noted that India's administrative reform efforts have addressed all the aspects evaluated by 'Doing Business', with particular emphasis on tax payment, cross-border trade, and insolvency resolution.

IBC places more of an emphasis on restoring operational enterprises as opposed to liquidating them. In this context, the implementation of the Corporate Insolvency Resolution Process

(CIRP) is intended to achieve a state of equilibrium in the interests of all of the stakeholders and creditors. In the shadow of the committee of creditors, a resolution professional assumes control of the distressed company's affairs. They then invite the potential resolution applicants for the corporate debtor to develop a resolution plan, seek approval from the Creditors' Committee, and then present the plan to the Ld. Adjudicating Authority for its approval in accordance with the International Business Code. Relevantly, if they are disqualified under section 29A of the IBC, the responsible individuals who have placed the corporate debtor in the state of insolvency are not permitted to be resolution applicants. This would be the case if they are a resolution applicant.

The Insolvency and Bankruptcy Code places a high priority on maximising the value of assets and promotes involvement from prospective buyers and investors by means of a bidding procedure that is open and transparent. Because of this, there has been a rise in interest from investors both local and foreign, who see potential in the process of purchasing financially troubled businesses and turning them around successfully. As a result, the IBC has been successful in preserving employment, protecting the interests of creditors, and integrating additional funds into the economy through the revitalization of viable enterprises.

India's standing on the Ease of Doing Business Index maintained by the World Bank has seen significant shifts as a result of the adoption of the IBC. The bankruptcy and Bankruptcy Code (IBC) has resulted in a number of favourable results as a result of optimising the bankruptcy resolution procedure. Through this, creditor rights have been enhanced, the average amount of time needed for settlement has been lowered, and recovery rates have been improved. As a consequence of this, investors now see India as a more desirable location for doing business there. In addition, the IBC has been a source of assistance for the expansion of firms, particularly

new businesses and Micro, Small, and Medium Enterprises (MSMEs).

In the context of social beings, the word "society" refers to the interactions formed through the formation and re-formation of an organization that directs and regulates the behaviour of individuals in various ways. Society is an essential condition for every human being and is required for the fulfilment of life's demands. It is also a condition that liberates and restricts the actions of persons.

Both insolvency and bankruptcy have the potential to have substantial repercussions for society in India. A corporation can be unable to fulfil its financial commitments, such as paying wages and other costs if it goes bankrupt or becomes insolvent. Because of this, there is a possibility that the workers of the firm and their families would be adversely impacted, which may have a domino effect spreading across the community.

The possibility of employment losses is one of the most significant societal effects that might result from insolvency and bankruptcy. Workers can be terminated from their jobs or be required to look for other employment if their employer is unable to pay them. Because of this, the impacted workers and their families may find themselves in a difficult financial situation, since they may have a difficult time making ends meet in the absence of a consistent pay check.

The value of a company's assets may decrease as a result of insolvency or bankruptcy, which may have a detrimental effect on the wealth of the company's shareholders. Insolvency and bankruptcy cannot be avoided. This may result in social unrest and dissatisfaction because individuals may have the perception that their financial stability has been compromised.

Insolvency and bankruptcy may also have a detrimental influence on society as a whole, since the creditors, suppliers,

and other stakeholders of the firm may also be impaired by the situation. This may result in a decrease in the local economy as well as a reduction in the supply of products and services.

Therefore, The Insolvency and Bankruptcy Code (IBC) has exerted a substantial impact on the economic expansion of India through its resolution of critical issues pertaining to non-performing assets (NPAs), corporate insolvency, and the business climate at large. Multiple factors contribute to the impact of the IBC on the economic growth of India:

1. By facilitating the timely resolution of distressed companies, the IBC has helped in freeing up capital that was previously locked in non-performing assets, enabling banks and financial institutions to reallocate resources to more productive uses. By easing the rapid resolution of failing enterprises, the IBC has aided in freeing up cash that was previously trapped in non-performing assets, allowing banks and financial institutions to reallocate resources to more productive purposes.
2. Through the empowerment of creditors and the provision of an unambiguous legal framework for debt settlement, the IBC has enhanced the probability of success for creditors in terms of recovery. The trust of lenders and investors has improved as a result of this, which has led to a more effective distribution of resources and credit throughout the economy.
3. IBC has made a significant contribution to the development of a culture of credit by sending a message to both borrowers and lenders that failure to fulfil commitments would result in severe repercussions. The result of this has been an increase in the level of discipline that is present in financial transactions, a decrease in moral hazard, and an improvement in the general health of the credit market.
4. Through the provision of a solid legal framework for dealing with bankruptcy, IBC has also contributed to

India's improvement in its position in terms of ease of doing business. The effective resolution process has resulted in an improvement in investor confidence and a reduction in the risk that is associated with doing business in India.

5. The IBC has enabled the reorganization and rejuvenation of financially troubled enterprises, therefore safeguarding employment, assets, and economic worth that would have otherwise been lost in a protracted bankruptcy procedure.
7. The IBC's favourable influence on economic development is seen in several economic measures, including GDP growth, investment levels, and general business optimism. An enhanced settlement procedure and a more robust credit environment are crucial in fostering a thriving and dynamic economy.

Thus, the impact of the Insolvency and Bankruptcy Code on India's economic development has been significant. Thus, the Insolvency and Bankruptcy Code (IBC) has enhanced the durability and efficiency of the financial system by tackling concerns about corporate bankruptcy, non-performing assets (NPAs), creditor retrieval, and facilitating commercial operations. This is crucial for ensuring consistent economic progress.

Conclusion

In conclusion, insolvency and bankruptcy have the potential to have substantial effects on both the economy and society in India. As far as the economy is concerned, insolvency and bankruptcy may result in the loss of jobs, a decrease in creditworthiness, and a decrease in the value of assets.

On the social front, insolvency and bankruptcy may result in a downturn in the local economy, as well as financial hardships, job losses, and the loss of employment opportunities. These repercussions have the potential to affect a diverse group of

stakeholders, including as creditors, debtors, workers, shareholders, and the society at large. In order to mitigate the adverse impacts that insolvency and bankruptcy have on the economy and society, the government need to have appropriate policies in place from the beginning. For the purpose of avoiding insolvency and bankruptcy, it is essential for enterprises to use effective risk management and financial management. Additionally, it is important for the government to have laws in place.

On the other hand, there are also possible adverse effects that need to be taken into consideration, such as the loss of jobs for workers, the reduction of investments for shareholders, the general lack of trust in the market, and so on. IBC is a mechanism that businesses may use to settle their financial problems. It is a tool that allows businesses to strike a balance between safeguarding the interests of creditors and reducing the negative impacts on workers and shareholders.

Therefore, it is evident that the IBC (Insolvency and Bankruptcy Code) is one of the most crucial laws implemented in the last ten years. It has significantly enhanced the "ease of doing business in India" and has shown to be a successful factor in accelerating the pace of the Indian economy. The rules governing individual bankruptcy and insolvency have developed over the course of many centuries in response to changes in the norms and beliefs of a whole society. India has made significant progress due to the adoption of the modern IBC regulations. Within the scope of the Indian bankruptcy system, the law has provided a structure that is impartial, efficient, and quick. This was done with the intention of bringing about economic transformation. The Code is a piece of contemporary law that takes into consideration the problem of agricultural crises and financial illiteracy, particularly in rural India. Additionally, it incorporates the imperative actions that are required to guarantee the smooth implementation of the new procedures.

CHAPTER 11

CORPORATE SOCIAL RESPONSIBILITY: A DEVELOPMENT 'ALTERNATIVE' TO ACHIEVE COMMUNITY DEVELOPMENT THROUGH WELFARE OF THE ELDERLY AND PERSONS WITH DISABILITY

Preeti Priyam Sharma

Reflexive modernization means not less but more modernity, a modernity radicalized against the paths and categories of the classical industrial setting[1]*.*

-Ulrick Beck

The concept of industrial society rests upon a contradiction between the universal principles of modernity- civil rights, equality, functional differentiation, methods of argumentation and skepticism- the exclusive structure of its institutions, in which these principles can only be realized on a partial sectoral and selective basis. The consequence is that industrial society destabilizes itself through its very establishment. Big businesses amplify this risk factors be it in the form of environmental degradation, changing family structures, rampant industrialization and so on.[2]

According to Milton Friedman, in a purely capitalistic society, role of a business organization and state should not overlap but the idea of the society (capitalistic and industrial) is quite different within the reflexive modernistic stage of societal development.[3] However, with the increase in the global reflexivity towards modernity, the processes of early

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[1] ULRICH BECK, MARK RITTER., RISK SOCIETY: TOWARDS A NEW MODERNITY, (SAGE PUBLICATIONS,1992)

modernization have been viewed critically in terms of their impacts on people and the planet.

Statutory mandate, growing consumer awareness and social responsibility has proven that today big businesses need to outline their value creation process (how it impacts customers, employees, other stakeholders, and the community). Consumers today are astute and perceptive about the 'social responsibility' of different corporate brands and products they use as a consumer society and their work place's value commitments. The author being a part of the consumer society is an insider to the group. Studies have shown the impact of social responsibility or the lack of the same significantly impact the product brand value in society and affects consumer preferences.[2] Today, consumers look for ethics and value commitments in the brands that they consume.

John Elkington in 1997 through his book "Cannibals with Fork, the Triple Bottom Line of Twentieth Century Business" developed the triple bottom line concept in terms of economic prosperity, environmental quality and social justice.

Elkington opines that companies that want to be sustainable must pay attention to the "3Ps". In addition to pursuing profit, companies must also pay attention to and be involved in fulfilling the welfare of the community (people) and actively contribute in preserving the environment (planet)[3]

Conglomerates guilty of lack of social responsibility (environmental degradation, animal abuse, human rights violations, cruel animal testing, exploitation, slavery and so on) have had to face a social backlash due to which they had to

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[2] Jing Yang, Kelly Basile, *The Impact of Corporate Social Responsibility on brand equity*, MARKETING INTELLIGENCE & PLANNING (2018), https://doi.org/10.1108/MIP-02-2018-0051

[3] Y .Wibisono, Membedah Konsep & Aplikasi CSR, Corporate Social Responsibility, (2007)

rethink and redesign their brand to regain consumer acceptability and the market goodwill.[4]

The idea of public private partnership has multiple manifestations. As a country of 1.4 billion people[5] India has its own developmental challenges: welfare of the marginalized and vulnerable sections of the society often end up being underserved due to the volume of the services required and the resource constraints of a developing country. India today is slated to become the third largest economy in the world[6]. Corporate Social Responsibility seems like a viable alternative to bridge this gap between economic prosperity and ever widening welfare requirements.

Corporate Social Responsibility (CSR) is a self- regulating business model that helps a company be socially accountable to itself, its stake holders, and the public. CSR has gained prominence as a guiding framework for businesses to align their operations with societal needs and expectations.[7] The reflexive modern understanding of the long-term goal of business is sustainable value creation and not mere profit. At its core, CSR entails the integration of social, environmental, and ethical concerns into business strategies and practices.[8] The contemporary business scenario in the post covid word is

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[4] Poh Ling Tan, S. Mostafa Rasoolimanesh, Govindaraju Manickam, *How corporate social responsibility affects brand equity and loyalty? A comparison between private and public universities*, Vol. 8, HELIYON, Vol.8 (2022)

[5] World Population (2024)- worldometers, https://www.worldometers.info., (last visited on Dec 5, 2024)

[6] *India to be third largest Economy in the world by 2030*,THE ECONOMIC TIMES,(Dec 5, 2024,5.00 PM,https://www.m.economictimes.com/news/economy/indicators/india-to-be-3rd-largest-economy-by-2030-but-population).

[7] Cooleaf.com, (Dec 5, 2024,7.00 PM,https://www.cooleaf.com/guides/making-an-impact-the-benefits-of-corporate-social-responsibility-csr).

[8] Saloni Sharma, *Corporate Social Responsibility and Disability: A Comprehensive Analysis*, Vol.13, Issue 7, INTERNATIONAL JOURNAL OF SCIENCE AND RESEARCH, (2024)

focused on sustainable solutions to social and environmental problems.

Companies who have an active and effective CSR policy have been found to do well in all aspects of business.[9] CSR is internal as well as external. Companies (which meet the criteria as stipulated by Company Act, 2013) today have active corporate social responsibility policy which extends from employee engagement, internal structural reforms for ease of working conditions community social engagement, environmental restoration, welfare actives for the vulnerable and marginalized in society with activities ranging from short term support like medical / health camps, awareness generation activities or long term institutional involvement by building institutions (Arise + of Tech Mahindra) and partnerships with government and civil society to contribute to stake holders.[10]

Objective of the study:

The objective of this research paper is to attempt to explore CSR as a development 'alternative' vis a vis welfare of two extremely vulnerable sections of society: a) the elderly b) persons with disability. As India stands at crossroads of pivotal and fast paced changes towards its goal of 'Developed at 2047[11]', it is time to rethink developmental priorities and truly embark on the agenda 'inclusive development'.

In a country labelled as a 'subcontinent' by many due to its socio- cultural- political- economic and cultural diversity, it is a challenge to embark such an agenda due to the very factors that make it a unique nation. Yet true development can only be

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[9] Id at. 9

[10] Thecsrjournal.in, (Dec 5, 2024,8,00 PM.https://thecsrjournal.in/csr-projects-persons-with-disabilities-india-pwd/#google_vignette).

[11] Pib.gov.in, (Dec 5, 2024,9.00 PM),https://pib.gov.in/PressReleasePage.aspx?PRID=2007105#:~:text=Union%20Minister%20of%20Commerce%20%26%20Industry,being%20made%20in%20this%20direction,.

achieved when the quality and dignity of life of all sections of society are achieved. 'Ease of living' should not be targeted for delivery to only the upwardly mobile sections of the society but to the vulnerable and those at the bottom of the development pyramid[12]

Importance of Community Development (CD) to Inclusive development

Community Development (CD) is an organized effort of individuals in a community conducted in such a way to help solve community problems with a minimum help from external organizations. External organizations include government and non-government organizations, and corporations of various types and sizes such as small and medium enterprises (SMEs) and multinational corporations (MNCs). The implication of UN's definition of CD is, therefore, emphasizing creativity and self-reliance in the community for short- and long-term goals, but not to defy the CSR roles of the various types of business firms. [13]

CSR can involve a range of activities such as working in partnership with local communities, socially sensitive investment, developing relationships with employees, customers and their families, and involving in activities for environmental conservation and sustainability.

CBR- Community based rehabilitation[14]

Community based inclusive development (CBID) ensures that persons with disabilities and the elderly are respected and

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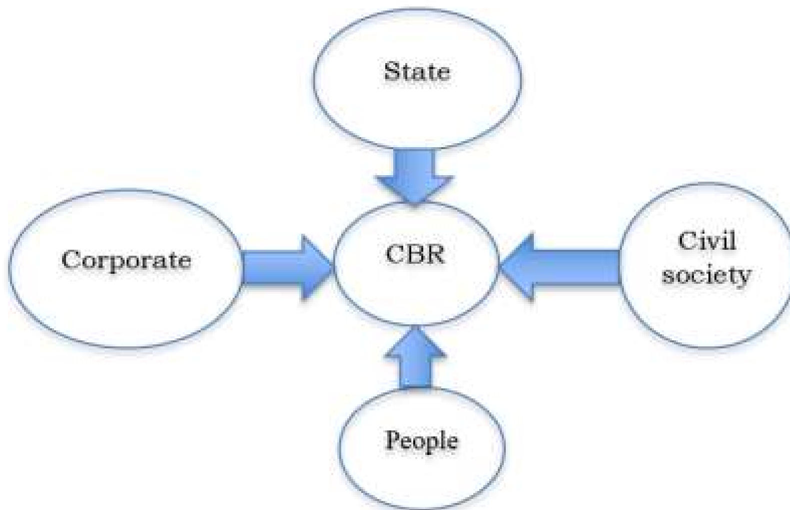
[12] C. K. Prahalad,Stuart L. Hart, *The Fortune at the Bottom of the Pyramid*, STRATEGY+BUSINESS, Issue 26, 2002

[13] Maimunah Ismail, *Corporate Social Responsibility and Its Role in Community Development: An International Perspective*, Vol 2/9, ULUSLARARASI SOSYALARASTIRMALAR DERGISI, THE JOURNAL OF INTERNATIONAL SOCIAL RESEARCH, Fall, 2009

[14] Cbm.org, (Dec 5, 2024,10 PM),https://bm.org/in-action/community-based-inclusive-develoment-cbid/.

included in their communities on an equal basis in all areas of life. It is people centred, community driven and human rights based. CBID is a key approach to realizing the Convention on the Rights of persons with Disabilities and leave no one behind in achieving the Sustainable Development Goals.



CSR- Community Based Rehabilitation- Inclusion of persons with disabilities and the elderly multi-pronged approach (corporate- State-civil society- people)

CSR and Elderly Care

Elderly Care is an underdeveloped area within the caregiving domain in India, which is home to one-sixth of the global population. Growth in the elderly population is showing a rising trend both globally and in India.[15]

According to United National Population Fund (UNFPA), Elderly citizens, meaning those above the age of 60 today, comprise

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[15] George Abraham Kurian, *Elderly Care – A Case for the CSR Initiatives*, Vol 2, Issue 3, BUSINESS ETHICS AND LEADERSHIP, (2018)

around 12% of current global population of 7.3 billion and is projected to touch 22% (2 billion) by 2050, which for the first time in history, will outnumber the population under 15 years of age.

In the Indian context, such elderly citizens constituted 7.5% of the Indian population (104 million) as per the last census of 2011, which is estimated to rise to 12.5% by 2021 (143 million) and to 20% (300 million) by 2020.[16]

The most crucial and preferred aspect of living arrangements for the elderly is co-residence with adult children in extended families or multigenerational households where kins/kids provide income, personal care and emotional support to the elderly [17]

- In the Indian scenario, family care is an integral part of the old age care. A family is the most cherished social institution in India and the most vital non-formal social security for the elderly[18]. In recent years, many changes have occurred in the family system that adversely affects elders.
- The most crucial and preferred aspect of living arrangements for the elderly is co-residence with adult children in extended families or multigenerational households where kins provide income, personal care and emotional support to the elderly. [19]

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[16] Helpageindia.org, (Dec 5, 2024,1.30 AM,https://www.helpageindia.org/document/elder-abuse-how-india-treats-its-elderly-2017).

[17] Irudaya Rajan Sebastian, Sanjay Kumar, Living Arrangements among Indian Elderly: Evidence from National Health Family Survey, Vol 38, Issue 1 ECONOMIC AND POLITICAL WEEKLY, (2003)

[18] George Abraham Kurian (2018), supra note 14.

[19] Ageinternational.uk, (Dec 6, 2024,9.00 AM),https://www.ageiternational.org.uk/policy-research/statistics/global-ageing/.

A few facts about the Elderly population:

- Today 962 million people are over 60, of which 62% of people over 60 live in developing countries; by 2050 this number will have risen to 80%. 80% of older people in developing countries have no regular income. Only 1 in 4 older people in low- and middle-income countries receive a pension. Nearly two-thirds of the 44.4 million people with dementia live in low- and middle-income countries. Healthcare is unaffordable, inaccessible, or inappropriate for many in the developing world, particularly in rural areas. Health insurance coverage is available only to 27% or 350 million of the Indian population [20]
- By 2050, there will be over 2 billion people aged 60 and over, more than twice the number measured in 2000. [21]
- It is often seen that a healthy and earning elderly member is always considered an asset; while on the other hand, bedridden and fully dependent parents may be regarded as a liability. The elderly, who have adequate financial resources and take care of family affairs, who are productive and involved in income generation activities and contribute to the family, are looked after well, and held in good esteem by the young[22]
- It has been found people who belong to underprivileged communities and lower economic status, experience lower levels of social capital, poorer levels of life satisfaction. Same has been found to be true in case of the elderly in rural areas and specifically women[23]

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[20] National Health Profile,2017,(Dec 6,2024, 11.00 AM), http://www.indiaenvironmentportal.org.in.

[21] Id. at 20

[22] George Abraham Kurian, supra note 14

[23] Robert Hagan, Roger Manktelow, Brian Taylor, Loneliness, cumulative inequality and social capital in later life: Two stories, IRISH JOURNAL OF SOCIOLOGY, (2020).

- Today there is ever increasing loneliness among the people especially elderly. Additionally, certain relationships, such as those with spouses or very close family and friends, are particularly valuable for a sense of belongingness and deficits in these is not easily rectified merely by increased social contact with others.[24]
- Robert Chamber describes the 'deprivation trap' which is seen as associated with powerlessness, isolation, poverty, physical weakness, and vulnerability.[25] This idea certainly applicable to the social discourses on Disability (persons with disabilities) and Ageing
- Statutory services have the capacity to break down these barriers and provide a bridge to social mixing that does not usually otherwise transpire in these marginalized person's social lives. [26]

Sustainable Development Goal-3 closely related to healthy ageing states:

> *"To ensure healthy lives and promote well-being for all at all ages through universal health coverage including financial risk protection".*

Initially, the areas falling within the ambit of Corporate Social Responsibility (CSR) in India were largely fashioned around the eight MDGs[27]:

- Eradicating hunger, poverty and malnutrition, promoting preventive health care, sanitation and safe drinking water. The elderly and the persons with disabilities have heterogenous yet special needs and

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[24] Id. at 23

[25] Joakim Davidson, Community Based inclusive development as a strategy for Millenium Development Goals. (Bachelor)Uppsala university, (2010)

[26] Supra note 46.

[27] George Abraham Kurian, supra note 14

vulnerabilities with regards to dietary and nutrition needs, healthcare and sanitation needs.

- Promoting education, including employment enhancing vocational skills especially among children, women, elderly and other livelihood enhancement projects; although persons with disabilities is not directly mentioned, persons with disabilities deserve a life with dignity which can be possible only within a context of physical, social and economic empowerment. It requires resource allocation, institution creation, and institutional empowerment
- Promoting gender equality; setting up homes and hostels for women and orphans- women and children who suffer from physical or mental disability or have aged are especially vulnerable to sexual exploitation, violence, and discrimination. In many cases viewed as a burden to life, they might experience extreme neglect and mal treatment, hence institutional support in terms institutions which can provide a 'safe space' for such people often address a development vacuum.
- Setting up old-age homes, day care centres and such other facilities for senior citizens, - not the most popular idea within the Indian society and culture. Filial piety[28] is an important value, households and families failing to do so are subject to social criticism. But does it mean that elderly within families are treated well and provided for due to the presence social and cultural mandates? Studies suggest otherwise elderly neglect and abuse is on the rise. Old age homes are never short of inmates and the demand for such institutions is on the rise. They are increasingly being opted for by of the elderly who can afford such services to cope with loneliness, neglect and other challenges. The need for companionship, medical attention and lifestyle

[28] Stories of Shravan Kumar and Lord Rama and their dedication to their parents are a good reflection of the kind of elderly-care based values which have shaped Indian cultural and civilizational values. These continue to influence today also within the context globalization and urbanization.

challenges are often not met within modern family set ups. The persons with disability have a different type of needs of life-style and support. Sometimes a single household may have the presence of both the categories leading to pressure of resource generation the constraint is not only felt at the level of material resources but human labor and time as well.

- Measures for reducing inequalities faced by socially and economically backward groups: This requires concrete policy designed to address the needs of these sections and that of their caregivers. Apart from resource allocation towards social welfare schemes, their sincere implementation and stake holder participation in the same process is important. In a fast-globalizing society, the economic pressures generated often create deep inequalities of wealth, income and social capital, also the question of access to social welfare arises. In most cases these are reserved for the below poverty destitute sections. Yet the middle-class families need all the social support while care giving these groups in the form of day care/ community care centres wherein the vulnerable can be cared for while the caregivers discharge their economic. Disability is living life with a little creativity. Creativity and empathy are needed while designing policy and programs. 21st century middle class families in India are generally double income families. Presence of elderly or persons with disability increases the economic pressure, the process can be greatly facilitated if there are reliable day- care centres, financial support for both sections across the country in every town and district. This would automatically have a positive impact on worker productivity and the family caregiving scenario would naturally see a natural uplift.

CSR policies should cater to ageing, post-retirement communes might attract better workers.

Issues Faced by the Elderly [29]

- Lesser disposable income for meeting financial needs:
- Pension entitlement limited to a small percentage of Elders:
- Disproportionately high mix of illiquid assets:
- Unanticipated financial difficulties, due to miscalculating retirement needs

There is a need to provide for the economic and health needs of the elderly and to create a social milieu, which is conducive and sensitive to the emotional needs of the elderly. There are Government schemes that seek to attract CSR activities towards elderly care in India:

Atal Vayo Abhyuday Yojana (AVYAY),[30]

Initiative for Channelization of Corporate social responsibility (CSR) funds for elderly care-

This initiative is to channelize the CSR funds in an appropriate manner for elderly care projects. Under Schedule VII of Section 135 of the Companies Act, setting up old age homes, day care centres and such facilities for Senior Citizens is an approved item for CSR funding. Currently, there is no mechanism for identifying suitable projects for CSR funding in the Senior Citizen segment; and as such, there is no implementation authority monitoring this program.

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[29] George Abraham Kurian, supra note 14

[30] Atal Vayo Abhyuday Yojana (AVYAY),Ministry of Social Justice and Empowerment, Government of India, (7th Dec,2024, 6.00 PM),https://socialjustice.gov.in/schemes/43#:~:text=The%20main%20objective%20of%20the,State%2F%20UT%20Governments%2FNon%2D

Objective of this initiative:

i. To select reputed institutions through a transparent mechanism for taking up CSR Advocacy on behalf of the elderly segment.
ii. To enable preparation of a shelf of projects for CSR funding after due appraisal of the financial viability and socio-economic impact.
iii. To prepare an advocacy statement and reaching out to Corporates who are in the CSR bracket to encourage them to take up funding of the elderly care projects already appraised and placed in the shelf
iv. To assist the corporate entities desirous of investing the elderly care segment by coordinating with the Central and State governments.
v. To mobilize Rs.5000 Cr over the next five years from the CSR funds for the elderly care projects

Funding: The funding to the identified agency will be 5% of the CSR funds brought into the elderly care segment through its advocacy. The payment to the identified agency will in proportion to their performance.

The following could be the list of projects that can be funded through CSR funds (suggestive not exhaustive): -

i. Senior Citizen Homes for destitute focusing in the aspirational districts
ii. Setting up employment portals for re-employment of retired persons.
iii. Funding activities such as meals-on-wheels for feeding destitute elders in the urban areas
iv. Taking up ventures for telemedicine to support the medical requirements of senior citizens.
v. Developing IT platforms for re-skilling retired persons so as to secure suitable reemployment.
vi. Sponsoring elderly for health insurance through PMJAY
vii. Organizing SHGs for elderly to take up productive enterprises

Legal provisions for CSR[31]

Government of India through enactment of Companies Act 2013, Section 135 formally involved with effect from 1st April, 2014 the Corporate Sector in the development agenda of the country by adopting a process of Corporate Social Responsibility (CSR). Under this Act, the Board of the eligible Companies, having minimum revenue of Rs. 1000 crore or net worth of Rs. 500 crore or a net profit of Rs. 5 crore or more in a year, spend at least 2% of the average net profits made during the three immediately preceding financial years on CSR. The Act lists out a set of activities eligible under CSR (Specified in Amended Schedule VII of the Act dated 27thFeb. 2014). As a matter of fact, Senior Citizens Welfare was missing in original schedule but was, however, incorporated in the amended schedule.

The schedule makes mention of elder issues, setting up of Old Age Homes and Day Care Centers, enhancing vocational skills of elderly and such other facilities for senior citizens. The CSR landscape has indeed evolved over last couple of years in terms of number of companies engaging actively in CSR initiatives. There has been a shift in focus from simply spending money on CSR to measurable and sustainable impact creation. Companies have become more serious about CSR spend and level of compliance is going up year after year. The CSR spending in the country presently is around Rs. 25000 Cr per year. In contrast to increasing spend on overall CSR, the support to Elder Friendly Causes has been consistently coming down.

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[31] Aiscon.org, (6th Dec,2024), https://www.aiscon.org/aiscon23/wp-content/iploads/csr-speaker23/MK Raina-VP-AISCON-CSR-Committee.pdf.

Schedule VII of the Companies Act 1956, lists the permissible CSR activities that a company obligated under Section 135 can include in mandatory spending out of net profits.[32]

Clause (iii) of the referred Schedule includes setting up old age homes, day care centers and such other facilities for senior citizens

This offers forward-looking companies, the avenue to play a significant role in Elderly care which does not appear to be sufficiently addressed having regard to the extent and complexity of the problem.

