NLS Business Law Review

Volume 7(1) | 2021

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

www.nlsblr.com

Subscription: INR

The mode of citation for this issue of NLS Business Law Review 2021 is as follows:

2021 NLS Bus. L. Rev.

Published by:

NLS Business Law Reivew
National Law School of India University
Nagarbhavi, Bangalore – 560072
Website: www.nlsblr.in Email: nlsblr@nls.ac.in

Distributed exclusively by:

Eastern Book Company
34, Lalbagh, Lucknow - 226 001
U.P., India
Website: www.ebc.co.in Email: sales@ebc-india.com

Board of Advisors

Rahul Singh
Associate Professor of Law, National Law School of India University, Bangalore
Member of the Board of Governors, Asian Business Law
Institute, Singapore Academy of Law, Singapore.

Contents

CASE NOTE

Merger Thresholds and Merger Thresholds in the Digital Economy

*Abdullah Hussain and Prerna Parashar**

In India, much like the rest of the world, the thresholds for merger notification to the competition authority is based on the turnover of the parties involved in the deal. In 2014, when Facebook acquired WhatsApp for $19 Billion, the question of whether antitrust law was doing enough to prevent acquisition of 'nascent competition' and 'killer acquisitions' came to focus, and particularly whether a transaction value threshold ought to be introduced. Since then, various reports have studied digital markets, including the question of sufficiency of merger thresholds. In fact, the CCI in 2020 released its market study of e-commerce in India, and noted that these markets are concentrated with a few large players. A more recent example that questions the appropriateness of the current antitrust law in detecting such deals is Zomato's acquisition of Uber Eats for $250 Million. This paper questions appropriateness of the current threshold in India. It explores and analyzes various changes that have the potential to ameliorate the current law. These include lowering current thresholds, introducing a transaction-value threshold, increasing the number of staff of the Combinations Division of the CCI, and providing more residuary power to the CCI.

* Abdullah Hussan - Partner (Competition Law), L&L Partners.
** Prerna Parashar - Senior Associate (Competition Law), L&L Partners.
Views expressed are the authors' own. The authors have no conflict of interest to declare. Facts and figures in this paper reflect the position as of October, 2022, unless indicated otherwise.

I. Introduction

Ever since Facebook acquired WhatsApp in 2014 for 19 billion dollars, the question of whether antitrust law was doing enough to prevent acquisition of 'nascent competition' and 'killer acquisitions',[1] really came to the forefront. Reportedly, the big five, i.e. Facebook, Amazon, Microsoft, Google, and Apple, also known as 'FAMGA', acquired over 750 companies over the last 30 years[2], with 476 of these coming in the last 10 years.[3] The Report of the UK Government- appointed Digital Competition Expert Panel, headed by Prof. Furman, notes that 400 acquisitions were made by the top five over the last 10 years,[4] while the UK Competition and Markets Authority's commissioned report puts the figure at 299 for Google, Facebook, and Amazon in the period 2008 – 2018.[5] According to the recently published Report of the Judiciary Antitrust Subcommittee of the US House of Representatives, GAFA has acquired 568 companies over the last 20 years.[6]

As the rancour grew against 'big tech', several significant studies were conducted and reports were published.[7] In June 2020, the OECD held a

---

1 The term 'killer acquisition' applies more aptly to acquisitions in the pharmaceutical industry, where the acquisition is made for the primary purpose of discontinuing the acquired product. *See* OECD Background Note on 'Start-ups, Killer Acquisitions and Merger Control' 12 May 2020, <http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 15 October 2020.

2 'Visualizing Tech Giants' Billion-Dollar Acquisitions' 5 May 2020, at <https://www.cbinsights.com/research/tech-giants-billion-dollar-acquisitions-infographic/> accessed 15 October 2020.

3 Elaine Burke '10 Years of Acquisitions Show How Big Tech Came to Be' 5 July 2019 <https://www.siliconrepublic.com/companies/big-tech-acquisitions-2009-2018> accessed 15 October 2020.

4 Jason Furman, 'Unlocking Digital Competition Report of the Digital Competition Expert Panel' (2019) <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel> p 12 accessed 15 October 2020.

5 Lear, 'Ex-post Assessment of Merger Control Decisions in Digital Markets' (2019) <https://www.gov.uk/government/publications/assessment-of-merger-control-decisions-in-digital-markets#:~:text=As%20part%20of%20its%20continual,of%20harm%20in%20digital%20mergers> p 10. accessed 15 October 2020.

6 Majority Staff Report and Recommendations of the Subcommittee on Antitrust, Commercial and Administrative Law, of the Committee on the Judiciary of the US House of Representatives, *Investigation of Competition in Digital Markets* (6 October 2020) <https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf> accessed 15 October 2020.

7 *See* Furman (n 4); Lear (n 5); Stigler Center for the Study of the Economy and the State, *Stigler Committee on Digital Platforms* (2019) <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf> accessed 15 October 2020; Crémer, de Montjoye and Schweitzer, 'Competition Policy for the Digital Era' (April 2019) <https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1> accessed 15 October 2020; 'FTC Hearings on Competition and Consumer Protection in the 21st Century' (Oct 15-172018) <https://www.ftc.gov/news-events/events-calendar/2018/10/

two-day meeting of the Competition Committee, focusing on 'Start-ups, killer acquisitions, and merger control'.[8] Two primary areas of concern were whether antitrust laws' merger thresholds were adequately capturing such transactions, and how were antitrust authorities to assess such acquisitions. This paper concentrates on the former.[9]

Most jurisdictions work on a combination of worldwide and national thresholds based on turnover or revenue.[10] Transactions related to new age technology, created by start-ups, typically fall below these thresholds when they are acquired by incumbents. Some antitrust authorities even acknowledged that there may be an enforcement gap in bringing such transactions within the review mechanism.[11] In 2015 Germany and Austria proposed to introduce transaction-based thresholds, and eventually did in 2017. The European Commission floated a consultation paper in 2016, but appears to

---

ftc-hearing-3-competition-consumer-protection-21st-century> accessed 15 October 2020; *Digital Platforms Inquiry*, (June 2019), <https://www.accc.gov.au/system/files/Digital%20 platforms%20inquiry%20-%20final%20report.pdf> accessed 15 October 2020; JFTC Research Centre, *Report of Study Group on Data and Competition Policy* (2017) <https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606_files/170606-4.pdf> accessed on 15 October 2020; JFTC Research Centre, *Report Regarding Trade Practices on Digital Platforms* (October2019) <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031Report.pdf> accessed 15 October 2020; Canada Competition Bureau's Data Forum, *Discussing Competition Policy in the Digital Era* (August 2019) <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04492.html#sec04-1> accessed 15 October 2020; CMA, *Online Platform and Digital Advertising* (July 2020) <https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf> (accessed 15 October 2020); Autorité de la concurrence,= 'Competition & e-commerce' (May 2020) <https://www.autoritedelaconcurrence.fr/sites/default/files/concurrence-commerce-en-ligne-en.pdf> accessed 15 October 2020.

8 OECD (n 1).

9 As the German submission to the OECD put it: "*This article does not intend to contribute to the different theories of harm this topic entails; it is the logical precondition for any meaningful competitive assessment of a merger's actual effects on the market structure that potentially harmful acquisitions do not escape the prism of merger control in the first place.*"

10 ICN Merger Working Group, *Setting Notification Thresholds for Merger Review* (April 2008) p 8 <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_SettingMergerNotificationThresholds.pdf> accessed 15 October 2020.

11 For example, see the speech by Margaret Vestager in March 2016, "*A merger that involves this sort of company (WhatsApp) could clearly affect competition, even though the company's turnover might not be high enough to meet our thresholds. by looking only at turnover, we might be missing some important deals that we ought to review.*", <https://wayback.archive-it.org/12090/20191129204644/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en>accessed 15 October 2020; The CCI's Chairperson also referred to this "potential enforcement gap" or "blind spot" in the panel session on Digital Merger on 15 September 2020 of the ICN Conference 2020, attended at <https://icn-2020.videoshowcase.net/icn-2020-day-2-sept-15?category=64043> accessed 15 October 2020.

have concluded that referrals from national competition authorities would work efficiently enough,[12] coupled with the 'new tool'.[13]

Similar to most jurisdictions, India's thresholds are based on the turnover and assets of the parties in question, which determine whether a transaction will be notifiable to the Competition Commission of India ('**CCI**'). Thus, it is open to the same 'enforcement gap'. The August 2019 Report of Competition Law Review Committee that had been set up by the Central Government, had a chapter devoted to '*Technology and New Age Markets*'.[14] Among other things, the Committee concludes that a 'size of transaction' or 'deal value' threshold '*may be introduced in due course*'.[15]

The challenges of digital economy have not escaped the CCI's notice. In 2019, it launched a market study on e-commerce in India, and on 8th January 2020, the CCI released its report.[16] The report focuses on platform/intermediation services in three areas – consumer goods, accommodation services, and the food services – and notes that these markets are concentrated with a few large players in each of the three categories,[17] making an obvious reference to Flipkart and Amazon in consumer goods, MakeMyTrip in accommodation, and Swiggy and Zomato in food services.

On 22 January 2020, Zomato announced its acquisition of Uber Eats for approximately 350 million USD (or 2500 crores INR). The transaction was not reported to the CCI as it did not breach the current thresholds, andis perhaps exactly the kind of transaction the Committee was hoping to catch with the introduction of the transaction value threshold.[18]

---

[12] *See* EU Submission to the OECD 25 May 2020, Crémer and Schweitzer (n 7) 4-5; In a 11th September 2020 address at the IBA's 24th Annual Competition Conference, Ms. Vestager indicated that the EC "*plans to start accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves*", <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en> accessed 15 October 2020.

[13] *See* the EC's Press Release 2 June 2020 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977> accessed 15 October 2020Also Speech by the EC Competition Commissioner, Margaret Vestager at the ASCOLA Annual Conference, 26 June 2020, <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age-changing-enforcement-changing-times_en> accessed15 October 2020.

[14] *Report of the Competition Law Review Committee* (July 2019) <http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf> accessed 17 October 2020.

[15] *Report of the Competition Law Review Committee* (n 14) 159.

[16] Competition Commission of India 'Market Study on E-Commerce in India' (CCI 8 January 2020) <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed 17 October 2020.

[17] *Ibid.*

[18] Indeed, the CCI has reportedly sent a notice to Zomato to confirm this. See <https://www.moneycontrol.com/news/business/exclusive-i-competition-regulator-launches-probe-into-

Home confinement due to the outbreak of COVID-19 gave us a pause to think about this in greater depth. Our research threw up some interesting facts and figures, and called into question not only appropriate thresholds for the digital economy, but also the appropriate thresholds for merger regulation as a whole. This paper first looks at the current thresholds in India, and questions whether they are set at an appropriate level. The paper then also looks at the nature of transactions in a digital economy and whether a transaction value-based threshold could address the concern.

II. CURRENT THRESHOLDS

India's current merger notification thresholds work on a turnover and asset test., If the combined turnover or assets of the acquirer and the target (or of their groups) in India is over the prescribed figures, the transaction would have to be notified to the CCI for prior approval. When the statute was first enacted in 2002, the prescribed turnover figure of the acquirer and target in aggregate was 3000 crores INR in India and the asset figure was 1000 crores INR in India. In 2011, this was increased to INR 4500 crores and INR 1500 crores *via* a Central Government Notification,[19] and in 2016 it was increased to INR 6000 crores and 2000 crores.[20] In 2011, the Central Government also introduced the '*target de minimis threshold*' – i.e. if the target has a turnover of less than 750 crores or assets of less than 250 crores in India, the transaction would be exempt from the notification regardless of whether the combined value of acquirer and target crossed the main thresholds.[21] These *de minimis* figures were increased to 1000 crores and 350 crores in 2016.[22]

But how did Parliament arrive at 3000 crores in 2002? And how did the Central Government arrive at 750 crores as the target *de minimis* figure? Very little is available publicly on these aspects, and repeated RTI applications did not yield any fruitful results. What little material was shared suggests that the increase from 3000 to 4500 crores in 2011, and then to 6000

zomato-uber-eats-deal-5302501.html> and <https://www.news18.com/news/tech/trouble-for-zomato-cci-probes-possibly-anti-competitive-uber-eats-acquisition-2632713.html> accessed 15 October 2020.

19 Ministry of Corporate Affairs Notification S.O. 480(E) (4 March 2011) <https://www.cci.gov.in/sites/default/files/notification/SO479%28E%29%2C480%28E%29%2C481%28E%29%2C482%28E%29240611.pdf> accessed 15 October 2020.

20 Ministry of Corporate Affairs Notification S.O. 675(E) (4 March 2016) <https://www.cci.gov.in/sites/default/files/notification/SO%20673%28E%29-674%28E%29-675%28E%29.pdf> accessed 15 October 2020.

21 EU Submission to the OECD (n 12).

22 EC's Press Release (n 13).

crores in 2016,was a simple result of enhancing the value on the basis of the increase in the Wholesale Price Index, taking FY 2003 as the base year.[23]

The International Competition Network suggests that the size of the economy and a comparison with other jurisdictions are useful metrics to analyze when determining one's thresholds.[24] Other considerations may include whether the agency has residuary power to look at transactions that fall below the thresholds, and also the resources of the agency.[25]

III. A COMPARISON

We decided to compare the top 10 jurisdictions by GDP, as well as Russia and South Africa (to round off BRICS nations), with our own, on these metrics. This is not altogether an easy task as the thresholds systems vary significantly. While a market share based threshold may have a clear benefit in bringing the most problematic transactions to the authorities for review, it is also replete with uncertainties over the appropriate market definition and availability and presentation of the data. The most objective and reliable criteria appear to be revenue, which is why most jurisdictions work on a combination of worldwide and national thresholds based on turnover.[26] Others combine transaction value thresholds to the turnover thresholds, and have separate acquirer and target figures.[27] A relative minority also base thresholds on market shares in addition to turnover.[28]

All in all, however, turnover was the most consistently used criteria across jurisdictions, and in most cases satisfying a national turnover test was mandatory. Thus, this was the chosen metric. The numbers were primarily sourced from the official websites and annual reports published by each authority wherever available, details of which may be found in the appendix

[23] Minutes of the Meeting of the Committee of Secretaries 6 October 2010 (resulting in the 2011 increase) and Notes of the Ministry of Corporate Affairs 10, 14, 17 and 18 December 2015 (resulting in the 2011 increase).

[24] ICN Merger Working Group (n 10) 10-11.

[25] *Ibid*.

[26] For example, USA, Germany and Brazil.

[27] For example, USA, Canada and Germany.

[28] For example, UK, Spain, and Portugal.

Country	US	EU	China	Japan	Germany	UK	France	India	Italy	Brazil	Russia	Canada	SA
GDP (USD)	20.5 trillion	18.8 trillion	13.6 trillion	4.97 trillion	3.95 trillion	2.85 trillion	2.78 trillion	2.72 trillion	2.08 trillion	1.86 trillion	1.65 trillion	1.71 trillion	368 billion
Annual Net sales/ turnover (USD) relatable to that coun try except in the case of United States & Russia, which is world wide[29]	188 million for one party and & 18.8 million for another	275 milli on[30] turn over of at least two of the entities	285 million comb ined turn over of all parties	186 million for one party and& 46 million for another	28 million 6 for one party and & 5 million for another	86 million turnover of the target	56 million turn over of each of at least two of the parties	800 million comb ined turnover of the acquirer and target	570 million aggre gate turn over of all parties	140 million for one party and & 14 million for anot her	141 million comb ined turn over of the acqu irer and target	294 million[31] comb ined revenues of the parties	393 million comb ined annual turn over

[29] US and Russia also require that the transaction satisfy a local nexus requirement. For foreign based transaction, the US requires that acquired assets situated abroad should have generated sales in excess of USD 94 million and aggregate sales of the acquirer and target in the United States are more than USD 207 million. Russia requires that the target be a Russian company, the assets be situated in Russia, or the target has sales of over USD 15 million in Russia.

[30] Works in conjunction with a worldwide turnover threshold.

[31] Works in conjunction with a size of transaction threshold.

Country	US	EU	China	Japan	Germany	UK	France	India	Italy	Brazil	Russia	Canada	SA
Target turnover thres holds (USD)	18.8 million 94 million for assets situated abroad	275 million of at least two of the entities	57 million of at least two of the parties	28 million	5 million	86 million	56 million	133 million	35 million of at least two of the parties	14 million	5 million	No mini mum target turn over	11 million
Staff	1176	848	805	832	315	586	500	197	285	392	3504	391	220
Number of filings in a 12-month period CY/FY 2018/ 2019	2089	382	448	321	1400	62	252	94	73	404	1086	231	348
	2009 – 2019 average[32]												
Number of filings in a 12-month period	1692	332	282	283	1183	72	215	80	230	495	2700	233	328

The following table contain the results of the comparison:

[32] Based on available data, the average for US, UK, Germany and EC is for a 10-year period, India for 8, and France for 7.

Notes on Currency Conversion:

- The rate of conversion of INR into USD is the average spot rate for the last six months quoted by the Financial Benchmarks India Private Ltd (FBIL): 1USD = INR 74.99 (as on 12 July 2020).
- Average of last 6 months for GBP into USD as quoted by FBIL, as on 12 July 2020: 1GBP=1.24USD
- Average of last 6 months for EUR into USD as quoted by FBIL, as on 12 July 2020: 1EUR=1.10USD
- All other figures are approximations based on current conversion rates, as perhttps://www.xe.com/currencyconverter (as on 13 July 2020).

What immediately stands out is that India's turnover threshold is the highest by far. Prior to 2016, when the thresholds were increased, India would have still been the highest on the list, while it would stand second based on its original 2002 figures (behind where Italy is currently).[33] While the GDP of the US, EU, and China outstrip that of India's by some distance, the turnover thresholds are significantly lower. India is sandwiched squarely between Germany, UK, and France, which have a slightly higher GDP, and Italy, Brazil, and Russia, which are slightly lower. The turnover thresholds of the former three are over ten times lower than India's. Italy is the closest to India in terms of the threshold, and still about 250 million dollars lower.

The result is of course that India and Italy receive the least number of notifications amongst the 13, and again by quite a margin. While the US and Germany receive over 1000 notifications a year, the EU, China and Brazil are around the 400 mark, and India and Italy received less than a 100. The only exception to the rule appears to be the UK, which received fewer, although it is a voluntary notification regime.

A ten-year average of the number of notifications received by each agency between 2009 – 2019 yields the same results, except Italy, which averages 230 notifications in that period. This was primarily for the reason that up to 2012,[34] Italy did not have a mandatory local nexus requirement, and therefore, captured a number of transactions with little to no impact in Italy.

---

33 Approximations given that the currency conversion rate has changed over the period 2009 – 2019. However, the thresholds of the comparison jurisdictions were also lower and have increased over time.

34 Organisation for Economic Cooperation and Development, 'Annual Report on Competition Developments in Italy' (OECD 2012) p. 4 <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2013)45&docLanguage=En>.

The ICN also suggests that thresholds may be set on the higher side for agencies with residuary powers to look into transactions falling below the thresholds.[35] Of the 13, the antitrust authorities of the US, Canada, Brazil, China, Japan, and the UK have such a power. Yet, their thresholds are not on the higher end of the scale and all are significantly lower than India's, where the CCI does not possess such a residuary power.

Finally, the ICN asks us to consider the agency's resources.[36] However, if a country wants a serious pre-merger notification system in place to screen potentially problematic transactions, the answer appears to be in increasing the staff numbers rather than increasing the thresholds so fewer notifications are made. India stands in last position amongst the countries examined in terms of staff numbers. According to CCI's 2018-19 Annual Report, the Commission has a total sanctioned staff of 197 split between the CCI (156) and the office of the Director General of Investigation (41). Although the CCI could technically refer a 'phase 2' investigation to the DG's office, it has never done so. The Combinations Division (one of the six divisions at the CCI) handles merger regulation in its entirety. Between October and November 2019, the CCI increased its filing fees for both merger regulation and prevention of anti-competitive practices. This can be suitably adjusted to cover additional staff requirements.[37]

A quick review of the ET–500 Companies list of 2019,[38] reveals that about half, i.e., 250 out of approximately 1800000 companies registered in India[39] have turnover in excess of 6000 crores INR, the current turnover threshold. 250 A similar cursory review reveals that several sectors are quite concentrated where a single player has more than 50% market share – for example automotive glass, adhesives, lead batteries, oral care, mopeds, and glass

[35] ICN Merger Working Group (n 10) 6.

[36] ICN Merger Working Group (n 10) 10.

[37] Back of the envelope calculations suggest the Commission received approximately INR 21.1 crores from filing fees in FY 2018-19 with 74 Form I, and 20 Form II filings. A quick comparison of budgets would suggest that the CCI's budget (of INR 162 crores, i.e. approximately USD 22 million) compares to that of France (USD 27.5 million) and South Africa (USD 24.7 million), whereas it is twice that of Brazil's (USD 11 million). All three countries review a significantly higher number of transactions as compared to India.

[38] See<https://economictimes.indiatimes.com/marketstats/market-cap-,pageno-10,pid-60,sortby-CurrentYearRank,sortorder-asc,year-2019.cms> accessed 15 October 2020.

[39] That is not to say that only transactions involving companies covered in top 250 listed companies in India are ever notified. In fact, there are several transactions every year that involve companies that do not find a mention in the ET-500 since once the target level turnover threshold of INR 1000 crores is crossed, the turnover threshold of INR 6000 crores is the aggregate of both (or all) parties involved. It is also possible that the threshold of INR 2000 crores is crossed on aggregate even through the turnover threshold is not.

lined equipment to name a few.[40] The CCI itself has had an occasion to note the concentration in several markets during its enquiries into abuse of dominance – in markets such as viscose staple fibre,[41] standing/tilting MRI machines,[42] licensing of Bollywood music to FM stations,[43] borosilicate glass tubes,[44] and backhoe loaders.[45]

This brief study shows that perhaps the current thresholds may need to be re-calibrated, and at the very least merits re-visiting to understand if it at the desired level.

IV. KILLER ACQUISITIONS & TRANSACTION VALUE THRESHOLDS

In addition, we are also currently in the midst of a global overhaul of regulations that aim to address the peculiarities of the new age digital markets. One of the main concerns, in this regard, is ensuring that transactions of a certain nature are brought within the purview of the regulator's screening process. Acquisitions in the digital space tend to be characterized by the target slipping under the thresholds due to its minimal turnover in the growth years. One answer appears to lie in introducing a transaction value threshold. The thinking behind this is that start-ups tend to burn cash in their early years, with little to no revenue until they reach a critical mass. They, therefore, have minimal assets and revenue and thus, will inevitably fall below merger notification thresholds. However, the incumbent acquirer sees the potential (and possibly threat) which is reflected in the high acquisition price. For example, when Facebook acquired Instagram for 1 billion

---

40 *See* for example '20 Most Profitable Firms in India Generate 70% of the Country's Profits' *Livemint* (18 May 2020) <https://www.livemint.com/companies/news/20-most-profitable-firms-in-india-generate-70-of-country-s-profits-11589766746084.html> accessed 16 October 2020; Ajai Sreevatsan, 'How Big Tech Reset will Impact India' Livemint (16 October 2020), *"found that one-sixth of the country's business sectors has a dominant firm that controls over 70% of all sales"*, <https://www.livemint.com/technology/tech-news/how-big-tech-reset-will-impact-india-11602773100875.html> accessed 16 October 2020; Nandini Sen Gupta, 'Moped Sales Pick up Speed on Rural Demand' *The Times of India* (15 December 2020), <https://timesofindia.indiatimes.com/business/india-business/moped-sales-pick-up-speed-on-rural-demand/articleshow/79727821.cms>accessed 16 December 2020.

41 *XYZ* v *Assn. of Man-made Fibre Industry of India*, 2016 SCC OnLine CCI 71.

42 *House of Diagnostics LLP* v *Esaote SpA*, 2016 SCC OnLine CCI 49.

43 *HT Media Ltd.* v *Super Cassettes Industries Ltd.*, 2014 SCC OnLine CCI 120.

44 *Kapoor Glass (P) Ltd.* v *Schott Glass India (P) Ltd.*, 2012 SCC OnLine CCI 17.

45 *Bull Machines (P) Ltd.* v *JCB India Ltd.*, 2014 SCC OnLine CCI 43.

US dollars in 2012 (approximately 5000 crores INR at the time), it had 13 employees and *zero* revenue.[46]

Detractors criticise the introduction of a new transaction-based threshold on primarily three grounds.[47] Firstly, the introduction of a new transaction-based threshold would lead to uncertainty and add to administrative burden. Secondly, and worse still, it would result in a chilling effect on investment and innovation. Finally, they point to the fact that a post-facto review under the abuse of dominance and vertical restraints provisions can always be undertaken by the CCI.

However, these arguments are not particularly convincing. The introduction of any new regulation normally adds some uncertainty and additional administrative burden. There were many clarifications required on the application of the turnover and asset tests as they currently function under the Competition Act, requiring the CCI to bring out a detailed set of FAQs on the subject after a few years. The Central Government also had to clarify its intention with respect to the *de minimis* threshold several years after it was first introduced.[48] Germany and Austria faced similar queries from

---

[46] And WhatsApp had 55 employees and revenues of EUR 10 million when it was acquired two years later for 19 billion USD. See German submission to the OECD, dated 28 May 2020, p. 3.

[47] AZB Partners, 'Introduction of alternative merger enforcement thresholds – is it the way forward?' (30 November 2018) <https://www.azbpartners.com/bank/introduction-of-alternative-merger-control-thresholds-is-it-the-way-forward/> accessed 15 October 2020; Anisha Chand and Anmol Aswathi, 'Do New-age Markets Call for New Merger Thresholds? The India Story' *Moneycontrol* (5 May 2020) <https://www.moneycontrol.com/news/opinion/do-new-age-markets-call-for-new-merger-thresholds-the-india-story-5223171.html> accessed 15 October 2020 For arguments against tech regulation and calls for a more interventionist approach in general, see Christine Wilson and Keith Klovers, 'The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating these Mistakes with Big Tech' Oxford Journal of Antitrust Enforcement (7 November 2019) <https://academic.oup.com/antitrust/article/8/1/10/5614371> (accessed 15 October 2020); Christine Wilson, 'Global Innovation, Local Regulation: Navigating Competition Rules in the Digital Economy' Remarks at UIC John Marshall Law School Center for Intellectual Property, Information and Privacy Law Chicago IL (13 March 2020) <https://www.ftc.gov/system/files/documents/public_statements/1569053/wilson_-_global_innovation_local_regulation_ui_chicago_speech_3-13-20.pdf> accessed 15 October 2020; Geoffrey A Manne, 'Correcting Common Misperceptions About the State of Antitrust Law and Enforcement' Invited Statement on the House Judiciary Investigation Into Competition in Digital Markets, (17 April 2020) <https://www.competitionpolicyinternational.com/wp-content/uploads/2020/07/Manne_statement_house_antitrust_20200417_FINAL3-POST.pdf> accessed 15 October 2020; Statement of Prof. John Yun, before the House Judiciary Antitrust Subcommittee (24 September 2019) <https://www.judiciary.senate.gov/imo/media/doc/Yun%20Testimony.pdf> accessed 15 October 2020; Henrique Schneider, 'EU Antitrust Policy in the Digital Era' (29 October 2020) Competitive Enterprise Institute <https://cei.org/issue_analysis/european-union-antitrust-policy-in-the-digital-era/> accessed 15 December 2020.

[48] Ministry of Corporate Affairs Notification dated 27 March 2017 read with Press Release dated 30 March 2017.MCA Notification <https://www.cci.gov.in/sites/default/files/

industry and practitioners with regard to the transaction value threshold they introduced in 2017. A year later they issued a 'Joint Guidance' on the subject which clarified many of these aspects.[49] Nor did the new test appear to dramatically increase the number of filings in either Germany or Austria. 18 notifications were based on this threshold in Germany (of approximately 2686 in the same period)[50] and 15 filings in Austria of over 400 in total.[51]

Similarly, there is no evidence to suggest that India's merger notification system, the CCI's narrow interpretation of the *de minimis* exemption, or of the 'investment only' exemption, has led to a reduction in investments or innovation.[52] The factors influencing investments appear to be more dependent on the expected return on investment, political stability, tax rates, enforcement of contract, and so on.[53]

Finally, the argument that the CCI can always look at conduct under the abuse of dominance and vertical restraints provisions is true for merger regulation as a whole. The point is to address foreseeable issues prior in time rather than react to complaints subsequently.

So, would the introduction of a transaction value threshold solve the problem of 'killer acquisitions'? After all the Facebook/WhatsApp transaction was mandatorily notifiable in the US, one of the few countries with a transaction value threshold. Yet, the US has come in for the most criticism when it comes to missing out on killer acquisitions. In February 2020 the FTC directed the FAMGA contingent to provide key information and documents on '*the terms, scope, structure, and purpose of transactions that each*

---

notification/S.O.%20988%20%28E%29%20and%20S.O.%20989%28E%29.pdf> accessed 15 October 2020.

49 <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> accessed 15 October 2020 and <https://www.bwb.gv.at/en/news/news_2018/detail/news/final_joint_guidance_on_new_transaction_value_threshold_in_the_merger_control_has_been_published/#:~:text=The%20Austrian%20Cartel%20Act%20and,400%20million%20Euros%20in%20Germany> accessed 15 October 2020.

50 OECD Background Note on Start-ups, Killer Acquisitions and Merger Control, 12 May 2020, p. 40.

51 Martin Glasser, *Why the introduction of a new transaction value jurisdictional threshold for the EUMR has been postponed, at least for now*, (28 June 2019)<https://oxcat.ouplaw.com/page/775#11> accessed 15 October 2020.

52 As NYU Law Professor Scott Hemphill states, even preventing certain transactions will not affect funding for start-ups, "*but in fact most deals would be unaffected and for those that are, typically there are other buyers.*" <https://leconcurrentialiste.com/scott-hemphill-uncertain-harms/> accessed 15 October 2020.

53 In fact, to the contrary the Furman report suggests that "*mergers in digital markets could be detrimental to consumer welfare through reducing future levels of innovation and competition.*" See Furman (n 4) 12.

company consummated between Jan. 1, 2010 and Dec. 31, 2019'.[54] The purpose of this exercise – a better understanding of tech firm's acquisition and '*whether large tech companies are making potentially anticompetitive acquisitions of nascent or potential competitors that fall below HSR filing thresholds and therefore, do not need to be reported to the antitrust agencies*'.[55] This is despite the fact that the US agencies have the residuary power to look into mergers that do not cross the thresholds,[56] a power that the CCI lacks.[57] In October 2020, the Antitrust Subcommittee of the US House of Representatives concluded its 16 month long investigation into Big Tech and published a 450 page report, which amongst other things, recommended strengthening merger law and enforcement to protect nascent competitors.[58] And finally in December 2020, the FTC filed a suit against Facebook[59] for wilfully maintaining its monopoly power "*through its course of anticompetitive conduct, including though anticompetitive acquisitions and anticompetitive conditioning of access to interconnections*" and sought divestiture of WhatsApp and Instagram, and more pertinently, "*a prior notice and prior approval obligation for future mergers and acquisitions.*"[60]

But how prevalent is this problem of 'killer acquisitions' in India? According to one study approximately 582 acquisitions were concluded in the Indian start-up ecosystem in the five- year period between FY 2015 to FY 2019.[61] In its E-commerce Study, the CCI noted that platform/ intermediation services is concentrated with a few large players in each of

---

54 See 'FTC Press Release' (11 February 2020) <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies> accessed 15 October 2020.

55 Ibid; At the ICN's (virtual) 2020 Conference in September 2020, FTC Chairman Joseph Simon reportedly stated that "the agency may issue a special order that would require several Big Tech firms to file premerger notifications for acquisitions that fall well below existing thresholds", as reported by PaRR on 14th September 2020 <https://app.parr-global.com/intelligence/view/intelcms-wcr76p?utm_source=Notifications&utm_medium=Email&utm_campaign=Alert&utm_term=5bad1b47d6c34b0025f1620c> accessed 15 October 2020.

56 The FTC used this power 15 times over the last 5 years to challenge non-notifiable mergers, and the DOJ 18 times over the same period. See US Submission to the OECD, (4 June 2020) p 13.

57 Notably, the US, UK, Canada, Brazil, and Japan have this power. See OECD Background Note, (12 May 2020) p 42.

58 Majority Staff Report and Recommendations of the Subcommittee on Antitrust, Commercial and Administrative Law, of the Committee on the Judiciary of the US House of Representatives (n 6).

59 'FTC Press Release', (9 December 2020) <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization?utm_source=govdelivery> accessed15 December 2020.

60 'FTC Complaint', (9 December 2020) para 171 s X, <https://www.ftc.gov/system/files/documents/cases/1910134fbcomplaint.pdf> accessed 15 December 2020.

61 See <https://inc42.com/features/2019-in-review-top-10-high-profile-startup-acquisitions-in-india/> accessed 15 October 2020.

consumer goods (read Flipkart and Amazon), accommodation services (read MakeMyTrip), and the food services markets (read Zomato and Swiggy). A preliminary web search suggests these five acquired (or invested in) approximately 40 companies in the last 10-odd years.[62] How many of these were notified to the CCI? *Three.*[63]

The CCI is, therefore, currently handicapped in its merger enforcement by (a) high thresholds, (b) the absence of a transaction value threshold, and (c) the lack of a residuary power to examine transactions that fall below the thresholds.

V. CONCLUSIONS & OPTIONS

Jurisdictions, such as the UK and Spain,[64] that work on a market share threshold along with a turnover test, also face the jurisdictional gap in capturing high value low turnover transactions, albeit to a lesser degree.[65] As the CMA recognized in its recently published Advice of its Digital Markets Taskforce, its 'share of supply test' still runs the risk that it "*fails to capture many transactions entered into by the most powerful digital firms, which often involve moving into adjacent markets…*".UK is also blessed with powers to look at transaction below the thresholds.[66] Despite this, it was proposed in this report[67] that the government should establish a Digital Markets Unit housed within the CMA and should formulate new regulations that would empower

62 Aggregated from multiple sources including, <https://www.crunchbase.com/organization/swiggy#section-acquisitions> accessed 15 October 2020; <https://tech.economictimes.indiatimes.com/news/internet/zomatos-acquisitions-so-far-and-where-they-stand/75144770> accessed15 October 2020; <https://officechai.com/startups/startups-acquired-by-flipkart/> accessed 15 October 2020.

63 Excluding Amazon's investments in Shoppers Stop and Future Coupons, which were not digital start-ups.

64 See Submission by Spain to OECD 14 May 2020 p 2-3, <http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 15 October 2020.

65 'Advice of the CMA's Digital Markets Taskforce' (8 December 2020) .57 <https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice_--.pdf> accessed 15 December 2020.

66 However, as the ICN notes, market shares are *"inherently subjective and fact-intensive may be appropriate for later stages of the merger control process (e.g., determining the scope of information requests or the ultimate legality of the transaction), but such tests are not appropriate for use in making the initial determination as to whether a transaction requires notification"*; See ICN Merger Working Group (n 10) 2.

67 UK Government release dated 08 December 2020, available at <https://www.gov.uk/cma-cases/digital-markets-taskforce?utm_source=a481f63d-447f-417f-9a3b-4a0b7bb-19d7e&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily> (last visited on 15 December 2020).

it to label a firm as having 'Strategic Market Status' and require such firms to notify ***all*** transactions to the CMA for approval.[68]

France launched public consultations in October 2017 on modernising merger control. It noted that three options were available to it in terms of (a) introducing a market share threshold, (b) a transaction value threshold, and (c) specific ex-ante control and ex-post-merger control.[69] It preferred the third, and launched a second public consultation in June 2018 for this purpose. Specifically, it is looking at introducing a requirement to give prior information of transactions by "structuring platforms".[70] On 19 February 2020, the French Competition Authority published its Contribution to the debate on competition policy and digital challenges, suggesting that such structuring platforms be required to inform the authority of ***all*** mergers entered into by such companies.[71]

Germany is set to adopt the 10th amendment to its Act against Restraints of Competition, also known as the Digitalisation Act, which if passed in current form would, amongst other things, empower the FCO to require that designated companies notify ***all*** future transactions,including those that fall below the thresholds.[72]

In June 2020, the EC announced that it is considering a 'new tool' to combat markets that are prone to tipping, such as digital markets.[73] The

---

68 (n 66).

69 See Submission by France to OECD, p 4, <http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 15 October 2020.

70 Which it proposes to define as *"a company that provides online intermediation services for exchanging, buying or selling goods, content or services, and who holds structuring market power because of its size, financial capacity, user community and/or the data that it holds, enabling it to control access to or significantly affect the functioning of the market(s) in which it operates, with regard to its competitors, users and/or third-party companies that depend on access to the services it offers for their own economic activity"*. Submission by France to OECD, p. 7. Norway has a similar regime in place, while Italy and Netherlands are considering it. See OECD Background Note, 12 May 2020, p 42. The Furman Report also recommends that *"Digital companies that have been designated with a strategic market status should be required to make the CMA aware of all intended acquisitions"*, Recommended action 8, at p 12; The ACCC's Digital Platforms Inquiry Report of June 2019 also recommends that *"Large digital platforms [should] provide advance notice to the ACCC of any proposed acquisitions potentially impacting competition in Australia"*, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>, 30 accessed 15 October 2020.

71 'FCA Contribution' (24 February 2020) <www.autoritedelaconcurrence.fr/en/press-release/autorite-publishes-its-contribution-debate-competition-policy-and-challenges-raised> accessed 15 October 2020.

72 See piece by Wilmer Hale, 'New Antitrust Rules for the Digital Economy: German "Digitalization Act" Nears the Finish Line' 14 December 2020 <https://www.jdsupra.com/legalnews/new-antitrust-rules-for-the-digital-53319/> accessed 15 December 2020.

73 EC's Press Release (n 13).

new tool in essence would permit the EC to not only conduct broad market investigations (which it already has the power to do) but also address any structural problems it finds. It points to Greece, Iceland, Romania, UK, Mexico, and South Africa, as examples of authorities that can carry out market investigations and impose remedies to fix any competition problems they find.[74] Companies would not be fined but may be directed to modify practices and follow certain obligations.[75] In December, the Commission unveiled its much-anticipated twin legislative proposals – the Digital Services Act and the Digital Markets Act. The latter requires companies identified as "gatekeepers" to comply with a wide and inclusive set of 'dos' and 'don'ts'.[76]

For years, the CCI followed a largely non-interventionist policy with respect to technology related markets, and repeatedly dismissed complaints against Flipkart, Amazon, Uber, Ola, MakeMyTrip, OYO.[77] In 2019, the CCI changed gears and launched a study into the e-commerce sector. A formal investigation against MakeMyTrip followed in October 2019, and a second investigation into the practices of Flipkart and Amazon was ordered in January 2020. The next logical step would be to bring more transactions within the ambit of its purview, with a particular focus on the digital economy.

For a start, the Government and the Commission may consider:

1. Lowering the current turnover thresholds.
2. Lowering the target *de minimis* turnover threshold.
3. Introducing a transaction value threshold.
4. Increasing the number of staff of the Combinations Division of the CCI, and building the expertise of personnel in the area.

Save South Africa, Canada, and Russia, the remaining jurisdictions rely solely on a turnover threshold or a hybrid between turnover and transaction value, and not on an asset threshold. However, given that the turnover and asset thresholds work on an either/or basis in India, there may not be a need to consider modifying it. Lowering it appropriately may be considered, as

---

[74] EC's Press Release (n 13).

[75] *Ibid.*

[76] 'EC Press Release' (15 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2347> accessed 15 December 2020.

[77] As the former Secretary of the CCI described it: *"the cases dealt with by the Commission in the digital space reveal its non-interventionists approach generally, unless some tangible harm...becomes apparent...keeping in mind the ever-evolving nature of the e-commerce industry..."*, Global Competition Review, 'E-Commerce Competition Enforcement Guide' 15 October 2019 <https://globalcompetitionreview.com/guide/e-commerce-competition-enforcement-guide/second-edition> accessed 15 October 2020.

could lowering the target asset *de minimis* threshold (or doing away with it entirely).

A more radical suggestion would be to confer the CCI with a residuary power to look into transactions falling below the thresholds. This could also be combined with permitting voluntary notifications for transactions that do not breach the thresholds.[78] No doubt, this would cause considerable anxiety to industry participants given the lack of certainty over whether a consummated deal would be scrutinized somewhere down the line, although the system has been in place in the US, UK, Brazil, Canada, and other major jurisdictions for several years.

With regard to transaction value thresholds, there is certainly merit in introducing them as they would bring within the CCI's ambit a few additional transactions to evaluate. These will cut across sectors and not be limited to the digital economy. However, that may in fact be useful since experience from other jurisdictions suggests that the other sectors likely to be affected are pharmaceutical, healthcare, and chemical industries.[79] There would no doubt be teething troubles, which can be clarified by the CCI based on the questions that arise. It may also look at the Joint Guidance issued by Germany and Austria in order to anticipate the kind of issues likely to crop up and nip them in the bud.[80] The results of the US retrospective study, currently underway, would also be instructive. The CCI is currently conducting a similar study of acquisitions in the digital market,[81] as is Brazil.[82]

---

78 For example, Sweden has both a voluntary notification system as well as powers to call for a notification to be filed, for those transactions that fall below the thresholds. See OECD Background Note (12 May 2020) p. 15.

79 OECD (n 80) 42 and <https://oxcat.ouplaw.com/page/775#11> accessed 15 October 2020.

80 The most common of these are (i) how to assess value in cases of consideration contingent on meeting certain targets, securities transactions, or consideration involving asset or securities swaps, and (ii) how to ensure the domestic nexus requirement is met, particularly in global transactions. Both these concerns are covered in detail in the Guidance, <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> accessed 15 October 2020.

81 See statement by the CCI Chairperson in Report 'Competition Commission Initiates Studies on Telecom Sector, M&A in Digital Market' *The Economic Times* (8 June 2020) <https://economictimes.indiatimes.com/industry/telecom/telecom-news/competition-commission-initiates-studies-on-telecom-sector-ma-in-digital-market/articleshow/76264193.cms?from=mdr> accessed 15 October 2020; Also remarks by the CCI's Chairperson in the panel session on Digital Merger (15 September 2020) of the ICN Conference 2020, <https://icn-2020.videoshowcase.net/icn-2020-day-2-sept-15?category=64043> accessed 15 October 2020.