1. Old Age Homes for elders including Ex-employees: While spending for employees in the guise of CSR is prohibited by the statute, an obligated company may consider setting up and maintaining of old homes, day care centers or related facilities for elders in their area of operation. The beneficiaries can include elders who retired employees of the Company are also as they no longer fall into the category of “employees” and thus improve their image with their workforce of being caring employers. [33]
2. Engaging services of Elders to strengthen work-force: the elderly population generally has to retire from their jobs, as they reach pensionable age. In India, the pensionable age in government and larger corporations is in the 55-60 range. In comparison, the pensionable age in several western countries is around 70 years. This elderly section comprising those who are professionals or possess specialized skills and experience, present a good opportunity for companies

[32] Schedule 7 of Companies Act,2013,Corporatelawreporter.com, (6 Dec,2024,7.00 PM),http://corporatelawreporter.com/companies_act/schedule-7-of-companies-act-2013-activities-which-may me-included-by-companies-in-their-corporate-social-responsibility-policies/.

[33] George Abraham Kurian, supra note 14

to hire on contractual or part-time basis, due to their availability and willingness to work. [34]

HelpAge India Research Report of 2017 on Elderly Abuse indicates that though there is demand for post-retirement work, though not among many Elders. Some relevant findings are as follows: Demand is more among men (18%) than women (11%). In 65-70% of cases, Elders did not get the job applied for, or could not continue because of adverse circumstances. Employing elders can increase the percentage of the working population and improve contributions to the country's Gross National Product (GNP).[35]

3. Promoting healthy ageing:

WHO (2014) has suggested a Regional Strategy for Healthy Ageing (2013-2018) which seeks to promote care of older persons through the life-course approach Healthy ageing is viewed as a process that spans the entire life course and that can be relevant to everyone, not just those who are currently free of disease. The five proposed strategies (WHO, 2017) are:

- Commitment to action on healthy ageing in every country;
- Developing age-friendly environments;
- Aligning health systems to the needs of older populations;
- Developing sustainable and equitable systems for providing long-term care (through home, communities and institutions);
- Improving measurement, monitoring and research on healthy ageing

[34] Id. At 34
[35] Helpageindia.org, supra note 15

Indian companies can play a key role in supplementing governmental initiatives through CSR projects aimed to engage elders and support healthy ageing for Elders.

Elderly citizens comprise a valuable and respected segment of the population and their well-being is of utmost importance for harmonious existence for all societies in the years to come.

Persons with disabilities and CSR

The World Health Organization (WHO) states disabilities is a condition where a person experiences limitations due to a physical disability, making it difficult to access all public facilities and infrastructure.[36] In protecting people with disabilities from various forms of discrimination, especially discrimination in finding work and in the work environment, various policies within the framework of corporate social responsibility are needed.

The intersection of CSR and disability remains relatively overlooked[37]. Disability affects almost 15 % of the global population represents an important yet vulnerable demographic group

Basic idea: CSR emphasizes the ethical and moral obligations of businesses towards stakeholders beyond shareholders, encompassing employees, customers, communities, and the environment. Disability inclusion, on the other hand, entails creating environments and opportunities that enable persons with disabilities to participate fully and equally in all aspects of life. Most companies want to positions themselves in the long-term business sector as a reliable and 'socially responsible entity'.

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[36] Disability,Who.int, (6 Dec,2024,9.00 PM), https://who.int/health-topics/disability#tab=tab_1.

[37] Saloni Sharma, supra note 8

Persons with disabilities continue to face barriers to full participation in society, which includes employment, education, and access to goods and services. Societal response to the issue of disability is a 'medical' focusing on 'flaws' and 'weaknesses and thus therapy and cure- based. The social response looks at them as a different category of people and places the burden on the society to facilitate their life. This is invariable connected to the idea of 'normality' in the context of human beings. The idea that there is a person with normal abilities' and a 'person with disabilities. Thus, the begins the social construction of ideal and normal kinds of humanities. In this context, the integration of disability inclusion within CSR frameworks is a matter essential for sustainable and inclusive development. This can ensure equal opportunities, accessibility, and participation for persons with disabilities across all aspects of business operations, including employment, products and services, and community engagement

According to WHO an estimated 1.3 billion people experience significant disability.[38] This represents 16% of the world's population or 1 in every 6 of us.[39] Some persons with disabilities die up to 20 years earlier than those without disabilities[40]. Persons with disabilities have twice the risk of developing conditions such as depression, asthma, diabetes, stroke, obesity, or poor oral health.[41] Persons with disabilities find inaccessible and unaffordable transportation 15 times more difficult than for those without disabilities[42]. Health inequities arise from unfair conditions faced by persons with disabilities, including stigma, discrimination, poverty, exclusion from education and employment, and barriers faced in the health system itself. Thus, international organizations, such as the

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[38] Who.int, supra note 35

[39] Id. at 38

[40] Id at 39

[41] Id. at 40

[42] Id. at 41

United Nations and the World Bank, have highlighted disability as a key development issue, leading to increased advocacy efforts and policy initiatives. Many countries have enacted legal frameworks which include provisions related to accessibility, reasonable accommodations, non - discrimination, and employment quotas for persons with disabilities. Compliance with these regulations is a critical aspect of CSR for companies operating in these jurisdictions.

The Convention on the rights of Persons with Disabilities requires State parties to ensure that persons with disabilities have access to the same range, quality and standard of free or affordable health care as other people.[43]

The World Health Assembly Resolution WHA74.8 on the highest attainable standard of Health for persons with disabilities calls for Member states to ensure that persons with disabilities receive effective health services as part of universal health coverage, equal protection during emergencies and equal access to cross-sectoral public health interventions. Disability inclusion is crucial to achieving Sustainable Development Goals and global health priorities to achieve health for all.[44]

Some leading companies have developed comprehensive policies and initiatives to promote disability inclusion within their organizations. These initiatives may include accessible workplace design, reasonable accommodation policies, diversity and inclusion training, and support programs for employees with disabilities.

One of the key areas of focus for CSR related to disability is employment practices. Companies are increasingly recognizing the value of hiring and retaining employees with disabilities, not only as a matter of social responsibility but also for the benefits

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[43] Saloni Sharma, supra note 8

[44] Id at 43

they bring to the workforce in terms of diversity, innovation, and talent. Companies should collaborate with educational institution for the persons with disabilities and create 'incubation centers' whereas some basic/ enhanced employability skills may be honed among such individuals for a substantial time which can create exact but limited skill sets that organizations look for in its human resources.

In an era of ever increasing white- collar crimes[45], persons with disability with their limitations may be the 'alternative' set of human resources that companies need to uphold ethical-moral standards.

CSR lays impetus on designing products and digital platforms that are usable by people with diverse abilities, as well as providing alternative formats and assistive technologies to facilitate access. Many companies are engaging in partnerships and collaboration with disability organizations, government agencies, and other stakeholders to advance disability inclusion. These partnerships enable companies to leverage expertise, resources, and networks to create more impactful CSR initiatives.[46] Increasingly, companies are recognizing the importance of measuring and reporting on their disability - related CSR activities.

Case studies of leading companies across various industries provide valuable insights into innovative approaches to disability inclusion, including accessible employment practices, product design, and community partnerships[47]. By integrating disability inclusion within CSR frameworks, businesses can not

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[45] Claglobal.com, https://www.claglobal.com/insights/counteracting-the-rise-in white-collar-criminality/.

[46] Boris Miethlich, Ľudomír Šlahor, *Employment of persons with disabilities as a corporate social responsibility initiative: necessity and variants of implementation*, CBU INTERNATIONAL CONFERENCE ON INNOVATIONS IN SCIENCE AND EDUCATION, (2018)

[47] Saloni Sharma, supra note 8

only enhance their social impact but also contribute to more inclusive and sustainable development. However, achieving meaningful disability inclusion requires sincere efforts from businesses, policymakers, civil society organizations, and other stakeholders.

Disability inclusion strategies within the organization presented in the form of a table:

Table: Measures as elements of CSR initiatives to promote the employment of PWD in companies	
Scope	Measures
Working Environment	Accessibility (barrier free), universal workplace design strategies, technologies, barrier free corporate website
Corporate Culture	Promoting a diversity climate, encouraging PWD to form networks or interest groups within the company
Human Resources	Sensitizing employees and managers, providing a barrier-free recruiting process, participation in job fares, offering internships, trainings and placement programs as well as entry-level positions to disburden the entry of PWD in labor, leadership development opportunities for PWD, providing role models within the company
Job	Adapted, flexible and/or irregular working hours, telecommuting, adjustments of the job profile
Management	Signal the willingness to employ PWD (internally and externally), define the

	commitment in terms of actions, provide incentives for employees regarding the promotion of employment of PWD
Source	Boris Miethlich, Ľudomír Šlahor[48]

Conclusion

Thus, there is potential for the goal of inclusive development of 'vulnerable' sections of society within the CSR framework. The CSR projects have proven to be beneficial for both the companies social standing and long-term brand equity, at the same time creates solutions to social problems (within the context of this study). Studies by Harvard business review has shown, CSR activities increase employee motivation and employee loyalty.[49] It may lead to increased costs, it may also reduce costs in some cases, it may lead to increased revenue for the company. It generates 'goodwill' for an organization which cannot be quantified in material terms. Most companies seem disinclined to completely integrate CSR with their business strategies and goals and rather end up developing separate yet cogent CSR program.[50] However, the many programs seem to suffer from lack of logic and poor coordination as studies suggest.[51] The way forward seems that most companies should focus on developing coherent CSR programs and implementation strategies for optimum positive outcomes for all stakeholders viz. profit, people and the planet.

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[48] Bori Boris Miethlich, Ľudomír Šlahor, supra note 45.

[49] V. Kasturi Rangan, Lisa Chase and Sohel Karim,*The Truth about CSR*, Harvardbusinessreview.org, (6 Dec,11 PM,https://hbr.org/2015/01/the-truth-about-csr,).

[50] Id. at 49

[51] Id. at 50

CHAPTER 12

THE ROLE OF AN AUDITOR AS A WHISTLE-BLOWER OF CORPORATE FRAUD UNDER THE INDIAN LEGAL FRAMEWORK: AN ANALYSIS

Rinita Das

Introduction

Whistle-blowing is the practice of reporting any fraud, illegal or dubious activity of the company like corruption, discrimination, poor governance, insider trading, data mishandling, fraud and so on. It is defined as "disclosure by organizational members (former and current) of illegal, immoral or illegitimate practices under the control of the employers, persons or organizations that may be able to effect actions" (Dozier and Miceli, 1985[1]). But, the corporate legal framework of India does not define the term. The entire process raises an alarm or attention for public interest promoting good corporate governance. The greatest benefit of whistleblowing is to raise red flag before the problem aggravates. This doctrinal study seeks to explore the position of the auditors as a whistle-blower under the Indian corporate law regime along with few instances of the whistle blowing and the nature of the punishment imposed by the court.

Within the model of corporate governance, the auditors are entrusted with the responsibility to detect the existing irregularity of the financial statement that is prepared by the management and give an unbiased opinion of the same. The auditor's report details the company's actual corporate governance practices. Therefore, the auditors are presumed to

[1] Janelle Brinker Dozier And Marcia P. Miceli ,*Potential Predictors of Whistle-Blowing: A Prosocial Behavior Perspective* ,ACADEMY OF MANAGEMENT REVIEW Vol. 10, No. 4 (1985) https://doi.org/10.5465/amr.1985.4279105

be acting as the guardian of the company's financial integrity for the stakeholders. The importance of audit function is identified by Jensin and Meckling (1976)[2] who stated that "audit is a type of activity that increases the value of the firm". In the course of audit function, it is the public expectation of the auditors to detect fraud and raise red flags.

Auditors as Whistle-blowers of the corporate fraud

Auditors have access to the company's financial information and consequently they are able to identify any existing financial fraud sharing an overlapping responsibility of disclosing the fraud for the benefit of the stakeholders. In corporate fraud, the whistle blowing is done by the following:

a. The statutory auditors - They are in charge of confirmation and authentication of the financial statements. Both internal and external data related to the company is available to the auditors and they are responsible to analyze the management's financial operations. Auditors can be considered to be the representative of the stakeholders and accountable to disclose any irregular or illegal action that is unearthed in the process of preparing the financial statements. Furthermore, audit failure raises questions on the integrity of the auditors.
b. Internal auditors - They are the employees of the company under a contract of employment and can blow the whistle on the existing corporate fraud if they get any information about the company's wrongdoing in the course of their employment. The internal auditors enjoy the position of accessing the sensitive financial information and therefore can be better placed to be a whistle blower of corporate financial frauds.

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[2] *M.C. Jensen and W.H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, Journal of Financial Economics, 3, 305-360,1976*

c. However, the organizational norm may discourage the whistleblowing. The implication of audit of financial statements means the detection of fraud or any sort of irregularity that is apparently reflected in the documents produced by the management. Although this happens to be a great public expectation towards the auditors.

Other whistle-blowers may be the following:

a. Lawyers- The corporate fraud can also be disclosed by the lawyers. Cofee (1986[3]) states that the large corporate fees that are given to the corporate lawyers act as an incentive to them to disclose fraud.
b. Investors- The fraud should be disclosed by the investors and their delegates. “The incentive to monitor the risk of their investment falls on the equity holders, debt holders and their delegates like the auditors, analyst, rating agencies” (Fama, 1990[4]). Therefore, whistle blowing needs to be done by them.
c. Managerial personnel- For frauds in the nascent stage, the monitoring of the board of directors may be effective to prevent it, if they themselves do not indulge in the same.

The unique position of the auditors as whistle blowers in corporate fraud

Auditors with specialized knowledge, skill, expertise and access to the information relating to the company enjoy a unique position to disclose the commercial viability of the company and consequently predict the future of the company. The auditor’s

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[3] John C Cofee *Understanding the Plaintiffs’ Attorney: The Implication Of The Economic Theory For Private Enforcement Of Law Through Class And Derivative Actions*,COLUM. L. REV. (1986) 669

[4] Eugene F. Fama, *Contract Costs and Financing Decisions*, THE JOURNAL OF BUSINESS, Vol. 63, No. 1, Part 2: A Conference in Honor of Merton H. Miller's Contributions to Finance and Economics (Jan., 1990), pp. S71-S91 (available at https://www.jstor.org/stable/2353261

objectivity, independence and professional skeptics with an interrogative observance are censorious of the audit experience which increases the value of the audit. Moreover, during audit, they access information which helps them to mitigate doubts about their client's instability or facts that enables their client i.e. the company to continue their existence. They exercise appropriate measure of suspicion and remain sensitive to reduce the ill effects of the undisclosed material misstatement on the third party.

The need of a defined auditor's role agrees that the audit gives credibility to the financial information in the perspective that they are likely to detect fraud existing in the company while discharging their audit function. For ensuring the credibility of the financial information therefore, the auditor exercises due care, skill and diligence in the application of the Acts, rules, regulations and standards so that the fraud will automatically come to light. All the above-mentioned factors give a reasonable assurance against financial fraud commission. Additionally, a satisfactory auditor's report facilitates hope of assertion against corporate fraud among the public due to the extensive array of financial and non-financial information that is comprehensively reflected therein.

Section 143(3)[5] states the required information to be mentioned in the auditor's report. The section reads: -

The auditor's report shall also state—

a. whether he has sought and obtained all the information and explanations which to the best of his knowledge and belief were necessary for the purpose of his audit and if not, the details thereof and the effect of such information on the financial statements;
b. whether, in his opinion, proper books of account as required by law have been kept by the company so far

[5] Companies Act, 2013

as appears from his examination of those books and proper returns adequate for the purposes of his audit have been received from branches not visited by him;

c. whether the report on the accounts of any branch office of the company audited under sub-section (8) by a person other than the company's auditor has been sent to him under the proviso to that sub-section and the manner in which he has dealt with it in preparing his report;
d. whether the company's balance sheet and profit and loss account dealt within the report are in agreement with the books of account and returns;
e. whether, in his opinion, the financial statements comply with the accounting standards;
f. the observations or comments of the auditors on financial transactions or matters which have any adverse effect on the functioning of the company;
g. whether any director is disqualified from being appointed as a director under sub-section (2) of Section 164;
h. any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith;
i. whether the company has adequate internal financial controls with reference to financial statements in place and the operating effectiveness of such controls; (j) such other matters as may be prescribed."

Furthermore subsection (4) states that "Where any of the matters required to be included in the audit report under this section is answered in the negative or with a qualification, the report shall state the reasons therefor".

All the significant information relating to the company reflected in the books are exposed to the auditors and it is their responsibility to check the compliance of the Standards, Acts and rules; prepare the Report based on data provided by management that will be presented at the AGM. Furthermore, if

necessary, they will provide suggestions for improvement and notify the proper authorities of any suspicious or fraudulent business activity. Therefore, the audit report gives a comprehensive view of the financial information of the company which makes the role of the auditors significant for the company. It ensures the operation of the company within the laws as well as prevention of fraud or illegal activities. They also identify potential risk associated with the company's financial statements. Some acts of whistle blowing that widely impacted the corporate world reflect the importance of the position of not only the auditors but other stakeholders as well.

- Firstly, Micheal Woodford who was the president of Olympus Corporation for six months was a whistle blower. He claimed that an acquisition's erroneous payment led to costs for asset impairment on the company's account. After being removed, he insisted on asking about the over $1 billion in fees Olympus had paid to mysterious firms to conceal losses. He also suggested that organized crime was involved in the concealing of investment losses of over 117.7 billion yen. The corporation acknowledged that there were improper accounting procedures on November 8, 2011, and that the funds had been used to pay for investment losses that had occurred in the 1990s. However, Tsuyoshi Kikukawa, the former president, Hideo Yamada, the auditor, and Hisashi Mori, the executive vice president, were blamed. KPMG and Ernst & Young were the company's auditors.
- Secondly, Carmen Segarra who was a former employee of the New York Federal Reserve Bank became the whistleblower. In 2011, Segarra was hired by the bank as a bank examiner, responsible for evaluating and regulating some of the largest banks in the United States. Segarra raised concerns about the bank's regulatory practices and its relationship with Goldman Sachs. She alleged that the Bank had a culture of deference to the banks it regulated, which compromised

its ability to effectively carry out its oversight duties. Segarra claimed that she was pressured by her superiors at the New York Federal Reserve Bank to change her examination findings regarding Goldman Sachs and was ultimately fired in 2012 after refusing to do so. She sued the New York Federal Reserve Bank for wrongful termination, alleging that she was retaliated against for refusing to compromise her independence as an examiner.

In both the above-mentioned cases the retaliation against whistle-blower is very apparent.

- Thirdly, Sherron Watkins is an American businesswoman who gained prominence for her role as a whistleblower in the Enron scandal, one of the largest corporate scandals in history. Houston, Texas-based energy corporation Enron that collapsed in 2001 due to widespread accounting fraud and deceptive financial practices. In 2002, Sherron Watkins, who was a vice president at Enron, sent an anonymous memo to the then Enron CEO Kenneth Lay, warning him about accounting irregularities and the potential for a financial disaster. The memo, later known as the "Watkins memo," outlined her concerns about questionable accounting practices and the use of off-balance-sheet entities to hide debt. Watkins' memo was a crucial internal communication that shed light on the fraudulent activities taking place within Enron. Her actions helped to expose the systemic corruption and financial manipulation at the company After the Enron scandal became public and the company filed for bankruptcy, Watkins voluntarily revealed her identity as the whistleblower. She testified before Congress and cooperated with investigators, providing valuable insights into the inner workings of Enron and the misconduct that occurred.
- Fourthly, in 2004 Peter Rost was the former Vice president of Pfizer reported the accounting irregularities

> of Wyeth, a pharmaceutical company to the management. Soon after, he was transferred to New Jersey as retaliation. He sued Wyeth and Pfizer and was fired from Pfizer. However the case was settled out of court on undisclosed terms.

Employees and internal auditors blew the whistle in the following two cases. Firstly, in 2012, Antoine Deltour, a former employee of Price Waterhouse Coopers (PwC) in Luxembourg, became involved in a high-profile whistleblowing case known as the LuxLeaks scandal. Deltour leaked confidential documents from PwC that revealed tax avoidance schemes used by various multinational corporations operating in Luxembourg. The leaked documents shed light on the complex arrangements and loopholes used by these companies to minimize their tax liabilities. Antoine Deltour's actions brought international attention to the issue of corporate tax avoidance and prompted discussions on the need for greater transparency in tax systems. Secondly, Cynthia Cooper is an American accountant who played a significant role in uncovering the financial fraud at WorldCom, which was one of the largest telecommunications companies in the United States. The fraud, which took place in early 2000, involved improper accounting practices and inflated financial statements. As the Vice President of Internal Audit at WorldCom, Cynthia Cooper and her team began an investigation into suspicious accounting entries and irregularities. Through their diligent work, they discovered a massive accounting fraud done by the top executives within the company. Cooper and her team found that expenses were being capitalized to inflate profits, resulting in an overstatement of the company's earnings. The fraud amounted to billions of dollars, making it one of the largest corporate scandals in history at that time. In 2002, Cynthia Cooper took the data she had obtained to the board of directors of the company. This prompted an internal investigation and eventually led to the disclosure of the fraud to the public.

Although the management of the company is responsible to prepare the financial statements and make the related disclosures but audit of these financial statements is the principal responsibility of the auditors. Therefore, the public look up to them for the truthfulness of the financial information relating to the company as provided by the management. Additionally, the audit report prepared by the auditors contains an unqualified opinion as the accuracy and the fairness of such statements that add credibility to the reported financial statements and the business performance and ultimately the value of the investment of the shareholders.

Indian laws on the Auditor's duty to blow the whistle

There is no provision in the Companies Act 2013 that directly imposes the duty on the auditor to blow the whistle in case of detection of fraud in the company. But there are some provisions that enable the authorities and the stakeholders to get the information of the fraud while the auditor performs his audit function which are discussed herein:

- The auditor has the responsibility of reporting fraud under Section 143(12) of the Act. The section states that "if an auditor in the course of performance of the duties has reason to believe that an offence involving fraud has been committed by the company officers and employees, he shall report the matter to the Central Government within 60 days along with the Audit Committee response if the fraud is more than Rs. 1 crore". The fraud needs to be reported as per CARO[6] in the Annual Reports. "In case the amount of fraud involves less than Rs. 1 crore, then the auditor has to report it to the Board of directors. Hence the intimation relating to the existing or past fraud is sent to the regulatory authorities for them to take action. It is also brought to the notice of the directors".

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[6] Companies (Auditor's Report) Order 2020

- For the resignation of the auditors, section 140(2) states that "an auditor needs to file a statement of resignation as provided in the rules to the Registrar of Companies within thirty days from the date of the resignation. In case of the government company, the statement needs to be filed with the Comptroller and Auditor General of India. The statement shall contain the facts and reasons of his resignation". This provision is mandatory. If an auditor fails to file the statement, then he shall be liable to a "penalty of Rs. 50,000 or an amount that is equal to his remuneration, whichever is less. For a continuing offence, the auditor shall be liable to a further penalty of Rs. 500 each day subject to a maximum of Rs. 5 lakhs". According to the rules, the board of directors must convene a meeting soon after the resignation submitted by the auditor and appoint another auditor and consequently inform the Registrar of Companies about the new appointment. Therefore, for every appointment and removal of the auditor, the regulatory authorities are informed. Sudden resignation of the auditor discloses the reasons to the authorities as well and therefore if they find something suspicious, they can conduct examination into the matter and unearth any sort of irregularities, if exist.
- Section 177(9) requires "every listed company to establish a vigil mechanism for directors and employees to report genuine concerns to the audit committee". By encouraging employees who may have information about the alleged fraud to come forward and voice their concern without fear, a company can uphold the highest standards of ethical and legal conduct. Therefore, it provides an opportunity to blow the whistle to the management about the suspected fraud or any sort of unethical behavior.
- Section 146 states that "it is the responsibility of the auditor to attend the annual general meeting (AGM)". The audit report has to be placed in the AGM so that the investors get an opportunity to clarify any financial

information that is suspicious and confront on any of the statement mentioned in the Report.

- SA 240 specifies the "responsibility of the auditors to obtain reasonable assurance that the financial statements are free from any material misstatement", maintain professional skeptism throughout the audit. In the course of audit they have to investigate into inconsistent response of the management relating to their explorations, inquire from management and internal audit team whether any instances of fraud has occurred in the past and obtain respective views of the same, evaluate the fraud risk factors which is present from the information given, identify any unfamiliar connection while performing the methodical procedure and analyze them to determine the likelihood of major misstatement as a result of fraud and assess the audit evidences. Although, directly the laws do not impose any responsibility on the auditors to identify fraud and blow the whistle but indirectly they are responsible to identify fraud that may have occurred in the company and reflected in the documents that are produced to them.
- SA 250 states that if an auditor suspects that the management or those in charge of the management are involved in non-compliance to the laws, rules or regulations, then he shall inform the said non-compliance to the next higher level or to the audit committee of the supervisory board. In other cases, the auditor shall take legal advice if no such authority exists

In India, it is found that the courts have imposed penalties on auditors for having failed to exercise their objectivity, skill and professional skeptisism or collude with the management for the commission of fraud. However, there are many instances when the court has convicted the auditors for having colluded with the management in order to commit fraud. Hence, the auditor's failure to detect fraud was very apparent. The punishment imposed by the courts ranges from reprimand to suspension from practice including fine and imprisonment. In some cases,

the court held that auditors are liable for gross misconduct for failing to disclose material irregularity in the books and only reprimanded the auditors. In CA Institute V V.K. Madhava Rao(1956)[7] the chartered accountants were unexperienced and acted without due care and diligence, in giving certificates for the income tax purpose but not for getting any benefit. The court held that the punishment of suspension will be too severe and strongly reprimanded him.

In Registrar of Companies V Arunajatai (1962)[8] without checking the transactions, the auditor approved the textile company's balance sheet. The debts which were given to another company with the same promoters were written as losses. The Madras High Court held that there were adequate reasons to arouse suspicion from the profit and loss account for the auditors to carry on the verification, which the auditors have not done. The High Court took into consideration the reputation of the company that actually swayed the auditors and determined that there was no mala fide intention and therefore the High Court strongly reprimanded the auditor. Lack of mala fide intention on the part of the auditor reduced the punishment. In this case, the court also enumerated that the duties of the auditors are to examine the accounts and records maintained by the company and to ensure that they reflect the transactions correctly and supported by the authority. Similarly in Punjab State Government V K.N. Chandla (1972)[9] the auditor certified that the funds of the government was used appropriately wherein most of the funds were unused. The auditor did not dispute the gross negligence of his conduct but claimed for a reduced punishment on the ground that he had no ulterior motive and there was no loss caused to the state of

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[7] AIR 1956 Hyd 205

[8] SCC Online Mad 118

[9] SCC Online HP 66

Punjab and the remaining money can be paid back. The High Court strongly reprimanded the auditor.

In Chief Controller of Exports, New Delhi v G.P.Acharya (1964)[10] the chartered accountants has certified that the statements were true which in fact was not true. They claimed that the gross clerical error was by the staff. The council found the accountant to be unfit for being the member for the institute. The court held that he should have seen the documents himself without reposing trust on the staff who produced the documents. For the negligence and carelessness of the auditor, the court strongly criticised him and gave him a severe warning that he should be more responsible in future. But did not consider him unfit for the profession.

On the contrary in CIT Madras V G.M. Dandekar (1953) it is seen that the court held that it is not the responsibility of the CA to investigate whether the_accounts produced by the client is correct or not. ICAI v Somnath Basu (2006)[11] the investment of the bank is incorrectly credited to the account of brokers and the auditors failed to report the irregularity. But the High Court did not find it as a deliberate recording of the misstatement and lack of moral turpitude. The court held that if the auditor has acted negligently or inefficiently, he cannot be held liable for professional misconduct without an element of ill motive present and therefore the court held that the auditor is not liable for gross negligence and absolved the charges by giving a warning.

In ICAI V P.K.Mukherjee (1968)[12] the Anandabazar Patrika had the Employees Provident Fund that was managed by the trust and the board made certain advances in contravention of the rules. The director issued cheques to repay but at the request

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[10] AIR 1964 Cal 178

[11] SCC Online Cal 590

[12] 1968 AIR 1104

of the management the cheque was kept with the trustees and not encashed. The auditors certified that the loans were granted by the company and adjustments made which was actually not done. It was alleged that the loans granted to the company was in contravention of the rules. The court held that the auditors are responsible for the professional misconduct as the auditors have failed to disclose the irregularity to the shareholders which shows that their conduct was wholly untrustworthy. The court was of opinion that the proper punishment would be the removal of the name from the register for a limited period of time but as the proceedings are pending for a long-time, the auditor was subjected to severe reprimand.