82 See PaRR, 'CADE Asks 18 Digital Companies for info About Mergers, Acquisitions' (4 July 2020) <https://app.parr-global.com/intelligence/view/prime-3065831?utm_source=Notifications&utm_medium=Email&utm_campaign=Alert&utm_term=5bad1b47d634b0025f1620c> accessed 15 October 2020 - which reports that GAFA, Twitter, Uber, and 12 others have been sent notices by CADE regarding mergers and acquisitions in which they were involved.

In addition, the CCI may, in parallel, consider tasking a suitable organization with a more broad- based and detailed study of the turnover and assets of Indian companies, as well as that of certain sectors, to arrive at suitable thresholds – both for the current turnover and asset tests, and also for a transaction value.

VI. APPENDIX (SOURCES FOR THE DATA CITED IN THE TABLE)

GDP 2019	https://databank.worldbank.org/data/download/GDP.pdf

No.	Jurisdiction	Thresholds	Staff & Number of filings
	US	https://www.federalregister.gov/documents/2020/01/28/2020-01423/revised-jurisdictional-thresholds-for-section-7a-of-the-clayton-act	https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf
	EU	Merger control procedures of the EU - European Commission (europa.eu)	http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2020)37&docLanguage=En
	China	Merger control in China: overview | Practical Law (thomsonreuters.com)	
	Japan	ICN_merger_template_Japan_v2_clean.2015.pdf (jftc.go.jp)	http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2020)37&docLanguage=En

No.	Jurisdiction	Thresholds	Staff & Number of filings
	Germany	Bundeskartellamt - Merger control	https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Jahresbericht/Jahresbericht_2019.pdf?__blob=publicationFile&v=3
	UK	https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903147/guidance_on_changes_to_the_jurisdictional_thresholds_for_UK_MC.pdf	https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2019-to-2020/competition-and-markets-authority-annual-plan-201920
	France	https://www.autoritedelaconcurrence.fr/en/merger-control	https://www.autoritedelaconcurrence.fr/sites/default/files/2020-07/rapport-annuel-2019.pdf
	India	https://www.cci.gov.in/sites/default/files/quick_link_document/Revised%20thresholds.pdf	https://www.cci.gov.in/sites/default/files/annual%20reports/ENGANNUAL REPORTCCI.pdf
	Italy	https://en.agcm.it/en/scope-of-activity/competition/mergers-and-acquisitions/turnover-thresholds	http://www.oecd.org/official documents/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2020)17&doc Language=En
	Brazil	Questions on Mergers — CADE	http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2020)39&doc Language=En

No.	Jurisdiction	Thresholds	Staff & Number of filings
	Russia	https://en.fas.gov.ru/upload/other/Local%20Nexus%20and%20Jurisdictional%20Thresholds%20in%20Merger%20Control%20(Russian%20Contributions).pdf	https://en.fas.gov.ru/international-cooperation/oecd/oecd-annual/
	Canada	Pre-merger notification transaction-size threshold to remain at $96M in 2020 - Canada.ca	https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-Annual Report-2019-2020-Eng.pdf/$file/CB-Annual Report-2019-2020-Eng.pdf
	South Africa	http://www.compcom.co.za/merger-thresholds/	http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2020)53&docLanguage=En

Modern Corporate Insolvency Regime in India: A Review

*Dr. Vijay Kumar Singh**

Insolvency and Bankruptcy Code (IBC), Corporate Insolvency Resolution Process (CIRP) in particular, has emerged as one of the most successful regulations in India for a number of reasons and this paper would explore these very reasons and present the major factors, which contributed towards success of the Code so far. Since the constitution of the Expert Committee on the subject in August 2014, a great level of transformation has happened in the law, policy and practice in dealing with financial distress. The reference points have changed to the extent that a default in payment of debt, which was considered routine before IBC, is now a major concern for enterprises. It has contributed towards evolving a 'culture of compliance', which is termed as the 'modern corporate insolvency regime'. The regime witnesses a change from 'debtor-in-possession' to 'creditor-in-possession', clarity on the concept of 'default', concept of financial creditor, and a predictable framework of timely, efficient and fair resolution; the hallmark of the modern regime. The institutional pillars under the Code make the process of CIRP smooth, handled by professionals trained to handle stressed assets as a going concern. A regulator with a difference facilitates creation of an ecosystem to further the objectives of the Code. This paper would briefly trace the development of the modern corporate insolvency regime in India, elaborate the functioning of the institutional pillars and analyze some of the major jurisprudential developments. At the end, some major areas which require further progress or the unfinished agenda, will be brought forward. The paper intends to provide a general overview of the modern corporate insolvency regime in India.

* Professor and Dean, School of Law, University of Petroleum and Energy Studies (UPES).

I. INTRODUCTION

A robust ecosystem for entrepreneurship must provide for smooth transition in case of business failures.[1] It is important to have an ecosystem, which not only fosters 'the freedom of entry' for a commercial entity (that is, the freedom to start a business) and 'the freedom of doing business' or to continue doing business (by providing a level playing field), but also 'the freedom to exit' or discontinue the business.[2]

Economic reforms in early 1990s in India focused mainly on freedom of entry by dismantling the *license-permit-quota Raj*. The reforms then shifted focus to freedom of doing business, i.e., to ensure that freedom granted in the first phase of reforms is not misused and to avoid market failure, restraints had to be placed on economic agents.[3] But even a firm enjoying freedom of entry and freedom to do business could fail to deliver as planned for a variety of reasons. It could be because of faulty conceptualization of business, inefficient execution of business, change of business environment, or even *mala fide* design in some cases.[4] The modern corporate insolvency regime in India,

[1] "While reducing the stigma associated with bankruptcy may be difficult, policy makers can minimize the negative effects of business failures and take advantage of their positive effects by adopting efficient and well-functioning bankruptcy laws". See 'Resolving Insolvency: Measuring the Strength of Insolvency Laws, Doing Business 2015 Going Beyond Efficiency' pp 96-101 <https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Chapters/DB15-CaseStudy-Resolving-Insolvency.pdf>.

[2] IBBI and IFC (World Bank), *Understanding the IBC: Key Jurisprudence and Practical Considerations - A Handbook*, Delhi (2020).

[3] Monopolies and Restrictive Trades Practices Act 1969 and now the Competition Act 2002 ensures this.

[4] Shubhanker Yadav & Anindita Chakraborty, 'Corporate Collapses in India: Issues and Challenges' (2016) 7 RKGJM 47-54.

also referred to as the Corporate Insolvency Resolution Process ("CIRP") expressly and elaborately lays down the freedom to exit in an orderly and a time-bound manner, ensuring non-erosion or less erosion of capital. The stream of insolvency laws can be segregated chiefly under two heads, i.e., personal insolvency[5] and corporate insolvency.[6] The focus of this paper is on corporate insolvency.

Modern corporate insolvency regime in India began its formal journey with the passage of the Insolvency and Bankruptcy Code, 2016 ("IBC" / "the Code"). IBC paved way for a futuristic, clean, professionally-driven and resolution-based law for resolving insolvency.[7] It also marks a major economic reform by India only next to the implementation of GST.[8] This is clearly reflected by the significant improvement on '*Resolving Insolvency*' parameter in the Ease of Doing Business Ranking ("EoDB"), i.e., a progression to rank 47 in 2019 from rank 138 in 2009.

Debtors and creditors started using the Code for resolution by the end of 2016, as the ecosystem for CIRP was already put in place.[9] Initially, skepticism surrounded the implementation of the Code as matters were required to be handled by professionals who were just born, like the Adjudicating Authority ("AA") being new to the system of corporate insolvency (previously being handled by High Courts). Another reason for the initial skepticism was the historical baggage of the sluggish Non-Performing Asset ("NPA") resolution mechanism. Within few months of the implementation of the Code, clarity began to emerge with the operationalization of the Code, and the plugging of gaps through interpretation by the National Company Law Tribunal ("NCLT")/ National Company Law Appellate Tribunal ("NCLAT")/ Supreme Court and the consequent amendments in Regulations.[10] Whether the CIRP regime has passed the litmus test is the answer we are looking for in this paper.[11]

---

5 Deals with individuals and partnership firms governed by Provincial Insolvency Act 1920 and Presidency Towns Insolvency Act 1908.

6 Under the Companies Act 2013, Insolvency and Bankruptcy Code 2016 and Limited Liability Partnership Act 2008.

7 Speech by Smt. Nirmala Sitharaman, Hon'ble Union Minister of Finance and Corporate Affairs on Third Annual Day of the Insolvency and Bankruptcy Board of India at New Delhi on 1st October, 2019 (December 2020), <https://ibbi.gov.in/uploads/resources/418c870b-4d2004c7cc2569c7456b53fb.pdf>.

8 Ministry of Finance, Press Release dated 11th May, 2016 "This (The Insolvency and Bankruptcy Code, 2016) is considered as the biggest economic reform next only to GST."

9 MS Sahoo and Anuradha Guru, 'Indian Insolvency Law' (April-June 2020) 45 (2) Vikalpa: The Journal for Decision Makers.

10 IBBI, Section-wise Jurisprudence on IBC upto 30.09.2020 (December 2020) <https://www.ibbi.gov.in/uploads/legalframwork/4a38b0aa7994e2bdbe63d67fd0a5d212.pdf>.

11 Sumant Batra, 'IBC has Passed Many Litmus Tests, will Continue to Weather Storms' *The Financial Express* (May 21, 2019), <https://www.financialexpress.com/opinion/

IBC's success rests on four basic pillars, i.e., the AA, Insolvency and Bankruptcy Board of India ("IBBI"), Insolvency Professional Agencies ("IPAs") including Insolvency Professionals ("IPs"), and Information Utilities ("IUs"). There has been an improvement in functioning of all these pillars in the last four years, which would be discussed in section II of the paper.

In terms of achieving the primary objectives of the Code, i.e., (i) maximizing value (ii) rescuing a viable business and (iii) keeping the order of claims stable,[12] a broad overview of statistical analysis provided by IBBI in its latest newsletter[13] is very encouraging. Some snapshots are worth mentioning here for the benefit of the readers.

- The Code was able to rescue 277 Corporate Debtors ("CDs") with an asset value of Rs. 1.02 lakh crore, which was about 193 percent of the realizable value.[14] The BIFR regime was not at all efficient due to its debtor-in-possession model.

- 1025 CDs ended up with orders of liquidation, with liquidation assets valued at Rs. 0.42 lakh crore, of which 132 have been fully liquidated. Time taken for liquidation was 10 years on an average.

- The Code helped bring a behavioral change in debtors towards resolution of distress in its early stages. 14884 applications for initiation of CIRPs of CDs, having underlying default of Rs. 5,15,170 crores, were resolved before their admission.

- The process of resolution saw a distinct speed compared to previous regime. It took average of 384 days to complete the CIRP process yielding resolution, average 318 days were taken for CIRP process, leading to liquidation order. Voluntary liquidation processes took an average of 359 days for closure.

- An analysis of cost of CIRP works out to be on average 0.79% of liquidation value and 0.42% of resolution value.

- India's rank on 'Ease of Resolving Insolvency' improved to 47 from 95 in 2019.

---

ibc-has-passes-many-litmus-tests-will-continue-to-weather-storms/1583818/>.

12 World Bank, the International Finance Corporation, and Oxford University Press, *Doing Business in 2004 Understanding Regulation*, The International Bank for Reconstruction and Development / The World Bank (2004).

13 IBBI, Insolvency and Bankruptcy News July – September 2020, p 20 vol 16.

14 The realisable value of the assets available with the 277 CDs rescued when they entered the CIRP was only Rs. 1.02 lakh crore though they owed Rs 4.89 lakh crore to creditors.

II. TRACING THE PATH OF DEVELOPMENT

Modern corporate insolvency regime in India has seen several iterations in the past until the Bankruptcy Law Reform Committee ("BLRC") was assigned the responsibility to examine this comprehensively. This was done to meet the lofty goals of improving EoDB, facilitating more investment, leading to higher economic growth and development.[15] It is important to note that the recommendations of BLRC build upon a series of work already undertaken in this area since 1964. In the past, bankruptcy reforms had involved treating the broad landscape of the bankruptcy process as given by undertaking certain incremental changes. The BLRC had the mandate of comprehensive reform, covering all aspects of bankruptcy of individuals and nonfinancial firms. Here, the term "non-financial firms" was included but was not restricted to limited liability corporations. The only element which was not covered in the BLRC was the recent work of the Financial Sector Legislative Reforms Commission ("FSLRC"), which had a comprehensive solution for the failure of financial firms.[16]

Table I.1: Government committees on bankruptcy reforms

Year	COMMITTEE	OUTCOME
1964	24th Law Commission	Amendments to the Provincial Insolvency Act, 1920
1981	Tiwari Committee (Department of Company Affairs)	SICA, 1985.
1991	Narasimham Committee I (RBI)	Recovery of Debts Due to Banks and Financial Institutions Act (RDDBFI Act), 1993
1993	Onkar Goswami Committee (Min. of Finance)	Report of the Committee on Industrial Sickness and Restructuring
1998	Narasimham Committee II (RBI)	Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002
1999	Justice Eradi Committee (GOI)	Companies (Amendment) Act, 2002, Proposed repeal of SICA

---

15 Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015, Sixteenth Lok Sabha, (April 2016) para 3 <http://ibbi.gov.in/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf>.

16 Report of the Financial Sector Legislative Reforms Commission, Volume I: Analysis and Recommendations, Government of India (March 2013) (Chairman: Justice B.N. Srikrishna), <http://dea.gov.in/sites/default/files/fslrc_report_vol1_1.pdf>.

2001	L. N. Mitra Committee (RBI)	Proposed a comprehensive bankruptcy code.
2005	Irani Committee (RBI)	Enforcement of Securities Interest and Recovery of Debts Bill, 2011. (With amendments to RDDBFI and SARFAESI).
2008	Raghuram Rajan Committee (Planning Commission)[17]	Proposed improvements to credit infrastructure.
2013	Financial Sector Legislative Reforms Commission (Ministry of Finance)	Draft Indian Financial Code ,which includes a "Resolution Corporation" for resolving distressed financial firms

BLRC submitted its final report[18] in less than 15 months on 4th November 2015 and within another six months it was signed by the President on 28th May, 2016 to be the modern insolvency law of the land. The next step for the implementation of the Code was to have the necessary paraphernalia in place.

A. Revival of Sick Companies

In the wake of sickness in the country's industrial climate prevailing in the eighties, the Government of India set up in 1981, a Committee of Experts, under the Chairmanship of *Shri T. Tiwari* to examine the matter and recommend suitable remedies. Based on the recommendations of the Committee, the Government of India enacted a special legislation namely, Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA").[19] The legislative framework for revival and rehabilitation of sick companies has evolved over a

[17] Raghuram Rajan, *A Hundred Small Steps Report of the Committee on Financial Sector Reforms* (2008).

[18] *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, November 2015* [Chairperson Dr. TK Viswanathan], available at <http://ibbi.gov.in/BLRCReportVol1_04112015.pdf.> BLRC also submitted an interim report Interim Report of the BLRC February 2015, available at <http://www.finmin.nic.in/sites/default/files/Interim_Report_BLRC_0.pdf>.

[19] <http://www.bifr.nic.in/introduction.htm>Industrial sickness had started right from the pre-Independence days. Government had earlier tried to counter the sickness with some ad-hoc measures. Nationalisation of Banks and certain other measures provided some temporary relief. RBI monitored the industrial sickness. A study group, came to be known as Tandon Committee was appointed by RBI in 1975. In 1976, HN Ray committee was appointed. In 1981, Tiwari Committee was appointed to suggest a comprehensive special legislation designed to deal with the problem of sickness laying down its basic objectives and parameters, remedies necessary for revival of sick Units. The committee submitted its report to the Govt. in September 1983 and suggested the following: Need for a special legislation, need for setting up of exclusive quasi-judicial body. Thus, the SICA came into existence in 1985 and BIFR started functioning from 1987

period of time. SICA was followed by the Companies (Second Amendment) Act, 2002, which incorporated the provisions for revival of sick industrial companies in Companies Act, 1956. Thereafter, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, was enacted; and finally, the Companies Act, 2013, was passed. The provisions relating to sick companies have undergone significant changes during each of these transitions.[20]

The main objective of SICA was to determine sickness and *expedite the revival of potentially viable units or closure of unviable units* (unit herein refers to a Sick Industrial Company). It was expected that by revival, idle investments in sick units will become productive and by closure, the locked-up investments in unviable units would get released for productive use elsewhere (the basic philosophy behind the insolvency resolution laws and policy).

The Board of Experts, namely the Board for Industrial and Financial Reconstruction (BIFR), was set up in January, 1987 and was functional with effect from 15th May 1987. The Appellate Authority for Industrial and Financial Reconstruction (AAIRFR) was constituted in April 1987. Government companies were brought under the purview of SICA in 1991 when extensive changes were made in the Act including, inter-alia, changes in the criteria for determining industrial sickness.

The failure of BIFR and the misuse of the provisions of SICA were being reported to the extent that BIFR was itself termed sick.[21] Former Prime Minister and one of the chief architects of the SICA, *Shri. V.P. Singh,* stated in 2001 that "BIFR" has failed.[22] One of the major reasons for BIFR's failure was attributed as, "*BIFR lacks professional expertise in conserving cash, managing working capital and dealing with equity conversion options, which are necessary to turn around a business.*"[23] The biggest criticism of the system adopted by the BIFR, under the provisions of SICA was that during restructuring, control of the company was left in the hands of the old management. "If the same people, who were responsible for the downfall

---

20 A Ramaiya, '*Guide to the Companies Act: Providing guidance to the Companies Act, 2013*', vol 3, 2015, p 4365.

21 'Sick Firms Seek Cure, But BIFR Itself is Sick' *DNA* (Sep 18, 2006) available at <https://www.dnaindia.com/business/report-sick-firms-seek-cure-but-bifr-itself-is-sick-1053830>.

22 'BIFR has failed: VP Singh' *Business Line* (Kolkata, March 7, 2001) "*Sick units which have no hopes of recovery could not carry on" and "An alternative mechanism had to be devised to tackle industrial sickness."*

23 Raghavendra Verma, Tooling up: Deprived of Adequate Insolvency Protection, Indian Companies in Distress are Struggling to Restructure, India Business Law Journal, Dec 2011, pp. 11, available at <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Deprived_of_adequate_insolvency_protection-_Indian_companies_in_distress_are_struggling_to_restructure.pdf >need to provide journal name, publisher, page number.

of the company, take over the revival process, there is a lack of confidence [among the creditors]," notes *Abizer Diwanji* from EY.[24] IBC addresses the aforesaid two main drawbacks of SICA and has now become the primarily legislation in India to deal with the situations of corporate insolvency, coupled with the concept of rehabilitation. As the preamble outlines, IBC has come into existence to consolidate and amend the laws relating to both reorganisation and insolvency resolution.

B. The NPA Resolution Conundrum

As a guardian of monetary policy, the Reserve Bank of India ("RBI") keeps an eye on the bad debts and NPAs. In this regard, the RBI prescribes prudential standards to regulate the activities of commercial and other banks. To prescribe a uniform and consistent approach for the classification of assets by banks, and to ensure an adequate level of provisioning on those assets on the basis of an objective criteria, the RBI keeps updating the *Master Circular on Prudential norms on Income Recognition, Asset Classification and Provisioning,* pertaining to Advances ("the Master Circular").[25] As part of its supervisory processes, the RBI also assesses the extent of compliance by banks with prudential norms on income recognition, asset classification and provisioning. As per the Master Circular, an asset, including a leased asset, becomes non-performing when it ceases to generate income for the bank.[26] Banks are required to classify non-performing assets further into the following three categories based on the period for which the asset has remained non-performing and the realisability of the dues, i.e., (i) Sub-standard Assets (ii) Doubtful Assets and (iii) Loss Assets.[27] Recovery of debts/loans remains one of the greatest challenges for the banks, in spite of the fact that several measures were taken by the Government to ameliorate the situation. This was done through special mechanisms of recovery through Debt Recovery Tribunals ("DRT"),[28] securitization under SARFAESI, or the various voluntary mechanisms for debt restructuring.[29]

---

[24] *Ibid.*

[25] Master Circular - Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances RBI/2015-16/101 DBR.No.BP.BC.2/21.04.048/2015-16 (1 July 2015). <https://rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=9908>. The latest circular of RBI on this point is Prudential Framework for Resolution of Stressed Assets, RBI/2018-19/203 dated June 7, 2019.

[26] *Ibid*, para 2.1.1 of Master Circular.

[27] RC Kohli, 'Practical Guide to NPA Resolution – Taxmann, 4th ed (2017).

[28] Presently 39 DRT's and 5 DRAT's are functioning in India, see <https://drt.gov.in/front/composition.php>

[29] Corporate Debt Restructuring ("CDR"), Strategic Debt Restructuring ("SDR"), Sustainable Structuring of Stressed Assets (S4A), joint lender's forum, 5:25 scheme, see RBI Schemes Guidelines, Economic Survey 2016-17.

Banking Regulation Ordinance 2017 – The ordinance amended the Banking Regulation Act, wherein the Central Government was empowered to authorize[30] the RBI to direct banks to initiate recovery proceedings against loan defaulters.[31] The RBI issued a revised framework for resolution of stressed assets[32] harmonizing it with IBC, which led to the withdrawal of all voluntary mechanisms. The new framework requires the lenders to report credit information, including classification of an account as Special Mention Account ("SMA") to Central Repository of Information on Large Credits ("CRILC") on all borrower entities having aggregate exposure of Rs. 50 million and above. RBI directed twelve large corporate accounts[33] to undergo IBC resolution process, which constituted about 25% of total NPAs at that point in time. Nine of these accounts have already been resolved and three are under process. The Code has brought forward the trend of publishing the names of loan defaulters,[34] which brings a sense of urgency for debtors to submit for early resolution and not drag their feet in avoiding loan payments.

C. The BLRC Report

BLRC was set up by the Department of Economic Affairs, Ministry of Finance, under the Chairmanship of *Dr. T.K. Vishwanathan*,[35] by an office order dated August 22, 2014, to study the "corporate bankruptcy legal framework in India" and submit a report to the Government for reforming the system. During the course of its deliberations, the Committee decided to divide the project into two parts:

(i) to examine the present legal framework for corporate insolvency and suggest immediate reforms, and

(ii) to develop an 'Insolvency Code' for India, covering all aspects of personal and business insolvency.

---

30 *Dharani Sugars & Chemicals Ltd.* v *Union of India*, (2019) 5 SCC 480, *"the power to be exercised under the authorisation of the Central Government requires due deliberation and care to refer to specific defaults."*

31 The Banking Regulation (Amendment) Act 2017 introduced ss 35AA and 35AB.

32 RBI Circular RBI/2017-18/131 on Resolution of Stressed Assets – Revised Framework dated February 12, 2018.

33 Essar Steel, Monnet Ispat & Energy, Bhusan Steel, Bhusan Power, *Era Infra Engineering*, *ABG Shipyard*, Jaypee Infratech, Amtek Auto, Alok Industries, Jyoti Structures, *Lanco Infratech* and Electrosteel Steels.

34 'Top Wilful Defaulters: Here is the List of 2,426 Who Together Owe Rs1.47 Lakh Crore to Public Sector Banks' *Moneylife* (18 July 2020), <https://www.moneylife.in/article/top-wilful-defaulters-here-is-the-list-of-2426-who-together-owe-rs147-lakh-crore-to-public-sector-banks/60959.html>.

35 Former Secretary General, Lok Sabha and former Union Law Secretary.

BLRC in its eight chapters of volume I provides a comprehensive analysis of its suggestions including the economic thinking behind the Code. The seven principles which drive the design of the Code are as follows:[36]

- The Code will facilitate the assessment of viability of the enterprise at a very early stage.
- The Code will enable symmetry of information between creditors and debtors.
- The Code will ensure a time-bound process to better preserve economic value.
- The Code will ensure a collective process.
- The Code will respect the rights of all creditors equally.
- The Code must ensure that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding.
- The Code must ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy.

D. Modern Dimension of Corporate Insolvency

The Supreme Court of India had on previous occasions made a reference to the Statement of Objects and Reasons for understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to a statute, and the evil which the statute was sought to remedy.[37] The reports of Commissions or Inquiry Committees, preceding the introduction of a Bill, have also been referred to as an evidence of historical facts or of surrounding circumstances or of mischief or evil intended to be remedied, and at times for interpreting the Act.[38] The Supreme Court, while dealing with one of its first substantive cases under the IBC, i.e., *Innoventive Industries Ltd.* v *ICICI Bank,*[39] has resorted to a number of external aids to construction including

---

[36] BLRC Report (n 18) para 3.4.2.

[37] *British Airways Plc.* v *Union of India,* (2002) 2 SCC 95 : AIR 2002 SC 391.

[38] GP Singh, *Principles of Statutory Interpretation*, 12th ed, LexisNexis, pp 243.

[39] *Innoventive Industries Ltd.* v *ICICI Bank,* (2018) 1 SCC 407 [Coram: RF Nariman and Sanjay Kishan Kaul, JJ].

the speech of the Finance Minister,[40] BLRC Report, and the Bill, to understand the background and the true intent of the legislature.[41]

The Supreme Court provides for important paragraphs contained in the report of the BLRC Report, stating that "these excerpts give us a good insight into why the Code was enacted and the purpose for which it was enacted". As a key economic reform, the code has shifted the balance of power from debtor to the creditor.[42]

There are two schools of thought on insolvency.[43] The prevailing school is that of the 'proceduralists', represented in the main by the pioneering work of *Thomas Jackson*.[44] The other school is composed of 'traditionalists', who at its inception is represented in literature by the work of *Elizabeth Warren*.[45] The former school submits that the purpose of insolvency is primarily to affect the orderly distribution of the debtor's assets to its creditors, and to avoid the inefficiencies of letting creditors individually collect the unpaid debt from the insolvent company. Proceduralists believe that a collective insolvency procedure is beneficial to all the creditors, considering the savings brought about by cooperation as well as the maintenance of the going-concern value of the debtor, whose assets may be dissipated and dismembered if creditors will not cooperate with one another. The scenario is reminiscent of the famous game theory problem called the 'prisoner's dilemma'. To the

[40] "Shri Arun Jaitley: .... the object behind SICA was revival of sick companies. But not too many revivals took place. But what happened in the process was that a protective wall was created under SICA that once you enter the BIFR, nobody can recover money from you. So, that non-performing investment became more non-performing because the companies were not being revived and the banks were also unable to pursue any demand as far as those sick companies were concerned, and therefore, SICA runs contrary to this whole concept of exit that if a particular management is not in a position to run a company, then instead of the company closing down under this management, a more liquid and a professional management must come and then save this company. That is the whole object. And if nobody can save it, rather than allowing it to be squandered, the assets must be distributed -- as the Joint Committee has decided -- in accordance with the waterfall mechanism which they have created." (Emphasis Supplied) [para 15 *Innoventive Industries*]

[41] See the Statement of Objects and Reasons of the Code (The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.) In *Vijay Kumar Jain* v *Standard Chartered Bank,* (2019) 20 SCC 455, held that "notes on clauses are an important aid to construction of sections of the Code as they show what the drafting committee had in mind when such provisions were drafted."

[42] MS Sahoo, Insolvency Reforms: A Road under Construction, 'Insolvency and Bankruptcy Regime in India A Narrative' (2020), Insolvency and Bankruptcy Board of India ("IBBI"), New Delhi.

[43] Danilo Penetrante Ventajar, 'Human Rights Perspectives in Insolvency' Department of Global Political Studies, Spring 2011.

[44] Thomas H Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 Yale LJ 857.

[45] Elizabeth Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92 Mich L Rev 336-340.

proceduralists, however, the only fear is that the secured creditors may walk away from the collective enforcement of all claims during liquidation, as they have an option available if resolution fails.[46] In contrast, the traditionalists would allow the disregard of an absolute priority rule and consequently "*take into account the interests of weaker or non-adjusting economic parties, such as employees, tort victims, or other stakeholders with no formal legal rights*." The Code adopts the modern thought of proceduralists with clear rules of priority in distribution of assets during liquidation. The IBC also gets inspiration from the UNCITRAL Legislative Guide on Insolvency ("UNCITRAL Guide"),[47] as a benchmark.

E. The Good Samaritans

The first commencement notification of the Code came on 19th August, 2016. While the provisions of the Code are yet to be notified fully, in particular Part III of the Code dealing with individual insolvency, the Code has seen one of the fastest transformations in just four years including four Ordinances,[48] leading to corresponding amendments to the Code. The success of a new legislative framework depends upon several factors, including but not limited to building the ecosystem of positive compliance and weeding out problems. The modern CIRP regime got requisite attention of all stakeholders. The Government, Ministry of Corporate Affairs ("MCA") and the Regulator (IBBI) have been prompt in easing out the bottlenecks in the legislation; NCLT, NCLAT and the Supreme Court has been prompt in disposing of cases and laying down jurisprudence of modern corporate insolvency regime.[49] The professionals have been quick to adapt to the changes and transform their working style.

Other than the above stakeholders, there has been a genre of professionals, academicians, research organizations, and industry bodies, who have been instrumental in providing support and creating an environment of positivity and required academic research[50] and critique, which kept the ecosystems improving further. We call them 'good Samaritans'.

---

46 Pratik Datta, 'Value destruction and wealth transfer under the Insolvency and Bankruptcy Code', (2016) NIPFP Working Paper No. 247 <https://www.nipfp.org.in/publications/working-papers/1842/>

47 UNCITRAL Legislative Guide on Insolvency 2005, available at <https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf>.

48 Dated 23rd November 2017, 6th June 2018, and 28th December 2019, 5th June 2020.

49 See IBBI (n 10) Section-wise Jurisprudence on IBC upto 30.09.2020.

50 Aparna Ravi, 'Indian Insolvency Regime in Practice: An Analysis of Insolvency and Debt Recovery Proceedings', Economic and Political Weekly, 2015.

Policy Research Institutions – To begin with *M/s Vidhi Centre for Legal Policy* officially provided the legal research and writing services to the BLRC.[51] The intervening period between the interim and the final report of the BLRC were utilized by the IGIDR Finance Research Group and the NIPFP to conduct the BLRC Conference.[52] The Indian Institute of Corporate Affairs ("IICA") also conducted two stakeholder's consultation on the legal framework of insolvency laws with special reference to MSME and Corporate Sector.[53] The Society of Insolvency Practitioners of India ("SIPI"),[54] under the *aegis* of INSOL India, provided for 'draft insolvency best practices'.[55] The Insolvency Research Foundation (IRF) has been established by the IICA, in partnership with SIPI.[56] Industry associations, like ASSOCHAM,[57] also contributed in organising stakeholders' consultation and policy debate around the enforcement dimensions of the modern corporate insolvency regime in India. NLU Delhi came up with the first moot court on Insolvency laws in India.[58]

Insolvency Professionals' Associations, like '*All India Insolvency Professional Association* ("AIIPA")'[59] and '*Insolvency Practitioners Bar Association ("IPBA")*', provided a forum to the practitioners to discuss

---

[51] Policy Research is a great emerging area in India wherein the professionals/institutions are working to influence the making of a legislation by publication of various white papers, draft reports and legislations.

[52] The 1st Bankruptcy Law Reforms Committee Conference, organized in IIC Delhi on 31st July and 1st August 2015

[53] See IICA Annual Report 2014-15, on 27th February and 19th March 2015 respectively.

[54] SIPI, Best Practices Task Force deliberated extensively on the code of conduct of insolvency professionals (led by Mr Sumant Batra), INSOL India (2017) <https://www.insolindia.com/best-practices-task-force-with-sipi.php>.

[55] SIPI, 'Draft Insolvency Best Practices' INSOL India (2017) (best practices on Avoidance of Conflict of Interest, Payment of Corporate Insolvency Resolution Process Costs, Payment of Fee and Reimbursement of Out-of-Pocket Expenses, Confidentiality, and First Two Weeks from the Date of Appointment of Interim Resolution Professional, IP Planning before Day One), <https://www.insolindia.com/draft-best-practices>.

[56] IICA, Report of Joint Steering Committee, (January 2019), <https://iica.nic.in/images/Final%20Report-IRF.pdf>

[57] Organized the first National Conference – IBC 2016 – A Game Changer on 25th October 2016.

[58] The inaugural edition of the competition was held during 28-29th October 2017. The theme of the 2020 edition is 'Corporate Insolvency Resolution, including issues on Individual Guarantors and Cross-Border Insolvency'. <https://nludelhi.ac.in/up-event1.aspx?id=35096>.

[59] All India Insolvency Professional Association, 11 Insolvency Professionals from 7 states came together to form an association and formally obtained certificate of registration as on 15th Nov 2017, see <https://aiipa.business.site/>.

pressing issues, under the Code, and suggest reforms.[60] The NCLT and the AT Bar Association provided a forum to all practitioners before the Tribunals.[61]

The IBC enforcement has seen a generous support from all quarters including other regulators as well, like RBI, SEBI, CCI, etc. Some of these initiatives are:

- SEBI requires its listed entities to report default under the Listing Regulations.
- RBI's revised framework on stressed assets (Feb 12, 2018) paved way for big accounts being classified as NPA, nine of which have already seen resolution with a good realization value compared to the liquidation value.
- RBI and SEBI have mandated the entities under control to share the information with Information Utilities.
- Faster approvals of combination matters by the CCI.
- Relaxation on Minimum Alternative Tax ("MAT") for companies subject to IBC.

III. THE INSTITUTIONAL PILLARS

Dr. Ambedkar said, "However good a Constitution may be, if those who are implementing it are not good, it will prove to be bad. However bad a Constitution may be, if those implementing it are good, it will prove to be good." This statement is right for every ecosystem. Realizing the need for having a proper ecosystem for the implementation of the Code, the new legislation provides for the establishment of three new institutional structures, whose functioning is critical for the smooth implementation of IBC. These are (i) a new regulator known as IBBI (ii) a new profession of insolvency professionals and (iii) information utilities to collect and store information on debts and defaults. Other than the aforesaid three pillars, the AA functions as the fourth pillar. To provide a comprehensive examination and suggestions to establish these pillars, MCA constituted four working groups[62] in July 2016 and by the end of December 2016 all these pillars were up and going, except IUs, which took some time to start and is still struggling to

[60] There are also others like Corporate, Insolvency and Bankruptcy Laws Bar Association (CIBBA).

[61] See <http://www.ncltandatbar.com/aims-objectives.php>.

[62] WG 1: Recommend the design of the IBBI, WG 2: Recommend on the rules and regulations for Insolvency Professionals (IPs) and Insolvency Professional Agencies (IPAs), WG 3: Recommend on the rules and regulations for the insolvency and liquidation process, WG 4: Recommend on the rules and regulations for Information Utilities (IUs).

establish as a primary source for information on loan default. Empirical evidence shows that a conducive institutional environment and an appropriate insolvency regime are key factors in the recovery of stressed assets, apart from loan characteristics.[63]

A. IBBI – The Board with a difference

The Insolvency and Bankruptcy Board of India ("IBBI" / "The Board") was set up on 1st October 2016,under the IBC.[64] It is a unique regulator, which regulates a profession as well as transactions. It has regulatory oversight over the IPs, IPAs and IUs.[65] The IBBI writes and enforces rules for transactions, namely, corporate insolvency resolution, corporate liquidation, individual insolvency resolution and individual bankruptcy under the Code. The BLRC justified the case for the establishment of IBBI resting on four strands of work that are required to be done, i.e., (i) Regulation of IPAs & IPs (ii) Regulation of Information Utilities (iii) Drafting Regulations, and (iv) Statistical Systems Functions.[66] The IBBI is one of the key pillars of the ecosystem responsible for the implementation and the actualising of the objectives, enshrined in the Code.

The regulator has a major role to play in the success of any regulation. It is the leadership of the regulator that creates the ecosystem of compliance, stability and forward-looking pace. Though, the IBBI got notified on October 1st 2016, the parent Ministry of the Code,[67] MCA, began the work on draft regulations even before that, which in fact saw the regulations under the Code being rolled out within two months of existence of the IBBI. No doubt the leadership at the IBBI was swift in its actions on all fronts, i.e., introducing the Limited Insolvency Examination ("LIE"), recognizing IPAs and IPs, working on various regulations, advocacy efforts and networking with allied ministries (Finance, Law and Justice) and regulators (RBI, SEBI, CCI).

The IBBI is one of those regulators that got established in just about 4 months[68] as compared to the constitution of the NCLT, which took several years and also about 7 years for the CCI to come into existence functionally. It is pertinent to note that though the Code provided for a transition

---

[63] RBI, *Insolvency and Bankruptcy Code and Bank Recapitalization*, Report Trend and Progress of Banking in India 2016-17.

[64] <http://www.ibbi.gov.in/about-ibbi.html>

[65] Also see Registered Valuers under the Companies Act 2013.

[66] Para 4.1 BLRC Report (n 18).

[67] Allocation of Business Rules.

[68] IBC got promulgated on 28th May 2016 and IBBI came into existence on 1st October, 2016.

mechanism to designate any financial sector regulator[69] until the Board was established, the provision was not required to be used.[70]

Organisational Design – The chairman of the working group, which was tasked to recommend the design of the IBBI[71], ultimately went on to implement the recommendations, as a Chairman of IBBI. Experience and commitment of the Chairperson of IBBI was phenomenal in quickly drawing a picture for the regulator in the minds of all stakeholders with a motto, "*we mean business*". The IBBI focused on transparency in its working and bound itself with the best practices to the extent that for the first time in India, it came up with a 'regulation to make regulations'.[72] Consciousness towards 'sound design' principles[73] for high performance is evident in the report of the working group.[74] The IBBI finds its organisational design somewhat inspired by that of SEBI and not CCI. An analysis of the key functioning of the IBBI, demonstrates how it is a Board with a difference.[75]

Governance and Housekeeping: The IBBI functions through its erudite Governing Board,[76] which meets frequently[77] to decide the policy matters, draft regulations and organisational directions. Whole time members take care of the demarcated areas of functioning through Executive Directors and staff.[78] The Board also has two advisory committees on Corporate Insolvency

[69] To exercise powers and functions of the Board under the Code

[70] S 195 of IBC 2016. The time period between 28th May, 2016 to 1st October, 2016 was managed by Ministry of Corporate Affairs through its Joint Secretary *Mr Amardeep Singh Bhatia* who actively led the discussions on different draft regulations and working group deliberations.

[71] *Dr MS Sahoo*, as member Competition Commission of India chaired this working group; got appointed as Chairperson of IBBI while working group was in its deliberation. A learned man with post-graduation degrees in Economics, Law, Management and Company Secretary, *Dr Sahoo* has experience of working with SEBI, ICSI, NSE and Government of India.

[72] The Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations 2018.

[73] Strengthen feedback loops, optimal organizational design, separation of powers, transparency and responsiveness

[74] Ministry of Corporate Affairs, Govt. of India , 'Building the Insolvency and Bankruptcy Board of India' (2016) <https://www.ibbi.gov.in/Wg-01%20Report.pdf>.

[75] IBBI can be a great management case-study on functioning of a modern regulator. Its meticulous and quick response to challenges and bottlenecks is worth examining. Within three days of its existence the Board started functioning with its first Board Meeting on 4th October 2016 and is swift in its responses so far.

[76] Chaired by Chairperson IBBI, three whole time members, ex-officio representatives from Ministry of Finance, Ministry of Corporate Affairs, Ministry of Law and Justice and Reserve Bank of India. There are also two part-time members including the Chief Economic Adviser. As on 16-12-2020.

[77] Board met 2 times in 2016, 6 times in 2017, 4 times in 2018, and 4 times in 2019 as per the information available on website of IBBI.

[78] Organizational Structure of IBBI, available at <https://www.ibbi.gov.in/uploads/structure/Organization_Chart.pdf>.

and Liquidation[79] and Service Providers.[80] There is also a technical committee for Information Utilities.[81]

Drafting Regulations: The IBBI has been very quick in drafting regulations and also in updating them with latest changes. As a best practice, the website of the regulator has a section that accepts comments from public on a rolling basis,[82] which ensures public participation in the making of the regulations.

Regulating Insolvency Professionals: One of the major functions of the IBBI is to regulate IPs and help create an ecosystem with qualified and trained professionals to further the objectives of the Code. The IBBI conducts the qualifying examination for IPs. On one hand it takes strict action[83] for violations of code of conduct by IPs, and one the other, it facilitates capacity building through training programs and frequent guidance notes[84] for IPs and IPAs. The IBBI's good work got rewarded with additional responsibilities to regulate the 'Registered Valuers', under the Companies Act.[85]

Statistics, Research and Advocacy: Record keeping and facilitating *suo motu* complete information on its website shows clarity and transparency in the functioning of the IBBI. Well researched newsletters[86] provide a lot of information, including statistical analysis of data, to the stakeholders.

---

[79] Advisory Committee on Corporate Insolvency and Liquidation (24th September, 2020 to 11th June, 2023) (Uday Kotak as Chair) see <https://www.ibbi.gov.in/about/view-committee/6>

[80] Advisory Committee on Service Providers (26th May, 2020 to 25th May, 2023) (TV Mohandas Pai as Chair) <https://www.ibbi.gov.in/about/view-committee/4>. Advisory Committee on Individual Insolvency and Bankruptcy (Chair Justice BN Srikrishna) completed its term on 15th Sept 2020.

[81] In accordance with Regulation 14 of the IBBI (Information Utilities) Regulations 2017.

[82] Invitation of Public Comments: Regulations notified under the Insolvency and Bankruptcy Code 2016, see <https://ibbi.gov.in/webfront/regulation_comment.php>.

[83] As on 16th December 2020, there are about 47 cases in which IBBI has taken action against IPs

[84] See facilitation letters issued by IBBI on different subject matters, <https://ibbi.gov.in/legal-framework/facilitation>.