In Council for ICAI v Uma Shankar Jha (2016)[13], Jha was the concurrent auditor of bank of Punjab and the Sind, New Delhi. The objective of the concurrent auditor was to keep a check on the general audit and transactions of the newly opened accounts. But the auditors have to be more vigilant of a fraud that has been committed. The committee is of opinion that if the auditors would have been careful, they would have identified the modus-operandi of the fraud. The disciplinary committee has given full opportunity of being heard to the respondents. The court held the auditors responsible but left them with a strong reprimand. Therefore, ill motive is taken as a factor for imposing liability on the auditor.

In Deputy Secretary, Government of India v S. N. Dasgupta (1956)[14] the auditor was suspended from practice as he did not verify the cash in hand of the bank. The court further held that the lack of the bank's active concealment will not absolve the liability of the auditors for professional misconduct. The court held that, it is the duty of the auditor to inform the shareholders so that they may make the directors accountable to the actions

[13] 2016 SCC online del 4467
[14] AIR 1956 Cal 414

which the auditors failed and consequently the court ordered for the suspension of the auditors for two years.

In Superintendent of Police V Rajamany (1961)[15] the negligence of the auditor allowed the bank to indulge in fraudulent practices and the intentional wrongdoing of the auditor by allowing false entries in the books. The auditor stated that he believed the information to be true as it was furnished by the employees but he was convicted and suspended from practicing for three years. This was primarily for the fact that the auditor has delegated the duty to the subordinates without considering their capability which amounted to gross dereliction of ones' duties. Therefore, the court did not consider 'mens rea' or the moral turpitude of the auditor in the discharge of the professional activities.

In Bikhram Chatterjee and ors. V Union of India (2018)[16] there was a mismatch of the tally data with the accounts and the groping has not been sent to the forensic auditors by the auditors of the company. For non-cooperation with the forensic auditors, the court expressed strong displeasure and directed the auditors to hand over the documents enlisted and if they express their unwillingness, they should record reasons and hand it over. In case of violation of the order, the court considered the auditor guilty of professional misconduct. Therefore, the courts held the auditors liable for professional misconduct if they failed to cooperate with the regulatory authorities.

From the above cases, it can be inferred that the courts have held the auditors liable for professional misconduct for having failed to perform their obligations under the law. The courts have strongly reprimanded the auditors for gross negligence if there is no loss caused or no personal gains that the auditors

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[15] SCC Online Mad 86.
[16] 2018 SCC online SC 3390

have derived from the negligent conduct. This included cases when the auditors have failed to identify the fraud of the company due to carelessness. Furthermore, when the auditors have failed to detect fraud and gave a certificate that does not reflect the true financial condition of the company, the court has imposed varied penalties that ranged from suspension of the name of the auditor to strong reprimand. The false certificate proved the suppression of the facts or false entries but if it was result of gross violation of the duty of the auditors or failure to exercise reasonable care, then the court imposed severe punishment whereas if no loss was caused or the certificate was issued in the light of the facts that gave no opportunity to the auditors to unearth the truth hidden deep inside, the court strongly reprimanded the auditors and told them to be more vigilant in future.

Whistle blowing by auditor's v professional misconduct

In order to express his view on the company's financial accounts, the auditor obtains and discovers a lot of concealed information about the company's financial and non-financial characteristics. If he is substantially negligent in the performance of his professional obligations or fails to report a material fact that he discovers but was not declared in the financial statements, he will be held liable for professional misconduct. On the contrary, according to schedule II of the Chartered Accountants Act 1949, "a chartered accountant in practice shall be deemed to be guilty of professional misconduct, if he discloses information acquired in the course of his professional engagement to any person other than his client so engaging him, without the consent of his client". However, an auditor shall not be held liable for 'professional misconduct' if he is required by law to disclose such information. Therefore, the auditor shall have to maintain professional secrecy. On receiving any information that purports to reflect fraud in the organisation or any illegality, it is not their responsibility to disclose it to the authorities except as specified in section

143(12) of the Companies Act; or he cannot inform the income tax authorities about any evasion of taxes that the company or firm may have indulged in.

The auditor's report shall point out the commission of irregularity in the organisation, if any; and on filing of the auditor's report before the Registrar of Companies or placing the report before the shareholders in the AGM will make the commission of the irregularity or illegality public.

The auditor may disclose the information that he has received in the course of professional conduct on two specific cases-

a. If consent if given by the client, or
b. If he is required by law to disclose the information.

This provision of the Act is applicable to the chartered accountant in practice and not to the auditors under the contract of employment. Therefore, the statutory auditors as defined in Section 2(2) of the Chartered Accountants Act 1949 has some professional constraints for being a whistle-blower of corporate fraud. The section reads "chartered accountant in practice as a person who for a consideration of remuneration received or to be received,— (i) engages himself in the practice of accountancy; or (ii) offers to perform or performs services involving the auditing or verification of financial transactions, books, accounts, or records or the preparation, verification or certification of financial accounting and related statements or holds himself out to the public as an accountant; or (iii) renders professional services or assistance in or about matters of principle or detail relating to accounting procedure or the recording, presentation or certification of financial facts or data; or (iv) renders such other services as, in the opinion of the Council are or may be rendered by a chartered accountant in practice". The internal auditor playing the role of the whistle-blowers has no reservations in their operation.

An overview of the Factors promoting whistle blowing

Whistle blowing suffers immensely when there is an opportunity of retaliation and especially lack of protection to whistle-blowers against such retaliation is the most significant hindrance to whistle blowing. Whistle blowing is done by both, the insiders and the outsiders having access to the information that reflects the commission of fraud in the company. If whistle blowing is done by insiders, then in every possibility they may have to face retaliation of various types, ranging from dismissal to filing of law suits on flimsy grounds. Glazer and glazer 1989[17] opine that "job termination is the most common form of retaliation". This is apparent from the examples given hereinabove. Miceli et al (1994) in their study have identified that "the auditors who blow the whistle are most likely to lose the assignment of the fraud committing firm or company. Subsequent to the revelation, the auditor of fraud committing firm is more likely to be replaced after the fraud comes to light and the likelihood is much higher if the auditor himself blows the whistle".

The study of Arnold and Ponemon (1991[18]) shows that "internal auditors with low level of moral reasoning are unlikely to blow the whistle on wrong doing and this is particularly pronounced under the retaliation". Much earlier in 1986, Near and Miceli[19] inferred from their study that retaliation reduces the whistle blowing on the wrongdoing. Therefore, it is necessary to overcome the hindrances to the act of whistle blowing. The

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[17] M.P.GLAZER, , THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY ,New York, Basic Books, Inc, (1989)

[18] D.F. Arnold and L. A. Ponemon: 1991, I*nternal Auditors Perceptions of Whistle Blowing and the Influence of Moral Reasoning*:*An Experiment, Auditing,*A JOURNAL OF PRACTICE AND THEORY 10, 1991,pp.1–15

[19] Marcia P. Miceli, Janet P. Near, *Relationships among value congruence, perceived victimization, and retaliation against whistle-blowers*, Journal of Management, Volume 20, Issue 4,1994,Pages 773-794,ISSN 0149-2063,https://doi.org/10.1016/0149-2063(94)90030-2.

incentive of the auditors to blow the whistle is promoted by two factors;

1. Firstly, the internal factor that includes the moral and cognitive development of the auditors which is backed by his understanding of the professional and social commitment along with the desire of better career opportunities and reputation benefits, and stimulated by the following-
    - Financial Rewards: Offering monetary rewards, such as a percentage of the fines imposed or recovered funds resulting from the whistle blowing, can motivate individuals to disclose information about illegal activities. These rewards can serve as a form of compensation for potential risks and personal losses that the whistle blowers may have to face.
    - Job Security: Guaranteeing job security for whistle blowers by implementing policies that prohibit retaliation is vital. This includes protection against termination, demotion, or any other adverse employment actions as a result of whistle blowing.
    - Recognition and Public Appreciation: Acknowledgment and public recognition in the form of awards, certificates, or public statements of gratitude, to the whistle blowers for their contributions towards exposing wrongdoing can help foster a culture of accountability and encourage others as well;
2. Secondly, the external factors which include the enforcement of the law and the organizational structure of transparency and disclosure that by design blows the whistle on corporate fraud. The external factors can be stimulated by the following-
    - Legal Assistance: Providing legal aid or assistance to whistle blowers can help to start the complex legal processes involved in reporting

misconduct. This ensures that whistle blowers have access to the necessary resources and expertise to protect their interests,

- Whistle blower Support system: Establishing support programs that offer counseling, legal advice, and emotional support can assist whistle blowers in coping with the potential risk of loss that they may encounter. This support network helps to create a safe environment for reporting misconduct.

Conclusion

Whistle blowing is a significant aspect for early detection of illegal conduct or fraud. The auditors need to be given statutory protection against private action or any sort of retaliation for reporting of fraud or illegal activities which is a necessity for the discharge of their official function according to section 143(12) of the Companies Act 2013. The corporate regulatory framework of India ought to define the scope of fraud detected by whistle blowing or the acts on which whistle blowing is to be done along with the procedure thereof, giving security to the whistle-blowers against any sort of retaliation. The progressive corporate law regime of India suffers a vacuum in this aspect.

CHAPTER 13

JURISDICTIONAL ISSUES IN E-COMMERCE DISPUTES: CONFLICT OF LAWS

Monmi Gohain
Prerna Das

Introduction

> *"The rise of an electronic medium disregards geographical boundaries throws the law into disarray by creating new phenomena that need to become subject of clear legal rules but that cannot be governed satisfactorily by any current territorially based sovereign..."*
>
> \- David R. Johnson & David Post

Development and advancement in technology has greatly impacted the businesses. Now businesses are not restricted to a conventional mode of shop or one city or area, it has gone online and transcends boundaries. Commercial transactions now take place through digital mode and it has replaced the conventional methods of conducting business. Use of computers and Information Technology to conduct business by and between entities and individuals is termed as electronic commerce.[1] Electronic Commerce or e-commerce is now growing exponentially. This exponential growth has resulted in borderless e-commerce.

Disappearance of geographical borders has also brought a host of jurisdictional issues to courts. Borderless commercial transactions give rise to various challenges including tax jurisdiction, conflict of presiding laws, jurisdictional issues in

[1] K.SETH AND D.Y.CHANDRACHUD, COMPUTERS, INTERNET AND NEW TECHNOLOGY LAWS: A COMPREHENSIVE REFERENCE WORK WITH A SPECIAL FOCUS ON DEVELOPMENTS IN INDIA. Gurgaon, Haryana, India: LexisNexis,2022

conflicts, and many more. Jurisdictional complexities stem from the international nature of transactions, leading to uncertainty in applicable laws and forums. In jurisdictional issue pertaining to immovable property the laws to be applicable, forum to adjudicate, and enforcement authority is clear, that is based on where the immovable property is located. Nonetheless, the same is not the case with movable property and is specially complicated when talking in terms of e-commerce.

E-commerce has no boundaries and no territorial limits. No territorial limit implies that when in case of dispute, any court where the crime had been committed can try the suit or even where the accused has its place of business or resides. In conventional or traditional businesses, the territory is demarcated, and in case of any conflict the jurisdiction is very limited. However, this is not the case in e-commerce. For instance, an e-commerce business having its headquarters in India, doing business in multiple countries like UK, USA, China, Australia, New Zealand, etc. committed a corporate fraud effecting the population in these countries. Now the question arises that in which country's court the matter will be having the jurisdiction to try the case. Along with that, the issue can also be pertaining to which country's law will be applicable in such a matter. Moreover, there can be initiation of proceedings in multiple countries resulting in conflict of verdicts. When there is similar proceeding on-going against the same party in different countries, the corporate has the option to choose its court. A party when has the option to choose the court or jurisdiction where he wants his case to be tried, will choose the one which will give him the most favourable output. This is known as forum shopping.

Jurisdiction: The Concept

Jurisdiction in simple terms means the power of the court to hear and determine a case. The presence of the jurisdiction of the court is crucial to ensure the power of enforcement to a

court, without which the verdict of the court is of little or no value.[2] Conventionally, when we talk about jurisdiction, we talk about territorial jurisdiction with demarcated borders. However, this is not the case in matters of e-commerce. In the virtual world, there are no territorial boundaries. Cyberspace can be thought of as a single, unbounded space that transcends national boundaries. Further, with several steps involved in online shopping, it is reasonable to say that in case of a dispute it will be extremely difficult to determine which court will have a jurisdiction in the matter, due to the complex jurisdictional nature of such transactions.[3]

We need to first understand the concept of jurisdiction to understand the various areas where there is possibility and where conflicts arise in matters of conflict in e-commerce. Even though not always the conventional principles of determining jurisdiction will apply with equal force in the cyberspace. In this chapter, we discuss in depth the meaning of jurisdiction and the three prime pre-requisites of jurisdiction.

Jurisdiction in Traditional Sense

Meaning of Jurisprudence

"Jurisdiction" in simple terms means the power of a court to adjudge, i.e., to hear and determine a case.4 'Jurisdiction' is derived from the Latin word "Jurisdicto" which means authority to judge.5 Jurisdiction is the right and power of a court to interpret and apply the law in a particular geographic location.

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[2] N.Kamath, LAW RELATING TO COMPUTERS, INTERNET & E-COMMERCE: A GUIDE TO CYBERLAWS & THE INFORMATION TECHNOLOGY ACT, 2000 AS AMENDED BY THE INFORMATION TECHNOLOGY (AMENDMENT) ACT, 2008 WITH RULES, REGULATIONS AND NOTIFICATIONS. Delhi,Universal Law Pub. Co, 2009

[3] Sengupta, supra note 2.

[4] Seth & Chandrachud, supra note 1.

[5] S.R.MYNENI,INFORMATION TECHNOLOGY LAW: CYBER LAWS. HYDERABAD, ASIA LAW HOUSE,2014.

Definition of jurisdiction is given under Black's law Dictionary as

> *" The power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favour of or against persons (or a res) who presents themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient."*

A court not having jurisdiction cannot decide a matter and the plaintiff is to establish that the court where he has filed his case has jurisdiction.[6] Jurisdiction is primarily of three types- "pecuniary", "territorial/ personal", and "subject-matter jurisdiction". All the three categories of jurisdiction are required to be satisfied for a verdict delivered by court to have validity and enforceability. "Pecuniary Jurisdiction" refers to jurisdiction which is based on the limitation of amount of claim which is made in that proceeding. This category of jurisdiction is divided in a hierarchical order. "Subject-Matter Jurisdiction" refers to the court's power to hear and give judgment on certain cases that can be categorized in a subject matter domain. The court where a legal dispute is or a claim is filed, ought to have authority to decide an issue pertaining to a specific subject matter or domain. "Personal or Territorial Jurisdiction" is the authority of a court to hear and decide a matter against a particular set of persons. This means the defendant should belong to "territorial jurisdiction" in which the forum is situated.[7] "Territorial jurisdiction" is further divided for adjudicating cases related to products into immovable and

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[6] Charles, supra note 3.

[7] Seth & Chandrachud, supra note 1.

movable property.[8] Territorial jurisdiction pertaining to immovable property is much simpler than in case of movable property especially in terms of e-commerce.

Pre-Requisites of Jurisdiction

Jurisdiction requires three pre-requisites for it to be the valid and enforceable jurisdiction. These three requisites are: -

a. Determining the jurisdiction to Prescribe
b. Determining the jurisdiction to Adjudicate
c. Determining the jurisdiction to Enforce

The most important prerequisite is having the jurisdiction to prescribe. If this condition is satisfied, we examine if there is jurisdiction to adjudicate and then jurisdiction to enforce. These three categories of jurisdiction are dependent on one another and share common parameters.[9]

"Jurisdiction to Prescribe"

1. The jurisdiction to prescribe refers to the jurisdiction of a nation's rules and regulations to apply to a certain group of people. The authority and privilege of a State to apply its laws to individuals, their actions, possessions, or interests, as well as their position, interpersonal connections, business, or other entitlements inside that State, is known as its jurisdiction to prescribe.[10]
2. Simply stated, a country has jurisdiction to prescribe law with respect to: -
    a. "Conduct that, wholly or in substantial part, takes place within its territory;
    b. The status of persons, or interests in things present within its territory;

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[8] Sengupta, supra note 2.
[9] Julia Alpert Gladstone, Determining Jurisdiction in Cyberspace, The Zippo Test or Effects Test? INSITE, (2003).
[10] Seth & Chandrachud, supra note 1.

c. Conduct outside its territory that has or is intended to have substantial effect within its territory;
d. The activities, interests, status; or relations of its nationals outside as well as within its territory; and
e. Certain conduct outside its territory by persons who are not its nationals that is directed against the security of the country or against a limited class of other national interests.[11]

These principles are popularly known as the territorial principles, nationality principles, the effect principles, and the protective principles, respectively."[12]

To determine whether a state has a jurisdiction to prescribe there are certain theories. The theories namely are- "subjective territoriality", "objective territoriality", "nationality", "protective principles", "passive nationality", and "universality".[13] All these theories have its own merits and limitations. For instance, the theory of objective territoriality was applied in Playboy Enterprise Inc. v. Chuckleberry Publishing, Inc.[14].

It is one of the first landmark case involving "cross border jurisdictional" dispute on the internet. "The defendant based out of Italy, displayed, and distributed obscene photographs to internet users including customers based in the USA as a paid service. The defendants knew that their market was US customers. The court took the view that distribution of such obscene material in the USA violated an order prohibiting the use of Trade Mark of 'Playmen' that is distributed in USA. The order put an injunction on the access to website in USA.

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[11] Section 402, 2043 and 421, Restatement (Third) of Foreign Relations Law of the United Nations, 1987.

[12] Seth & Chandrachud, supra note 1.

[13] Id.

[14] Playboy Enterprise, Inc. v. Chuckleberry Publishing; Inc, (1996), 939 F Supp 1032 (S.D.N.Y. 1996)

Nonetheless, the order could not ban completely the rights of the defendants to sell its magazine to the remaining internet users in other jurisdictions beyond its territorial control."

Jurisdiction to Adjudicate

Simply put, "jurisdiction to adjudicate" refers to the court's capacity to hear a case and render a decision. A country must possess the "jurisdiction to prescribe" the law it intends to apply in order to resolve the dispute to have the jurisdiction to adjudicate.[15] Jurisdiction to adjudicate includes the power of the court to judge that particular matter, and facts in question must be subject to the tribunal's investigation under law. [16]

To determine whether a court holds the jurisdiction to adjudicate a case or not, number of factors are considered, which are: -

a. Prong of reasonableness.
b. Direct or indirect presence of the defendant within the Forum State (state in which those proceedings are being heard), and his activities along with its effect.
c. In case of dispute related to property within a Forum State, the location of the property in the forum state.
d. Conduct of the defendant outside the State that may have a direct and foreseeable impact in a forum State.
e. Defendant's nationality or residence.[17]

It is pertinent to note that just because jurisdiction to adjudicate is found to be reasonable does not mean that the Forum State also has the jurisdiction to prescribe. It is also possible that the State may have the authority to prescribe but not to adjudicate. For instance, Section 1(2) r.w.s. 75 of the Indian Information

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[15] Seth & Chandrachud, supra note 1.

[16] A.RASTOGI AND A. REGIDI,CYBER LAW: LAW OF INFORMATION TECHNOLOGY AND INTERNET. Gurgaon, Haryana, 2014, India: LexisNexis.

[17] Section 402, 403 and 421 of the Restatement (Third) of Foreign Relation Law, 1987.

Technology Act, 2000 states that it applies to "any offence or contravention committed outside India by any person apart from its application to the whole of India." Further, Section 75 of the Act applies to "any offence or contravention committed outside India by any person irrespective of his nationality if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India." Thus, this implies that the Act has jurisdiction to prescribe over non-residents who may commit an offence outside India. However, the jurisdiction to[18] adjudicate will be a challenge; particularly as such person will need to be extradited if there is a treaty between the two countries in question.[19]

Jurisdiction to Enforce

1. The "jurisdiction to enforce" denotes the power of a state to direct someone to comply with its laws and regulations through a variety of channels, such as judicial or non-judicial action, administrative or police action, or both.[20] In other words, a state has the right to lawfully detain, prosecute, find guilty and imprison a person for violating its laws. To have the jurisdiction to enforce, the forum must have the "jurisdiction to prescribe". Very rarely would a state let the law enforcement agency of another state to implement its own laws within its borders without the state's express written approval.
2. According to Section 13 of the "Code of Civil procedure, 1908" (CPC), an international judgement is final in India regarding a matter decided directly by the same parties, except for situations in which the judgement was not rendered by a competent court, was not decided on the merits, adopted an incorrect interpretation of international law, or neglected to take Indian law into

[18] Kevin Jetton, E-Commerce, 391 Counterpoints 221 (2013).
[19] Seth & Chandrachud, supra note 1.
[20] Restatement (Third) Foreign Relation law US, Section 401.

account. Further, it also mentions that Indian courts will not take into consideration the judgment of foreign court which was in violation of natural justice, or judgment was obtained by fraud, or it recognises any claim which is based on breach of any Indian law. Further, according to Section 44 A of CPC foreign judgments can be enforced, however, the enforcement of foreign decree is limited to those countries which are notified by the Government of India as "reciprocating countries". Different actions are part of the enforcement process, such as serving court orders, conducting police investigations, and making suspects' arrests.

3. This section, thus, discussed what jurisdiction is and its pre-requisites. Jurisdiction in itself is a complicated issue, nonetheless, when talked in terms of e-commerce it come with its own challenges. Let us now discuss on the jurisdictional issues specially related to e-commerce and the principles used to resolve the dispute.

Jurisdictions Pertaining To E-Commerce

In this chapter focus is given on the provisions of jurisdiction given under the three core legislations which governs the e-commerce disputes currently in India, which includes "Code of Civil Procedure, 1908", "Information Technology Act, 2000", and Code of Criminal Procedure, 1975. It will further study the tests and various principles that are deployed by the court in order to aid the existing provisions in determining jurisdiction.

Jurisdiction under Information Technology Act, 2000

Sub-sections (2), (4) and (5) of Section 1 of Chapter- I and the First Schedule and sub-sections (3) (4) & (5) of Section 413 of the "Information Technology Act, 2000" narrates the provisions about the 'Jurisdiction' of the IT Act.[21] Section 1 (2) of the IT Act, 2000 provides that "the Act shall extend to the whole of India"

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[21] Myneni, supra note 8.

and, save as otherwise provided under the Act, it applies also to "any offence or contravention thereunder committed outside India by any person." Further, Section 75 sub-section (1) of the Act deals with application of the IT Act, 2000 to "any offences or contravention committed outside India by any person irrespective of his nationality." Sub-section (2) of Section 75 states that this Act shall apply to "an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India."

This section gave Indian courts prescriptive authority, meaning thereby, that any offensive content that violates the IT Act, 2000 that is accessible on an Indian computer shall constitute a crime. With this, Indian courts have broad authority to take on cases involving defendants from other states who may use their website to display content or carry out activities that are legal in their home nation but illegal in India.[22]

The IT Act, 2000 does not provide for any separate criminal courts to decide cybercrime matters. While for civil or commercial cases wherein compensation is claimed for any contraventions as contraventions as provided under the IT Act, 2000, the Adjudicating Forum is empowered to grant compensation by virtue of Section 46 of the IT Act, 2000. Example of such cases can be where someone unauthorisedly deletes data of another person, introduces virus, or copies or extracts certain data amongst other acts mention in Section 43 of the said Act.[23]

The Act is likely to cause conflict of jurisdiction. The domain name system is the foundation of e-commerce. The domain name-related concerns are not even addressed by the IT Act of 2000. The rights

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[22] Seth & Chandrachud, supra note 1.

[23] Seth & Chandrachud, supra note 1.

and obligations of domain name owners are not included in the legislation, and even domain names are not defined.[24]

Jurisdiction under Civil Procedure Code, 1908

In e-commerce there are multiple stages involved. For this reason, the determination of which court will have jurisdiction over a dispute will be quite challenging. The CPC has established a number of criteria that will be used to identify which Court will have jurisdiction over a specific case.[25] For a suit for compensation for wrongs to person/movable property, the Court which will have jurisdiction will be either one of the following within whose territorial jurisdiction- the wrong done, or where the defendant resides, carries on business/ personally work for gain.[26]

The general rule of jurisdiction under CPC is given in Section 20 of the Act. It lays down the factors to determine jurisdiction in cases where jurisdiction has not been specifically provided for, or the where the parties have not agreed to a jurisdiction in a contract. Thus, as per this section cases which do not involve immovable property, or is against a person or movable property, then the jurisdiction can be exercised on the proof of either of the following factors: -

a. All or any of the defendants resides/ carry on a business within the territorial limits of the Court's jurisdiction.
b. The cause of action arises wholly or partly within the territorial limits of the court's jurisdiction.

The Courts have exercised personal jurisdiction under Section 20 of CPC, 1908, over entities owning websites that could be accessed within their local jurisdiction, on the grounds that

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[24] K.P.S. Mahalwar, Praveen Kumar, and Varun Kumar, Cyber Crime, and the Law: Evaluation of the Information Technology Act, 2000, (2011) PL September S-2.
[25] Rastogi supra note 19.
[26] Section 19, CPC, 1908.

these websites were "carrying on business" within the local limits of the Court's jurisdiction.[27] In India, Section 15-19 of CPC have been traditionally governing civil cases involving elements of e-commerce. Sometimes the matter becomes complicated because of the nature of business, wherein a specific territory cannot be ascertained to resolve a jurisdictional conflict.[28] The court in the case of Dhodha House v. S.K. Maingi[29] "clarified the meaning of the term "carrying business". Just the presence of an agent at a particular place, does not mean that the firm carries out its business at that place."

Court's Jurisprudence in Determining the Jurisdiction Pertaining to E-Commerce

In e-commerce, generally it is the movable property which is at dispute. The term "movable property" is defined as "property which can be transferred from one place to another." In such cases the two places where the law prescribes jurisdiction to adjudicate depends on:

a. Where cause of action arose, and
b. Where the defendant has its place of doing business

Nonetheless, it is quite tough to determine the place of doing business in cases of e-commerce. For instance, let's take a company based in Delhi which sells products through website. The product can be bought by anyone from anywhere in the world through internet. In such cases, the "place of doing business" is all over the world. So, certain principles and tests are being laid down to determine the jurisdiction in matters of e-commerce.

[27] Rastogi supra note 19.
[28] Sengupta, supra note 2.
[29] Dhodha House v. S.K. Maingi (2006) 9 SCC 41.

Tests to Determine Territorial Jurisdiction in E-Commerce Matters

The American and Indian approach to determine present jurisdiction in cyberspace (which is quite similar) is different from the European approach. [30] Nonetheless, the US has a longer jurisprudence compared to India with respect to determination of jurisdiction in e-ecommerce disputes. The principles developed in the US have been relied on by the Indian courts to decide disputes. Therefore, it is important to understand these principles before discussing the topic of jurisdiction of e-commerce disputes in India.[31] Below are the certain tests that are applied by the US courts and now the Indian courts as well to determine whether the court has the jurisdiction to try that specific matter or not.

Long Arm Statute Test

"Long Arm Statutes" are laws of the state which prescribe grounds for exercising jurisdiction over a non-resident defendant.[32] The US Supreme Court in the case of Hess v. Pawloski[33] "upheld a Massachusetts statute that provided that the non-residents who use the roads in Massachusetts would be deemed to submit to jurisdiction in Massachusetts as legally valid.