[85] IBBI conducts the examination and as on 30th September 2020, there are 3358 Registered Valuers across the three asset classes, i.e., land and building, plant and machinery and securities or financial assets. There are 14 Registered Valuer Organisations (RVOs)

[86] Themes of IBBI Quarterly Newsletter – 'Insolvency and Bankruptcy News' - Vol 1 Freedom to Exit: The Insolvency and Bankruptcy Code, 2016 builds the third pillar of economic freedom; Vol 2: The Essence of Time; Vol 3: *Missing from website*; Vol 4: Balancing the Interests of Stakeholders; Vol 4: Resolution: the soul of IBC; Vol 5: Insolvency Profession: An Institution in the Making; Vol 6: COC Dharma; Vol 7: Automating the Wheels of Commerce; Vol 8: Shepherding Valuation Profession; Vol 9: Individual Insolvency: the Next Big Thing; Vol 10: A resolve for resolution; Vol 11: Whose Company Is It Anyway?; Vol 12: IBC: A Code for Corporate Governance; Vol 13: The Art of Value Maximization in CIRP; Vol 14: Insolvency Law in times of COVID 19; and Vol 15: Resolvability: A 'Living Will' for Companies

The IBBI also promotes research on various themes through its research initiatives,[87] advocacy programs, quiz competitions, etc. The IBBI has also established the "*IBBI – Insolvency and Bankruptcy Law Research Chair*" at IICA.[88]

B. Insolvency Professionals

The BLRC recommended for an ecosystem of regulated professionals to handle the task of monitoring and managing matters of business during the corporate insolvency resolution process.[89] The UNCITRAL Guide[90] succinctly outlines the role of an IP as follows: "*Insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially.*"

Prior to the IBC, the corporate insolvency proceedings were governed and managed by the Official liquidator ("OL") under the Companies Act and for sick companies under SICA / SARFAESI / RDDBFI. OL is the officer of Central Government and is attached to the High Court to oversee the liquidation proceedings.[91] The new insolvency regime has brought forward the concept of IPs. IBC seeks to balance the rights of all stakeholders by adopting a 'professional-in-possession' model, meaning that the driving force of the insolvency resolution mechanism (including interim management of the debtor) is an independent, regulated but private IP, working under the overall supervision of a committee of creditors. It is a striking and notable shift from the prevailing scenario as the management of liquidation proceedings has shifted from a government functionary to an independent private professional.

---

87 IBBI Research Initiative, 2019 released on July 1, 2019, updated on August 1, 2020 to include new and emerging areas of research in insolvency laws and policy, see <https://www.ibbi.gov.in/uploads/whatsnew/244e5a00f261e8e918bc68577b074934.pdf>.

88 Vacancy Notification, IBBI Chair Professor, IICA (April 2019) <https://ibbi.gov.in/webadmin/pdf/whatsnew/2019/Apr/Chair-Professor-IBBI-Vacancy_2019-04-22%2023:23:30.pdf>.

89 BLRC Report page 31 (Executive Summary) need to provide details of date of publishing, name of the report

90 United Nations Commission On International Trade Law, '*Legislative Guide on Insolvency Law*' (2005) <https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf>"*Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime.*"

91 Official Liquidators, Ministry of Corporate Affairs (2020) <http://www.mca.gov.in/MinistryV2/officialliquidators.html>.

As the Code is largely executed through insolvency professionals, its success hinges on their skills and competence. IPs are licensed professionals authorised by IPAs and the IBBI. Other than the IPs and IPAs, the IBBI has also allowed the formation of Insolvency Professional Entities (IPEs) which are directly registered and recognised by the IBBI. While IPs can come together to form an IPE,[92] they cannot act as an IP in their independent capacity.[93] There have been some issues surrounding the engagement of professionals by RP in a CIRP. The IBBI has released a discussion paper for public comments[94].

This significant shift, as expected, has provided for a fast resolution of insolvency, reduced the burden of the overburdened judiciary in India, prevented red-tapism and made the insolvency proceedings and system more liberal and unprejudiced. An IP may hold any of the following roles under the Code: (i) Resolution professional ("RP") to resolve insolvency for a firm or an individual (ii) Bankruptcy Trustee in an individual bankruptcy process; (iii) Liquidator during a liquidation process; (iv) Administrators under SEBI.[95]

IPs are also required to have Authorisation for Assignment (AFA)[96] to undertake assignments under the Code, and also have to undertake Continuing Professional Education (CPE)[97] as per the guidelines. The IBBI has been very strict in terms of discipline and functioning of the Ips.[98]

Limited Insolvency Examination ("LIE") – One of the greatest challenges before the IBBI was to institutionalise the profession of IPs, who would not

---

92 There are 74 recognized IPEs as on September 30, 2020 (this excludes the 43 derecognized ones)

93 See Release by IBBI issued to clarify the position under the Code as to who can render services as IPs. 'No person to function as an Insolvency Professional without Certificate of Registration' IBBI Press Release dated 15th June 2017 <http://ibbi.gov.in/webadmin/pdf/press/2017/Jun/IBBI.pdf>.

94 IBBI, Discussion Paper, 'Engagement of "Professionals" in a Corporate Insolvency Resolution Process' (December 2020) <https://www.ibbi.gov.in/uploads/whatsnew/b042b88a757cf4a9b490b9d7ee3f165a.pdf>.

95 SEBI (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018. There are about 698 such recognised administrators by SEBI across 15 zones in India.

96 Regulation 7A of IP regulations. See disciplinary proceedings on this ground in the case of Mr Abhay Narayan Manudhane, Insolvency Professional (IP), 15th Dec 2020 <https://ibbi.gov.in/uploads/order/d5d2b8fdf8e559b55b349d6e40d1dae8.pdf>.

97 IBBI (Continuing Professional Education for Insolvency Professionals) Guidelines, 2019, an IP shall undertake a minimum of 10 credit hours of CPE each calendar year and a minimum of 60 credit hours of CPE in each rolling block of three calendar years.

98 Of the 3195 IPs registered till date, registrations of four IPs have been cancelled through disciplinary action, and registrations of two IPs cancelled on failing to fulfill the requirement of fit and proper person status. The Disciplinary Committee ("DC") has disposed of 37 show cause notices against IPs by September, 2020. See IBBI Newsletter Vol 16.

only act as service providers but also become strong pillar of IBC ecosystem. To meet the immediate need in 2016, the IBBI allowed the registration of chartered accountants, company secretaries, cost accountants, and advocates in practice for 15 years as IPs. The window for such registration was open for one month[99] and such registrations had a validity of six months.[100] Later, the IP Regulations introduced the requirement of passing the LIE.[101] With a focus on quality and desire to develop a cadre of trained professionals, the IBBI also began with its Graduate Insolvency Program ("GIP"), which is run by the Centre for Insolvency and Bankruptcy at IICA.[102] The BFSI Skill Council tried to work out a model curriculum for the Insolvency & Bankruptcy Associate, which doesn't seem to have worked out.[103]

Insolvency Professional Agencies (IPAs) – IPAs regulate and govern the working of IPs in India. These are the self-regulatory authorities, under the modern insolvency regime, that governs the working of IPs registered under them. IPs are governed by IPAs, which in turn are administered and supervised by the IBBI.[104] There are three IPAs recognised by the IBBI, each floated by the three professional institutes i.e., ICAI,[105] ICSI[106] and ICMAI[107]. Out of the registered 3195 IPs, the maximum is Chartered Accountants, followed by Company Secretaries. There are IPs, who are also the members of the Bar Council,[108] but the Bar Council of India or any other body has not chosen to apply for an IPA so far.

---

99 Till December 31, 2016 – These registrations expired by June 30, 2017

100 IBBI, *Report of Working Group on Graduate Insolvency Programme* (2018) <https://iica.nic.in/gip/pdf/gip-report.pdf>

101 Sixth phase of the examinations are announced w.e.f. 1st January 2021. With each of these revisions, syllabus is reviewed to update the latest changes. So far there are about 24,757 exam takers of which 4,509 were successful attempts. <https://ibbi.gov.in/examination/limited-insolvency-examination>.

102 https://iica.nic.in/gip/. First batch of two-year GIP program kick started with 37 students on 1st July 2019. The second batch has also been rolled out in 2020. need to provide details of publisher, date of publishing, author.

103 NSQF Level 5, National Qualifications Register, see <https://www.nqr.gov.in/qualification-title?nid=3912>.

104 A strong regulatory regime may be inimical to the development of the IP profession. BLRC believed that a new model of "regulated self-regulation" is optimal for the IP profession and thus suggested two tier structure of regulation which meant that the Board shall not directly govern the IPs (in case of IPs the legal structure binds the IPs). IPAs shall be regulating the IPs and the Board shall keep a close vigil on the working and operations of IPAs and IPs.

105 Institute of Chartered Accountants of India having maximum registered IPs – 1971.

106 Institute of Company Secretaries of India having 943 registered IPs.

107 Institute of Cost Accountants of India having 268 registered IPs.

108 These are only 202, less than the IPs recognized basis their managerial experience (502 in number).

C. Adjudicating Authority

The Role of the AA is very important in the success of the modern corporate insolvency regime. Learning from the past experience, it is clear that a highly fragmented framework with different laws and different judicial for a is problematic.[109] Further for a entrusted with adjudicating on matters relating to insolvency and bankruptcy may not have the business or financial expertise, information or bandwidth to decide on such matters. This led to delays and extensions in arriving at an outcome, and increased the vulnerability to appeals of the outcome.[110] In compliance of the *Madras Bar Association cases,*[111] the NCLT and NCLAT were established.[112] The NCLT has been recognized as an AA, under the Code.[113] In the *Swiss Ribbons Case,*[114] while examining the constitutional validity of various provisions of the law, the Supreme Court found the appointment of Judicial/Technical members of NCLT/NCLAT as valid. However, it directed to set up circuit benches of NCLAT[115] and also reiterated the requirement of changing the administrative ministry of NCLT/NCLAT from MCA to Ministry of Law and Justice.[116]

Role of AA: The constitutional validity of NCLT/NCLAT has been upheld by the Supreme Court in *Swiss Ribbons*, however, High Courts still retain the powers of judicial review over administrative actions, especially in matters relating to public law, which crosses path with the jurisdiction

---

[109] Kristin van Zwieten, 'Corporate rescue in India: The influence of courts' (2015) Journal of Corporate Law Studies (1).

[110] BLRC Report para 3.3.1 (n 18).

[111] *Union of India* v *Madras Bar Assn.*, (2010) 11 SCC 1 and *Madras Bar Assn.* v *Union of India*, (2015) 8 SCC 583.

[112] The Ministry of Corporate Affairs *vide* notification dated June 01, 2016 constituted the National Company Law Tribunal (NCLT) and its appellate authority, the National Company Law Appellate Tribunal (NCLAT) under Section 408 of the Companies Act 2013.

[113] Section 5(1) of the Code, provides the definition of 'Adjudicating Authority' for the purpose of Insolvency Resolution and Liquidation for Corporate Persons and for that purpose identifies NCLT as such authority.

[114] *Swiss Ribbons (P) Ltd.* v *Union of India,* (2019) 4 SCC 17 .

[115] Within a period of 6 months. A petition has been filed in Madras High Court to expedite NCLAT Bench in Chennai already. At present NCLAT operates only out of Delhi. However, NCLT has 15 benches – New Delhi, Ahmedabad, Allahabad, Hyderabad, Bengaluru, Chandigarh, Chennai, Cuttack, Guwahati, Hyderabad, Indore, Jaipur, Kochi, Kolkata, Mumbai.

[116] It may be noted that post retirement of NCLT President, Justice MM Kumar, this position is still to be filled with a permanent occupant and since last one year is being taken care of by the Acting President Mr. BSV Prakash Kumar.

of NCLT/NCLAT.[117] The Supreme Court, in *Embassy Property,*[118] laid down the boundaries of jurisdiction that are limited to the Code. Further, in *K. Sashidhar,*[119] it was held that the NCLT/NCLAT have no jurisdiction and authority to analyse or evaluate the commercial decisions taken by the Committee of Creditors ("CoC").

D. Information Utilities

The working Group on IUs[120] recognized them as the first pillar of the institutional infrastructure under the IBC.[121] IUs are at the core of the institutional innovation of the IBC. The immediate triggering of the IBC resolution process on default by the corporate debtor, its time-bound completion either in a resolution plan or liquidation order and if necessary, an efficient liquidation of the corporate debtor; are all heavily premised on a sound, well-functioning IU industry. The IBBI registered[122] the first and the only IU on 25th September 2017 by the name National E-Governance Services Limited (NeSL).[123] The BLRC envisaged a private competitive market[124] for IUs, rather than a centralized depository with the State.

Resistance to Change – The path for the IU has been filled up with many challenges. Though conceptualized as the sole authority to certify default in IBC cases, the Supreme Court in *Swiss Ribbons* held that 'the evidence by way of loan default contained in records of such utility is only a *prima facie* evidence of default, rebuttable by the corporate debtor.[125] Further, the Registrar NCLT had to change the requirement from 'mandatory' to 'wherever available with IU" in a notice, requiring all concerned parties to file the

---

117 *Anthony Raphael Kallarakkal* v *National Company Law Tribunal*, 2018 SCC OnLine Bom 13865, *Kamal K Singh* v *Union of India*. 2019 SCC OnLine Bom 5609.

118 *Embassy Property Developments (P) Ltd*. v *State of Karnataka,* (2020) 13 SCC 308 : 2019 SCC OnLine SC 1542 "a decision taken by the government or statutory or quasi-judicial authorities in relation to a matter which is in the realm of public law cannot be treated as one "arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor" under Section 60(5) of IBC and the same can be corrected only by way of judicial review of administrative action".

119 *K. Sashidhar* v *Indian Overseas Bank,* (2019) 12 SCC 150 : (2019) 2 IBJ (JP) 161.

120 Working Group 4 to recommend the rules and regulations for Information Utilities, K V R Murty, Joint Secretary (e-Governance), Ministry of Corporate Affairs, who is the Convenor. Report dated January 10, 2017, <http://www.ibbi.gov.in/wg-04report.pdf>.

121 Section 215 of Insolvency and Bankruptcy Code (IBC), 2016.

122 Press Release, National E-Governance Services Limited (NeSL) registered as IU, Sept 2017, <https://ibbi.gov.in/IU_Registration_Press_Release_(CP).pdf>.

123 To know more about National E-Governance Services Limited (NeSL) see <https://nesl.co.in/welcome-to-nesl/>.

124 Section 214(h) of the Insolvency and Bankruptcy Code (IBC) mandated that private IUs have to be interoperable.

125 *Swiss Ribbons*, paras 85-87, 53, and 54 citation needs to be provided.

default from an IU in all new and pending cases of CIRP at the intervention of Kolkata High Court.[126] Further, the IBBI has allowed IUs to access MCA-21 and the Central Registry of Securitisation Asset Reconstruction and Security Interest of India ("CERSAI") data to help default authentication of a debtor's default.[127]

IV. Corporate Insolvency – Nuts and Bolts

As on September 30, 2020, a total of 4008 CIRPs have commenced[128] covering almost all major sectors like manufacturing, real estate, construction, transport, electricity, hotels, etc. Surprisingly, the first ones who approached to use the CIRP process were corporate debtors, followed by operational creditors. Over the years, jurisprudence is now clear that the CIRP process is not another 'loan recovery mechanism',[129] but the foremost objective of the Code is resolution; so that the firm is protected as a going concern.[130]

The CIRP process, under the Code, is time-bound with specific timelines in each of its step with an overall window to complete it within 330 days.[131] While this timeline has been held not to be mandatory,[132] the Supreme Court has said, "it is of utmost importance for all authorities concerned to follow this model timeline as closely as possible."[133] The CIRP process commences from the date the application is admitted by the AA and an Interim Resolution Professional ("IRP") is appointed. This is followed by process of claim collection and validation to form a COC, which is the next stage when the IRP is either formally confirmed as the Resolution Professional ("RP") or another IP is brought in[134] as the RP. Then comes the stage of Resolution

---

126 Understanding the IBC (n 2), pp 26.

127 IBBI circular dated 7th September 2019 - No. IBBI/IU/025/2019.

128 IBBI Newsletter Vol 16. Of these, 473 have been closed on appeal or review or settled; 291 have been withdrawn; 1025 have ended in orders for liquidation and 277 have ended in approval of resolution plans.

129 *Mobilox Innovations (P) Ltd.* v *Kirusa Software (P) Ltd.* (2018) 1 SCC 353.

130 *Swiss Ribbons*. Citation needs to be provided Also see In *Binani Industries Ltd.* v *Bank of Baroda,* 2018 SCC OnLine NCLAT 112 "the first order objective of the IBC is resolution, the second order objective is maximization of the value of assets of the firm, and the third order objectives are promoting entrepreneurship, availability of credit, and balancing the interests of stakeholders. This order of objectives is sacrosanct.

131 180 days as per Section 12(1) of IBC plus 90 days extension under Section 12(2) and 60 additional days due to amendment in section 12(3) mandating its completion within 330 days.

132 *Essar Steel (India) Ltd.* v *Satish Kumar Gupta,* (2020) 8 SCC 531 : 2019 SCC Online SC 1478.

133 *Arcelormittal India (P) Ltd.* v *Satish Kumar Gupta,* (2019) 2 SCC 1.

134 As on Sept 30, 2020, out of 3199 cases wherein RP has been appointed in about 884 cases RP is different from an IRP.

Plan, which either succeeds or the matter goes into liquidation. It can be seen here that the IP wears different hats during the whole CIRP process, i.e., as an IRP before the CoC comes into picture (responsible to NCLT), RP until finalization of a resolution plan (responsible to the CoC), and if the resolution plan fails, the IP discharges the role of a liquidator (responsible to NCLT again). While it is difficult to cover all jurisprudential issues in this article, some major questions decided by Supreme Court have been dealt with. These decisions have addressed some major areas of jurisprudential conflict, including majority of the cases in which there have been divergent views between NCLT and NCLAT. A quick ruling on these 'law points' by the Supreme Court, have provided the required stability to the ecosystem.

A. The Default and the Financial Creditor

For initiating a CIRP under the IBC, the primary condition is that a default should have occurred.[135]An application for resolution can be made by any one of the following: (i) Financial Creditor ("FC"), (ii) operational creditor ("OC"),[136] (iii) corporate debtor ("CD"). The initial phase of jurisprudential development under the Code revolved around the discussions on the concept of default, the meaning of FC, and the requirement of notice by FC to CD, as is the case with OC. One of the interesting matters which came up was in relation to home buyers, who claimed to be FC of the builders under the Code.[137] The Code was amended to provide clarity that home buyers were FC,[138] under the Code, and hence can trigger the CIRP Process. This has also been found constitutionally valid in the *Pioneer Urban Case*.[139] However, the 2020 Amendment to the Code, increased the CIRP trigger amount from Rs. 1 Lakh to Rs. 1 Crore, which would essentially exclude many small home buyers to be classified as FC under the Code.[140]

---

135 Default is non-payment of debts when they become due and payable. An amount not less than Rs. 1 lakh in Section 4 of the Code has now been increased to Rs. 1 Crore w.e.f. 24th March 2020. This was done as a COVID response to save MSMEs going under the IBC hammer.

136 OCs have triggered 50.32% of the CIRPs, followed by about 43.16% by FCs and remaining by the CDs.

137 Supreme Court dealt with this matter initially in absence of a clear provision in the Code; however, did not allow interim pro rata disbursements beyond the provisions of the Code. Later the Code was amended to recognize home buyers as FC. See *Chitra Sharma* v *Union of India* (2018) 18 SCC 575.

138 Section 5(8)(f) - the amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.

139 *Pioneer Urban Land and Infrastructure Ltd.* v *Union of India,* (2019) 8 SCC 416.

140 As of September 2019, of the 10,860 IBC cases pending with NCLT, 1,821 cases (17%) have been filed by homebuyers. Swain and Dandiya, 'Coronavirus outbreak: Relaxed IBC timelines may be a face-saver for Indian corporates' (April 9, 2020) <https://www.businesstoday.in/opinion>.

Withdrawal of CIRP: Once triggered whether the CIRP process could be stalled by way of settlement between the FC and CD was a pertinent question. In the matter of *Impex Ferro Tech Ltd.* v *Agarwal Coal Corpn. (P) Ltd.*,[141] the Supreme Court invoked Article 142 of the Constitution[142] to allow a settlement. Again, in *Uttara Foods and Feeds (P) Ltd.* v *Mona Pharmachem*,[143] the SC invoked Article 142, observing that Government should amend the provision regarding inherent power of NCLT and NCLAT to allow withdrawal of petitions filed under the Code in case the matter is settled by the parties. Accordingly, Section 12A got incorporated in the Code.[144] Supreme Court in *Arun Kumar Jagatramka* Case (2021)[145] has further explained the scope of Section 12A in the following words:

> An application for withdrawal under Section 12A is not intended to be a culmination of the resolution process. This, as the statutory scheme would indicate, is at the inception of the process... The withdrawal leads to a *status quo ante* in respect of the liabilities of the corporate debtor. A withdrawal under Section 12A is in the nature of settlement, which has to be distinguished both from a resolution plan which is approved under Section 31 and a scheme which is sanctioned under Section 230 of the Act of 2013.The scheme of compromise or arrangement under Section 230 of the Act of 2013 cannot certainly be equated with a withdrawal simpliciter of an application, as is contemplated under Section 12-A of the IBC.[146]

---

141 2017 SCC Online SC 1976, [Coram: R.F. Nariman and Navin Sinha, JJ].

142 Which allows the Supreme Court to "pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it."

143 (2018) 15 SCC 587.

144 Any application admitted under sections 7, 9, or 10 of the IBC can be undertaken only with approval of the CoC with a 90 percent voting share. Before admission it can be withdrawn anytime. Often this is done if the applicant and CD reach a settlement while the proceedings are pending. This is more common with applications filed by OCs. In *Uttara Foods*, Supreme Court said:

"We *are of the view that instead of all such orders coming to the Supreme Court as only the Supreme Court may utilize its powers under Article 142 of the Constitution of India, the relevant Rules be amended by the competent authority to include such inherent powers. This will obviate unnecessary appeals being filed before this Court in matters where such agreement has been reached*."