In United States v. Thomas[34] , a criminal action was filed against persons who posted obscene messages on bulletin board systems that were accessed by subscribers in Tennessee violating the federal law. The ruling stated that the application of Tennessee's community standard to verify criteria for judging the photos' obscenity was justified since the defendants had

[30] Seth & Chandrachud, supra note 1.
[31] Charles, supra note 3.
[32] Rastogi supra note 19.
[33] Hess v. Pawloski, 274 US 352 (1927).
[34] United States v. Thomas, 74 F. 3d 701 (6th Cir. 1996).

deliberately transferred their material into the state by accepting a subscription from a citizen of that state."[35] The court observed, "Venue for federal obscenity prosecutions lies 'in any district from, through or into which' the allegedly obscene material moves."[36]

Substantial Connection Test

Substantial Connection Test helps in determining the General and Specific Personal Jurisdiction. 'General jurisdiction' is attracted in case a non-resident defendant has continuous and systematic contacts with the State so that personal jurisdiction will be invoked despite the cause of action not being related to the defendant's contacts with the Forum State.[37] For specific jurisdiction, the cause of action should be related to the defendant's contacts and three-part test needs to be satisfied, namely: -

a. The defendant has contacts with the forum which are related to the cause of the action,
b. Those contracts amount to purposeful availment of the privilege of conducting activities within the forum, and
c. The exercise of jurisdiction is reasonable.[38]

Minimum Contact Test

"Minimum Contacts" means physical contacts or presence within the forum state. The "minimum contact test" was introduced in International Shoe Co. v. Washington[39]. In this case, the appellant is a Delaware corporation with an office at Missouri. It had employed 11 to 13 salesmen in Washington who were paid a commission for the work done. The prime issue in

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35 Seth & Chandrachud, supra note 1.
36 1996 FED App. 0032P (6th Cir.).
37 Perkins v. Benguet Consolidated Mining Company, 342 US 437 (1952), 447.
38 Cybersell Inc. v. Cybersell Inc. & Ors., 130 F.3d 414 (9th Cir. 1997).
39 International Shoe Co. v. Washington, 1945 SCC OnLine US SC 158.

this case was "to determine the level of connection that must exist between a non-resident corporation and a State in order for that corporation to be sued within the State.

The court found that the activities on behalf of the appellant/corporation render it amendable to suit in courts of the State of Washington to recover payments due to the State Unemployment Compensation Fund as it established sufficient contacts between the State and the corporation."[40] Thus, according to this test, "a State can sue a non-resident Foreign Corporation if the Corporation satisfies the "minimum contacts" with the Foreign State and principles of natural justice has been duly considered."[41]

Effect Test

1. The "effects test" looks at calculating the injury caused to the plaintiff in the forum State by the intentional act of the defendant outside the forum State. The US Supreme Court in Calder v. Jones[42] laid down this test. It states this test as one where "the State derives personal jurisdiction over a non-resident defendant. In this case, the national Enquirer, a corporation based in Florida published an allegedly defamatory article on Shriley jones, a resident of California. A complaint alleging libel was filed by the complainant against the national Enquirer, its distributors and the newspaper's editor and the journalist who wrote the article in the State Court of California."
2. The Court held that "although the article was written and printed in Florida, the journalist and the editor of the newspaper expressly aimed at the California based Jones and knew that publishing such an article may harm the reputation of Jones in California In short, the

[40] Charles, supra note 3.
[41] Seth & Chandrachud, supra note 1.
[42] Calder v. Jones, 465 US 783 (1984).

effects of the conduct committed in Florida was felt in California where they were directed."

3. Thus, under this test the following points are to be noted-
4. Prima facie, was the forum state specifically targeted?
5. Did the specific targeting of the forum state result in injury or harm to the plaintiff?
6. Was the plaintiff actually present within the forum state? [43]

Sliding Scale/ Zippo Test

1. The Zippo Sliding Scaling Test was laid down in the case of Zippo Manufacturer v. Zippo. Com.[44] This is the most widely accepted test in the US for the determination of the level of interactivity of a website.[45] In this case, the plaintiff was a reputed lighter manufacturing company and the defendant operated an active web portal from California with many subscribers from Pennsylvania. The users in Pennsylvania, constituted 2% of Zippo Dot's client. The defendant used the word "Zippo" to render its online news services in Pennsylvania. The Plaintiff in this case contended that the defendant by transacting business in Pennsylvania had caused infringement of its trademark "zippo."
2. When addressing the issue of jurisdiction of this case between California and Pennsylvania, the court for the first time laid down the "Zippo Sliding Scale Approach". As per the "Sliding Scale Test", there are three kinds of website: active, passive and interactive. In active website, there is a definite business activity conducted by the defendant with the residents of the forum State[46]. While the passive websites are those which disseminate mainly information to internet user and would not

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[43] Rastogi supra note 19.
[44] Zippo Manufacturers v. Zippo. Com, 952 F Supp 1119 (WD Pa 1997).
[45] Rastogi supra note 19.
[46] CompuServe, Inc. v. Patterson, 89 F. 3d 1257 (6th Cir. 1996).

attract exercise of personal jurisdiction[47]. Interactive website is between these both wherein users may input some information in the website.[48]

3. The court established the "sliding scale approach" in this decision. It held that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportional to the nature and quality of the commercial activity that an entity conducts over the internet." Under this test the following points are to be noted –

a. What was the degree of interactivity of the website?
b. Was the nature of the activity permissible?
c. Did the interactivity result in commercial transaction?[49]

In the Zippo case, the court took the view "that the defendant would fall in the category of "active website" and held the exercise of personal jurisdiction over the defendant was fair and justified." This Zippo test is, however, implicitly rejected by courts criticizing that the level of interactivity and commercialism sufficient to justify purposeful availment.[50]

These are the tests and principles followed by the US courts in determining the jurisdiction in case of internet cases. The next section reflects on the India's approach to the complex issue of jurisdiction in the e-commerce space.

India's Approach to the Complicated Problem of E-Commerce Jurisdiction

In India, civil matters containing aspects of e-commerce are traditionally governed by Section 15-19 of the CPC. At times, the issues get intertwined with complexities due to the nature of business, wherein a specific territory cannot be assigned to settle a jurisdictional dispute.[51] This gap has been very well

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[47] Benusan Restaurant Corp., v. King, 937 F. Supp. 295 (S.D.N.Y. 1996)
[48] Martiz, inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996).
[49] Rastogi supra note 19.
[50] Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F. Supp. 2d, 1154.
[51] Sengupta, supra note 2.

recognised by the courts. To fill this gap, several tests have been deployed by Indian Courts as well to determine the jurisdiction in such e-commerce matters.

A. Dow Jones Rule- This rule was applied initially in dealing with jurisdictional issue. One of such case was *Casio India Co. ltd. V. Ashita Telesystems Pvt. Ltd.*[52]. In this case the Delhi High Court had to deal with a passing off action in relation to a domain name dispute. "The court in the issue of jurisdiction held that mere accessibility of the defendant's website within the Court's territorial limits was sufficient for the exercise of the jurisdiction. This case is perhaps against the interest of the defendants which the CPC would certainly not endorse."[53] Thus, this approach was a very narrow and inadequate as practically every site on internet is accessible everywhere.

B. Interactivity Test- Delhi High Court in the case of India TV, Independent New Service Pvt. Ltd. V. India Broadcasting Live, LLC[54] "observed that merely because a website is accessible from a particular place will not suffice for the courts to assume personal jurisdiction over foreign website owner or a non-resident entity". The dispute was regarding the domain name "India TV". The court applied the Zippo Sliding test. It laid down the following rules:

i. Mere access to the website is not sufficient to establish jurisdiction.
ii. Limited interactivity of a website may not be sufficient to establish jurisdiction.
iii. The defendant must have sufficient contact with the forum state, for instance if the defendant's services can be availed of within the forum state.

[52] Casio India Co. Ltd. v. Ashita Telesystems Pvt. Ltd., (2013) 106 DLT 554.
[53] Sengupta, supra note 2.
[54] India TV, Independent News Service Pvt. Ltd. v. India Broadcasting Live, LLC, (2007) 145 DLT 521.

iv. The claim of the plaintiff must arise on account of the defendant's contact with the forum state.[55]

C. **Purposeful Avaliment Test**- It was given by a 2011 US Supreme Court decision in the case J. McIntyre Machinery Ltd. v. Nicastro[56]. This test was affirmed by Delhi High Court in the 2009 judgment of Banyan Tree Holding (P) Ltd. V. A. Murali Krishna Reddy[57], this was further explained via another Delhi High Court Judgment of 2017 which was Impresario Entertainment & Hospitality (P) Ltd. V. S&D Hospitality[58]. The "Purposeful Avaliment Test" as laid down by the US Supreme Court is that "this test could be understood as the placing of goods into the stream of commerce, by the defendant, with the expectation that they will be purchased by consumers within the forum of the State." In this the US Supreme Court also added that the test did not amend the rule of "personam jurisdiction". In the banyan tree case, they deliberated on the issue of mere accessibility versus purposeful usage. [59] "

The Delhi High Court ruled that the mere possibility of access of website from Delhi would not mean that the defendants were carrying out business in Delhi. It must establish that the defendant had "personally availed" of the jurisdiction of the place by indulging in conscious and intentional acts within the jurisdiction, in furtherance of commercial interests with the intention of forming a full and final executable contract."[60] In the Impresario Entertainment case[61], the Delhi High Court gave more

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[55] Rastogi supra note 19.

[56] J. McIntyre Machinery Ltd. v. Nicastro, 2011 SCC OnLine US SC 122: 564 US 873 (2011).

[57] Banyan Tree Holding (P) Ltd. V. A. Murali Krishna Reddy, (2009) SCC OnLine Del 3780.

[58] Impresario Entertainment & Hospitality (P) Ltd. V. S&D Hospitality, (2018) SCC OnLine Del 6392.

[59] Sengupta, supra note 2.

[60] Charles, supra note 3.

[61] (2018) SCC OnLine Del 6392.

clarification on this by differentiating between the "purposeful availment test" from the "purposeful avoidance test". The Court clarified that to establish jurisdiction, the plaintiff must demonstrate that the defendant has purposefully availed the jurisdiction of the forum state, rather than the defendant simply having to demonstrate that he had avoided the state.

D. Forum Convenience Test- The general doctrine of "*forum non conveniens*", which applies to all civil matters, is the source of this test. The main idea is that a court may decide to transfer a case to a more suitable court if it determines that a specific forum is inconvenient for the parties involved in a suit. The change must be made by keeping in mind the interest of all the parties and with the goal of achieving justice.[62] This Doctrine of Forum Convenience was legitimised by the Supreme Court in the case of Kusum Ingots & Alloys Ltd. V. Union of India"[63] where it laid down that in appropriate cases the Court could refuse to exercise its discretionary jurisdiction by invoking the doctrine.

Indian courts may therefore presume that they have jurisdiction over an offence if it is committed or the consequence of the offence so committed is so felt within its jurisdiction. For instance, if something on a foreign website that is accessible from India constitutes a crime under the IT Act, Indian courts have the authority to take jurisdiction over the matter. However, in such scenarios, the foreign courts' acceptance of the Indian judgment is necessary for the enforcement of the judgments of the Indian courts.[64]

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[62] Bryan A. Garner and Henry Campbell Black, Black's Law Dictionary (St. Paul, Minn. West Group, 1999).

[63] Kusum Ingots & Alloys Ltd. V. Union of India, (2004) 6 SCC 254.

[64] Charles, supra note 3.

Conclusion and Suggestions

To sum it up, this paper has analysed the crucial issue of jurisdiction in disputes related to e-commerce. It first reflects the basic concept of jurisdiction along with brief explanation of the categories of jurisdiction including pecuniary, territorial/ personal, and subject-matter jurisdiction. It has reflected that the territorial jurisdiction in respect of immovable property is comparatively easier to identity than that of movable property. Further, it studied the pre-requisites of jurisdiction. The pre-requisites include- jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce. All these jurisdictions are inter-related.

When talking about the jurisdiction related to trans-border e-commerce are complex. Further, such complexity inversely effects the person who is been wronged which is generally the consumers. Therefore, it is important to have clarity regarding the jurisdictional concerns pertaining to e-commerce. The only thing that can assist an individual who has been wronged in filing a claim in the appropriate court is an accurate determination of jurisdiction. This paper studies the various tests especially laid down by the USA court to determine the jurisdiction. It also studies the tests administered by the Indian court to fill the gap in jurisdictional provisions as per the Indian laws prescribed in e-commerce disputes. The next section had mentioned in detail the various provisions available under the Indian laws including IPC, CPC, CrPC, and IT Act to be prescribed for adjudge the case.

Forum shopping means when the litigants select the forum which will give them the most favourable outcome. Parties have the right to chose the forum to adjudicate if more than one court has the jurisdiction to adjudge the matter. Nonetheless, this option gets a negative connotation and becomes unethical when such selection is done on the basis of which forum will give the most favourable outcome.

In this paper we have analysed that the there are multiple tests for determining the jurisdiction, nonetheless, every test considers different jurisdiction. This multiplicity of jurisdiction negatively impacts the consumers as they are aggrieved party and uncertainty of jurisdiction deteriorate the consumers right to get justice in a timely manner. Not only the territorial jurisdiction but also the jurisdiction to prescribe, in other words we can say the conflict of laws in turn gives the defaulting e-commerce sites the upper hand. With this the defendant which is generally the e-commerce site or larger e-commerce site has the power to select the forum which can adjudicate such matters. This does not stay confined to selection; it takes a negative connotation when the litigator chooses the forum State which is beneficial or will give more favoured outcome.

Suggestions

There is still a lack of clarity in Indian laws and precedents, particularly when it comes to business-to-consumer (B2C) transactions. The various difficulties that the internet creates were not taken into consideration when Indian laws were written. To ensure that there is no space for confusion while handling such transactions, it is strongly advised that there be distinct legislation in the form of an act or statute dedicated particularly to e-commerce transactions. If not, then certain changes must be made to the CPC. B2B transactions are rather clear, but when there are several intermediaries and customers involved, problems might occur. In order to resolve such issue below are some of the suggestions after studying the existing provisions and the gaps in them.

1. **Regulatory Framework**- There is a dire need now to draft a regulatory framework where the jurisdictional issue pertaining to e-commerce is dealt with. The provision of jurisdiction should explicitly state whether the Indian act will be prescribed on e-commerce websites

having their headquarters or "place of business" outside India.

2. **Jurisdiction Determining Test**- Till proper regulatory framework is implemented, a just and fair test of determining the jurisdiction must be advocated by the courts. As per this paper's study and analysis, the "effect test" is the most reasonable and just method to determine the jurisdiction.

3. **Provision to Curtail Forum Shopping**- Parties must be allowed to choose their forum. Nonetheless, proper guidelines should be laid down to avoid malicious and unethical use of such option given to the litigants and the parties.

CHAPTER 14

NAVIGATING THE TAX LANDSCAPE: A GUIDE TO MERGERS AND ACQUISITIONS

Mayank Parashar
Grace Bhadauria

Introduction

Mergers and Acquisitions (M&A) transactions are complex deals that involve multiple stakeholders and can have significant financial implications for all parties involved. Understanding the tax implications of these transactions is crucial for M&A practitioners and stakeholders to ensure the success of the deal. The paper, Navigating the Tax Landscape: A Guide to Mergers and Acquisitions, provides comprehensive guidance on how to navigate the tax landscape during M&A transactions. Mergers and Acquisitions involve combining two or more companies to create a new entity or integrating one company into another.

These transactions can take various forms, such as stock purchases, asset purchases, or mergers. The tax implications of each type of transaction can differ, making it essential to have a solid understanding of the legal framework. Taxes are a crucial aspect of M&A transactions and can significantly impact the success of the deal. As the paper highlights, having a solid tax strategy in place is critical to minimize tax exposure and ensure the success of the transaction[1]. The tax planning section of the paper covers topics such as due diligence, identifying tax risks, and developing a tax strategy that aligns with the overall business strategy. The tax implications of M&A transactions are not limited to domestic deals. Cross-border transactions have additional international tax considerations that require careful

[1] PricewaterhouseCoopers Private Limited, Mergers and Acquisitions: The Evolving Indian Landscape (2016), (23 June,9.00 AM),https://www.pwc.in/assets/pdfs/trs/mergers-and-acquisitions-tax/mergers-and-acquisitions-the-evolving-indian-landscape.pdf.

planning and execution. The international tax considerations section of the paper provides guidance on how to navigate the tax implications of cross-border transactions, including transfer pricing and tax treaties.

In summary, Navigating the Tax Landscape: A Guide to Mergers and Acquisitions is a comprehensive guide that provides valuable insights into the tax implications of M&A transactions. It emphasizes the importance of having a solid tax strategy in place and covers the legal framework, tax planning, tax structuring, and international tax considerations. This paper is an essential resource for M&A practitioners and stakeholders looking to ensure the success of their transactions[2]. As the world of M&A continues to evolve, understanding the tax implications will remain a critical component of a successful deal.

Legal Framework

The legal framework surrounding mergers and acquisitions (M&A) transactions is complex, and understanding it is crucial for successful deal-making. A key component of this framework is taxation, which can significantly impact the outcome of M&A transactions. This section provides an overview of the legal framework surrounding M&A transactions and the tax implications that arise from them. M&A transactions can take various forms, including stock purchases, asset purchases, and mergers. The legal framework for each type of transaction is different, and the tax implications can vary as well. In stock purchases, the buyer purchases the shares of the target company, and the ownership of the company changes hands. In asset purchases, the buyer purchases specific assets of the target company, such as inventory, equipment, or real estate. In mergers, two companies combine to form a new entity, and the

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[2] *KPMG International Cooperative, Mergers and Acquisitions Transactions and Restructuring: A New Reality* (June 2021), (Aug,2023,4.00 PM),https://kpmg.com/xx/en/home/insights/2021/06/mergers-and-acquisitions-transactions-and-restructuring-a-new-reality.html.

ownership of both companies changes. The tax implications of these transactions are significant. For example, in a stock purchase, the buyer takes on the tax basis of the shares purchased. If the shares have appreciated in value, the buyer may have to pay capital gains taxes on the difference between the purchase price and the fair market value of the shares. In an asset purchase, the buyer takes on the tax basis of the assets purchased.

This can result in depreciation and amortization deductions that can offset taxable income. In a merger, the tax implications can be complex, as the two companies' tax bases must be combined, and there may be tax implications for shareholders. The legal framework for M&A transactions is governed by several laws and regulations. One of the most important laws is the Internal Revenue Code (IRC), which sets forth the rules and regulations for federal taxation.

The IRC provides guidance on how different types of transactions are taxed and outlines the requirements for tax-free reorganizations, tax-deferred exchanges, and other tax planning strategies. Another important law is the Securities Act of 1933[3], which governs the issuance of securities and the registration of securities offerings with the Securities and Exchange Commission (SEC)[4]. The Securities Exchange Act[5] of 1934 governs the trading of securities on national exchanges and requires companies to file periodic reports with the SEC. Courts have also played a significant role in shaping the legal framework for M&A transactions. For example, in the case of Commissioner v. Duberstein[6], the Supreme Court established the standard for determining whether a payment is taxable as income. The Court held that a payment is taxable if it is made

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[3] Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (2020).
4SINGHANIA AND SINGHANIA,CORPORATE TAX PLANNING AND BUSINESS TAX PROCEDURES,18th ed. New Delhi: Taxmann Publications, 2021.
[5] Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (2020)
[6] Commissioner v. Duberstein, 363 U.S. 278 (1960)

in exchange for services rendered or if it is made as a gift. The Court also established the principle that the intent of the parties is critical in determining the tax implications of a transaction.

The legal framework surrounding M&A transactions is complex, and taxation is a critical component of this framework. Understanding the tax implications of different types of transactions is crucial for successful deal-making. The IRC, Securities Act of 1933, and Securities Exchange Act of 1934 are some of the laws that govern M&A transactions[7]. Courts have also played a significant role in shaping the legal framework, and landmark cases such as Commissioner v. Duberstein have established key principles for determining the tax implications of transactions.

Tax Planning

Tax planning is a crucial aspect of any M&A transaction. It involves developing a comprehensive tax strategy to minimize the tax exposure and risks associated with the deal. Tax planning should be an integral part of the overall M&A strategy and must be implemented early in the deal process to maximize its benefits. Due diligence is a crucial part of tax planning. It involves conducting a thorough review of the target company's tax position and identifying potential tax risks and opportunities. Due diligence must be conducted early in the process to ensure that any tax risks or issues are identified and addressed before the deal is finalized.

Failure to conduct due diligence can lead to significant tax liabilities and risks for the acquirer. One of the critical tax planning considerations is the structure of the transaction. The tax implications of different types of M&A transactions can vary significantly. For example, stock purchases may be taxed differently from asset purchases or mergers. In some cases, a

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[7] TaxGuru, Merger and Acquisitions: Provisions under Income Tax Act, 1961, (23 Aug,2023,6.00 PM),https://taxguru.in/income-tax/merger-acquisitions-provisions-income-tax-act-1961.html.

tax-free reorganization may be more beneficial than a taxable transaction. It is essential to choose the right structure that maximizes tax benefits and minimizes tax risks. Developing a tax strategy is another crucial aspect of tax planning. It involves identifying tax risks, analyzing tax implications, and developing a plan to minimize tax exposure. The tax strategy must be developed in collaboration with the company's tax department and legal team to ensure compliance with applicable tax laws and regulations[8]. One famous case in which tax planning played a significant role is the Pfizer-Allergan merger.

In this case, Pfizer used tax planning to move its tax residence from the United States to Ireland, where Allergan was based. The move was intended to reduce Pfizer's tax liabilities and take advantage of Ireland's lower corporate tax rates. However, the deal fell apart after the U.S. Treasury issued new regulations aimed at curbing such tax inversion deals. Another example is the Vodafone-Hutchison Essar deal in India. The deal was structured as an indirect transfer of shares, and Vodafone argued that it was not liable to pay tax in India.

The Indian tax authorities disagreed and claimed that the transaction was taxable in India. The dispute went to the Indian Supreme Court, which ultimately ruled in favor of Vodafone, stating that the Indian tax authorities had no jurisdiction over the transaction. In last we can say that, tax planning is a critical aspect of M&A transactions, and failure to plan can result in significant tax liabilities and risks. Due diligence, transaction structuring, and tax strategy development are all essential elements of tax planning. Companies must work closely with their tax and legal teams to ensure compliance with applicable

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[8] Manal Garg and Nidhi Jain,*Tax Planning in Mergers and Acquisitions: A Conceptual Study*, INTERNATIONAL JOURNAL OF BUSINESS AND MANAGEMENT INVENTION 6, no. 7 (July 2017): 40-49, https://www.ijbmi.org/papers/Vol(6)7/Version-1/H0607014043.pdf.

tax laws and regulations and to develop a tax strategy that maximizes benefits and minimizes risks[9].

Tax Structuring in Merger & Acquisitions

Tax structuring is an important aspect of mergers and acquisitions (M&A) as it can significantly impact the tax exposure of the parties involved in the transaction. Tax structuring involves planning and executing the transaction in a way that minimizes tax liabilities and maximizes tax benefits. There are several tax structuring techniques that can be employed during an M&A transaction, including tax-free reorganizations, tax-deferred exchanges, and tax-free spin-offs. One common tax structuring technique is tax-free reorganization.

A tax-free reorganization occurs when two or more companies combine or reorganize, and no tax is imposed on the transaction. Under Section 368 of the Internal Revenue Code (IRC)[10], there are several types of tax-free reorganizations, including statutory mergers, stock-for-stock exchanges, and asset acquisitions. In a statutory merger, one company acquires another company's stock or assets, and the acquired company ceases to exist as a separate legal entity. In a stock-for-stock exchange, the acquiring company issues its stock to the shareholders of the acquired company in exchange for their stock. In an asset acquisition, the acquiring company purchases the assets of the acquired company. Another tax structuring technique is a tax-deferred exchange[11].

A tax-deferred exchange occurs when one company exchanges its assets for similar assets of another company without

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[9] K.Rajesh, Mergers and Acquisitions: Tax Implications in India, ,INTERNATIONAL JOURNAL OF BUSINESS AND MANAGEMENT. Res. 283, 288 (2016), https://www.ijbmi.org/papers/Vol(6)7/Version-1/H0607014043.pdf.

[10] Internal Revenue Code of 1986, 26 U.S.C. §§ 1-9834 (2020).

[11] Cloudficient, Ultimate Guide to Mergers & Acquisitions, https://www.cloudficient.com/blog/ultimate-guide-to-mergers-acquisitions

triggering a tax liability. Under Section 1031 of the IRC, a tax-deferred exchange can be used for real estate transactions, and under Section 1033, it can be used for non-real estate transactions, such as machinery or equipment. Finally, a tax-free spin-off is a tax structuring technique that involves a company distributing its shares of another company to its shareholders without triggering a tax liability.

Under Section 355 of the IRC, a tax-free spin-off can be used when a company wants to divest a subsidiary or business unit, while allowing shareholders to retain an interest in the spun-off entity. Tax structuring can be complex and requires careful planning and execution to ensure that the transaction is structured in a way that minimizes tax exposure. Failure to properly structure an M&A transaction can result in significant tax liabilities for the parties involved.

As such, it is important to consult with tax professionals to ensure that the transaction is structured in a way that achieves the desired tax benefits while minimizing tax liabilities[12]. There have been several famous cases involving tax structuring in M&A transactions. For example, in the case of Pennzoil Co. v. Texaco Inc[13]., Pennzoil claimed that Texaco's acquisition of Getty Oil Co. violated an agreement that Pennzoil had with Getty to purchase the company. Texaco argued that the acquisition was a tax-free reorganization under Section 368 of the IRC. The case eventually settled for $3 billion, with Pennzoil receiving $1 billion in damages. This case illustrates the importance of properly structuring M&A transactions to avoid costly disputes and litigation.

National Tax Considerations In M&A Transactions

In any M&A transaction, the tax implications must be considered, not only for the acquiring company but also for the

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[12] KANGA, PALKHIVALA, AND VYAS. THE LAW AND PRACTICE OF INCOME TAX. 11th ed. Mumbai: Taxmann Publications, 2020.

[13] Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987)

target company. One of the key considerations is the national tax implications that arise from the transaction. National tax laws and regulations vary across different countries, and it is important to understand the tax implications of the transaction in each relevant jurisdiction. One of the main national tax considerations is the capital gains tax, which is levied on the profit that is made when an asset is sold.

In an M&A transaction, this can be a significant tax that needs to be planned for. Other national taxes that need to be considered include stamp duty, withholding tax, and value-added tax. It is important to note that tax authorities may scrutinize M&A transactions to ensure that they comply with tax laws and regulations. Therefore, it is essential to ensure that all tax requirements are met to avoid penalties and other consequences.

International Tax Considerations In M&A Transactions

In addition to national tax considerations, international tax implications can arise in M&A transactions, particularly in cross-border transactions. These transactions can involve complex tax structures, and it is essential to understand the tax implications in each relevant jurisdiction to ensure compliance with local tax laws and regulations. One of the key considerations is transfer pricing, which refers to the pricing of goods or services that are transferred between entities within the same company in different jurisdictions[14].

This can be a significant issue in M&A transactions involving multinational corporations, as transfer pricing can be used to shift profits to lower-tax jurisdictions. Another important consideration is the impact of tax treaties between countries. Tax treaties can affect the tax implications of M&A transactions, particularly in relation to withholding taxes on dividends, interest, and royalties. It is important to understand the

[14] William D. Andrews et al., Taxation of Corporate Reorganizations (2019)

relevant tax treaties and their implications to ensure compliance and avoid double taxation[15]. One notable example of international tax considerations in M&A transactions is the case of Facebook's acquisition of WhatsApp. In this transaction, Facebook faced potential tax liabilities in several countries, including the US and the UK. The company ultimately decided to restructure the acquisition to minimize its tax exposure. Lastly, understanding the national and international tax implications of M&A transactions is crucial for ensuring compliance with tax laws and regulations and minimizing tax exposure. By considering these tax considerations in the planning and structuring of M&A transactions, companies can minimize risks and optimize the value of the transaction.

Post-Merger Integration

Post-merger integration refers to the process of combining two or more companies into a single entity after a merger or acquisition has taken place. This process is crucial for the success of the newly formed company, as it enables the effective and efficient management of resources and operations. One important aspect of post-merger integration is the tax implications that arise after the transaction has been completed. These implications can have a significant impact on the financial performance of the company, and as such, it is important to carefully consider them during the integration process. One key tax consideration is the treatment of goodwill and intangible assets. Goodwill is the excess of the purchase price over the fair value of the assets acquired in a transaction, while intangible assets include items such as patents, trademarks, and copyrights. The tax treatment of these assets can vary depending on a number of factors, including the nature of the assets and the jurisdiction in which the company operates. Another important consideration is tax reporting requirements. After a merger or acquisition, the newly formed

[15] STEVEN M. DAVIDOFF ET AL., MERGERS AND ACQUISITIONS: LAW, THEORY AND PRACTICE (3d ed. 2019)

company may be subject to different reporting requirements than the individual companies were before the transaction[16]. It is important to ensure that all reporting requirements are met in a timely and accurate manner to avoid penalties and other negative consequences. Finally, tax-efficient financing can also be an important consideration in post-merger integration. This involves using financial structures and strategies that minimize the tax liability of the company. For example, the company may consider using debt financing instead of equity financing to take advantage of tax deductions for interest payments. Overall, post-merger integration requires careful consideration of the tax implications of the transaction. By understanding and managing these implications effectively, the newly formed company can achieve greater financial success and minimize the risk of negative consequences.

Conclusion

In conclusion, Mergers and Acquisitions (M&A) transactions can have significant tax implications, which makes having a comprehensive understanding of the tax landscape crucial for M&A practitioners and stakeholders. The paper, Navigating the Tax Landscape: A Guide to Mergers and Acquisitions, has provided a comprehensive guide to understanding the tax implications of M&A transactions. The legal framework section has provided an overview of the different types of M&A transactions and how they are taxed. The tax planning section has covered due diligence, identified tax risks, and developed a tax strategy. The tax structuring section has provided guidance on how to structure M&A transactions to minimize tax exposure, including the use of tax-free reorganizations, tax-deferred exchanges, and tax-free spin-offs. The international tax considerations section has provided guidance on the international tax implications that arise during cross-border transactions and has covered transfer pricing and tax treaties.

[16] GOEL, GARG, AND GOEL,MERGERS, ACQUISITIONS, AND CORPORATE RESTRUCTURING. 3rd ed. New Delhi: McGraw Hill Education (India) Private Limited, 2021

Having a solid tax strategy in place during M&A transactions is crucial, as it can significantly impact the success of the deal. The paper has emphasized the importance of due diligence in identifying potential tax risks and developing a tax strategy. It has also provided guidance on how to structure M&A transactions to minimize tax exposure and has covered international tax considerations. In addition to the information provided in this paper, further reading and resources are available to assist in navigating the tax landscape during M&A transactions. M&A practitioners and stakeholders are encouraged to consult with tax experts and legal counsel to ensure compliance with applicable tax laws and regulations. Overall, the paper has provided a valuable resource for M&A practitioners and stakeholders looking to understand the tax implications of M&A transactions. With its comprehensive coverage of the legal framework, tax planning, tax structuring, and international tax considerations, the paper provides a complete guide to navigating the tax landscape during M&A transactions.

CHAPTER 15

WOMEN DIRECTORS: STORY OF A REVOLUTIONARY MEASURE

Jhalak Nandwani

Introduction

Legislative makers of India have time to time tried to cope up with the social changes, be it the abolition of adultery or the decriminalization of same sex relationships. As the society now-a-days is being more acceptable towards women's rights and their position equivalent to that of men, law makers have also made amendments to respective legislations. Law now recognizes rights of women in all forms. Women now have a right to father's property, right to equal remunerations, right to be treated equally at par with men, right to enter and run businesses, etc.

The Companies Act has also brought in various amendments to ensure gender equality and better representation of women in the business functions. One such revolutionary provision is the introduction of section 149(1)[1] that talks about the appointment of women directors. Section 149 (1), vide its second proviso states that certain class of companies shall mandatorily appoint at least one women directors in its board. This is a profound step towards ensuring enhanced representation of women in decision making processes, but its actual compliance and actual role of women is still a big question.

This research essentially discusses the importance having women directors on board, and how ensuring gender diversity can promote efficiency and firm's performance. It also highlights the developments made by the legislation in this regard, analysing the loopholes and efficiency in its implementation.

[1] The Companies Act 2013, s 149(1).

Statistics regarding women directors on board have been obtained for various countries, so as to support our research.

History behind the Enactment

It was not in 2013 that the government first decided to have women as directors in the board of companies. In 2002, the Naresh Chandra Committee recommended that every company must have atleast one women as director. The idea behind proposing this recommendation was to have better corporate governance practices and to enhance gender diversity in boards, as has been the trend in many other countries.

However, this recommendation was widely criticized and hence was dropped down. Again in 2011, this recommendation was brought up by the Companies Bill of 2011[2]. For instance, a report was submitted by the British Department of Trade and Industry that stated that more the gender diversity on boards, more will be the efficiency of the company. This was again discussed in 2010 when Standard Chartered Bank came up with a report stating that companies, especially top 100 companies as listed in Bombay stock Exchange shall have women directors, but the proportion of women directors in India is way behind than that of UK and USA.

Norway was the first country to have introduced such a requirement in 2003 so as to improve governance model of companies. It mandated that 40 percent of the directors in a company shall be woman.[3] Having more women on board serves two purposes, firstly it provides utilitarian value, i.e., by enhancing firm's performance and financial position, and secondly it enhances board diversity and provides significant opportunity to women to be a part of the main decision-making

[2] The Companies Bill 2011.

[3] *Ten years on from Norway's quota for women on corporate boards*, THE ECONOMIST (17 February, 2018).

process of the company, that has been dominated by men since ages.

It was time that women are also entrusted with leadership roles and are brought into the forefront in the corporate sector. However, such a futuristic approach was not appreciated and welcomed by all. In 2013 when the companies act was amended and this mandate came into force, many companies and organizations opposed this on the grounds that directors should be appointed on the basis of merit and not on the basis of gender. Even the Federation on Indian Chambers of Commerce and Industry (FICCI) opposed this, however, this objection was completely dismissed on the rationale that India does have many qualified and meritorious women who can very well hold such positions of responsibility.

This step is also welcomed from the perspective of corporate governance measure, as it would add on to the moral and ethical values to the company and would ensure gender equality. The aim of law makers was to provide more opportunities to women and to bring them forward into the mainstream sections of society. When education for women has always been promoted by the legislators and judiciary, its high time that more working opportunities also be given to them.

Various studies over the years have highlighted the important role that women directors have played on the board and contribution that they have given to its performance. In 2019, a study by McKinsey[4] pointed out that companies that have better diversity in terms of gender are likely to give more outputs and value creation than companies who don't have so. In these times where gender equality has become a paramount issue, this provision is of more relevance. Another study by the Peterson Institute for Economics have stated that companies that have

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[4] Vivian Hunt, *Delivering through Diversity, McKinsey & Co.* (22nd November, 2023, 9:55 PM), https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/delivering-through-diversity>.

women appointed to the post of directors or executives tend to have higher profit margins than other companies. Around 30 percent increase in the net revenues have been observed in this regard. Also, the vice president of World Bank has highlighted the importance of empowering women in not just in corporate world, but in all sectors of the economy, as it could help increase the financial stability within the country, increase GDP, economic status and productivity.

Women Directors- A Legal View

The amendment to the Companies Act in 2013 had introduced the concept of women directors. The main objective of introducing such a provision was to ensure better governance practices, enhance corporate responsibility and better regulatory practices. Having women directors on the board would enhance diversity and would provide an opportunity to women to be a part of the core decision making process of the company. A study conducted by the Bank of America Merill Lynch in 2019 stated that companies that have at least one women director on the board tend to have been profits, earnings and valuations.[5] For example, Asia Pacific stocks that had women directors accounting for 12 percent of the board have showed better valuation, higher profit margins and earnings, as appointment of women directors is directly proportionate to higher returns and lesser risks.

A proviso to section 149 that made the appointment of women directors mandatory. Second proviso to sub-section 1 of section 149 states that every company shall have board of directors, consisting of such individuals as directors, wherein it is mandatory for certain prescribed class of companies to have atleast one women director.[6] Vide notification dated 5th July, 2017, it has been clarified by the Ministry of Corporate Affairs

[5] Harsha Jethmalani, '*If having more women directors boosts returns, why is India Inc. shying away?*' Live Mint (India, 8 March 2019).
[6] Supra note 1

that such proviso is not applicable to certain specified IFSC Companies.[7] Further, Rule 3 of the Companies (Appointment and Qualification of directors) Rules, 2014[8] provides for the class of companies that need to fulfill the criteria as mentioned in this proviso. It states that every listed company, every public company having a paid up share capital of at least 100 crore or turnover of at least 300 crore, as per the last audited financial statement, shall appoint at least one women director in its board.[9] Such companies need not appoint a women director from the very first day itself.

Once a company has been incorporated and it fulfills the conditions as prescribed herein, it shall comply with this requirement within six months period from the date of its incorporation. And later on, in case any vacancy arises, it shall be filled up at the earliest, i.e., before or at the time of the next board meeting or within three months from such vacancy, whichever comes later.

Penalty

In case a company contravenes or fails to comply with this provision, punishment as under section 172[10] of the act shall be imposed. This provision does not specifically state the penalty for non-compliance of appointing women directors, but in general it imposes punishment for not complying any provision of the chapter that deals with appointment and qualification of directors. It states that a fine of not less than Rs.

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[7] Umakanth Varottil, *Exemption to Companies operating from the IFSC, India Corp Law* (24th November, 2023, 6:45 PM), https://indiacorplaw.in/2017/01/exemptions-to-companies-operating-fro.html>.

[8] The Companies (Appointment and Qualification of directors) Rules 2014, Rule 3.

[9] Id.

[10] The Companies Act 2013, s 172.

50,000 shall be imposed on the company or officer in default, and this fine can be extended upto Rs. 5,00,000.[11]

Exception

It is mandatory for certain class of companies to mandatorily appoint women directors on board. But as per Special Economic Zone 2005 Notification No. GSR 8 (E)[12], companies that are set up under this act are exempted from fulfilling this mandate. Also, any unlisted public company, although licensed by Reserve Bank of India, Securities and Exchange Board of India or Insurance Regulatory and Development Authority, if located in any approved SEZ area, is exempted from this requirement as under section 149.

Procedure

Every person, who is to be appointed as a director must necessarily have a Director Identification Number (DIN). The women director who seeks to be appointed to the board shall first obtain a DIN before being appointed to the board. Further, as per the mandate of Rule 8 of the Companies (Appointment and Qualification of Directors) Rules, 2014[13], she must file her consent in writing to become a woman director in form DIR-2.

A form DIR-8 shall also be filed stating that she is not disqualified from being appointed as a director on the board of the company, in pursuant to section 164 (2) of the 2013 act[14]. Rule 9 of the Companies (Meeting of Board and its Powers) Rules, 2014[15] states that any director, including woman director, before appointment to the board shall disclose all his interests in the company and other associated companies, vide

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[11] Id.

[12] The Special Economic Zones (Amendment) Rules 2007.

[13] The Companies (Appointment and Qualification of Directors) Rules 2014, Rule 8.

[14] The Companies Act 2013, s 146 (2).

[15] The Companies (Meeting of Board and its Powers) Rules 2014, Rule 9.

form MBP-1. After making all such compliances, when the woman director is appointed, her appointment shall be intimated to the Registrar of Companies within 30 days of her appointment, by filing Form DIR-12.

Women as Independent Directors

The companies act, vide section 149 (4)[16] mandates appointment of independent directors as well on the board, so as to prevent biasness in decision making and that the board takes decisions not only for the sole purpose of increasing profits for themselves, but to also take welfare of other stakeholders into consideration. Women directors can be independent directors as well. The Securities and Exchange Board of India has suggested for appointment of at least one independent women director on board due to various reasons like it ensures better governance practices, improved profitability, improved employee morale, better risk management, etc.

The Securities and Exchange Board of India (Listing Obligation Disclosure Requirements) Regulation 2015, vide regulation 17 (1)[17] has mandated that there must be a balance of executive and non-executive directors on the board and also that there shall be at least one women director. Further, listed companies that are in the list of top 500, as per market capitalisation, needs to appoint at least one women independent director in its board since the financial year 2019 and top 1000 listed companies, as per market capitalisation, shall have at least one independent women director by beginning of financial year 2020.

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[16] The Companies Act 2013, s 149 (4).

[17] The Securities and Exchange Board of India (Listing Obligation Disclosure Requirements) Regulation 2015, R 17(1).

Limitations and Loopholes

This policy was one of the most crucial measure to bring reform in the corporate world, but its compliance is a major issue and the actual situation is filled with loopholes. Qualified companies were required to comply with this mandate by the beginning of financial year 2015, and till then, many companies have failed to do so, and as a result, SEBI was forced to impose a high penalty of 3.9 million USD for any further non-compliance after this period.

In Nizam Deccan Sugars Ltd v. Registrar of Companies[18], the company failed to comply with the mandate of section 149 (1) before the scheduled deadline, and hence penalty worth Rs. 1,25,000 was imposed on them.

Also, in Horse Shoe Capital v. Shakti Bhog Foods Ltd.[19], company did appoint a women director initially, but once the vacancy arose, the company did not appoint new women director to fill in the vacancy within three months, hence the Registrar of Companies filed a suit against the company and penalty was imposed. Some companies forcefully complied with this requirement just to escape penalty or comply with corporate governance standards. Companies failed to fulfil the real intent of the legislation.

Public listed companies in India have only 4 percent of women directors. Companies cite different reasons for this, like some companies prefer a male dominated work culture, that maternity leaves can hinder their management, etc. Another requirement in this regard is the mandate of appointing women independent directors. This was a well appreciated effort of the

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[18] Nizam Deccan Sugars Ltd v. Registrar of Companies, C.A. No.25/621A/HDB/2016.

[19] Horse Shoe Capital v. Shakti Bhog Foods Ltd, CP-87 (ND)/2013.

legislators, but existing directors tend to hire such women independent directors from their family itself, just to comply with the law. For instance, Reliance Industries appointed Nita Ambani as its first female director. This dilutes the very essence and purpose of the legislation.

Also, the time limit of three months prescribed by the companies act of filling up the vacant position of women director is a bit unreasonable as sometimes it may be difficult to find a suitable candidate with sufficient experience, expertise and training who could handle the responsibility well.

Reality in Global Context

Although the requirement of appointing independent women directors was inserted in the companies act in 2013, even till 2015 this mandate was not followed by majority of the companies. Compliance of this provision was a major issue. A data suggests that by 2015, there were almost 189 companies that had not complied with this requirement of having one women director. Later that year, the securities and exchange board of India had issued a notification wherein it had decided that if any listed company fails to comply with this requirement by end of that financial year, penalty worth Rs. 50,000 will be imposed on them.

And if this failure continues for more than six months after the commencement of next financial year, the directors and promoters of that company shall also be made liable and an additional penalty of Rs. 1000 per day shall also be imposed from July and of Rs. 5000 per day from October.[20] However, this imposition of penalty had not solved the issue and it was again in 2017 that the need for certain stringent measures was felt. In

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[20] '*Women Directors: Non-compliant firms to face R50K penalty*' The Indian Express (India, 9 April 2015).

2017 itself, more than 200 complaints of non-compliance as filed with the Registrar of Companies.

Discrimination on the basis of gender and lack of gender diversity at workplace is an issue not just in India, but in many other developed countries like United Kingdom, Canada, United States as well. Having more woman employees not just increases gender diversity, but promotes better work culture and better value for the company as well. Government can enact legislations in this regard to remove this biasness, and legislature of many countries have been successful in this.

According to MCSI All Countries World Index, more than 38 percent of the boards of companies globally have women directors appointed by the end of 2020[21]. The diversity of the board of directors have been increasing over the years, but still it cannot be said that women are well represented in the companies. A study conducted for 2900 MSCI All Countries World Index companies, women comprised of nearly 20 percent of the entire board of directors in 2019 and this number increased to 20.6 percent by the end of 2020.[22]

Many jurisdictions have now adopted laws to make appointment of woman directors to the board mandatory. More than two third of the MSCI All Countries World Index companies have made it mandatory for companies to have atleast one third women directors in their board.[23] But in reality, only 20.3 percent of companies could achieve the threshold of appointment of one-third women to the board. Nearly 23 percent of the companies did not appoint even one women director to the board.

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[21] *Women on Corporate Boards*, Catalyst, (25th November, 2023, 5:22 PM), https://www.catalyst.org/research/women-on-corporate-boards/>.

[22] Id.

[23] C.Emelianova, *Women on Boards*,2019 progress report, MSCI, (1st December, 2023, 2:33 PM) < https://www.msci.com/www/research-paper/women-on-boards-2019-progress/01667826614>.

Canada

Canada does not have mandatory requirement of appointing women directors to board. Still, more than 29 percent of the companies in Canada do have appointed women as their directors by 2019, and in 2020 this figure increased to 30 percent. 75 percent of the companies had three or more women to their board and there is no company that has not even a single women director.

United Kingdom

UK also does not have any law requiring companies to appoint women directors compulsorily. The rate of women directorship in 2019 was 31.7 percent, which steadily increased to 34.3 percent in 2020. More than 80 percent of the companies had three or women to their board and there is no company that has not even a single women director.

Recently, government of UK and companies therein have started focusing on the need of having more gender diversity on the board of companies, so as to promote balance of skills, gender as well as cultural diversity. Due to this need to promote gender diversity, Hampton-Alexander review came up with a report in 2016 suggesting a target that by 2020, top 350 companies in financial times stock exchange should have atleast 33 percent i.e., one third of woman as directors of companies. these top 350 companies over-achieved this target by having 34.3 percent of boards comprising of females.

European Union

In European Union, women held 29.5 percent of the seats in the board, as directors in public listed companies in 2020. Out of all the states in European Union, only six member states have made it mandatory for companies to appoint women directors. In these six members, women account for 37.6 percent of the board. In rest of the member states that do not have made this

requirement mandatory, women constitute only 24 percent of the board.

United States

Out of the top 500 listed companies in USA, nearly one-third of their board constitute of women directors. Today, all these companies have atleast one women director. It is quite noteworthy that 4 percent of the companies had its board comprising of only woman directors. The count of woman as independent directors of these top 500 companies have also increased to 47 percent.

Despite these numbers, woman are still under-represented. Steps have been taken by states to make sure that adequate representation is given to women on board. For instance, in 2018, California came up with a mandate requiring all public listed companies to appoint woman directors. Washington also enacted a legislation titled 'Washington Business Corporation Act' in 2020 requiring all public companies to have a board consisting of 25 percent woman in order to promote gender diversity and to have woman involved in the decision-making process of the company.

India

The participation of women in board of the company has significantly increased after the 2013 amendment. As per the report of the Women on Corporate Boards (WCB), the participation of women on the board increased to 13 percent in 2017, from 5 percent in 2012.[24] This shows a positive consequence of enacting this requirement, that atleast some companies have started complying with the provision. The report also stated that almost 5 percent increase has been witnessed in the Return on Capital Employed (ROCE) of the

[24] *Supra* note 21.

companies since they have started appointing women directors on board.

Having women directors in the position of top decision makers of the company not only promotes gender diversity, but also promotes better work culture and enhances the share value and goodwill of the company. A report suggested that companies that have more women directors tend to perform well financially than those companies who have lesser women as directors.

It is an undisputed fact that more women representation significantly affects company's performance, but the reality is quite different. In order to comply with this mandate, companies often appoint their relatives as woman directors in the company.[25] this dilutes the entire purpose as many competent women might not get a chance to be a part of the board. Women account for only 4 percent of overall directorships in India[26]. For instance, Reliance Industries, although being one of the largest companies of India, had only 30 women as directors at one point of time.

As per the new mandate, companies were required to comply with the requirement of appointing woman directors by mid of the financial year 2014-15. By August 2014, more than 900 listed companies who were fulfilling the criteria had not yet appointed woman directors. Compliance of this provision has always been an issue, and so SEBI had to extend the deadline of compliance to August 2015.

Conclusion

The Indian constitution, vide article 14[27] has ensured and protected the equality between all genders. This has been

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[25] Suman Layak ,*The push to appoint women directors has brought diversity to an all-boys' club'*,THE ECONOMIC TIMES (India February 8 2020).

[26] 'Only 4% of Indian company directors are women: report' Business Standard (India August 8 2014).

[27] The Constitution of India 1950, Art 14.

incorporated in the section 149 of the companies act as well wherein appointment of women directors has been made mandatory so as to give adequate representation to all genders. The issue that can sometimes arise in this regard is the burden or obligation of complying with this legal mandate on one hand, and appointing trained and experienced individuals as directors on the board. Our Indian constitution guarantees equality in all forms, including equality between all genders, but in reality, men dominate many sections of society till today, including the corporate sector. The top decision makers of the company are dominated by men. With the changing society, law makers are trying to come up with new laws or amend old laws so as to empower women and include them in all sectors of society. One such major step taken by law makers was making mandatory the appointment of woman directors to the board, by passing an amendment to the Companies Act, 2013.

Board of directors are one of the most important part of the company. They are the decision makers and so responsible for overseeing the entire management and working of the company. Having people from different fields of study, gender, religion, region, abilities, etc, would promote diversity and provide better insights to the working of the company. But despite the fact that legislators have made it mandatory for certain companies to appoint woman on board, most of the companies fail to do so.

Although law makers have enacted a legislation and respective rules therein to promote women to acquire to managerial and decision-making positions in the company, this mandate could prove to be successful in long run only if there are sufficient mechanisms developed to effectively implement them. Companies must come up with their respective guidelines for implementing this mandate and also its compliance shall be well monitored. Women must be appointed to board not on the basis of their relationship with other board members, but solely on the basis of their merit and experience.

Gender equality and providing more opportunities to women will only promote economic and financial growth in long term and will also help in the overall development of the country. Women must be allowed to enter all sectors of society without any politics, biasness, discrimination. It is time that patriarchal society gets changed and women get to perform all those roles then traditionally were dominated by men. All the three organs of the government have a duty to correct such inequalities and to create better and bias-free environment for all genders, only then our society and our economy will be able to progress.

CHAPTER 16

GLOBAL GIANTS: RISE OF MNCS AND THEIR INTERACTION WITH HUMAN RIGHTS

Monzur Ul Kabir Choudhury

Introduction

The global economy is an entity of astronomical scale. It is a giant machine that connects almost every person on the planet. Within the sphere of globalization, it is perhaps economic globalization that has made every country in the world so intertwined that no state can keep itself out of it without its economy collapsing. Although the concept of global trade is not new, but in the modern world, integration of the global economy began at a fast pace after the Industrial Revolution wherein steam power, electricity and power loom were invented. These technological inventions allowed humans to increase their productivity beyond the capacity of their muscles and things started to be produced at a mass level and this also created a requirement for raw materials and market for selling the products. At this juncture both the way of economic production and the way of exchange of commodities transformed. Economic globalization is usually understood as the intensification and stretching of economic inter-relation across the globe, and this is because of the huge flow of capital and technology.[1] In the process, there is a linking of the national economies. As per Author Manfred Stager, there are three building blocks in the current global economic order viz Multi-National Corporations, International Economic Institutions and Large regional trading systems.

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[1] MANFRED B STEGER, GLOBALISATION-A VERY SHORT INTRODUCTION 37 (Oxford University Press 2003).

Establishment of Multinational Corporations: An Analysis

The origin of this phenomenon in the modern time can be traced back to the end of World War II after which the Bretton Woods Conference was held of which the main protagonist was John Maynard Keynes who propounded the idea of controlled capitalism.[2] This conference was held under the leadership of US and Britain and inter alia in this conference, it was decided to reverse the protectionist policy of the war period. Further, the group made commitments to expand international trade, lay down rules of international trade, and establish a secure money exchange system. Another important decision that was taken during this conference was fixing of the gold value of the US dollar.[3] Furthermore the conference laid the foundation for three international economic organization viz the 'International Monetary Fund', the International Bank for Reconstruction and Development (IBRD) widely known as 'World Bank' and 'General Agreement on Trade and Tariff' (GATT).[4] The primary duty of the IMF was to administer the international monetary system, World Bank was to lend various countries for post war reconstruction and later it started lending for industrial projects also and GATT which later on became the World Trade Organisation (WTO) was entrusted with the duty for preparing and enforcing multilateral trade agreement.[5]

As per some observers, the institutions emanating from the aforesaid conference provided the "golden age of controlled capitalism" for the next 30 years. During this period state control over the capital flow from international investors led to full employment and, the flourishing of the welfare state and it also led to a rise in wages and an increase in social services.

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[2] Id.

[3] The Bretton Woods System, WORLD GOLD COUNCIL (22 Sept. 2024, 11.00 AM), https://www.gold.org/history-gold.

[4] Bretton Woods-GATT, 1941-1947, OFFICE OF THE HISTORIAN (21 Sept. 2024, 9.00 AM),
https://history.state.gov › milestones › bretton-woods.

[5] Id.

Although such an economic model led to some class compromise but it worked well for three decades. In the early 1970s, the popularity of this system started to decline with the rise of conservative politicians gaining ground in the major economies of the world.[6] Further, as the U.S.-based industries were losing ground, the push for liberalization of trade restrictions seemed lucrative. In the meantime, President Richard Nixon in the U.S. abandoned the gold-based fixed rate. This led to a decade of "global economic instability" due to stagflation, low economic growth, high unemployment and public sector deficits. Thereafter, the political climate also changed, especially in the developed world. Politicians with conservative but Neoliberal economic ideologies began gaining ground. Controlled capitalism became a thing of the past and neoliberalism became vogue. This new ideology believed in the self-regulating mechanism of the market by eliminating the tariffs on the import of commodities and services.

This was inspired by the writings of economists Adam Smith and David Riccardo. It is to be mentioned here that although Adam Smith was an 18th-century Scottish economist and philosopher, his ideas found takers in the later 20th-century politicians, viz., President Ronald Regan of the United States of America and British Prime Minister Margaret Thatcher who vehemently pushed the neo-liberal ideas as opposed to Keynesianism. At this juncture, the concept of globalization was linked to the idea of liberalization of the global economy. To this English philosopher Herbert Spencer appended the idea of social Darwinism to the concept of free market.[7] He called it the "Most civilised form of human competition" wherein the fittest would rise to the top.[8] This new economic system found further

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[6] Andrea Estrada,The rise of conservatism, THE CURRENT (21 Sept. 2024, 9.00 AM), https://news.ucsb.edu/2010/012920/rise-conservatism.

[7] Social Darwinism and American Laissez-faire Capitalism, CONSTITUTIONAL RIGHTS FOUNDATION (Sept. 22, 2024, 7 PM), https://teachdemocracy.org/images/t2t/pdf/SocialDarwinismandAmericanLaissez.pdf.

[8] Id.

impetus with the collapse of the Soviet Union and Eastern Europe in 1989 to 1991 which highlighted the weaknesses of socialism. During this time the institutions founded by Bretton Woods also aligned themselves to the neoliberal ideas and took up the agenda of furthering such policies in the developing world. This push lead to the "internationalization of trade and finance". Numerous commentators link "free trade" with the concept of "economic globalization". Since 1947 the value of world trade has also increased exponentially i.e. in 1947 world trade was valued at 57 billion US Dollars and by the late 1990s it reached 6 Trillion US Dollars and of late in 2023 it was valued at 24 Trillion Dollars.[9] Developed and wealthy countries in the north led efforts to create a single regional and global market like "NAFTA" and "GATT".

The proponents of free trade say that it leads to an increase in consumer choice, an increase in global wealth, peaceful international relations, spread of new technologies. Beyond these, it is argued that it has benefits to societies like it increases specialization among the constituents in a society, and promotes competition and technological advancement. On the other hand critics (usually labour unions and environmentalists) argue that the gap between rich and poor countries is widening, it is leading to lowering of standards of labour across the globe, environmental degradation and there is growing indebtedness of the developing and underdeveloped countries towards the developed countries.

Internationalization of Trade

"Internationalisation" of trade is also linked to the liberalization of financial transactions. The globalisation of financial trading has occurred due to lesser restrictions and higher international opportunities for investment. Its growth originates in the 1980s

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[9] Evolution of trade under the WTO: handy statistics, WORLD TRADE ORGANISATION (Aug. 15, 2024, 6 PM), https://www.wto.org.english.res_e.statis-evolution.

when there was a gradual deregulation of securities and capital markets in Europe, North America, East Asia, Australia and New Zealand.[10] The same this happened after a decade in other parts of the world like the South East Asia, India and some other African countries. This phenomenon received further acceleration in the 1990s through technological advancements like the placing of New Satellite Systems in orbit, the laying down of fibre optic cables which laid the foundations of the internet enabling lightning-fast transfer of data and economic and political information across the continents. In the 2000s the information-based economy was established. Stock exchanges of New York[11], Tokyo, and Frankfurt were all connected through the internet wherein billions of dollars of trade was made possible within seconds. This "financial supermarket" spans the entire globe. The critics of this supermarket argue that the lion's share of this money transferred is actually not going for production of actual things like installation of machines, procuring raw materials, or payment of employees but it goes into extremely risky hedge funds which promises to draw profit from future production. Further there is a tendency of this speculative business to take benefit of weak financial and banking regulation of developing countries to make huge profit. This leads to creation of "boom and bust cycle" which puts social welfare of entire regions in risk.[12] One of such example is the "South East Asian Financial crisis" of 1997-1998 wherein when the foreign investors withdrew their investment, the economies of Thailand, Malaysia, the Philipines etc. faced excessive pressure and had to devalue their currency for debt servicing.