145 *Arun Kumar Jagatramka.* v *Jindal Steel and Power Ltd.*, (2021) 7 SCC 474.

146 Summary of the Decision by IBBI, see <https://www.ibbi.gov.in/uploads/legalframwork/4693a13e80846ec467eae52311923a64.pdf>.

Application of Limitation Act – Clarity in this regard was provided by the way of inclusion of section 238A[147] in the Code.[148] With regards to the internal deadlines under the Code, some flexibility has been provided.[149]

B. The Interim Resolution

In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of law, as well as, accounting and finance related functions. The latter includes the identification and control of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner.[150] An insolvency professional appointed by the AA, i.e., NCLT, during the initiation of the CIRP is known as an IRP. The term of the appointment of the IRP is only for a period of 30 days from date of her appointment. The interim RP discharges crucial responsibilities of the collection of claims, the collection of information about the entity from the debtor in the case of a creditor triggered IRP, the creation of the COC and taking over the management of the operations and monitoring the assets of the entity in IRP.[151] One of the major challenges faced by the IRP is to run the company as a going concern and arrange for interim finance.[152] Interim finance is recognized as the 'insolvency resolution process cost' and hence gets the highest priority in the resolution plan or liquidation.

C. The Moratorium

It is a 'calm period' during which the creditor's interest are preserved without affecting the operation of the CD's business as a going concern. There is a temporary prohibition on all recovery actions against the CD during this period, which allows the RP to undertake its duties under the Code without any intervention.[153] There have been several cases brought to test

---

[147] Insolvency and Bankruptcy Code (Second Amendment) Act 2018.

[148] *BK Educational Services (P) Ltd.* v *Parag Gupta and Associates,* (2019) 11 SCC 633, *Babulal Vardharji Gurjar* v *Veer Gurjar Aluminium Industries (P) Ltd.*, (2020) 15 SCC 1.

[149] *Surendra Trading Co.* v *Juggilal Kamlapat Jute Mills Co. Ltd.,* (2017) 16 SCC 143.

[150] *Essar Steel India Ltd.* v *Satish Kumar Gupta,* (2020) 8 SCC 531 : (2019) SCC OnLine SC 1478.

[151] BLRC Report (n 18) Para 5.3.1.

[152] Megha Mittal, 'Interim Finance becomes Effective and Attractive' Vinod Kothari <http://vinodkothari.com/wp-content/uploads/2019/06/Interim-Finance-Becomes-Effective-Attractive.pdf>

[153] Section 14 of the Code.

the strength of this provision,[154] which fortunately for the Code have been favorable. The IBC has prevailed, except the Constitutional Provisions,[155] and has laid down a great stability in the operation of the Code.

D. The Committee of Creditors

Creditor participation in insolvency proceedings has been widely seen as an essential feature of any well-developed insolvency administration system. This notion has been expressed in different ways in national systems of insolvency law, ranging from principles such as the *pari passu* rule, to the holding of creditor meetings to decide matters of importance in the insolvency proceedings, to the role of insolvency representatives in such proceedings.[156] Unless creditors are involved in the insolvency process, the law will seem irrelevant.[157] The CoC is constituted by the IRP after collating and verifying all the claims against the CD received within the notice period. The CoC consists of all the FCs and non-FCs and their voting rights are determined on the basis of share of their financial debt. The extant board of the company gets suspended[158] from the time the CoC is appointed until the resolution plan is accepted or the company goes into liquidation. The commercial wisdom of the CoC is paramount. The Resolution Professionals undertake their duties, as per the instructions of the CoC, subject to the ground rules set under the Code/Regulations/Guidelines.

E. The Resolution Plan

Getting a sound Resolution Plan is the ultimate objective of the CoC. So that the company under insolvency may be revived as a going concern. In this

---

[154] *Alchemist Asset Reconstruction Co. Ltd.* v *Hotel Gaudavan (P) Ltd.,* (2018) 16 SCC 94 *Anand Rao Korada* v *Varsha Fabrics (P) Ltd.,* (2020) 14 SCC 198 : 2019 SCC Online SC 1508; *Duncans Industries Ltd.* v *AJ Agrochem,* (2019) 9 SCC 725.

[155] In *Canara Bank* v *Deccan Chronicle Holdings Ltd.,* 2017 SCC OnLine NCLAT 255, the NCLAT held that the moratorium will not affect any proceedings initiated or pending before the Supreme Court under Article 32 of the Constitution of India or where an order is passed under Article 136. Further, it will not affect the powers of any High Court under Article 226 of the Constitution.

[156] Roman Tomasic, 'Creditor Participation in Insolvency Proceedings', OECD Meeting held on 27-28 April 2006, part of the publication "Legal & Institutional Reforms of Asian Insolvency Systems, <https://www.oecd.org/australia/38182698.pdf>.

[157] Asian Development Bank , 'Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General Counsel on TA 5795-Reg: Insolvency Law Reforms' (April 2000) Law and Policy Reform at the Asian Development Bank, vol 1 pp 10-86. (RW Harmer prepared the report).

[158] However, in *Vijay Kumar Jain* v *Standard Chartered Bank,* (2019) 20 SCC 455 : (2019) SCC Online SC 103, the Supreme Court held that resolution plans need to be provided to members of the suspended board of directors of the CD, as they have a right to participate in the meetings of the CoC.

regard, the preparation of Information Memorandum ("IM")[159] is one of the most significant tasks of the RP. There is also a requirement to appoint a 'Registered Valuer' for determining the 'fair value' and 'liquidation value' of the assets of the CD.[160]A successful resolution must have a good recovery rate,[161] which is calculated based on the time, cost and outcome of insolvency proceedings in each economy.[162]

Who could be the Resolution Applicant? Per se not a difficult question, became a bone of contention when the original promoter/director of the corporate debtor started submitting the resolution plan. This necessitated the introduction of Section 29A to the Code,[163] which provided for disqualifications of a resolution applicant. People find their way out through the cracks in the law and that is what happened with this provision, which has seen a couple of amendments by now.[164] The Supreme Court in *Arcelor Mittal*[165] laid down the ground rules for the interpretation of Section 29A and its constitutionality was further upheld in *Swiss Ribbons*.

While the approval/rejection of the resolution plan lies at the hands of the CoC, exercising their commercial wisdom,[166] finality comes only after concurrence of the AA, which ensures that the resolution plan is in line with the requirements of Section 30 of the Code.[167] From the date of the resolu-

---

[159] The IM is a document containing relevant information about the corporate debtor as is necessary for formulating a resolution plan by a potential resolution applicant, subject to maintenance of confidentiality.

[160] The value appointed must be registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017. Also see *Maharashtra Seamless Ltd.* v *Padmanabhan Venkatesh,* (2020) 11 SCC 467 : 2020 SCC Online SC 67.

[161] Recovery rate is a function of the time, cost and outcome of insolvency proceedings against a local company.

[162] Methodology for Doing Business, Doing Business Report, World Bank (2020), see <http://www.doingbusiness.org/methodology/resolving-insolvency>.

[163] Insolvency and Bankruptcy Code (Amendment) Ordinance 2017 issued on November 23, 2018.

[164] Insolvency and Bankruptcy Code (Second Amendment) Act 2018 promulgated on June 6, 2018, Insolvency and Bankruptcy Code (Amendment) Ordinance 2019, promulgated on December 28, 2019 – Amendment Act of 2020.

[165] *Arcelormittal India (P) Ltd.* v *Satish Kumar Gupta,* (2019) 2 SCC 1.

[166] *K Sashidhar* v *Indian Overseas Bank,* (2019) 12 SCC 150 : 2019 SCC Online SC 257, *Maharashtra Seamless Ltd.* v *Padmanabhan Venkatesh,* (2020) 11 SCC 467 : 2020 SCC Online SC 67.

[167] In, *Municipal Corpn. of Greater Mumbai* v *Abhilash Lal,* (2020) 13 SCC 234 : 2019 SCC Online SC 1479 held that the AA could not have approved the plan, which implicates the assets of MCGM, especially when the CD had not fulfilled its obligations under the contract. Hence, role of AA is important and not merely ticking the checkbox under this provision.

tion plan, the CD gets an immunity from prosecution of offences committed prior to the commencement of the CIRP.[168]

F. The Liquidation

Liquidation (Winding Up)[169] is a means by which the dissolution of a company is brought about and its assets realized and applied in the payment of its debts, and after the satisfaction of debts, the balance, if any, is paid back to the members in proportion to their contributions made by them to the capital of the company.[170] Liquidation is the last resort and involves the destruction of the organisational capital of the firm.[171] Where neither creditors nor debtors can find a commonly agreeable solution to keep the entity as a going concern, the entity enters into liquidation under the supervision of an IP. The role of CoC ceases to exist. The threat of loss in realizable value due to delays and movement into liquidation acts as a hanging sword and pushes all concerned towards a resolution plan. Liquidation is led by a regulated IP referred to in this case as the liquidator. The liquidator holds the assets of the company in trust. The rights of secured creditors are respected, they have the choice of taking their collateral and opt out of the liquidation process.[172] The recoveries that are obtained are paid out to the various claimants through a well-defined waterfall.[173] A company may also undergo a voluntary liquidation under the Code.[174]

It may be noted that while there is no specific guidance as to the fees charged by the IP in cases of resolution,[175] the *Liquidation Process Regulations* provides for a regulation on the Liquidator's fees.[176]

---

168 As per Section 32A of the Code The Insolvency and Bankruptcy Code (Amendment) Act 2020.

169 *Forech India Ltd.* v *Edelweiss Assets Reconstruction Co. Ltd.*, (2019) 18 SCC 549 : 2019 SCC Online SC 87.

170 A. Ramaiya, 'Guide to the Companies Act, 2013'18th ed vol 3, LexisNexis, pp 4460

171 BLRC Report (n 18) Executive Summary.

172 Section 52 of the Code, *ICICI Bank Ltd.* v *SIDCO Leathers Ltd.*, (2006) 10 SCC 452.

173 Section 53 of the Code. Also see Section 33 of the Code read with *Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016*.

174 The provisions relating to *Voluntary Winding Up* for a company were there in Companies Act 2013 which has now been omitted by virtue of Section 255 of the Insolvency and Bankruptcy Code 2016 ("Code") read with Schedule XI of the Code w.e.f. 15-11-2016. The Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations 2017 ("*VL Regulations*") provides for a detailed procedure in this regard.

175 However, in a Disciplinary Case IBBI has laid down the test of reasonableness of fees - No. IBBI/DC/04/2018 3rd May, 2018 – Case of Ms. Ruia.

176 Regulation 4 of the *Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016*.

V. THE UNFINISHED AGENDA

The Indian economy in the 21st century carries the legacy of economic policy-making focused on removing barriers to entry but it has already been replaced by the need for providing clear solutions to exit problems. There are fiscal, economic and political costs of impeded exit. In India, the exit problem arises because of three I's, i.e., interests, institutions and ideas/ideology. A review of the working of the Code in last four years, demonstrates that a lot has been achieved, however, the much is left to be desired in furtherance of providing accessible exit option. Some of these unfinished agenda may be discussed under the following heads.

A. Bankruptcy of Individuals

Sullivan, Warren and *Westbrook*[177] make many references to the notion that the current rate of bankruptcy is a symptom of some larger "social pathology" or "social problem."[178] They emphasize this by drawing an analogy between bankruptcy law and medical care:

> *The purpose of bankruptcy law, properly used rather than abused, is to serve as a financial hospital for people sick with debt. If hospital admissions rise dramatically, there are at least two explanations for the increase, it may be that doctors have started admitting patients who are not seriously ill and who could be treated as outpatients. Or the crowded hospital wards may simply reflect a breakdown of health in the community.*

In India, lending and then recovery of debt have not only been associated with legal and economic issues, but largely social issues.[179] Historically, the

---

177 Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America*, Oxford University Press (1989).

178 *Farmers defaulting loans and loan waivers was considered to be not a good trend by bankers and economists, is it setting up a culture of loan default?? "Waivers undermine an honest credit culture... It leads to crowding-out of private borrowers as high government borrowing tend to (impose) an increasing cost of borrowing for others," Patel said after Thursday's monetary policy announcement. "I think we need to create a consensus such that loan waiver promises, otherwise sub-sovereign fiscal challenges in this context could eventually affect national balance sheet."* Urijit Patel, RBI Governor *Livemint* <http://www.livemint.com/Politics/FLWzWep1Jdv8riZhMlNbtL/RBI-governor-Urjit-Patel-criticises-farm-loan-waiver-schemes.html> also see report of Advisory Group on Bankruptcy Laws by NL Mitra (2001) <https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/20811.pdf>

179 IBBI had set up an Advisory Panel under Justice BN Srikrishna to take the process forward on bankruptcy regimes for individuals. "*The composition of the advisory committee shows the recognition in the government that this is a sociological issue and not merely a subject involving default in payment of loans or other dues to creditors. The issue has become even more challenging, following a spate of recent insolvency cases involving real*

debtors were always depicted as poor people including small entrepreneurs and lenders were well-to-do people. There have been comparisons of corporates being provided with exit opportunities while individual lenders like farmers not.[180] Wider social acceptability for exit is important. While the Individual Insolvency[181] awaits a robust institutional infrastructure to kick in,[182] insolvency with reference to personal guarantors to corporate debtors have been brought into force.[183] It is important to bring the necessary infrastructure in place as soon as possible, so that the individual bankruptcy provisions may kick in.

B. Cross-Border Insolvency

The BLRC was of the view that cross-border issues may be taken up in the next stage of deliberations as domestic reforms in insolvency regime required the focus.[184] This was quipped as a half-hearted effort.[185] The Joint Committee of Parliament was of the view that not incorporating cross border insolvency provisions in the Code may lead to an 'incomplete Code'.[186] Accordingly, Sections 233 and Section 234 were included in the Code, which provided for an enabling mechanism for '*agreements with foreign countries*' and '*letter of*

---

estate companies such as Jaypee and Amrapali Group" – *Times of India* Sept 18, 2017, available at <http://timesofindia.indiatimes.com/business/india-business/govt-sets-up-personal-bankruptcy-panel/articleshow/60724960.cms>.

180 Mayank Jain, '*Farm loan waivers are not the same as corporate NPAs – and it's tough to say which is worse', Scroll.in* (23 June2017) <https://scroll.in/article/841436>.

181 The Insolvency & Bankruptcy Code, 2016, (IBC) classifies individuals into three classes, namely, personal guarantors to CDs, partnership firms and proprietorship firms, and other individuals, to enable implementation of individual insolvency in a phased manner.

182 IBBI, 'Report of the Working Group on Individual Insolvency' (October 2018) <https://ibbi.gov.in/uploads/resources/Final_report_of_WG_on_Individual_insolvency-Oct18.pdf>.

183 The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations 2019 and IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations 2019.

184 Similar views were echoed by the Department of Economic Affairs (DEA) in the written replies submitted to the Parliamentary Committee.

Cross Border Insolvency is a complicated issue where internationally there is no uniformity in procedure. Post Global economic crisis, Institutions such as G-20 and Financial Stability Board (FSB) are working on this matter. It has also been stated by the Ministry that the Government at an appropriate time will come out with a framework for Cross Border Insolvency.

185 Cyril Amarchand Mangaldas, '*Indian Insolvency Regime without Cross-border Recognition – A Task Half Done?*' (16 May 2017) <https://www.legallyindia.com/views/entry/indian-insolvency-regime-without-cross-border-recognition-a-task-half-done>; Aparna Ravi, '*Filling in the Gaps in the Insolvency and Bankruptcy Code - Cross Border Insolvency*' (17 May 2016) IndiaCorp Law at <http://indiacorplaw.blogspot.in/2016/05/filling-in-gaps-in-insolvency-and.html>.

186 Para 62, Lok Sabha Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015, Sixteenth Lok Sabha (April 2016).

request to a country outside India in certain cases'. The UNCITRAL Model Law ("Model Law") on Cross-Border Insolvency, adopted in 1997,[187] was designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address instances of cross-border insolvency more effectively.[188] Singapore became the 42nd Country[189] to enact a legislation based on the Model Law.[190] The Insolvency Law Committee ("ILC") submitted a detailed separate report[191] on adoption of the Cross Border Insolvency framework in India. Though, a comprehensive framework, as recommended by ILC, is still awaiting adoption. In the meanwhile, the NCLAT was harmonious while dealing with 'cross-border insolvency protocol' agreement between the RP in India and the administrator in Netherlands[192].

C. The Pre-Packs

A pre-packaged or a pre-arranged insolvency resolution process ("pre-packs"/"PPIRP") is such a mechanism where the resolution plan is formulated and finalised prior to the commencement of formal proceedings.[193] It is said that a pre-pack can maximize enterprise value by "combining the efficiency, speed, cost, and flexibility of workouts with the binding effect and structure of formal insolvency proceedings."[194] Providing legal recognition to out-of-court settlement is the key in a PPIRP. Some headway has been done by way of introduction of provisions relating to withdrawal of CIRP

---

[187] The Model Law was drafted by UNCITRAL's Working Group on Insolvency Law, approved and adopted by the Commission in May 1997 and endorsed by the United Nations General Assembly in December 1997.

[188] Sudhaker Shukla and Kokila Jayaram, *Cross Border Insolvency A Case to Cross the Border Beyond the UNCITRAL*, pp 207.

[189] W.e.f. 23-5-2017, Prior to enactment of the Companies (Amendment) Act in Singapore, legislation based on the Model Law had been adopted in many jurisdictions like: Australia (2008); Canada (2005); Great Britain (2006); Greece (2010); Japan (2000); the United States (2005) etc.

[190] With its adoption of the Companies (Amendment) Act (ss 354A, 354B, 354C and Fourteenth Schedule) on 10 March 2017.

[191] Ministry of Corporate Affairs GOI, *Report of Insolvency Law Committee on Cross Border Insolvency* (Chaired by Injeti Srinivas) (October 2018), <https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Oct/Report%20on%20Cross%20Border%20Insolvency_2018-10-22%2018:55:11.pdf>.

[192] *Jet Airways India Ltd.* v *SBI*, 2019 SCC OnLine NCLAT 1216, before the National Company Law Appellate Tribunal (2019, 26 September) cited in Ishita Das, The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016, Vikalpa: The Journal for Decision Makers 45(2) 104–114, 2020.

[193] Vidhi Center for Legal Policy, *Designing a Framework for Pre-Packaged Insolvency Resolution in India: Some Ideas for Reform Report* (February 2020) <https://vidhilegalpolicy.in/wp-content/uploads/2020/02/Report-on-Pre-Packaged-Insolvency-Resolution.pdf>.

[194] Dr SK Gupta and Jay Kothari, 'Broad Contours of the Proposed Structure of Pre-packs Scheme in India' (December 2020) <https://insolvencytracker.in/2020/12/19/pre-packs-in-india-broad-contours-of-the-proposed-structure/>.

application. However, to examine the issue comprehensively, a Committee has been constituted by MCA.[195] On the other hand, initiatives like project *Sashakt* have allowed banks to decide the resolution strategy, outside the IBC, through Inter-Creditor Agreements (ICAs).[196]

D. The Group Insolvency

A group of companies is an economic entity formed of a set of companies which are either companies controlled by the same company, or the controlling company itself (Insee). This relationship between companies, in legal terms, is governed by the 'holding' and 'subsidiary' provisions.[197] The Code, however, does not envisage a framework to either synchronise insolvency proceedings of different companies in a group or to resolve their insolvencies together.[198] During the insolvency resolution of some corporate debtors,[199] for e.g., in the case of *Videocon,*[200] the AA allowed consolidation of 13 of the 15 Videocon group companies. The Working Group recommendations[201] have addressed the problem in three dimensions –

> "first, elements that enable communication, coordination and cooperation among stakeholders in the insolvency proceedings of companies in a group (i.e., procedural coordination), second, elements that enable the assets of companies in a group to be consolidated in limited circumstances (i.e., substantive consolidation), third, rules to deal with the perverse behaviour of companies in a group, and fourth, interconnection among the companies that would make them part of a group."

---

[195] MCA. Constitution of sub-committee of Insolvency Law Committee to propose a detailed scheme for implementing prepack and prearranged insolvency resolution process (Chair – Dr. MS Sahoo), 24th June 2020, <http://www.mca.gov.in/Ministry/pdf/ACT_24062020.pdf>

[196] As recommended by Sunil Mehta Committee (2018) a five-pronged strategy to resolve bad loans, with the larger ones going to an asset management company (AMC) or an alternative investment fund (AIF). See Shryam Kagwar, Project Sashakt, (Oct 2018) <https://www.bankingfinance.in/project-sashakt-2.html>

[197] Section 2(87) of the Companies Act 2013, Regulation 2(1)(zm)of LODR.

[198] IBBI, 'Report of the Working Group on 'Group Insolvency' (September 2019) <https://ibbi.gov.in/uploads/whatsnew/2019-10-12-004043-ep0vq-d2b41342411e-65d9558a8c0d8bb6c666.pdf>

[199] Era infrastructure, Lanco, Educomp, Amtek, Adel, Jaypee and Aircel. See Vardaan Ahluwalia and Varsha Yogish, 'Staggered Lifting of the Corporate Veil: A Case for Group Insolvency Norms', Insolvency and Bankruptcy Blog, Cyril Amarchand, (Oct 2019) <https://corporate.cyrilamarchandblogs.com/2019/10/group-insolvency-norms/>.