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[10] Ric Battellino and Nola McMillan, The Deregulation of the Early 1980s and Re-Intermediation, RESERVE BANK OF AUSTRALIA (Sept. 22, 2024, 7 PM, https://www.rba.gov.au/publications/rdp/1989/8904/deregulation-of-the-early-1980s-and-re-intermediation.html).

[11] History of NYSE, NYSE (Sept. 22, 2024, 10 PM), https://www.nyse.com/history-of-nyse.

[12] Aaron Tornell and Frank Westermann, Countries: Facts and Explanation'(2002), IMF E-LIBRARY, (Sept.10, 2024, 7 PM), https://www.elibrary.imf.org/view/journals/024/2002/005/article-A005-en.xml.

Globalization and MNCs

A key player and beneficiary of the era of globalization of economies are the Multi-National Corporations. There are the modern-day versions of early modern commercial enterprises.[13]These are powerful entities with subsidiaries in several nations. There has been an exponential rise of the number of MNCs since the 1970s and this corresponds to the rise of the neo-liberal policies of various governments of the global north. To give an idea, there were roughly 7000 MNCs in 1970, by the year 2000 there were 50,000 MNCs and as of late in 2018 there are about 60,000 MNCs controlling more than 5,00,000 subsidiaries. For an understanding of the enormity of the MNCs let us consider the following facts. The current market valuation (2024) of 'Microsoft' is 3.3 Trillion US Dollars which is more than the current GDP of India which is at 3.2 Trillion US Dollars. 'Apple' is higher with a market capitalisation of 3.4 Trillion US Dollars. To give another example 'Saudi Aramco' has a market capitalization of 1.8 Trillion US Dollars with is 2.5 times the GDP of its home country Saudi Arabia. As per "Global Justice New", among the top hundred "global economic entities", 69 are MNCs and only 31 are countries.[14] From these facts, it becomes abundantly clear how much financial power is controlled by these giants in the global economy. Further, if we dig deeper and have a look into the parent country of these corporations, it would reveal that most of them are based in North America, Europe, Japan and South Korea. This reflects that there is an asymmetry of financial power between the developed and developing nations. Further, even within North America and Europe, it is the USA and Germany which has the most number of MNCs. These economic giants rival nation-states in their economic power, they control most of the global investment capital and technology and they also have the access to the global

[13] Id.

[14] 69 of the richest 100 entities on the planet are corporations, not governments, figures show, GLOBAL JUSTICE (Sept. 22, 2024, 9:29 PM), https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-are-corporations-not-governments-figures-show/.

market. At times these corporations do mergers and acquisition to stay prominent in the global market place. The critics often say that "economic globalization" is "corporate globalisation" or it can be also called as "globalization from above". These corporations consolidate their operation in labour market with less regulation where cheap labour is abundant and this has provided them the favorable production condition in the global south further increasing corporate profits. In turn MNCs have also boosted the Foreign Direct Investment in the developing world.[15] The capacity of the MNCs to distribute manufacturing process to various locations around the world shows the changing nature of global production. It permits them to bypass the trade unions and labour organisations which are mostly based within a certain jurisdiction thereby both structure and functioning of the global economy has changed considerably. They have major determining factor of flow of trade, location of industries etc. and as a result they influence the economic, political and social welfare of numerous countries.[16]

In the aforesaid situation, the role of international economic institutions have increased. Since the 1970s and especially after the fall of the Soviet Union, these institutions have taken the road of furthering neoliberal economic agendas of integrating and deregulating markets around the world. International Monetary Fund & World Bank Group do this by asking for structural adjustments as a condition precedent for providing loans to developing countries. These "structural adjustments" comprise of a set of neo-liberal policies which are called as the "Washington consensus".[17] The "Washington consensus" basically touches upon the following 10 areas viz. fiscal discipline, reduction of public expenses, creation of broad tax base with effective enforcement, determination of interest rate

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[15] Bruce Blonigen, Foreign Direct Investment Behavior of Multinational Corporations, NBER The Reporter (Sept. 22, 2024), https://www.nber.org/reporter/winter-2005/6/foreign-direct-investment-behavior-multinational-corporations.

[16] Id.

[17] Id.

by market, trade liberalization like no import tariffs, Foreign Direct Investment, privatization of state enterprises, deregulation of economy and protection of property rights. This agenda of the IMF and World Bank is faced with vehement criticism on the ground that these loans are mostly pocketed by authoritarian political leaders and their local businessman friends and the MNCs whom they indirectly benefit. Further these funds are also used for poorly planned infrastructure projects. Further less spending on public projects translates into less social programs, reduced spending on education and increased pollution. Furthermore, a major chunk of the budget goes into debt servicing and interest payments which is a vicious cycle of debt entrapment.

International Economic Developments and MNCs

With time, concerns of human rights violations by the MNCs gained importance and the United Nations with the guidance of Prof. John Ruggie came up with the 'Guiding Principles on Business and Human Rights' in short UNGP in the year 2011. These principles are based on the three pillars, viz., firstly, 'Protection of HR' which talks about enacting laws and laying down regulations in the realm of labour laws, laws on the protection of the environment, protection of vulnerable groups etc., which mandates businesses not to violate human rights; secondly, 'Respect for HR' which basically talks about imbibing Human Rights in corporate governance i.e. integration of respect for HR in decision making, policy framing, and in corporate governance structures and it also includes avoiding being accomplice to human rights abuses in their supply chain; and 'Remedy in case of violation' means establishment of Judicial and Non-Judicial Mechanisms for aggrieved victims of human rights violation.[18] These mechanisms need to be accessible and provide

[18] OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, (Oct. 21, 2024, 7.00 PM,https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf).

an efficacious remedy. Following these guidelines, numerous MNCs have already aligned their corporate responsibility and sustainability frameworks. UNGPs became the guiding light for other international guidelines in the field such as OECD Guidelines for MNCs, ISO26000 standard on corporate social responsibility and 'Global Reporting Initiative'. The Indian Ministry of Corporate Affairs has already prepared a zero draft of the 'National Action Plan on Business and Human Rights' in line with the UNGP principles.[19] A primary area of interaction of MNCs or for that matter any corporation with human rights is labour practices. A major chunk of India's workforce work in agriculture and informal sectors and are prone to low wages and poor conditions of work. With the advent of the MNCs, working conditions are supposed to get better but despite labour laws being present, reports of violations come from sectors like textile, mining etc. especially in the supply chains from where the products are sourced. Further, at times to attract foreign investment, labour laws are relaxed in the 'Special Economic Zones' which add to the problem.[20] Another significant point of interaction is the effect of MNCs on the environment.[21] In this segment, MNCs have a reputation to be notorious, especially in sectors of mining, infrastructure etc. which often leads to environmental degradation by Air and water pollution, deforestation, reduction in land fertility etc. Nevertheless, India is also among the few countries where 'Corporate Social Responsibility' is mandatory under the Companies Act of 2013.[22] MNCs are mandated to spend at least 2 percent of its average net profit of the previous financial years and it is also worth mentioning that some MNCs like Wipro, Tata Consultancy Services (TCS) and Infosys have taken up CSR initiatives relating

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[19] INDIAN INSTITUTE OF CORPORATE AFFAIRS, https://iica.nic.in/sob_nap.aspx (last visited Oct. 21, 2024).

[20] Jaivir Singh, *Labour Law and Special Economic Zones in India*, Working Paper Series CSLG 1, 6-14 (2012).

[21] YOU MATTER, (Oct. 21, 2024,7.00 PM),https://youmatter.world/en/category-environment/multinational-companies-global-emissions/.

[22] Section 135

to rural development, women empowerment, environmental sustainability etc. which aims at raising the standard of living of the rural population.[23] It is also to be mentioned that, some MNCs also perceive such requirements as mere compliances and not as a human rights commitment. Much before UNGPs, on a fateful day in 1984, India has already witnessed the disaster that MNCs operations may have caused in the form of Bhopal Gas Tragedy. Although the Indian Supreme Court has played a proactive role for compensation of the victims but as discussed before the sheer economic might of the MNCs and their ability to operate beyond borders give them a lot of impunity. For the victims of the Bhopal Gas Tragedy, it is still an ongoing battle after four decades.[24]

Conclusion

In view of the above discussion, it is abundantly clear that the rise of global economic giants or MNCs is closely linked to the major economic decisions of transformation from protectionism to controlled capitalism and finally to neo-liberalism which in turn are all linked to political choices of various times. Further, these MNCs with their economic power rivalling nation states and control over manufacturing and supply chains can easily bypass the national jurisdictions due to their multi-jurisdictional character thereby avoiding jurisdictions with strict labour and environmental regulations although it can't be denied that MNCs have also contributed to increasing the standard of living of workers in many poor and developing countries wherein they have introduced better wages and work conditions beyond the legal requirements. To conclude it can be said that with ethical practices, MNCs can transition from being exploiting to empowering and in this regard some of them have already shown success.

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[23] GIVE, (Oct. 21, 2024,8.00 PM),https://give.do/discover/news/csr-in-rural-india-addressing-the-unique-challenges-and-opportunities/.

[24] THE GUARDIAN, (Oct. 21, 2024,9.00 PM),https://www.theguardian.com/cities/2019/dec/08/bhopals-tragedy-has-not-stopped-the-urban-disaster-still-claiming-lives-35-years-on.

CHAPTER 17

UNITED NATIONS CONVENTION ON INTERNATIONAL SALE OF GOODS: OVERVIEW, APPLICABILITY AND CONCEPT OF FUNDAMENTAL BREACH.

Pranav Gandhi

Introduction

International sales law, whether codified or not, has long struggled with a lack of unity, standardization, and harmonization among diverse laws and regulations applied in international trade by various states. Previous attempts to establish a more uniform and widely accepted international sales law were ineffective, resulting in unresolved conflicts in international contracts and trade. The United Nations Convention on Contracts for the International Sale of Goods (CISG), adopted in 1980, played a crucial role in providing a framework for international sales law. The CISG unified rules governing international sale of goods contracts, influencing both international and domestic sales law.

The research paper also examines the concept of fundamental breach within the CISG, emphasizing that the convention doesn't explicitly define fundamental breach. Instead, it relies on agreements made by parties and surrounding circumstances. Jurisprudence provides criteria for determining when a breach is considered fundamental. Firstly, any violation of contractual obligations can qualify, irrespective of whether explicitly contracted or derived from CISG provisions. Even a breach of a secondary duty can lead to a fundamental breach, as seen in a case where a manufacturer failed to reserve goods exclusively for the buyer, resulting in a fundamental breach when the goods were displayed and sold despite the buyer's warning.

The concept of fundamental breach is crucial in the CISG, serving as a prerequisite for contract avoidance under articles 49(1)(a) and 64(1)(a) [1]. In cases of a fundamental breach, the buyer can request substitute goods (article 46(2)) and exercise remedies even if the risk has shifted to the buyer (article 70). Conversely, a non-fundamental breach allows the aggrieved party to claim damages (article 74) and seek a reduction in price (article 50).

The distinction between fundamental and non-fundamental breaches indicates a deliberate intent by CISG drafters to differentiate between the two categories. The consequences of a fundamental breach are more severe, potentially leading to contract termination. Determining whether a breach qualifies as fundamental is the initial consideration when a breach occurs.

Regrettably, Article 25 of the CISG lacks specific guidelines for distinguishing between fundamental and non-fundamental breaches. It states that a breach is fundamental if it substantially deprives the other party of what they are entitled to expect under the contract, unless the party in breach did not foresee such a result, and a reasonable person in the same circumstances would not have foreseen it. This provision has faced criticism for its lack of a clear definition of fundamental breach, arising from variations in definitions within different legal systems. These differences hindered the drafters from reaching a consensus on the specific breach type leading to contract avoidance. Notably, the Convention doesn't provide specific instances or examples illustrating what might qualify as

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[1] Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Vienna Sales Convention (CISG) - Alternatives of Complementary Instruments?*,UNIFORM LAW. REVIEW., 1996, p. 28, stating that the language of art. 25 is "vague and ambiguous"; Heuzé, La vente internationale des merchandises. Droit uniforme, Paris, 1992, p. 294, "redaction trèsdéfectueuse".

a fundamental breach; instead, it offers general interpretive guidelines. [2]

The United Nations Convention On Contracts For The International Sale Of Goods

Efforts towards unifying international sales law have been evident since the early part of the last century. The League of Nations was among the early advocates, attempting to unify the international law of sales, but these efforts proved unsuccessful. Subsequently, the United Nations Commission on International Trade Law (UNCITRAL) was established under the United Nations to reform and unify trade law. [3]The endeavors of UNCITRAL culminated in the creation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in 1980. Widely recognized as the international sales law code, the CISG has been adopted into domestic codes by various states (Schaffer, Augusti, Earle 2009). Undoubtedly, these concerted efforts have yielded positive outcomes in international sales law, eliminating ambiguity in international trade. Hence, the dedication and initiatives invested in the development of international sales law deserve commendation.

CISG Convention 1980

The United Nations Convention on Contracts for the International Sale of Goods, comprising 101 articles, was established during the 10th plenary meeting of the Vienna Diplomatic Conference on April 10, 1980. The convention was formally executed on April 11, 1980, in Vienna and has since been ratified by 76 countries. This international agreement

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[2] Babiak, Defining,*Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods*, TEMP. INTERNATIONAL . & COMPANY. LAW JOURNAL, 1992, p. 113.

[3] JOHN O. HONNOLD AND HARRY M. FLECHTNER, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION,4th Revised ed., Kluwer Law International.

addresses issues pertaining to trade transactions conducted on a global scale.[4]

Purpose of the Convention

The fundamental aim of the convention was to foster amicable relations among states by advancing international trade founded on principles of equality and mutual benefit, as articulated in the preamble of the discussed convention. Additionally, the convention sought to establish consistent rules governing international trade transactions, accommodating the diverse social, political, and legal systems in order to eliminate legal impediments in global trade (Preamble CISG 1980).[5] The reformative and non-coercive nature of the convention serves a positive purpose by promoting uniformity and harmonization in international sales law while allowing reasonable flexibility for domestic laws. The convention's objectives are manifold, encompassing the establishment of connections between laws and regulations applicable to states in their international contractual engagements to foster friendly relations. Moreover, its non-coercive application within domestic law prevents discrimination among states.[6]

Geographic Extent of CISG

Article 1 primarily addresses the geographic scope of the CISG, although Articles 2 and 3 are pertinent. It stipulates that, at the time of contract conclusion, the involved parties must have their places of business in different states. While the convention does not provide a definition for "Place of Business," case laws have clarified this term. Essentially, the contracting parties must not have their places of business in the same state, even if their

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[4] Peter Winship, *The Hague Principles, The CISG, and the "Battle of Forms*, PENN STATE JOURNAL OF LAW & INTERNATIONAL AFFAIRS, Vol.4, 2015.

[5] Ray August,International Business Law: Text, Cases, and Readings, (5th ed.). Upper Saddle River, NJ: Pearson Education,2009

[6] J.C.T.Chuah,LAW OF INTERNATIONAL TRADE, (4rd .ed). London: Sweet & Maxwell,2009

investment sources are from different states (UNCITRAL Digest 2008). This article underscores the international character of the convention, governing contractual relations among diverse states in the realm of sales law. A majority of states have ratified the convention and adopted it as the governing law for contracts involving the international sale of goods with other states. [7]

CISG Applicability

The CISG's scope is precisely delineated to prevent the international sale of goods contracts from becoming overly intricate. Articles 4 and 5 of the Convention on Contracts for the International Sale of Goods 1980 explicitly cover its scope, addressing the 'formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract' (Article 4, CISG 1980). The convention's scope also excludes liability for death or injury. Generally, the effect of the contract on the property in goods sold is not within the convention's scope. While certain other matters were contemplated for inclusion, they were deemed controversial due to discrepancies with national laws (Stefan Kroll, 2005-06). Beyond territorial considerations, the convention encompasses the formation of contracts of sale, obligations, and remedies for international sales of goods contracts.[8]

Global Standardization of International Sales Law

The concept of unifying law involves addressing the subject matter of legal rules that function across various political entities. The CISG is designed with the objective of unifying laws related to international sales, a necessity for global economic growth and the advancement of international trade. Despite the belief that unification is hindered by differences in policies, legal

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[7] AUGUST, RAY,INTERNATIONAL BUSINESS LAW: TEXT, CASES, AND READINGS, (5th ed.). Upper Saddle River, NJ: Pearson Education,2009

[8] JOHN O. HONNOLD AND HARRY M. FLECHTNER,UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION,4th Revised ed., Kluwer Law International,1980.

rules, and concepts, it is deemed achievable by avoiding extremes and fostering judicial or administrative cooperation (Andre Janssen 2009). Given the extensive history of international trade, the unification of international sales law was imperative, a role significantly fulfilled by the CISG. This convention is indispensable for standardizing international sales law, establishing a fundamental framework, and rectifying many existing gaps.[9]

Preconditions: Equality as a Fundamental Requirement

Equality among states serves as a fundamental prerequisite for the application of international sales law, and distinguishing between factual and legal equality is challenging. Effective and genuine equality, whether in fact or in law, is crucial to eliminating discrimination. Factual equality may address varying situations with equitable treatment, while legal equality completely excludes discrimination (Permanent Court of International Justice 1923).[10]

Initiatives and Measures

Disputes arising from United Nations and United Nations Emergency Force operations in Congo and the Middle East, respectively, raised financial concerns under Article 17(2) of the United Nations Charter. The International Court of Justice (1962) determined that the General Assembly's special powers do not diminish its general powers.[11] However, in the event of necessary action, the General Assembly must refer the matter to the Security Council, as the Security Council is the enforcing body of the United Nations and is not subject to restrictive

[9] https://www.lawteacher.net/free-law-essays/international-law/efforts-for-the-unification-of-the-international sales-law-international-law-essay.php

[10] Christine Moccia,*The United Nations Convention on Contracts for the International Sale of Goods and the Battle of Forms*, FORDHAM INTERNATIONAL LAW JOURNAL, Vol.13, 1989.

[11] J.C.T CHUAH,LAW OF INTERNATIONAL TRADE, (4rd .ed). London: Sweet & Maxwell,2009

discretion under Article 43. This delineates the appropriate hierarchy for undertaking actions and measures.[12]

The organization is not held responsible for payments resulting from actions taken by an incorrect entity. Both international and national laws impose accountability on a corporate or political body for the wrongful actions of its agent in relation to third parties. The court, with a majority of nine votes to five, concluded that these expenditures indeed qualified as expenses under Article 17(2).

State Rights: Charter of Economic Rights and Duties

Under the resolution passed by the General Assembly on December 12, 1974, known as the Charter of Economic Rights and Duties of States, the following rights and duties are outlined[13]:

Free Choice of Means: States are entitled to consider any applicable laws or regulations, guided by the principle of the free choice of means.

Association for Economic Development: States have the right to collaborate with primary commodity producers for economic development.

Advancement in Science and Technology: States retain the right to benefit from advances and developments in science and technology.

Judicial Equality in Decision Making: Based on the principle of judicial equality, states possess the right to participate in international decision-making processes regarding economic, financial, and monetary issues. These rights are reciprocal and

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[12] Peter Winship,*The Hague Principles, The CISG, and the "Battle of Forms*", PENN STATE JOURNAL OF LAW & INTERNATIONAL AFFAIRS, Vol.4, 2015

[13] Supra note 35.

must be respected by each state in relation to others. Observance of these rights is crucial for economic development.

Responsibilities of Developed States: Promoting Equality and Development

Where there are rights, corresponding duties arise, as outlined in the aforementioned convention. The duties of developed states include:[14]

*Elimination of Colonialism and Racial Discrimination***:** Developed states must take measures to eradicate colonialism, racial discrimination, and all forms of foreign aggression. This is a pivotal duty aimed at fostering harmony in the international community and promoting economic development.

Non-Reciprocal and Non-Discriminatory Tariff Preferences: Developed countries should enhance the system of generalized, non-reciprocal, and non-discriminatory tariff preferences for developing countries.

Promotion of Economy through International Trade: Developed nations must implement measures to boost the economy through international trade and avoid actions that may have negative repercussions.

Exploration of Sea-Bed Resources for Peaceful Purposes: Resources at the sea-bed and ocean floor should only be explored for peaceful purposes, recognizing them as the common heritage of mankind.

Environmental Protection Policies: States must formulate and implement environmental and development policies to protect the environment. Cooperation among states is crucial for this

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[14] JOHN O. HONNOLD AND HARRY M. FLECHTNER,UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION,4th Revised ed., Kluwer Law International

purpose, ensuring the protection of both domestic and international environments.[15]

Advancing Global Trade: Article 14 of the Charter

Under the provisions of Article 14 within the Charter of Economic Rights and Duties of States (1974), all states are obligated to collaborate in promoting the liberalization of world trade, contributing to the enhancement of living standards for their people. To achieve this objective, cooperative efforts must be undertaken to eliminate obstacles in international trading. Such measures not only augment foreign earnings for states but also prove beneficial for the growth of developing states in international trade.

Self-Determination: Upholding Fundamental Human Rights

The Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the United Nations on December 14, 1960, unequivocally asserts that subjecting people to alien subjugation, domination, and exploitation is inconsistent with fundamental human rights and unacceptable by the United Nations. This practice is also condemned for its adverse impact on world peace and cooperation. The right of self-determination, afforded to all individuals, empowers them to determine their political status and adopt economic, cultural, social, and developmental policies of their choosing. Recognized by the United Nations, any violation of the right of self-determination is considered a breach of international law.[16]

Sovereignty Over Natural Resources: General Assembly Resolution (1962)

The General Assembly's resolution on Permanent Sovereignty over Natural Resources (1962) acknowledges a nation or state's

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[15] Supra Note 36.
[16] Supra Note 25.

right to control the natural wealth and resources within its borders. Importantly, this sovereignty should be exercised for the welfare of the state's population. States also retain the right to explore and trade their natural resources in compliance with both domestic and international laws. The charter further allows states to engage in agreements over investments for natural resources among themselves, provided such agreements are conducted in good faith. This approach has garnered global appreciation, emphasizing the charter's primary objective of enabling states to progress in development by utilizing the natural resources within their own territories.

Inclusive Scope of CISG: Beyond Traditional Sales Contracts

Apart from its general application to contracts for the international sale of goods, the CISG also encompasses certain contract types that do not align with the traditional notion of "sales" contracts in domestic law. Identifying the specific type of contract falling within the CISG framework can be challenging in such cases (Bonell, Liguori 1997). However, this characteristic of the CISG proves advantageous as it addresses gaps in domestic law, expanding the convention's scope and making it more readily accepted by conflicting parties. This distinguishing feature sets the CISG apart from other laws, enhancing its overall value.[17]

Integration of CISG into Domestic Laws

China, through its 1999 new contract law, incorporated the enforcement of the CISG into its domestic legal framework, later revising it to align with international trends. Similarly, the Government of Singapore designated the CISG as the governing law for contracts, and Germany has recognized and applied the CISG in its courts. This gradual integration of the CISG into domestic laws showcases its significant role in influencing and

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[17] Chuah, J.C.T., (2009). Law of International Trade, (4rd .ed). London: Sweet & Maxwell.

reforming not only international sales law but also domestic legal systems (Bruno Zeller 2007). Instances like these affirm the global trend of states ratifying the CISG and introducing it into their domestic laws.

Harmonious Coexistence of CISG and Domestic Law

The CISG and domestic law harmoniously coexist, facilitated by the fact that the CISG is not forcibly imposed on international contracts for the sale of goods. Articles 92 and 94 of the CISG grant contracting states the flexibility to choose between the CISG and domestic law for their contracts.[18] This dual provision ensures that neither the CISG nor domestic law overrides the other forcefully, allowing for a seamless coexistence and unification of the two legal frameworks (Coetzee, Gama 2006). While the coexistence of two laws on the same subject matter is typically challenging, the CISG's flexible nature enables it to easily align with other laws on the same subject, prioritizing the intentions and will of the parties involved in contracts for the international sale of goods.[19]

Impact of CISG on National Legislation

The influence of the CISG extends beyond international law, making a mark on domestic legal systems through the evident integration of CISG rules and principles into the legislation of numerous states. Importantly, this influence is not coercive in nature. Several countries, particularly in Scandinavia, have not only adopted the CISG for cross-border sales but have also implemented it as part of their domestic sales law.

Notable examples include Sweden and Finland, which have incorporated the CISG concept into their national sales laws.

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[18] https://www.lawteacher.net/free-law-essays/international-law/efforts-for-the-unification-of-the-international sales-law-international-law-essay.php

[19] Christine Moccia, *The United Nations Convention on Contracts for the International Sale of Goods and the Battle of Forms*, FORDHAM INTERNATIONAL LAW JOURNAL, Vol.13, 1989.

Norway and Tokelau, the latter being a former trust territory of New Zealand, have enacted the CISG as their law governing sales for both domestic and international purposes. This widespread adoption reflects the positive influence of the CISG on domestic legal systems, signifying a tacit acceptance of international law principles and a commitment to maintaining harmony with uniform standards.

Criticisms of CISG

While the CISG has earned appreciation, it has not been immune to criticism, with focus primarily on issues related to interpretation, lack of neutrality, and perceived incompleteness.

Interpretation Challenges: Critics point out that the CISG lacks clear definitions for various terms used in its articles, introducing uncertainty in the interpretation of its provisions. Vague terms, such as "reasonable," contribute to this interpretive challenge. Consequently, the interpretation of various issues within the convention relies on the intentions and will of the parties at the time of contract conclusion or, in the case of disputes, on the decisions of the courts.

Lack of Neutrality: A dual criticism regarding the perceived lack of neutrality characterizes the CISG. Developing countries criticize it for being seller-friendly, while German practitioners argue it favors the buyer. However, such criticism may be seen as dependent on the specific provisions of the convention that either favor or disfavor the concerned parties, suggesting a fair balance.[20]

Incompleteness: The CISG faces criticism for its perceived incompleteness, as it does not provide clear guidance on various issues related to international sales law. Instead of establishing specific rules, the CISG leaves a significant number of matters

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[20] Supra Note 21.

to be decided by the parties, leading to its characterization as an incomplete code.

Brief Analysis

The culmination of efforts from the League of Nations era to the United Nations finally materialized in 1980 with the establishment of the United Nations Convention on Contracts for the International Sale of Goods (CISG). While the convention's purpose, as articulated in its preamble, garners global acceptance within the international community, its ratification remains subject to the individual interests of states. It is undeniable that the goal of achieving uniformity in international trade laws, as envisioned by the convention, still faces numerous challenges.

The convention operates on a dual scope, addressing both the territorial aspects involving states engaged in trade and the contractual status concerning the sale of goods between states. Furthermore, its ambit extends to contracts not covered by other laws, playing a crucial role in dispelling ambiguity surrounding the application of relevant laws.

Only states that have ratified the CISG have incorporated it into their domestic laws, creating potential conflicts among the domestic laws of various states, particularly when linked through trade relations. Challenges arise when a ratifying state engages in a trade agreement with a non-ratifying state, leading to issues of law applicability. In such instances, the CISG is rendered powerless and irrelevant, sidelined from its intended application.

The CISG has proven instrumental in interpreting domestic sales laws, given the precedence of international law over domestic laws. Consequently, some domestic courts have interpreted their local sales laws in alignment with the

principles of the CISG, fostering a coexistence of international and domestic sale laws.

Rationale for India's CISG Adoption

Regarded as one of the most successful treaties in private international law, the CISG owes its success to widespread adoption and the recent surge in international business transactions. Originally embraced by 11 countries in 1988, the Convention's influence has now extended to 84 nations, reflecting its significant role in facilitating and regulating global commerce. Countries that have ratified the CISG account for an impressive two-thirds of all goods involved in global trade, encompassing a majority of the world's population. Despite certain reservations among signatories, there is a unanimous commitment to implementing the CISG consistently, fostering the promotion of uniform laws and their consistent application. India, amidst the wave of liberalization since 1991, has experienced substantial growth in external trade, with most major trading partners being signatories to the Convention. This alignment with a common sales law facilitates smoother trade between India and its partners.

Firstly, India's existing sales law, The Sale of Goods Act, 1930, derived from the English Sales of Goods Act, 1893, is antiquated and ill-suited to modern commercial contracts due to advancements in transportation and contracting methods. The CISG's universal nature, drafted in multiple languages, enhances accessibility for international commercial entities worldwide.

Secondly, the Convention serves as a valuable gap-filling mechanism in contracts made across borders, especially those formed through phone, fax, or telex with limited details. Contracts are often incomplete or fail to cover all contingencies, creating gaps that a uniform sales law, like the CISG,

addresses.[21] For instance, the CISG resolves issues related to choice of law clauses, emphasizing its role in filling gaps rather than restricting parties' contractual freedom.

Thirdly, the CISG acknowledges the broad contractual freedom of parties involved in international sales contracts, allowing them to deviate from or modify its provisions. Article 6 of the CISG empowers parties to vary the impact of any provision or even exclude the application of the entire Convention, ensuring flexibility while promoting uniformity in international sales rules.

Fourthly, the CISG takes into consideration contemporary trade practices and realities, featuring contract interpretation provisions broader than those found in Common Law rules.

Fifthly, the CISG addresses practical issues prevalent in day-to-day trade practices. Notably, it includes provisions instructing parties to safeguard goods in their possession that rightfully belong to the other party.

Sixthly, CISG provides a boost to the Indian economy. Law and economy are indispensable. Legal system of a country is one of the important factors in facilitating its economy. Though it is not very true to claim that a strong legal system guarantees a robust economy, but it is difficult to find a robust economy without a strong legal system. As said by Prof. Baker:

> *"If economic factors and economic interests have partly determined the legal framework, it is even more true that law has furnished the whole general framework of rules within which and under which the factors and interests of economists have had to work."*

[21] https://www.lawteacher.net/free-law-essays/international-law/efforts-for-the-unification-of-the-international sales-law-international-law-essay.php

The Convention will strengthen the legal caricature to assist the Government's move to boost economic expansion overseas by facilitating Indian businessmen and Indian corporations with a consistent sales law with the countries with whom they are trading with.

Reasons for India's Hesitation to Adopt the CISG

One prominent reason for India's reluctance to sign the CISG is its perception that the convention lacks comprehensiveness. Specifically, it does not address contract validity concerns such as illegality, fraud, and misrepresentation. This viewpoint aligns with Barry Nicholas's observation that the CISG falls short of achieving a key objective of uniform laws.

The CISG's use of imprecise language poses discomfort for common law lawyers, a sentiment articulated by Professor Farnsworth. Arthur Rossett also criticizes the CISG for employing foreign and overly broad language, leading to uncertainty in interpretation. Notably, the CISG removes the buyer's legislative right, present in domestic law, to reject goods that don't meet quantity or quality standards. Indian trade bodies and legal advisors express concern over these discrepancies in CISG rules, particularly regarding the ambiguous 'fundamental breach' concept.

Article 8 of the CISG introduces potential incongruity, with the intent clause impacting judgments and deviating from genuine value. The concept of 'good faith' in CISG further adds complexity, as the interpretation lacks clarity on whether it pertains to the parties' conduct or fair dealings. Article 7(2), known as the gap-filling provision, introduces ambiguity through the use of general principles, and other international laws like UNIDROIT Principles and PECL also associate good

faith as an interpretative principle, emphasizing its obligatory nature.[22]

Examining another scenario contributing to India's non-ratification of the CISG, consider a contracting state "X" making a deal with an Indian trader as the buyer. In situations where no specific decision is made regarding the delivery of goods, the seller's obligation ends with the delivery to the first carrier. The application of the 'closest point' test by the CISG creates uncertainty, as in the event of a dispute, the jurisdiction falls on the court of the place of the first carrier, limiting India's recourse to its own courts for interim relief in certain undefined situations.

Applicability Of CISG

Applicability: The requirement of Internationality

An analysis of Article 1:

The CISG applies only to contracts of sale of goods between parties whose “place of business” is in “different Counties”. Different countries means, two parties will attend a contract of sale of good from two countries. For example**,** A and B are two parties of a contract. A‟s business place is China and B‟s business Canada. Goods will transfer from Taranto to Beijing. Here CISG will apply.

Business place means that place where the business is registered. According to article 10(a), if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstance known to or contemplated by the parties at the time before or at the conclusion of the

[22] Christine Moccia, *The United Nations Convention on Contracts for the International Sale of Goods and the Battle of Forms*, FORDHAM INTERNATIONAL LAW JOURNAL, Vol.13, 1989.

contract.[23]For example, seller has place of business in both state in E and

F. Buyer has a place of business in state F. Suppose that the making and performance of the contract are more closely related to state F than to state E. As Seller's place of business is in state F (not in a foreign state),CISG does not apply.

The CISG provides for two ways in which it will become the law of the contract. First, through Article 1(1) (a), the CISG applies when both parties to the contract of sale have their places of business in different States that are both Contracting States. For example, if a company with its place of business in Germany sells to one with its place of business in the People's Republic of China (PRC), the CISG applies because both Germany and the PRC are Contracting States. Germany is bound by Article1 (1)(a). If however a French company (France being a Contracting State) enters into a contract of sale with an Indonesian company (Indonesia is not a Contracting State as of today), the CISG cannot apply through article 1(1) (a) since one of the parties has its place of business in a non-contracting state.

ICC Arbitration Case No. 7531 of 1994. In this case it was held that A Chinese seller, defendant, sold scaffold fittings to an Austrian buyer, plaintiff. The buyer claimed lack of conformity of the goods and declared the contract avoided. Subsequently, the buyer sold the goods and sued the seller for damages; as such goods had been sold only partially and at a lower price.[24] The arbitral tribunal determined the CISG to be applicable to the contract in accordance with article 1(1) (a) CISG).[25]

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[23] PETER SCHLECHTRIEM AND INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS, 3rd ed., Oxford University Press, Oxford 2010.
[24] https://bura.brunel.ac.uk/bitstream/2438/12043/1/FulltextThesis.pdf
[25] PETER SCHLECHTRIEM AND INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS, 3rd ed., Oxford University Press, Oxford 2010.

Germany 25 June 1997 Appellate Court Karlsruhe (Surface protective film case **:** A German seller, defendant, delivered surface-protective film to an Austrian buyer, plaintiff, for use by the buyer's business partner. The buyer did not test the film, which had to be self adhesive and removable. When the film was removed from polished high-grade steel products, it left residues of glue on the surface. Upon being so advised, the buyer notified the seller the next day. However, this notice was given 24 days after the film had been delivered. The buyer paid the expenses of removing the glue residue and brought a claim for reimbursement of these expenses against the seller.

The CISG was applicable under both articles 1(1) (a) and 1(1)(b) CISG.

Applicability: The requirement of "relation of contracting state"

Direct and indirect application:

According to the criterion set forth in Article l (l) (a), the CISG is "directly"applicable when the parties have their places of business in different *Contracting States,* and this is true even where the parties are unaware that the States where their places of business are located are Contracting States. Thus, whenever this requirement is met and whenever the *lex fori* is the law of a Contracting State and the parties have not excluded the CISG, it will be applicable, independently from a different solution provided for by the rules of private international law. On the contrary, where the parties have their places of business in different Contracting States, but the forum is one of a non-Contracting State and its rules of private international law lead to the application of either the law of the forum or the law of a non Contracting State, the CISG will not be applicable *perse.*

The applicability of the CISG is, however, not necessarily excluded where the parties do not have their places of business in different Contracting States. By virtue of what has been

defined as a "classical solution," provided for by Article l(l)(b) CISG, the CISG can be applicable even where one or both parties do not have their places of business in Contracting States, provided that the rules of private international law lead to the application of the law of a Contracting State. Consequently, where the *lex fori* is the law of a Contracting State in which the rules of private international law of sales contracts are based upon the 1980 EEC Convention on the Law Applicable to Contractual Obligations, as in the Netherlands and other European countries, the CISG will generally be applicable when the law either chosen by the parties or, absent choice of law, that having the closest connection with the contract, is the law of a Contracting State.

Art. 1(1) CISG provides for two possibilities both of which have as a first prerequisite that the places of business are in different states:

A. (i) Places of business in different states and (ii) the states are contracting States – Art. 1(1)(a) CISG – Direct Application Or

B. (i) places of business in different (not necessarily contracting) states and (ii) The rules of private international law lead to the application of the law of a contracting state – Art. 1(1) (b) CISG – Indirect Application.

Meaning of Contracting State

It is an express choice of the law of a "Contracting state‟s should be interpreted not as are reference to domestic sales law, but as a reference to CISG, which is part of law of that state. ICC, International Court of Arbitration Case No. 7565 (1994), this is

a dispute between a Dutch seller and a US buyer[26]. The parties have expressly made the contract subject to “the law of Switzerland”, a contracting state. ICA interpreted the laws of Switzerland as the national law of Switzerland including CISG as international sales law. The contract was held to be governed by CISG.

Fundamental Breach of a Contract

The right to rescind a contract for breach depends on the gravity of the breach. A party is entitled to rescind a contract where the breach is material and willful, or vital. Similarly, a party to a contract is entitled to rescind where the other party has made a substantial breach, or a breach so substantial as to defeat the object of the contract, or a substantial and fundamental breach, so as to defeat the purpose or object of the contract. It is sometimes known as a Repudiatory Breach and is a breach so fundamental that it permits the distressed party to terminate performance of the contract, in addition to entitling that party to sue for damages.

The law of fundamental breach was historically treated as an extension of the doctrine of deviation.[27]The development of this doctrine can be traced down to the first half of the 19th century, when Tindal C.J. stated in Davis v. Garett[28] that deviation made by the carrier from the agreed voyage route brings the latter outside of contract and therefore outside of exceptions or limitation clauses provided by such a contract. This harsh attitude to deviation cases originated from the earlier marine insurance practice when cargo insurance policy was lost in case of deviation. Thereby strict obligations imposed to the carrier were designed to afford protection to the cargo owner.

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[26] Ibid.

[27] L. Gíaffi, *Case Law on the Concept of “Fundamental Bíeach*” in the Vienna Sales Convention’, (2003), Inteínational Business Law Jouínal

[28] Ibid

The doctrine of fundamental breach[29] is chiefly predicated on the facts or assumption that a party to a contract or contract of sale has committed a misnomer in the contract that goes to the root of the contract, thereby knocking the bottom off its commercial relevance. There is hardly any better legal doctrine which anchors activities surrounding international sale of goods like the doctrine of fundamental breach of contract. It is an important legal instrument that rears its head up from time to time due to induced or sometimes supervening commercial non-performance.

Fundamental Breach of Contract under Sale of Goods Act, 1930

Section 12 of the Sale of Goods Act, 1930, acknowledges conditions and warranties in the sale of goods. While conditions and warranties are recognized separately, both are essentially promises made by the seller. The distinction lies in the nature of the promise. A promise is deemed a condition when it affects the fundamental basis of the contract. On the other hand, it is considered a warranty when it corresponds to the main purpose of the contract. The consequences of a breach vary based on the nature of the promise.

As per Section 12(2) of the Sale of Goods Act, a condition is a stipulation essential to the main purpose of the contract, and a breach of such condition gives rise to the right to treat the contract as repudiated.

In the case of Baldry v. Marshall**,** the buyer sought advice from the seller (a car dealer) for the purchase of a touring car. The seller recommended a Bugatti as suitable for touring. Relying on this advice, the buyer purchased the Bugatti, only to find it unfit for touring. The court determined that the recommendation regarding the car's suitability for touring purposes constituted a condition under Section 12 of the Sales

[29] Ibid

of Goods Act. Since the car's unsuitability defeated the very purpose of the purchase, the buyer was entitled to return the car and receive a refund from the seller.

In Wallis v. Pratt, Lord Justice Fletcher Moulton defined a condition as "an obligation that goes so directly to the substance of the contract, or, in other words, is so essential to its very nature, that its non-performance will be considered by the other party as a substantial failure to perform the contract at all."

Fundamental Breach under the CISG

It is crucial to recognize that the CISG amalgamates Common Law and Civil Law traditions. This dominance is evident in its favoring contract retention and the consequent restrained interpretation of "breach" as a "fundamental breach."

Article 25 of the CISG defines a breach as fundamental when it causes substantial detriment to the other party, substantially depriving them of what they are entitled to expect under the contract, unless such a result was unforeseeable to the party in breach and a reasonable person in the same circumstances.

The fundamental breach is a pivotal provision, serving as a prerequisite for contract avoidance under Article 49(1)(a) and Article 64(1)(a). When the seller commits a fundamental breach, the buyer can claim substitute goods under Article 46(2) and remedies even if the risk has passed under Article 70.

According to the Article 25 of the CISG, a breach by one of the parties is fundamental if

> *"it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee, and a reasonable person of the same kind in the*

> *same circumstances would not have foreseen, such a result".*[30]

CISG distinguishes between fundamental and non-fundamental breaches. A non-fundamental breach entitles the aggrieved party to claim damages and price reduction under Article 74 and Article 50. In contrast, a fundamental breach leads to more severe remedies, including contract termination.

A. Substantial Deprivation: To qualify as a fundamental breach under the CISG, the detriment must be substantial. For example, a breach is considered fundamental when the contract's purpose is endangered to such an extent that the party's interest in fulfilling the contract ceases to exist.[31]

B. The Contractual Expectation: The concept of substantial deprivation is linked with the contractual expectation. A detriment is deemed fundamental only if the aggrieved party no longer has an interest in accepting contract performance. The expectations must be discernible from the contract.[32]

C. Foreseeability**:** Foreseeability, as per Article 25 CISG, prevents parties from avoiding the contract due to a fundamental breach if the substantial detriment was unforeseeable. The party in breach must show it did not foresee the detriment, and a reasonable person in the same circumstances would not have foreseen it.

The point of foreseeability remains debated—whether at the contract formation or breach occurrence. Some argue for contract formation, while others consider good faith, accounting for information received after contract formation. Contract terms explicitly stating the essence of performance leave little

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[30] https://bura.brunel.ac.uk/bitstream/2438/12043/1/FulltextThesis.pdf
[31] https://www.lawteacher.net/free-law-essays/international-law/efforts-for-the-unification-of-the-international sales-law-international-law-essay.php
[32] https://bura.brunel.ac.uk/bitstream/2438/12043/1/FulltextThesis.pdf

room for proving unforeseeable breaches, emphasizing the importance of contractual clarity

Importance of Distinguishing between "Fundamental" and "Non-fundamental" Breach

To illustrate the importance of distinguishing between "fundamental" and "non-fundamental" breach, I propose to consider first a breach of contract and its consequences under the Convention in general. While chapter II of Part III of the Convention deals with the obligation of the seller and provides remedies for the buyer, chapter III is concerned with the obligations of the buyer and provides remedies of the seller.[33]The seller is under the obligation to "deliver the goods, hand over any documents relating to them and transfer the property in the goods."[34] He must do so "within a reasonable time after the conclusion of the contract"[35]. If a date or a period of time is fixed the delivery must take place "on that date" or "within that period."

The seller is required to deliver goods "which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract." In particular the goods must be fit for the ordinary or particular purpose known to the seller[69], possess the quality of a sample or model held out to the buyer and be contained in a usual manner or adequate to protect and preserve the goods.

If the seller does not comply with one of these requirements he is in breach of the contract. Also, the buyer has certain obligations; the most important are to "pay the price for the

[33] https://bura.brunel.ac.uk/bitstream/2438/12043/1/FulltextThesis.pdf
[34] Article 30
[35] Article 33(c)

goods and take delivery of them". If the buyer fails to do so he is in breach of contract.[36]

Remedies

Several remedies are available for a breach of contract.[37] This is where the distinction between a "fundamental" and a "non-fundamental" breach becomes crucially important since certain remedies are only available in cases of a "fundamental" breach. The most important remedies of the Convention are:

Damages

If one of the parties fails to perform his contractual obligations Article 45(1)(b) gives the buyer and Article 61(1)(b) the seller the right to claim damages under Article 74. The latter sets out the rules for the calculation of damages as well as further conditions for liability. In addition to a "breach of contract", two further conditions have to be satisfied: a foreseeable loss must be

suffered by the injured party and there must be a causal link between the "breach of contract" and the suffered loss.[38]

Damages can be claimed for any failure of buyer or seller to perform the contractual obligations. Accordingly, the aggrieved party can recover damages from the party in breach even though the breach has not been "fundamental".

Reduction of price

In case of non-conformity of the goods, the buyer may also reduce the price under Article 50 pursuant to Article 45(1)(a).

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[36] Article 35(2)(a)(b)

[37] Article 45(1); 61(1)

[38] BIANCA, C.M. / BONELL, M.J. "Commentary on the International Sales Law - The 1980 Vienna Sales Convention" (1987) Milan, at Article 74, 2.2. (Knapp).

The remedy of price reduction can be applicable where the seller has delivered non-conforming goods and the buyer elects to accept them in spite of the non-conformity. The remedy of price reduction is not available in types of breach other than non-conformity of goods. Other types of breach contained in Articles 31-34 such as late delivery, handing over documents, etc. do not fall within the range of Article 50, and price reduction is not available. As with the remedy of damages, the remedy of price reduction does not require a "fundamental" breach but is available in any case of non-conformity of goods.

Contract Avoidance

Under Article 49 the buyer may declare the contract avoided if the seller fails to perform his obligations. The same applies to the seller under Article 64. Pursuant to Article 81 "avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due". Accordingly, once a contract has been declared avoided, the contract is terminated and the parties are released from their obligations for the future. The buyer loses the right to claim the delivery of goods and the seller cannot claim payment of the price anymore. However, the injured party does not lose the right to claim damages he suffered as a consequence of the breach. For the past, the parties may claim restitution and be required to return the supplied goods or the paid price.

Contract avoidance is a drastic remedy since world-wide commercial trade normally involves large quantities of goods and therefore involves expensive transport and storage. Consequently, the remedy of contract avoidance is not available for just any breach of contract; at this point the distinction between "non-fundamental" and "fundamental" breach, as defined in Article 25, becomes of major importance. The avoidance of contract may only be declared if the failure of the seller "to perform any of his obligations . . . amounts to a

fundamental breach" [39] or if the seller does not deliver the goods "within the additional period of time fixed" in accordance with the *Nachfrist*-type rule in Article 47. The same applies to the buyer if he does not perform his obligation to pay the price or take delivery of the goods.[40]

Other than in the limited *"Nachfrist"* situation, a "non-fundamental" breach of contract does not give the parties the right to avoid the contract.

The prerequisite of a "fundamental" breach is meant to save the contract and consequently to avoid expensive and wasteful reshipment where either the defect of goods is immaterial or the deprivations from the contract are insubstantial. This makes it clear that one has to carefully analyze whether a breach is "fundamental" or not and what exactly amounts to a "fundamental" breach within the meaning of Article 25.

Repair and delivery of substitute goods

In case goods "do not conform with the contract, the buyer may require the seller" to repair the goods[41] or to deliver substitute goods.[42] The buyer's right to repair is subject to the condition that the repair is not "unreasonable having regard to all the circumstances". The unreasonableness depends on the nature of the goods and other circumstances such as the distance of the respective countries of the parties or the extent of the defect of the goods, but does not depend on the character of the breach.

However, the right to require delivery of substitute goods depends very much on the character of the breach; substitute goods may only be requested in case of a "fundamental" breach.

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[39] Article 49(1)(a), 64(1)(a)
[40] Article.64 (1)(b)
[41] Article 46(3)
[42] Article 46(2)

The prerequisite of a "fundamental" breach was introduced in this provision to avoid expensive transports of substitute goods in cases in which the defect of the goods is trivial and the deprivation of contract is unsubstantial.

This, again, stresses the importance of the distinction between a "fundamental" and a "non fundamental" breach. While in the former case the buyer may require substitute goods the buyer, in the latter case, has to content himself with a request for repair or with claiming damages or price reduction.

Passing of risk

Apart from different available remedies, the distinction between "fundamental" and "non fundamental" breach becomes equally important in chapter IV of the Convention dealing with the "passing of risk". Pursuant to Article 70, "articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach", If "the seller has committed a fundamental breach of contract."[43]

Articles 67-69 are concerned with the time when the risk of loss or damage to the goods passes to the buyer. Once the risk passes to the buyer the seller is entitled to payment regardless of any damage or loss to the goods.[44]

Article 67 deals with the "passing of risk" in sales that involve the carriage of goods. In that case "the risk passes to the buyer when the goods are handed over to the first carrier."

Pursuant to Article 68 "the risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract." Article 69 is concerned with the buyer's failing to take

[43] https://www.lawteacher.net/free-law-essays/international-law/efforts-for-the-unification-of-the-international sales-law-international-law-essay.php
[44] Article 66

delivery. If the buyer does not take over the goods in due time, the risk of damage or loss passes to him.

Article 70 deals with "passing of risk" in the case of a breach of contract of the seller and situations in which such a breach may prevent the risk from passing to the buyer. In cases of non-conformity of goods that constitute a "fundamental" breach, the buyer does not lose his remedies although the risk of damage or loss has passed to him. Therefore, the buyer may declare the contract avoided if the non-conformity of goods already amounted to a fundamental breach at the time the risk passed to the buyer but the goods suffered further damage after the "passing of risk". If the non-conformity of goods did not amount to a "fundamental" breach before the risk has passed, contract avoidance is not available to the buyer since he has to bear the risk.

Miscellaneous

Furthermore the distinction between "fundamental" and "non-fundamental" breach becomes important where a contract avoidance may be declared for the reason of an anticipatory breach of contract.[45] Finally, the parties may declare an instalment contract avoided in case of a "fundamental" breach.

Conclusion

The fact that the CISG has been "the most successful international document so far" cannot be denied. The need of the hour requires that Indian traders have to familiarise themselves with the laws of many other foreign countries. Is it not level headed to offer them with the prospect of subscribing to a single homogeneous law, tailored as they see fit. CISG does precisely that.

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[45] Article 72

It is desirable to follow complete legal and management reassessment of procurement and sales procedures to be followed under the new system by international persons and their legal advisors. An increasing number of countries ratifying and increasing draw on is made of the CISG. Such traders require identification of clients and conditions in which use of the CISG is preferable over use of domestic law. Additionally, the opportunities, inadvertently and unknowingly, to develop into subject to the CISG remains very real. Failure to think clearly about choice of governing law issues at the time of contracting is quite expected to lead to disagreeable surprises in the occurrence of a dispute."

CISG is not a complete code like most other Conventions that aspires to complement particular areas of law, regulating all matters falling within its area of application. Some matters were considered to be too contentious for inclusion in the CISG since the national laws differed too much to complement the various approaches. To ensure maximum support for the Convention, the drafters decided to leave these issues outside the CISG's scope of application. They opted for a widely acceptable Convention as an alternative of a complete but controversial text.

For any legal system it is an exigent task to demarcate between cases where the contract continues regardless of its breach by one party and cases where the aggrieved party has to be permitted to terminate the contract and to recover its freedom to contract once more. The CISG reacts with a whole set of rules to that problem. The Convention grants the remedy of avoidance rather unenthusiastically and this policy is accepted by the courts.

After working for almost thirty years, the age when adults are fully aware of their strength and have already gathered adequate knowledge to put it to work, CISG has huge prospects to be converted into the truly global sales law. It is upto us to ensure

that this goal turns up at the velocity we estimate most advantageous. Since by now the major exporting countries are mostly contracting states, the rules of the Convention are of utmost relevance in international sales transactions. Even if the importing buyer has its place of business in a non-contracting sate, in most cases the rules of private international law will lead to the application of the Convention (Art.1(1)(b) CISG). Subject to the reservations provided for in Art. 92 et seq. CISG, almost all transactions therefore fall within the realm of the Convention. Seen from the importer's side, the Convention will not be applied only if the seller has his place of business in a non-contracting state and in the absence of an expressed or implicit choice of the law of a contracting state.

CHAPTER 18

UNMASKING CORPORATE FRAUD: UNDERSTANDING THE NATURE, CAUSES, AND CONSEQUENCES

Baani Chhibber
Ragini Shekhawat

Introduction

Fraud often goes undetected because employees intentionally bypass existing systems and policies designed to catch errors and mistakes. While these mechanisms are effective at identifying unintentional errors, they are not designed to detect fraud. Additionally, some companies lack proper systems and procedures, making it even harder to prevent or detect fraudulent activities. Internal fraud is particularly troubling as it involves betraying the trust placed in employees who handle assets, information, and customer interactions. Unfortunately, recovery of stolen funds is often limited. Studies have shown that a significant percentage of fraud cases result in no recovery or only a small fraction of the stolen amount being recovered. Companies should not rely on recovering fraud proceeds and must prioritize prevention and detection efforts instead.[1]

Following high-profile cases like Enron, WorldCom, and Tyco, the question arises as to whether companies have made progress in combating fraud. The question arises if the increased focus on fraud prompted them to strengthen controls and swiftly address perpetrators, or have companies largely remained complacent in their anti-fraud efforts.[2]

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[1] TRACY L. COENEN, ESSENTIALS OF CORPORATE FRAUD 2 (John Wiley & Sons, Inc.)

[2] TRACY L. COENEN, ESSENTIALS OF CORPORATE FRAUD 3 (John Wiley & Sons, Inc.)

While some progress has been observed in companies' efforts to protect themselves against fraud, there has not been a significant decrease in overall fraud rates. Critics argue that progress has been slow, resulting in limited tangible outcomes. It is also possible that companies have primarily focused on complying with regulations like Sarbanes-Oxley, rather than implementing comprehensive fraud prevention measures. Although companies may perceive improvement in fraud prevention and detection, self-assessments can be overly optimistic. The effectiveness of companies in reducing fraud remains questionable until a noticeable decline in fraud occurs on a global scale.[3]

Jonathan Gash once rightly said that *"fraud is the daughter of greed."* People can commit fraud to have easy financial gain, by plain greed, or to overcome crippling debts. In addition to having controls in a corporation, one can prevent and detect fraud by:

a. Understanding the system's flaws**:** A few things that are urgently needed include knowledge of controls, accounting flaws, adequate oversight of unethical signals rising from the top, etc. The lower cadres may also be encouraged to engage in unethical behaviour or fraud if the top management is dishonest.

b. A strong fraud prevention plan is essential: It would be necessary to develop a robust fraud prevention policy. For this, an Act can be envisioned with the necessary modifications, taking into mind India's Corporate Standing. Inspiration can be taken from the various international acts for example, reference can be taken from the *Sarbanes-Oxley (SOX) Act, of 2002* which set stricter financial reporting requirements for publicly traded companies and introduced provisions to enhance corporate governance, increase transparency, and

[3] TRACY L. COENEN, ESSENTIALS OF CORPORATE FRAUD 4 (John Wiley & Sons, Inc.)

prevent fraudulent activities[4] and *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, which established the Consumer Financial Protection Bureau (CFPB) and introduced measures to enhance regulatory oversight, increase transparency, and protect consumers from fraudulent practices.[5]

c. A Code of Conduct for all employees can be strictly implemented. Along with this, employees should be given periodic training to fight and report fraudulent activities.
d. There should be strict transparency at all levels.

Definition and Types of Corporate Fraud

1) Companies Act, 2013

The Companies Act, 2013 talks about corporate fraud in Sec. 447. It defines corporate fraud as:

"Fraud" in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.[6]

2) Black's Law Dictionary

Though the term "corporate fraud" does not find its meaning in Black's Law Dictionary, the term "fraud" is defined as:

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[4] Sarbanes-Oxley Act, 2002 (USA)
[5] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
[6] Companies Act, 2013, § 447, acts of parliament, 2013 (India)

An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Any kind of artifice employed by one person to deceive another. A generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. "Bad faith" and "fraud" are synonymous, and also synonyms of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc.[7]

Types of Corporate Fraud

Corporate Fraud can be categorised into three major headings as under:

1) *Financial statement fraud*: The deception or misrepresentation that an individual or entity makes knowing that the misrepresentation could result in some unauthorized benefit to the individual or to the entity or some other party.[8] This further includes Asset/revenue overstatement and Asset/revenue understatement.
2) *Corruption*- Illegality; a vicious and fraudulent intention to evade the prohibitions of the law; something against or forbidden by law; moral turpitude or exactly opposite

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[7] REVISED FOURTH EDITION HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 788 (St. Paul, Minn. West Publishing Co. 1968)

[8] REPORT TO THE NATIONS, GLOBAL STUDY O OCCUPATIONAL FRAUD AND ABUSE
(2020), (1 Sept, 2023,6.00 PM,https://acfepublic.s3-us-west-2.amazonaws.com/2020-Report-to-the-Nations.pdf

of honesty involving intentional disregard of law from improper motives. [9]

This further includes:

a) Bribery- There are two primary types of bribery schemes: kickbacks and bid-rigging. Kickbacks involve undisclosed payments from vendors to purchasing company employees, aiming to engage the corrupt employee in over-billing or gain additional business. In contrast, bid-rigging schemes occur when an employee aids a vendor in winning a contract through the competitive bidding process, providing an unfair advantage over competitors.[10]

b) Conflict of interest**-** A conflict of interest occurs when someone in a position of trust prioritizes their own interests over those of the organization they represent. For example, a CFO who creates an off-balance sheet entity and conducts personal business with it. Such situations compromise internal controls as impartiality is compromised. To address conflicts of interest, board approval is needed to waive provisions in the code of ethics, and disclosure must be made.[11]

3) *Misappropriation-* The act of misappropriating or turning to a wrong purpose; wrong appropriation; a term which does not necessarily mean peculation, although it may mean that.[12]

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[9] REVISED FOURTH EDITION HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 414 (St. Paul, Minn. West Publishing Co. 1968)

[10] United States Code, 2015, Chapter 11 (USA)

[11] E-LIBRARY.NET, (July 10, 2023,10.00 AM,https://ebrary.net/13476/business_finance/conflict_interest).