[200] *SBI* v *Videocon Industries Ltd.*, 2018 SCC OnLine NCLT 30104; *Raghuram Manchi*, 'A New Case Law relating to Group Insolvency', (May 2020) <https://ibclaw.in/a-new-case-law-relating-to-group-insolvency-by-raghuram-manchi-insolvency-professional/>.

[201] IBBI (n 199).

There is a need to have statutory clarity between the '*separate legal personality*' and the matters of '*lifting of corporate veil*'.[202]

E. Tackling Fraudulent Transactions

The IBC provides for wrongful/fraudulent transactions[203] that have been entered 1 year preceding the commencement of the CIRP (2 year in case of related party transactions). While we are yet to see many cases coming up under this category. The Supreme Court in *Anuj Jain's Case,*[204] laid down the seven-step process to be followed by the resolution professional while dealing with matters under Section 43 of the Code. Further, the importance of differentiating between the 'preferential transactions' and 'wrongful/fraudulent transactions' was pointed out. Hence, it is important that well trained IPs are available, who can detect the fraudulent transactions,[205] but at the same time, the IP is not expected to be extraordinarily thorough in this detection. The AA in a case, directly ordered the Serious Fraud Investigation Office ("SFIO") to investigate into the siphoning of funds, which got challenged before NCLAT. It was held that the AA cannot direct the SFIO directly to investigate into a matter, rather it should send the inputs to the Central Government for necessary action.[206]

F. The Pandemic Effect

Unprecedented times require unprecedented measures. COVID-19 has created a havoc in the lives of the entrepreneurs, causing defaults in their loan

---

[202] *Arcelormittal India (P) Ltd.* v *Satish Kumar Gupta*, (2019) 2 SCC 1.
"*...where a statute itself lifts the corporate veil, or where protection of public interest is of paramount importance, or where a company has been formed to evade obligations imposed by the Law, the court will disregard the corporate veil. Further, this principle is applied even to group companies, so that one is able to look at the economic entity of the group as a whole....the Court may pierce the corporate veil for the purpose and only for the purpose of depriving company or its controller of the advantage that they would otherwise have obtained by company's separate legal personality*".

[203] Sections 43, 45, 49, 50 and 66 under the Code deal with transactions that can be avoided or set aside by the IRP and the Liquidator. These transactions are of five categories: (i) Preferential transactions (ii) Undervalued transactions (iii) Undervalued transactions defrauding the creditors (iv) Extortionate credit transactions (v) Fraudulent trading or wrongful trading. See <https://lawanthology.com/2020/07/24/fraudulent-transactions-what-to-keep-in-mind-while-ring-fencing-your-assets/>.

[204] *Jaypee Infratech Ltd. Interim Resolution Professional* v *Axis Bank Ltd.,* (2020) 8 SCC 401.

[205] Western India Regional Council of the Institute of Chartered Accountants of India, 'Forensic Audit/Transaction Audit under IBC' (undated) <https://www.wirc-icai.org/images/publication/final-press-forensic.pdf>.

[206] *Union of India* v *Maharashtra Tourism Development Corpn.,* 2019 SCC OnLine NCLAT 1414.

payments. To ameliorate the conditions of corporate debtors, occasioned due to the pandemic, the GOI came up with several regulatory relaxation measures[207] and also the *Aatmanirbhar package*.[208] The CIRP trigger threshold has been raised to Rs. 1 Crore from Rs. 1 Lakh.[209] Further, the inclusion of Section 10A to the Code, exempts the period of six months w.e.f. March 25th, 2020 for initiating any CIRP for a default occurring during this period.[210] While there are critiques[211] to this suspension, the IBBI considers it as a "*valuable breathing space while the companies as well as the authorities can put in place a comprehensive strategy to wade the economy through the pandemic*."[212] The Supreme Court remarked in a case[213] that "the doors of justice cannot be closed and the NCLAT should find a way for online hearing."

G. Impact Assessment

The IBC and its enforcement, so far, have provided a hope for having a mechanism in India which continuously monitors the performance of laws and the institutions and measures the impact.[214] There is a great need to encourage research and provide information at ease for the researchers, which at present is missing. Information on various cases is not readily available in a searchable format.[215] Open access database on all orders/judgments of

---

[207] Press Release, Announcement of relief measures relating to Statutory and Regulatory compliance matters across sectors in view of COVID 19 outbreak, Press Information Bureau Govt. of India (24 March 2020) <https://ibbi.gov.in//uploads/press/50277513bcc7d-94092ce4ee2b6591aad.pdf>.

[208] More about Aatmanirbhar Bharat see <https://aatmanirbharbharat.mygov.in/.>.

[209] MCA Notification No. S.O. 1205(E) dated 24th March 2020.

[210] Shall not apply to any default committed under the said sections before 25th March, 2020. This period has further been extended until March 25, 2021 – <https://www.ibbi.gov.in/uploads/legalframwork/df55d4f612f270d6c637ee4b3c8131c8.pdf.> IBBI amended the CIRP Regulations to insert regulation 40C and regulation 47A to the Liquidation Process Regulations, which states "that subject to provisions of the IBC, the period of lockdown imposed by the Central Government in the wake of the COVID-19 outbreak shall not be counted in the timeline ... that could not be completed due to the lockdown".

[211] Aparna Iyer, '*Five things that make IBC suspension a bad idea*' Mint (22 Dec 2020). Former RBI Deputy Governor Viral Acharya has also expressed similar opinion in Times of India (July 29, 2020) <https://timesofindia.indiatimes.com/business/india-business/suspending-ibc-for-a-year-bad-idea-restart-bankruptcy-courts-in-2-3-months-viral-acharya/articleshow/77248303.cms>.

[212] IBBI Newsletter, From Chairperson's Desk, 'Insolvency Law in Times of COVID-19', Vol. 15, April – June 2020.

[213] An employee at NCLAT detected COVID positive and due to which NCLAT was closed. See *Marathe Hospitality* v *Mahesh Surekha* SLP No. 8139 of 2020, decided on 10.07.2020.

[214] See Vagda Galhotra, 'A Case for Legislative Impact Assessment', 54 (26) EPW.
"Lawmaking in India is fraught with inadequacy of pre-legislative thought, consultation and deliberation, along with insufficient analysis of the impact of the laws. The result, thus, is that there are too many laws and negligible data on their achievements."

[215] Sreyan Chatterjee & Gausia Shaikh & Bhargavi Zaveri, '*Watching India's Insolvency Reforms: A New Dataset of Insolvency Cases*' Working Paper 2017-012 IGIDR (2017).

the NCLT, NCLAT and Supreme Court would facilitate this. The Standing Committee on Finance has recognized the need for removing bottlenecks and streamline the CIRP further,[216] and hence it is a 'work in progress'. Economy-specific research has shown that insolvency reforms which encourage debt restructuring and reorganization reduce both failure rates among small and medium-size enterprises and the liquidation of profitable businesses.[217] COVID-19 has put a spanner in the wheel of reforms under the Code, and any impact assessment of the Code may not provide a true picture at this point in time. Going forward, the measuring matrix for impact assessment of the Code shall be its preamble which provides for "*reorganization and insolvency resolution … in a time bound manner for maximization of value of assets…, to promote entrepreneurship, availability of credit and balance the interests of all stakeholders…*"

VI. Conclusion

"Bankruptcy is a gloomy and depressing subject.

The law of bankruptcy is dry and discouraging topic."[218]

A review of the modern CIRP regulations and its implementation so far reflects otherwise. In fact, on one hand there have been curious cases like *Ruchi Soya,* in which the regulators had to intervene[219] to stop the rally in its share prices.[220] On another spectrum, cases like *Era Infrastructure* have become inconveniencing due to their inordinate delays, which also mock the

---

216 6th Report of the Standing Committee on Finance on The IBC (Second Amendment) Bill 2019, 17th Lok Sabha (March 2020).

217 Dewaelheyns, Nico, and Cynthia Van Hulle, 'Legal *Reform and Aggregate Small and Micro Business Bankruptcy Rates: Evidence from the 1997 Belgian Bankruptcy Code.*'(2006) 31(4) Small Business Economics 409–24; Rodano, Giacomo, Nicolas Andre Benigno Serrano-Velarde and Emanuele Tarantino '*The Causal Effect of Bankruptcy Law on the Cost of Finance*' (2011) <https://ssrn.com/abstract=1967485>; Giné, Xavier, and Inessa Love, '*Do Reorganization Costs Matter for Efficiency? Evidence from a Bankruptcy Reform in Colombia*' (2006) Policy Research Working Paper 3970, World Bank, Washington, DC.

218 C Waren, Bankruptcy in United States History 3 (1935), cited in McIntyre, Lisa J. (1989) '*A Sociological Perspective on Bankruptcy*'(1989) 65 (1) (6) Indiana Law Journal: <http://www.repository.law.indiana.edu/ilj/vol65/iss1/6>.

219 SEBI's Consultation Paper on '*Recalibration of threshold for Minimum Public Shareholding norms, enhanced disclosures in Corporate Insolvency Resolution Process (CIRP) cases*' (August 2020).

220 Rahul Oberoi, '*After 8,818% rally in 103 days, Ruchi Soya faces red flag; analysts want a SEBI probe*' *Economic Times* (1 July 2020) <https://economictimes.indiatimes.com/markets/stocks/news/after-8818-rally-in-103-days-ruchi-soya-faces-red-flag-analysts-want-a-sebi-probe/articleshow/76683745.cms>.

success of the Code.[221] *Dr. M.S. Sahoo* describes the IBC as 'a road under construction'.[222] There are intermittent course corrections required keeping in view the changing conditions of business, markets and economy. The ultimate goal is "*when India celebrates honest business failures*."[223] Another goal is to create a culture which discourages "lenders from issuing high-risk loans, and managers and shareholders from taking imprudent loans and making other reckless financial decisions."[224]

As India is turning more global and open with schemes like Make in India, Digital India, and Startup India, which have been implemented to achieve popularity and to transform India into a favoured investment destination, completing the unfinished agenda will make the insolvency laws in line with the international legislations and will provide a single door solution to all insolvencies. Imposing confidence on maverick professionals will make the insolvency proceedings more time bound and swift.

All the wheels of the insolvency ecosystem have to remain well-oiled with regular updates and shed the resistance to change. The magic of 'reform, perform and transform' can only happen when each stakeholder understands the basic philosophy of the Code and its noble objectives of resolution, which is not against anyone but for a greater good.

It is heartening to note that the Supreme Court in *Swiss Ribbons* provided for an *epilogue,* outlining the impact of the Code in terms of numbers observing "*these figures show that the experiment conducted in enacting the Code is proving to be largely successful. The defaulter's paradise is lost. In its place, the economy's rightful position has been regained*".

POST-SCRIPT: While I review this article in the last week of March 2021 to address the editorial comments/suggestions, I am overwhelmed by the amount of jurisprudence being created since I submitted the first version of this Article. This calls for writing a short post-script on the major developments from February 2021 to March 2021. While IBBI quarterly Newsletter for the quarter October – December 2020 is awaited, its website provides us with the developments.

---

221 Dipak Mondal, '*Pending Resolution*', *Business Today – Cover Story Corporate Distress* (18 October 2020) pp. 58. "*There are 29 winding up cases pending against Era Infra in different High Courts. This case sees no immediate closure even after three years, as litigation and procedural delays slow down the insolvency process.*"

222 MS Sahoo (n 42).

223 *Ibid*.

224 Djankov, Simeon, Oliver Hart, Caralee McLiesh and Andrei *Shleifer 'Debt Enforcement around the World*' (2008) 116 (6) Journal of Political Economy 1105–49.

Home Buyers and Construction Projects: In *Manish Kumar v. Union of India*,[225] Supreme Court settled the challenge made to the IBC amendment requiring the allottees under a real estate project to meet certain additional requirement to qualify as Financial Creditor. Individual home buyers now cannot bring action under IBC as financial creditor. In the process of deciding this case and agreeing to the justification for frequent amendments in IBC, Supreme Court again revisited the scope and objectives of IBC observing that "*The working of a statute may produce further issues, all of which may not be fully perceived or wholly foreseen by the law giver. The freedom to experiment must be conceded to the legislature, particularly, in economic laws. If problems emerge in the working of a law, which requires legislative intervention, the court cannot be oblivious to the power of the legislative to respond by stepping in with necessary amendment*".[226] Ruling out any 'malice' by legislature, Supreme Court approved the logic for restrictions imposed on individual home buyers to bring action as Financial Creditors under the Code. It was necessary for home buyers to have a critical mass to "*ensure that a reasonable number of persons similarly circumstanced, form the view that despite the remedies available under the RERA or the Consumer Protection Act or a civil suit, the invoking of the Code is the only way out, in a particular case*." In another case,[227] Supreme Court declined to entertain a petition under Article 32 filed by a home buyer, distinguishing its intervention in the cases of *Amrapali*[228] and *Unitech*.[229] Supreme Court in this case said "*the Court has no reason to doubt the genuineness of the grievance which has been espoused by the petitioner. However, the issue is whether his recourse to Article 32 is the correct remedy when alternative modalities are available and particularly since the engagement of the Court in a petition of this nature would involve a supervision which does not lie within the province of judicial review. Real estate projects across the country may be facing difficulties. The intervention of the Court cannot be confined to one or a few selected projects. Judicial time is a precious resource which needs to be zealously guarded. We have to always be mindful of the opportunity cost involved in exercising our discretion to admit a petition and to intervene, in terms of diversion of time and resources away from other matters where our intervention would be more apposite and necessary*." From the aforesaid decisions, it is clear that Supreme Court has now

[225] *Manish Kumar* v *Union of India*, (2021) 5 SCC 1.

[226] See Summary of the decision given by IBBI, <https://www.ibbi.gov.in/uploads/legalframwork/f6ec338d24e31bba2a43b173c1634414.pdf>.

[227] *Upendra Choudhury* v *Bulandshahar Development Authority*, 2021 SCC OnLine SC 92. Supreme Court followed its earlier view taken in the case of *Shelly Lal* v *Union of India*, 2021 SCC OnLine SC 222.

[228] *Bikram Chatterji* v *Union of India*, (2020) 16 SCC 356.

[229] *Bhupinder Singh* v *Unitech Ltd.*, 2020 SCC OnLine SC 1200.

balanced the requirements of 'judicial activism' vis-a-vis 'calibrated exercise of judicial discretion' and also highlighted the need for measuring the value of judicial time (opportunity cost).

Powers of NCLT/NCLAT: In *Gujarat Urja case*,[230] Supreme Court reiterated the wide powers of Adjudicating Authority under the Code, however, said that "NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the CD. However, in doing so, the NCLT and NCLAT must ensure that they do not usurp the legitimate jurisdiction of other courts and tribunals when the dispute is one which does not arise solely from or relate to the insolvency of the CD. The nexus with the insolvency of the CD must exist." In this case also, Supreme Court reiterated the objectives of the Code by stating "*The enactment of the Code is in significant senses a break from the past. While interpreting the provisions of the Code, care must be taken to ensure that the regime which Parliament found deficient and which was the basic reason for the enactment of the new legislation is not brought in through the backdoor by a process of disingenuous legal interpretation.*"

Supreme Court has declined to interfere with the decisions of the NCLAT in a number of cases since January 2021, however, on the other hand, in the case of *Arun Kumar Jagatramka*,[231] Supreme Court went ahead to state "The IBC was introduced in order to overhaul the insolvency and bankruptcy regime in India. As such, it is a carefully considered and well thought out piece of legislation which sought to shed away the practices of the past. The legislature has also been working hard to ensure that the efficacy of this legislation remains robust by constantly amending it based on its experience. Consequently, *the need for judicial intervention or innovation from the NCLT and NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC*."

IBBI continues to work for providing clarifications and guidance on different aspects of smooth functioning of the Code:

- Public comments were called on Pre-packaged Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016 based upon the report submitted by the sub-committee of Insolvency Law Committee (ILC).[232]

---

[230] *Gujarat Urja Vikas Nigam Ltd.* v *Amit Gupta* (2021) 7 SCC 209.

[231] *Arun Kumar Jagatramka.* v *Jindal Steel and Power Ltd.*, (2021) 7 SCC 474. This case involved a confusion as to applicability of the provisions of IBC in relation to Section 29A of the Code in the matter involving section 230 of the Companies Act, 2013. It has already been noted above that role of NCLT/NCLAT under the Code and Companies Act are different.

[232] Invitation of comments from public on Pre-packaged Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016, dated 8th January 2021, <https://www.ibbi.gov.

- Guidance on retention of records relating to the Corporate Insolvency Resolution Process.[233]

- Release of Handbook on Ethics for Insolvency Professional: Ethical and Regulatory Framework.[234]

- IBBI continues to maintain its vigilance on the news media regarding statements attributed to IBBI and its officials, which is evident from a recent letter to the Editor of Business Standard newspaper[235].

---

in/uploads/whatsnew/34f5c5b6fb00a97dc4ab752a798d9ce3.pdf>.

[233] Circular, Retention of records relating to Corporate Insolvency Resolution Process, (4th January 2021) <https://www.ibbi.gov.in/uploads/legalframwork/5bb3be107809847f06cf2059f54ff3c8.pdf>.

[234] Handbook on Ethics for Insolvency Professional: Ethical and Regulatory Framework, IBBI, (19th March 2021) <https://www.ibbi.gov.in/uploads/whatsnew/0ab3ccba77975afcd9eb7ac679154de8.pdf>. This handbook was produced in association with British High Commission and is based on inputs on the best practices followed by the Insolvency Practitioners in the United Kingdom.

[235] News item - "Normalcy restored, says Sahoo, as India resumes Insolvency proceedings", in the Business Standard dated 26th March 2021. Letter to the Editor of Business Standard from IBBI (26th March 2021) <https://ibbi.gov.in//uploads/press/2021-03-26-140239-ueroz-4949cd7ef3be23f7ebea7faae91a8d0e.pdf>.

Comparing Specific Performance under the Specific Relief (Amendment) Act 2018 with the CISG and the UNIDROIT Principles: The Problems of the "Un-common Law" in India

*—Ajar Rab**

The Specific Relief (Amendment) Act, 2018 expressed a clear intent to the world that India was more serious than ever about the enforcement of contracts. It took the bold step of breaking its historical chains of the common law, and like civil law jurisdictions, made specific performance the norm, rather than the exception. While this was a much-needed step, a more in-depth analysis of the concept of specific performance and the amendment, when compared with other civil law jurisdictions, the Conventions on the International Sale of Goods, and the UNIDROIT International Principles of Commercial Contracts, reveals a different picture. In a hasty effort to raise India's rank on the 'ease of doing business', India has neither completely adopted the civil law approach, nor entirely relinquished its inheritance from the common law. This created the "Un-common Law", which creates more problems than it resolves. The paper critically analyses the amendment in light of international instruments and practice across jurisdictions to highlight the steps in the right directions, the grey areas, and the drawbacks of the amendment. It concludes that a comprehensive re-look is required in order to align the regime on specific performance with international practice.

* Partner at Rab & Rab Associates LLP, Dehradun, Adjunct Professor at NUJS Kolkata and Visiting Professor at NLSIU, Bengaluru. The Author would like to thank Anshul Bhutani, Aarohi Chaudhary and Devansh Kaushik for their research assistance.

I. INTRODUCTION

Contract enforcement is vital to ensure that trade and commerce flourish in any society. In the absence of contract enforcement, private parties may resort to self-help and seize goods from a seller or use private means to coerce performance.[1] Contract enforcement, therefore, ensures that parties turn to courts to enforce their promises, either through the remedy of specific performance or through damages, to put the non-breaching party in the same position as it would have been but for the breach, i.e., expectation damages.[2]

In India, following the common law tradition, the right to damages was considered the primary remedy for breach of contracts, and specific performance was an exception.[3] The enforcement regime for contracts in India was considered mostly ineffective as damages fail to provide full compensation for the breach[4] and that considerably affected business sentiment as busi-

---

1 Edward A Tomlinson, 'Performance Obligations of the Aggrieved Contractant: The French Experience' (1989) (12) LLICLJ 139 188-192; Subha Narasimhan, 'Modification: The Self-Help Specific Performance Remedy' (1987) (97) YLJ 61, 91.

2 Subha Narasimhan, 'Modification: The Self-Help Specific Performance Remedy' (1987) (97) YLJ 61, 65.

3 Report of the Expert Committee on Specific Relief Act 1963 (2016) 3.

4 *Ibid.*, 13.

nesses require legal certainty. Therefore, to increase its rank on the 'ease of doing business' index, the government constituted an Expert Committee on the Specific Relief Act, 1963 ("**Expert Committee**") with the objectives of *inter-alia*(a) reviewing the Specific Relief Act, 1963 ("**SRA**") from the point of view of enforceability of contracts; b) to make specific performance a general rule and the grant of compensation for non-performance an exception; c) to dispense with discretionary relief under the SRA.[5] Pursuant to the recommendations of the Expert Committee, the Specific Relief (Amendment) Act, 2018 ("**2018 Amendment**") was enacted.[6] After the amendment, the right to specific performance is no longer an equitable relief, rather a statutory right.[7]

However, as most legislations in India, the recommendations of the Committee were accepted in a piecemeal fashion, leaving several lacunae in the SRA on the question of enforceability of contracts. This is highlighted when the SRA is compared with international instruments such as the Convention on the International Sale of Goods ("**CISG**") and the UNIDROIT Principles of International Commercial Contracts ("**PICC**").