[12] REVISED FOURTH EDITION HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 1150 (St. Paul, Minn. West Publishing Co. 1968)

This can be misappropriation of cash and/or of inventory and all other assets. It refers to the deliberate misuse of company funds by an employee for personal gain. It encompasses various actions such as forging company checks, submitting fictitious invoices, and manipulating attendance records.[13]

Legal Framework For Combating Corporate Fraud In India

COMPANIES ACT, 2013: The Companies Act, 2013 has numerous provisions that address the issue of corporate fraud in India. The Act lays out a proper mechanism to hold accountable the wrongdoer in various regards.

a) *Sec. 447 Punishment for fraud*

This portion of the Companies Act 2013 establishes the legal structure regarding the penalties for individuals engaged in fraudulent activities against a company. It specifies that anyone convicted of fraud can face imprisonment for a maximum of *10 years* and/or a fine equal to or greater than the amount of fraud committed, with a maximum fine of *three times the amount involved in the fraud.*[14]

b) Sec. 448 Punishment for false statement

According to this provision, individuals who acquire loans, rewards, or benefits from a company or its representatives through false statements or documents, or deceive others regarding their rights or obligations, will be held accountable. The severity of punishment for this offense depends on the level of wrongdoing, which can include fines, imprisonment, or both.

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[13] Zehra Maccawala, *What are the common types of corporate frauds?*,ZMAS,(July 12, 2023,11.00 AM, https://www.zmas.in/what-are-the-common-types-of-corporate-frauds/).

[14] Companies Act, 2013, § 447, Acts of Parliament, 2013 (India)

In certain circumstances, the offender may face more severe penalties based on the nature and seriousness of the offense.[15]

c) *Sec. 449 Punishment for false evidence*

This section of the Companies Act, 2013 deals with the consequences of providing false evidence to the Registrar or any other authority appointed under the Act. It states that if an individual submits forged, false, or incorrect evidence in a document filed, delivered, or signed by them with the Registrar or any other authority, they can be penalized with a fine of up to *one hundred thousand rupees* or imprisonment for a maximum of *six months*, or both.[16]

d) *Sec. 450 Punishment where no specific penalty or punishment is provided*

This says that if a company, its officers, or any other person violates any provisions of this Act, its associated rules, or any conditions, limitations, or restrictions related to approvals, sanctions, consents, confirmations, recognitions, directions, or exemptions, and if no penalty or punishment is specified elsewhere in this Act, the company, its defaulting officers, or other individuals involved can be fined up to *ten thousand rupees*. In the case of a continuing contravention, an additional fine of up to *one thousand rupees per day* can be imposed for each day following the initial violation.[17]

1) **SEBI ACT, 1992:** The Securities and Exchange Board of India Act, 1992 also provides several provisions to combat corporate fraud practices in India and penalize the individual or group od individuals involves in such fraudulent activities.

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15 Companies Act, 2013, § 448, Acts of Parliament, 2013 (India)
16 Companies Act, 2013, § 449, Acts of Parliament, 2013 (India)
17 Companies Act, 2013, § 450, Acts of Parliament, 2013 (India)

a) Sec. 15G Penalty for insider trading

If an insider engages in any of the following activities related to securities of a listed body corporate based on unpublished price-sensitive information:

(i) trading in securities either for themselves or on behalf of someone else
(ii) disclosing such information to any person without their request, except as required by law or in the ordinary course of business, or
(iii) advising or facilitating trading for others based on such information, they will be subject to a penalty.

The penalty will be no less than *ten lakh rupees* but may reach up **to *twenty-five crore rupees*** or *three times the profits gained* from insider trading; whichever amount is higher.[18]

b) Sec. 15H Penalty for non-disclosure of acquisition of shares and takeovers

If an individual, as mandated by this Act or any related rules or regulations, neglects to:

(i) disclose their total shareholding in a body corporate prior to acquiring additional shares of that body corporate,
(ii) issue a public announcement for the acquisition of shares at a minimum price,
(iii) send a letter of offer to the shareholders of the relevant company for a public offer, or
(iv) provide payment to shareholders who have sold their shares in accordance with the letter of offer.

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18 Securities and Exchange Board of India Act, 1992, § 15G, Acts of Parliament, 1992 (India)

He will be subject to a penalty, which will be a minimum of *ten lakh rupees* but may go up to *twenty-five crore rupees* or three times the profits derived from the failure, whichever amount is greater.[19]

c) Sec. 15HA Penalty for fraudulent and unfair trade practices

If an individual engages in deceitful and unjust trade practices concerning securities, they will be subject to a penalty. The penalty will be a minimum of *five lakh rupees* but may go up to *twenty-five crore rupees* or *three times the profits obtained* from such practices; whichever amount is greater.[20]

2) Prevention of Corruption Act, 1988

The Prevention of Corruption Act, 1988 (POCA) was enacted to bring together various laws and address corruption within government agencies. Its purpose is to prosecute and penalize public officials involved in corrupt activities. This legislation serves as a significant weapon in the fight against corruption, and its effectiveness is crucial for the success of anti-corruption endeavors. The Act grants the Central Government the power to appoint judges to investigate and adjudicate cases related to offenses punishable under the Act or instances involving conspiracy or attempted commission of such offenses.[21]

3) Prevention of Money Laundering Act, 2002

The Prevention of Money Laundering Act, 2002 (PMLA) was established with the aim of combatting the illegal practice of legitimizing income or profits derived from unlawful sources.

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[19] Securities and Exchange Board of India Act, 1992, § 15H, Acts of Parliament, 1992 (India)

[20] Securities and Exchange Board of India Act, 1992, § 15HA, Acts of Parliament, 1992 (India)

[21] SCC ONLINE, (July 10, 2023,6.00 PM,https://www.scconline.com/blog/post/2018/07/27/prevention-of-corruption-act-before-and-after-amendment-a-comparison).

This legislation empowers the government or public authorities to seize property obtained through illicit proceeds.

It encompasses the following objectives:

1. Preventing money laundering.
2. Combating and preventing the flow of funds into illicit activities and economic crimes.
3. Establishing provisions for the confiscation of property obtained from or involved in money laundering.
4. Imposing penalties on individuals involved in money laundering offenses.
5. Appointing an adjudicating authority and appellate tribunal to handle money laundering cases.
6. Addressing matters related to and arising from acts of money laundering.

In summary, the Act aims to prevent money laundering, deter the misuse of funds in illegal activities, seize assets tied to money laundering, penalize offenders, establish legal bodies to oversee money laundering cases, and address related matters.[22]

PART II: Regulatory and Enforcement Agencies

Regulatory and enforcement bodies ensure compliance with laws and regulations. Regulatory bodies establish rules and standards, while enforcement bodies enforce those rules through investigations, penalties, and legal actions. They work together to maintain compliance and uphold the integrity of industries and activities within a jurisdiction. India has a plethora of both regulatory as well as enforcement authorities.

In India, the regulation and oversight of corporate fraud fall mainly under the purview of the Ministry of Corporate Affairs (MCA) and the Securities and Exchange Board of India (SEBI).

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[22] DIRECTORATE OF ENFORCEMENT, (July 10, 2023,7.00 PM https://enforcementdirectorate.gov.in/what-we-do).

They work together to investigate and prosecute corporate fraud in the country. MCA operates through various regulatory bodies to oversee the corporate governance of corporations, regulation of companies, and investigation of corporate fraud. They are as follows:

1) **Serious Fraud Investigation Office (SFIO):** The SFIO is a specialized investigating agency under the MCA. It conducts detailed investigations into cases of serious corporate fraud and submits reports to the government for further action. It has its headquarters in Delhi with regional offices in Mumbai, Kolkata, Chennai, and Hyderabad[23]. The primary purpose of SFIO is to identify and prosecute or recommend prosecution for, white-collar crimes and frauds. SFIO is entrusted with investigating the affairs of a company in the following situations:

    a) *When a report from the Registrar or inspector under **sec 208** of the Companies Act, 2013 is received.*
    b) *Upon the special resolution passed by a company indicating the need for an investigation into its affairs.*
    c) *When it is deemed to be in the public interest.*
    d) *Upon request from any department of the Central Government or a State Government*

2) **Directorate of Enforcement (ED)**: The ED is a specialized financial investigation agency responsible for *investigating cases of money laundering and the violation of foreign exchange laws of the country*[24]. laws and combating financial crimes, including money laundering and foreign exchange violations. It collaborates with other agencies to investigate cases related to corporate

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[23] About SFIO // https://sfio.gov.in/en/about-sfio-history/
[24] Directorate of Enforcement // https://enforcementdirectorate.gov.in/

fraud. The ED ensures that the *Prevention of Money Laundering Act, of 2002*, The *Foreign Exchange Management Act, of 1999***,** and the *Fugitive Economic Offenders Act, of 2018* are successfully enforced and that the rules and regulations are followed[25].

It originated as an "Enforcement Unit" within the Department of Economic Affairs on 1st May 1956, to handle violations of Exchange Control Laws under the Foreign Exchange Regulation Act, 1947 (FERA '47). Over time, it evolved into the Enforcement Directorate with headquarters in Delhi and branches in Bombay and Calcutta. Later, a branch was opened in Madras.

3) ***Securities and Exchange Board of India (SEBI):*** SEBI is the regulatory authority governing securities markets in India. It aims to protect the interests of investors and ensure fair and transparent markets. SEBI's powers and functions include

a) *Disclosure and Investor Protection:* SEBI mandates disclosure requirements for listed companies and regulates the conduct of market intermediaries. It aims to prevent fraud and ensure investor protection.

b) *Market Surveillance:* SEBI monitors market activities, identifies potential market abuses, and takes appropriate regulatory actions to maintain market integrity.

c) *Investigation and Enforcement:* SEBI investigates cases of securities-related fraud and violations of regulations. It can impose penalties, initiate legal proceedings, and refer cases to other enforcement agencies.

4) *Chartered Accountants (CAs), Company Secretaries (CS), and Cost Accountants (CMA)* play a crucial role in auditing and reporting financial statements. These professionals are subject to regulatory oversight by their respective statutory bodies, such as the Institute of

[25] Supra note 90.

Chartered Accountants of India (ICAI) and the Institute of Company Secretaries of India (ICSI).

5) *Central Bureau of Investigation (CBI):* In the early stages of World War II, the Government of India recognized that corruption was on a rise, thanks to increased expenditure of war. To fight this issue, the Special Police Establishment (SPE) was formed in 1941 under the Department of War. The SPE initially investigated only the bribery and corruption cases related to the War and Supply Department. However, over time, its jurisdiction expanded to include railway corruption as well.

In 1943, an ordinance was issued to establish a Special Police Force to investigate offenses connected to the Central Government departments throughout British India. As the need for a central agency to combat bribery, corruption, and fiscal violations persisted beyond the war, the Delhi Special Police Establishment Ordinance of 1946 replaced the 1943 ordinance. The Delhi Special Police Establishment Act, 1946, was later enacted.

The SPE's authority extended to Union Territories, and its jurisdiction could be expanded to other areas with the consent of the State Government. The organization was initially placed under the charge of the Director of the Intelligence Bureau but later came under the Inspector General of Police. Over time, the SPE's responsibilities grew to include offenses under various sections of the Indian Penal Code, violations of fiscal laws, and crimes on the high seas, among others.

Recognizing the need for a central police agency capable of investigating corruption, fiscal violations, major frauds, and conventional crimes, the Central Bureau of Investigation (CBI) was established in 1963. The CBI comprises divisions such as Investigation & Anti-Corruption, Technical, Crime Records and Statistics, Research, Legal and General, and Administration.

Special units were created to handle specific cases, including economic offenses, assassinations, bombings, and bank frauds.

Over the years, some of the CBI's responsibilities were transferred to other organizations, and specialized divisions were established to handle corruption, economic offenses, and special crimes. The Directorate of Prosecution was formed in 2001. With the *Central Vigilance Commission Act, 2003*, the superintendence of the Delhi Special Police Establishment shifted to the Central Government, except for offenses under the Prevention of Corruption Act, 1988, which remained under the Central Vigilance Commission's purview.

The CBI has evolved into a trusted and multi-disciplinary central law enforcement agency, with the Director of CBI being responsible for its administration. The tenure of the CBI Director is secured by the CVC Act, 2003, which also outlines the selection process for the Director and other senior officers. The CBI is empowered to investigate and prosecute offenses across India, earning the trust of the people, Parliament, Judiciary, and the Government.[26]

Notable Corporate Fraud Cases In India

Corporate fraud cases have infested the Indian business landscape, exposing the shadier side of corporate governance and financial systems. These notable fraud cases have had far-reaching outcomes, shaking investor trust, exposing loopholes, and prompting significant reforms. These cases serve as important reminders of the need for stronger regulatory frameworks and ethical practices in the corporate world. Some noteworthy cases are:

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[26] CENTRAL BUREAU OF INVESTIGATION, (July 10, 2023,8.00 PM, https://cbi.gov.in/about-us?search=who-we-are).

Harshad Mehta Scam, 1992

The Harshad Mehta scam, also known as the Indian securities scam of 1992, was a significant financial fraud that shook the Indian stock market and exposed loopholes in the country's banking and financial systems. Harshad Mehta, also known as the "Big Bull" due to his aggressive trading strategies and substantial wealth, exploited various loopholes in the Indian banking system, particularly in the banking sector's regulatory framework.

The scam revolved around the manipulation of stock prices using a technique known as *"circular trading"* or *"ready forward"* transactions. Mehta exploited a loophole in the banking system known as the "Securities Scam RBI-Bank Receipts (BRs) Scam." He discovered that he could borrow money from banks against government securities and use the funds to buy stocks. However, instead of actually buying the securities, Mehta used fake bank receipts as collateral to secure the loans.

Using this method, he successfully managed to create artificial demands for certain stocks, which would thus result in a rapid increase in their prices. As the prices increased, he would sell his holdings at a significant profit.

Everything was going smoothly until journalist Sucheta Dalal published a series of articles in The Times of India, exposing Mehta's fraudulent activities. These revelations triggered a massive crash in the stock market and led to an investigation by the Central Bureau of Investigation (CBI) and the Securities and Exchange Board of India (SEBI).

The aftermath of the Harshad Mehta scam led to significant reforms in India's financial and banking sectors. The government introduced new regulations and implemented changes to prevent similar frauds from occurring in the future. The Securities and Exchange Board of India (SEBI) was granted

more power and autonomy to regulate the stock market, and the banking system underwent reforms to address the loopholes that Mehta had exploited.

Harshad Mehta was arrested by the Central Bureau of Investigation (CBI) in 1992 on charges of embezzling over 2.8 million shares from approximately 90 companies using counterfeit share transfer documents. The collective worth of the shares misappropriated was estimated at ₹250 crore. He was sentenced to 5 years of rigorous imprisonment. He passed away in 2001 due to a cardiac arrest.[27]

Satyam Computers Scam, 2009

The Satyam scandal, also known as "*India's Enron*[28]" was one of the biggest accounting frauds in India, which had an everlasting effect on the corporate governance norms in the country.

The revelations of the scam started when Satyam Computers, a famous IT service company in India, experienced a significant decline in its share price from Rs. 544 per share in 2008 to Rs. 11.50 per share in 2009[29]. This drastic drop was the result of large-scale accounting fraud the company was involved in. The company's balance sheets had been manipulated and misrepresented to deceive shareholders into believing that the company was performing well, thus encouraging them to invest.

B. Ramalinga Raju, the founder, and chairman of Satyam Computers confessed everything in a letter addressed to the Securities and Exchange Board of India (SEBI). Following Raju's confession, an investigation was launched by regulatory

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[27] "HARSHAD MEHTA, THE GUARDIAN https://www.theguardian.com/news/2002/jan/15/guardianobituaries1

[28] *Satyam Accounting Scandal Could Be India's Enron*,TELEGRAPH.CO.UK. The Telegraph,https://www.telegraph.co.uk/finance/4161198/Satyam-accounting-scandal-could-be-Indias-Enron.html

[29] *Indian It Scandal Boss Arrested*,BBC NEWS, http://news.bbc.co.uk/2/hi/business/7821087.stm

authorities, including SEBI and the CBI. The probe uncovered the extent of the accounting fraud, how the books were inflated from 2001 to 2008, and also exposed the involvement of other businessmen in the scam.

In his letter, Ramalinga Raju revealed that the firm had exaggerated its cash reserves by $1 Billion.

PNB/ Nirav Modi, 2011

The Nirav Modi-PNB Scam had a profound impact on the entirety of India's banking system. Firestar Diamonds, a diamond company owned by Nirav Modi, experienced rapid growth and expansion across multiple countries by securing loans through the buyer's credit from Punjab National Bank's (PNB) Brady House, Mumbai branch, which acted as an importer bank.

The scam involved the use of counterfeit Letters of Undertakings (LoUs) at PNB. These LoUs were issued in favor of branches of Indian banks, facilitating the import of pearls for a duration of one year, while the Reserve Bank of India guidelines stipulated a maximum timeframe of 90 days from the shipment date.

Nirav Modi obtained his initial fraudulent guarantee from PNB on March 10, 2011, and subsequently acquired an additional 1,212 such guarantees over a span of 74 months. By May 18, 2018, the magnitude of the scam had skyrocketed to over Rs 14,000 crore.[30]

The scam remained undetected for a significant period of time as PNB officials involved in the fraud did not record the transactions in the bank's core banking system, allowing the fraudulent activities to continue without scrutiny. It was only

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[30] *What Is The Pnb Scam*?, BUSINESS STANDARD ,https://www.business-standard.com/about/what-is-pnb-scam/

when the companies sought additional credit that these irregularities came to light.

Mass Insider Trading Case, 2017

The case, also known as the WhatsApp Leak Case, involves the dissemination of Unpublished Price Sensitive Information (UPSI) through WhatsApp messages, which disclosed sensitive details about prominent companies. Section 3(1) of the SEBI (Prohibition of Insider Trading) Regulations, 2015 explicitly prohibits *the communication or acquisition of unpublished price-sensitive information regarding a listed company or security, except for legitimate purposes, fulfilling job responsibilities, or fulfilling legal obligations*[31]*.*

Shruti Vora and Neeraj Kumar Agarwal were classified as insiders and were penalized with a fine of 15 lakh rupees each under Sections **15G, 12A(d), and 12A(e)** of the Securities and Exchange Board of India Act, 1992[32]. This was due to their possession and communication of unpublished price-sensitive information. According to SEBI, the accuracy of the information provided was too precise to be considered as mere estimates, that the numbers in question could not be associated with any brokerage or internal research, and the defines of "heard on the street" was also quashed.

ICICI-Videocon Fraud Case

The controversy surrounding the ICICI-Videocon loan scam unearthed in 2018 when allegations of impropriety and conflict of interest emerged. The CBI initiated an investigation into the

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[31] SECURITES AND EXCHANGE BOARD OF INDIA (PROHIBITION OF INSIDER TRADING) REGULATIONS, 2015
https://www.sebi.gov.in/legal/regulations/jan-2015/sebi-prohibition-of-insider-trading-regulations-2015-issued-on-15-jan-2015-_28884.html

[32] SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992

matter, and Chanda Kochhar was eventually removed from her position at ICICI Bank in 2019.

This scam revolved around Chanda Kochhar, the former Managing Director and CEO of ICICI Bank, who was accused of abusing her position to grant a loan of ₹3,250 crore[33] to Videocon International Electronics Limited between June 2009 and October 2011. According to reports, Kochhar granted the loan in exchange for illegal gratification and to secure undue benefits for her husband, Deepak Kochhar's company, NuPower Renewables Private Limited (NRPL). It is claimed that Deepak Kochhar received substantial financial gains as a result of the loan provided to Videocon. The CBI registered the accused under the Indian Penal Code, 1908 that related to criminal conspiracy and provisions of the Prevention of Corruption Act, 1988 in 2019. The CBI accused Kochhar of granting different loans such as Rs. 1875 cr. to Videocon Group Companies, Rs. 300 crores to Videocon International Electronics Ltd. Out of this, Rs. 64 cr. were transferred to NuPower Renewables[34].

Kochhar and her husband, Deepak Kochhar, were arrested by the Central Bureau of CBI on December 23, 2022[35] and CBI filed a chargesheet against 7 individuals including Ms. Kochhar in April 2023[36]. The proceedings are still ongoing.

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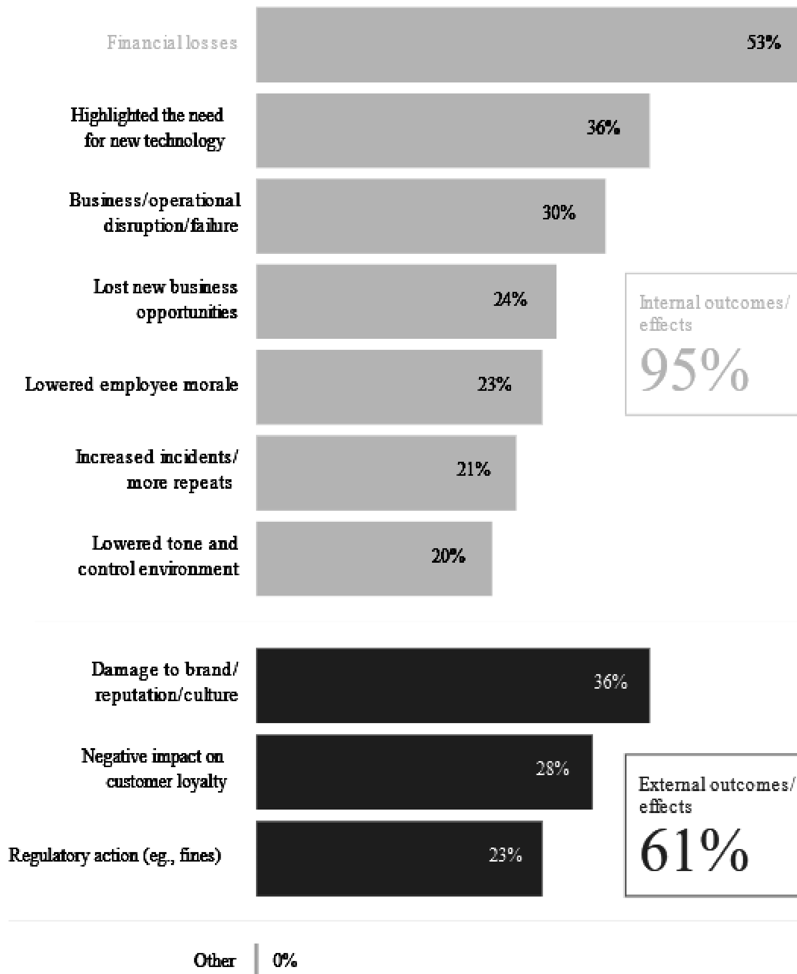
[33] *What The Icici Bank-Videocon Group Loan Case Is All About?,*THE TRIBUNE, https://www.tribuneindia.com/news/business/what-the-icici-bank-videocon-group-loan-case-is-all-about-463875).

[34] *Decoding Icici-Videocon Loan Fraud Case In Which Chanda Kochhar Was Arrested*,HINDUSTAN TIMES https://www.hindustantimes.com/india-news/decoding-icici-videocon-loan-fraud-which-spelt-doom-for-chanda-kochhar-101673244550424.html).

[35] *Ex-Icici Bank Ceo Chanda Kochhar's Arrest A Wake-Up Call For Private Banks: Experts,*THE ECONOMIC TIMES https://economictimes.indiatimes.com/industry/banking/finance/banking/ex-icici-bank-ceo-chanda-kochhars-arrest-a-wake-up-call-for-private-banks-experts/articleshow/96503971.cms).

[36] *Chanda Kochhar Misappropriated Icici Bank's Fund For Her Own* Use, INDIAN EXPRESS,https://indianexpress.com/article/cities/mumbai/chanda-kochhar-misappropriated-icici-banks-funds-for-personal-use-cbi-to-special-court-8687533/ *)*

Future Perspective



Source: to PwC's Global Economic Crime and Fraud Survey, 2022

The World Economic Forum (WEF) reported that the fraud and financial crime was worth $1 trillion in 2018.It stated that $8.2 billion was spent by private businesses on anti-money laundering measures in 2017. According to PwC's Global Economic Crime and Fraud Survey conducted in 2022 among 1,296 executives across 53 countries, 40% of these organisations encountered cybercrime[37]. Technology is evolving in a way that makes it easier for fraudsters to meticulously cover their trails. Around 2008, Bitcoin began to become increasingly common. The currency is often purchased or generated via a system that uses cryptography and is not considered legal cash. The production and trade of bitcoins are often masked under numerous layers of protected IP addresses, enabling both, the buyer and seller to maintain total anonymity. It is still entirely unregulated and has no security measures against fraud because it has not been recognized as a legal form of payment and so, bitcoins have now become a chosen instrument in money laundering because their transactions are so exceedingly difficult to track. A fraudster may use their legitimate cash to buy bitcoins on a Bitcoin exchange platform to conceal illicit profits from a Ponzi scheme or fraud.

This is just a single instance of how technology is always evolving, and individuals working in the field of fraud should be aware of all new hazards that can arise. Even if the internet world sometimes resembles the Wild West of old instead of an elegant picture of tomorrow, fraud may still be defeated regardless of the technology with the correct planning, knowledge, expertise, strategy, and technology to fight technology.

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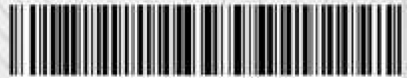
[37] PROTECTING THE PARAMETER: THE RISE OF EXTERNAL FRAUD: PwC GLOBAL ECONOMIC CRIME AND FRAUD SURVEY, 2022

Conclusion

> *"The fight against corporate fraud is a fight for justice, fairness, and the protection of the rights of all stakeholders involved."*
>
> *- Sally Yates*

Corporate fraud, in today's world, represents a pervasive and complicated problem that has far-reaching consequences for various stakeholders such as the company, employees, people, and the nation's economy. This research paper has explored the nature, causes, and consequences of corporate fraud, shedding light on the harmful effects it has on businesses, employees, investors, and society as a whole. Implementing robust corporate governance mechanisms, such as effective internal controls, transparent reporting practices, and ethical leadership can help in fighting corporate fraud. Additionally, fostering a culture of integrity, accountability, and ethical behavior within organizations is crucial for preventing and detecting fraudulent activities.

Through increased awareness, education, and collaboration among regulatory bodies, law enforcement agencies, businesses and society as a whole, it is possible to create a safer and more trustworthy corporate environment. By taking proactive measures to combat corporate fraud, we can enhance corporate accountability, promote investor confidence, and foster sustainable economic growth. Ultimately, eradicating corporate fraud requires a collective effort from all stakeholders to uphold the principles of transparency, ethics, and accountability in corporate practices.


978-81-941086-6-5

About National Law University and Judicial Academy, Assam

The National Law University and Judicial Academy, Assam (NLUJAA) has been established by the Government of Assam by way of enactment of the National Law School and Judicial Academy, Assam Act, 2009 (Assam Act No. XXV of 2009). The word 'School' was replaced by the word 'University' by amending the National Law School and Judicial Academy, Assam (Amendment) Act, 2012. The Hon'ble Chief Justice of Gauhati High Court is the Chancellor of the University. NLUJAA promotes and makes available modern legal education and research facilities to students and scholars drawn from across the country, including the North East, coming from different socio-economic, ethnic, religious and cultural backgrounds.

About The Centre for Advanced Research on Corporate Law

The Centre for Advanced Research on Corporate Law ("CARCL") is dedicated to promote study and practice of corporate law. It aims to shape corporate law as a dynamic academic discipline through rigorous research and collaborations with institutions and stakeholders. CARCL provide students and professionals with practical exposure to corporate law issues, conducts multi-disciplinary research, and organizes workshops, seminars, e-seminars and conferences to foster discussions on emerging corporate law topics.

National Law University and Judicial Academy, Assam