The paper attempts to make a comparative analysis between specific performance under the CISG, UNIDROIT, and the position in India, post the 2018 Amendment. Part A of the paper discusses the legal basis for the enforcement of contracts. Part B explores the concept of specific performance under common law and civil law in order to highlight the similarities and differences between both the systems of law and to understand how the remedy of specific performance is implemented in different jurisdictions. Part C of the paper critically analyses the 2018 amendment, in light of the comparisons with the CISG and the PICC, to identify the practical problems and lacunaein the 2018 Amendment. The paper concludes with a recommendation to revisit the 2018 Amendment and to harmonise the same with international instruments such as the PICC and CISG.

II. PART A

A. Basis of Contract Enforcement

Robust commerce requires promises to be upheld by parties and in case of failure, state intervention is required to enforce such promises. While States

---

5 *Ibid.*, 4.

6 *Ibid.*

7 *Ibid.*, 60.

generally follow and respect the 'freedom of contract',[8] they may take two approaches to contract enforcement, i.e., (a)the assumption that all promises are enforceable subject to exceptions, or (b)the assumption that all promises are generally unenforceable, subject to certain exceptions. In civil law as well as common law jurisdictions, the latter approach is usually followed.[9] Therefore, promises become contracts, when the same are enforceable by law,[10] and to be enforceable by law, certain conditions ought to be met,[11] i.e., enforceable promises ought to have a legal basis for enforcement.

1. 'Consideration'

The notion that a promise casts an enforceable duty began with Roman law.[12] Though English Law was not influenced by Roman Law tradition,[13] it created a category of actionable promises, the most important being an action of debt.[14] Thus, until the end of 16th century, mere promises *per se* were not enforceable unless they fell in the category of actionable promises.[15] The hesitation in enforcing promises was the lack of a legal basis for their execution. Hence, the concept of consideration, i.e., a sum of the conditions necessary for the action for breach of contract,[16] became the legal basis for the execution of promises. The broad idea was to identify those promises which, in the eyes of common law courts, were important to society and required legal sanctions for enforcement.[17] This legal basis as a test of *quid pro quo* has been replaced by the 'bargain test' in the United States,i.e., a promise or a performance should be bargained for.[18]

---

8 Learned Hand, 'Due Process and the Eight-Hour Day' (1908) 21 HLR 495, 507-08; Carolyn Edwards, 'Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues' (2009) 77 UMKCLR 647, 662.
9 E Allan Farnsworth, 'Comparative Contract Law' in Mathias Reimann and Reinhard Zimmermann (ed), *The Oxford Handbook of Comparative Law* (OUP 2012) 907.
10 Indian Contract Act 1872 (ICA) s 2 (h).
11 ICA s 10.
12 Farnsworth (n 9) 908.
13 *Ibid.*
14 David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999), 24.
15 Denis Tallon,'Civil Law and Commercial Law', *International Encyclopedia of Comparative Law* (1983) vol VIII, ch 2;
16 Farnsworth (n 9) 908.
17 *Ibid.*
18 Restatement (Second) of Contracts 1981 s 73 (1981).

2. 'Good Faith'

Civil law, on the other hand, required no such basis of consideration as there was an existing moral as well as a legal duty to execute promises.[19] This moral duty to fulfil promises is referred to as good faith or *pacta sunt servanda*.[20] Therefore, only a promise with an intention to be bound is required under Civil law.[21]

3. The Spectrum of Remedies

This general basis of enforcement is vital to understand the broad spectrum under which contracts are enforced. The requirement to enforce a contract may arise whenever there is a breach or non-performance. It is pertinent to note that 'breach of contract' is a term used by common law systems, whereas under civil law reference is made to 'non-performance' of the contract.[22] Nonetheless, both the terms ultimately mean the failure to achieve a specific result, according to terms of the contract or general law.[23]

A breach may occur on account of (a) defective performance;[24] (b) performance at the wrong time;[25] (c) performance at the wrong place;[26] (d) incomplete performance;[27] or (e) total non-performance.

Consequently, a breach of contract gives rise to primarily three types of remedies: (a) specific performance; (b) termination of the contract; and (c) the right to damages.

Apart from these, several other remedies are often not adequately discussed or addressed, especially under Indian law. For example, the right to

[19] Ole Lando & Hugh Beale, *Principles of European Contract Law: Parts I and II* (Kluwer Law International 2000) 399, 402; Sir Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (29th edn, OUP 2010) 575.

[20] Jason Webb Yackee, 'Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality' (2008) (32)5 FILJ 1550.

[21] Klaus-Peter Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert* (Schweitzer1985); Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford Scholarship Online, 1996), 537; Gerhard Kegel, *Vertrag und Deliktm* (Heymanns 2002) 3.

[22] Harriet Schelhaas, 'Non Performance' in Stefan Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2ndedn OUP 2015) 831.

[23] *Ibid*.

[24] UNIDROIT Principles of International Commercial Contracts 2016, (UNIDROIT) art 5.1.6.

[25] UNIDROIT arts 6.1.6 & 6.1.5.

[26] UNIDROIT art 6.1.6.

[27] UNIDROIT arts 6.1.2 & 6.1.3.

withhold performance,[28] the grant of additional time for performance,[29] and the right to cure non-performance.[30]An often confused reference is made to exemption clauses,[31] interference by the claimant,[32] or *force majeure*[33] under the concept of remedies. However, it is necessary to clarify that such references only provide an excuse from the performance of a contract, and hence a party is precluded from claiming damages or specific performance. Such references exclude only two out of the three remedies, and the remedy of termination of the contract continues.[34] Similarly, if the breach happens due to an act of the claimant, then there is no breach in the first place.[35] The scope of this paper is restricted to analysing the remedy of specific performance.

III. Part B

A. The Concept of Specific Performance

The right to specific performance arises from the principle of *pacta suntservanda,*[36] i.e., the binding nature of a contract entails a right to claim what was actually promised.[37] Specific performance, at its core, means the request by a party to direct the defendant to perform the contract in accordance with its terms. It is "all or nothing" whereas damages account for different circumstances, as well as a duty to mitigate damage.[38]

A critical aspect of the right to specific performance is that the contract should be in existence. The right to specific performance cannot be invoked once the contract has been terminated.[39] Damages, on the other hand, are not precluded by virtue of termination of the contract.[40] Therefore, three essential facets of the right to claim specific performance need to be addressed upfront. (a) the right to specific performance can only be invoked when

[28] UNIDROIT art 7.1.3.
[29] UNIDROIT art 7.1.5.
[30] UNIDROIT art 7.1.4.
[31] UNIDROIT art 7.1.6.
[32] UNIDROIT art 7.1.2.
[33] UNIDROIT art 7.1.7.
[34] AS Hartkamp, 'Principles of Contract Law', in AS Hartkamp et al (eds), *Towards a European Civil Code* (3rd edn, Wolters Kluwer2004) 125, 135-136
[35] Vogenauer (n 22) 830.
[36] UNIDROIT art 1.3.
[37] Vogenauer (n 22) 887.
[38] Ingeborg Schwenzer, 'Specific Performance and Damages According to the 1994 UNIDROIT Principles of International Commercial Contracts' (1999) 1(3) EJLR303.
[39] UNIDROIT art 7.3.5(1); *Crompton Greaves Ltd v. Hyundai Electronics Industries Co. Ltd.*, 1998 SCC OnLine Del 805 : 1999 (49) DRJ 754.
[40] Vogenauer (n 22) 826.

the contract is in existence; (b) the distinction between the substantial and procedural issue related to specific performance, i.e.,the substantive issue is whether a party is entitled to the remedy of specific performance or only entitled to damages.[41] The procedural question is whether the two remedies are mutually exclusive or cumulative? If they are cumulative, can damages be claimed immediately? Or does a party have to insist on specific performance, first?;[42] and (c) whether the claim for specific performance is being made with respect to monetary obligations or non-monetary obligations,i.e., to do 'to do or not to do' something? While each country provides for enforcement differently and is a matter of the *lex fori*, three broad categorisations can be made: (a) enforcement of monetary obligations; (b) enforcement of an action to hand over something; and (c) enforcement of negative covenants, i.e., 'not to do'.[43]

1. Monetary Obligations

Specific performance as payment of money, as a rule, is not subject to exceptions in both common law and civil law.[44] It is only the non-monetary obligations that are subject to exceptions. Thus, monetary obligations ought to be specifically performed.

Monetary obligations are neither impossible in law nor in fact, and the performance or enforcement is neither unreasonably burdensome nor expensive.[45] More importantly, performance can neither be obtained from another source, and the same is not exclusively of personal character.[46] Infact, even English law recognises monetary obligations as 'an action of debt'.[47] Thus, payment of damages is, in effect, a new obligation to pay money for the breach of contract and the decree for payment of this sum of money is specific relief. The objective is to compensate a party for losses rather than deter for the breach.[48]

---

41 Schwenzer (n 38) 289.

42 Guenter H Treitel, *Remedies for Breach of Contract* (OUP 1988), 47.

43 Schwenzer (n 38) 302.

44 *Ibid.*, 293.

45 *Ibid.*

46 *Ibid.*, 289.

47 Konrad Zweigert and Hein Kotz, *Einfiihrung in die Rechtsvergleichung Auf Dem Gebiete Des Privatrechts* (3rd edn,Tuibingen 1996) 553; Paul Neufang, *Erffillungszwangals "remedy" beiNichterffillung* (Baden 1998), 9.

48 Zimmermann (n 21) 829; Treitel (n 42) 965; James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (OUP 2007), 395; Stephen A Smith, *Contract Theory* (OUP 2004), 409.

The request for the performance of a monetary obligation is called an 'action for an agreed sum' or 'action of price'. Such actions do not fall within the realm of specific performance as the English law recognised only an 'action for debt' as specific performance. An action for money or damages was not 'debt' in the strict sense and hence an 'action for price' is often provided in a section different from the right to specific performance. Even under the Uniform Commercial Code ("UCC"), a right to the performance of monetary obligations does not include the right to recover the price as specific performance, which is different from the civil law approach.[49] This absence of recognition of the right to specific performance of monetary obligations is surprising as both civil law and common law jurisdictions recognise the right as the primary remedy of the aggrieved party.[50] In contrast, Article 7.2.1 of the PICC recognises the right to specific performance for monetary obligations, with the only exception being certain usage under article 1.9 of the PICC, where the usage requires the seller to resell the goods, which are neither accepted nor paid for by the buyer.[51] Following the philosophy of the common law, the SRA does not make reference to monetary obligations. Instead, Chapter I begins with reference to immovable property.[52]

2. Non-Monetary Obligations

The often-cited distinction between civil law and common law, with respect to specific performance, actually is in the context of non-monetary obligations where specific performance is considered to be the primary remedy under civil law and an 'extraordinary remedy' under common law.

(a) Specific Performance under Common Law

In common law jurisdictions, the primary remedy for breach of non-monetary obligations is the right to damages[53] for breach of contract.[54] Thus,

---

[49] Nayiri Boghossian, 'A Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods' (LLM Thesis, McGill University 1999).

[50] Vogenauer (n 22) 884.

[51] *Ibid.*, 886.

[52] *However, a provision for execution for money decrees is provided in Order XXI Rule 30 which states that a money decree may be executed by detention in the civil prison or by attachment in sale of property or both. Therefore, unlike other common law jurisdictions, India treats the execution of money decree as specific performance bringing it closer to civil law jurisdictions.*

[53] Mariana Pargendler, 'The Role of the State in Contract Law:The Common-Civil Law Divide' (2018) YJIL 143, 167.

[54] *Ibid*; *There is a difference of opinion on this amongst commentators. Trietel and Smith opine that the differences between the civil and common law approach may be more*

common law jurisdictions seek to ensure that the promisee obtains the economic benefit for which such party had contracted. As long as this benefit or advantage is received, it does not matter whether the defaulting party performs the contract or pays damages.[55] The idea is that the breach of the promisor's primary obligation of performance is transformed into a secondary obligation to compensate the non-breaching party by payment of damages. The underlying rationale is to balance the competing interest of the breaching party with that of the protection of the performance interest of the non-breaching party.[56] From a policy perspective, the restrictions on the availability of specific relief demonstrate that the encouragement of performance and the deterrence of breach are not the primary objectives.[57]

Specific performance, in common law jurisdiction, is primarily driven by history.[58] Specific performance was granted by courts of equity and not by courts of law. This duality of rights and remedies in equity and law have added much to its obscurityand lack of systematisation.[59] One of the results of relying on equity was that the commands of the Chancellor of the courts of equity became decrees*in personam*. Thus, a person was directed to do or not to do something at the threat of contempt of court and resultantly jailed for such contempt.[60] It is pertinent to highlight that specific performance as a remedy was brought to remedy the deficiencies of the common law and hence was characterised as an 'extraordinary' remedy.

In order to find a point of reconciliation between the powers of courts of law and courts of equity, the 'inadequacy test' was developed,i.e., specific performance will be granted only if an award of damages is inadequate to compensate the losses arising from the breach.[61]This was done to prevent the courts of equity encroaching upon the jurisdiction of the common law

---

theoretical than practical, while Rowan differs. Availability of specific performance is not uniform across civil law and common law jurisdictions, but rather varies from country to country, and different exceptions may apply. Specific performance may not be used with significant frequency in civil law practice, even when it is formally available "on the books." Common law courts have been increasingly liberal in granting requests for specific performance, suggesting further convergence between both traditions. Nevertheless, conceptual and practical differences persist.

55 Solène Rowan, *Remedies For Breach of Contract, A Comparative Analysis of the Protection of Performance* (OUP 2012) 52.

56 *Ibid.*, 19.

57 *Ibid.*, 53.

58 Max Rheinstein, '*Die Struktur des vertraglichen Schuldverhältnissesimangloameri kanischenRecht*' (De Gruyter 1932) 138; T Weir (tr), K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, OUP 1998) 479; Treitel (n 42) 63.

59 Charles Szladits, 'The Concept of Specific Performance in Civil Law' (1955) 4(2) AJCL 208, 209.

60 *Ibid.*, 211.

61 Farnsworth (n 9) 931.

judges.[62] Further, fetters were imposed on the grant of specific performance by the courts of equity, such as consideration of fairness, morality and onerous supervision by courts.[63]However, an exception was made for agreements relating to sale of land due to the social and political values associated with the ownership of land in England.[64]Thus, specific performance was granted for such agreements.

The reluctance to make specific performance as a primary remedy stems from two concerns, (a) the remedy ignores the concept of mitigation of damages; and (b) there are new techniques now available to identify and quantify losses recoverable as damages.[65] The reluctance also had its roots in the 'freedom of contract', and the far greater role of the State requires for specific performance.[66] One view was that the frequent use of the remedy of specific performance has the potential to turn a breach of contract into a matter that is regulated by criminal law.[67] A less powerful sanction might incline a court to make greater use of specific performance as a remedy.[68]

Common law courts were also reluctant to grant specific performance due to the costs of enforcing such claims.[69] The 'heavy-handed nature' of specific relief, the 'injustice' of compelling the breaching party to perform at a loss, and the extent to which the aggrieved party can be compensated through damages, also played a role.[70] Therefore, while the choice to claim specific performance was with the party suing for breach of contract, the decision to grant specific performance rested with the common law judges.

A common-law judge would ordinarily venture into the following considerations before granting the relief of specific performance: (a) Are the goods

---

62 *Ibid.*, 181.

63 *Ibid.*, 932.

64 David Cohen, 'The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry' (1982) 32 U Toronto LJ 31 <http://digitalcommons.pace.edu/lawfaculty/428/> accessed 26 October 2020: *common law courts continue to award automatically specific performance to enforce contracts for the sale of land irrespective of whether the buyer has a special interest in performance.*

65 A Burrows, *Remedies for Torts and Breach of Contract* (2nd edn, 1994) 350-3.

66 Hand (n 8) 507-08; Carolyn (n 8) 662.

67 Qiao Liu and Wenhua Shan, '*China and International Commercial Dispute Resolution*' (2015 Brill) 14.

68 Ewan McKendrick and lain Maxwell, 'Specific Performance in International Arbitration' (2013) 1(2) CJCL 195, 202. *Alan Farnsworth makes the point that, beyond factors relating to historical path dependence, "[a] more rational basis [for U.S. courts' reluctance to grant specific relief] can be found in the severity of the sanctions available for enforcement of equitable orders.*

69 Randy E Barnett, 'Contract Remedies and Inalienable Rights' (1986) (4) SPP 179 <http://www.bu.edu/rbarnett/4socphilpol179.html> accessed November 09, 2020.

70 Henrik Lando, Caspar Rose 'On the Enforcement of Specific performance in Civil Law Countries' (2004) 24 IRLE 473, 484.

unique? (b) Did the claimant mitigate the damages? (c)Would damages suffice to repair the harm? (d) Did the contract stipulate specific performance as the primary relief? (e)Would an order of specific performance unduly interfere with the defendant's liberty or require unusual court supervision?

However, even within English jurisprudence, the view on damages being a primary remedy has not been consistent. The failure of the common law to recognise the interest of a party in the actual performance of the contract has been the subject of criticism.[71] The general understanding that adequacy of damages would disentitle a party from claiming specific performance is also not entirely correct. English courts have ordered specific performance when the remedy would "*do more perfect and complete justice than an award of damages*".[72]

Nonetheless, in common law, the remedy of specific performance is not available as a matter of right rather available at the court's discretion or more precisely, the judge's.[73] Whenever such performance is granted, the court orders the defendant to do specifically what was promised, else face sanctions, fines or contempt.[74] Hence, courts are reluctant to grant an order for specific performance where damages would be an adequate remedy for the claimant as such an order would require constant supervision, or there is need for precision in making the order. Hence, it is extremely difficult to obtain specific performance in a long-term contract, which requires a continuous service.[75] As a general rule, common law courts will not enforce personal service contracts to prevent involuntary servitude,[76] and thus, specific performance is excluded for employment contracts.[77] Similarly, if the specific

---

71 *Alfred McAlpine Construction Ltd.* v *Panatown Ltd.* (2001) 1 SCC 518 : (2000) 3 WLR 946, 973, 1101 and 1112.

72 Anson (n 19) 576.

73 *Quadrant Visual Communications Ltd* v *Hutchison Telephone UK Ltd.*, (1993) BCLC 442, 451:*The Judge can take accountof the wishes of the parties when exercising his or her discretion, but the view of the parties is not, and cannot be, decisive.*

74 Boghossian (n 49).

75 *Co-operative Insurance Society Ltd.* v *Argyll Stores (Holdings) Ltd.* (1998) AC 1: *This scenario was illustrated by the decision of the House of Lords, where the court refused to grant a specific performance order requiring the defendant store owner to perform its obligation under a 35-year lease to keep the shop open for retail trade for the duration of the lease. This was done in spite of the doubtful adequacy of the damages remedy to the claimant. It was left with the uncertain task of quantifying its losses over the remaining period of the lease. Much easier would have been the remedy of specific performance.*

76 *De Francesco* v *Barnum* (1890) 45 Ch D 430, *Additionally, courts are realistic enough to recognize that the relationship of mutual confidence and respect, which is central to many such contracts, is seldom capable of being quantifiably restored by court order. In R* v *Incorporated Froebel Educational Institute Ex p L* (1999) ELR 488 (08), *a claim against a fee-paying school for the reinstatement of a pupil who had been excluded for alleged misconduct was refused on this basis.*

77 The Trade Union and Labour Relations (Consolidated) Act 1992 s. 236.

performance would cause undue hardship to the breaching party, it is likely that it will be refused.[78] It is also necessary to point out that common law jurisdictions, except India,[79] rarely contain rules of execution that permit specific performance at the expense of the breaching party as are found in civil law systems.[80]

(b) Specific Performance under Civil Law

The remedy of specific performance, under civil law jurisdictions, is the primary remedy unless there is an equitable reason denying such relief.[81] In such jurisdictions, the obligatory bond is considered to have intrinsic value, and the focus is primarily on upholding the relationship of the parties. It is for this reason that only performance by the original contracting party will be regarded as being truly satisfactory,[82] subject to specific performance being possible and conscionable.[83]

In Germanic systems, the remedy of specific performance was so obvious that it was not even expressly contained in the civil codes.[84] The only instance when the same was not granted was when the performance was impossible. Under French law, a distinction is made between obligations to transfer property (*obligations de donner*) and obligation to do or not to do (*obligations de faire ou de nepas faire*).[85] In the latter case, the obligation automatically triggers an action for damages only,[86] especially in the case of personal services[87] since specific performanic is not possible.

In civil law jurisdictions, specific performance is carried out in the case of movable property with the aid of an official, who takes the property from a party in breach and gives it to the claimant.[88] Similarly, in France, obligations to transfer property are carried out through court officials by putting

---

78 *Duraisingam* v *S.R. Jagannathan,* 2015 SCC OnLine Mad 12742; *Jayakantham* v *Abaykumar,* (2017) 5 SCC 178; *K. Narendra* v *Riviera Apartments (P) Ltd.,* (1999) 5 SCC 77; *Wedgewood* v *Adams* [1843] 49 ER 958.

79 The Code of Civil Procedure 1908 (CPC) Order XXI Rule 30.

80 Boghossian (n 49).

81 Szladits (n 59), 213.

82 Rowan (n 55) 52.

83 Jan M. Smits, *Contract Law: A Compatative Introduction, Second Edition* (EEPL 2014) 205.

84 Kötz (n 58) 469; Treitel (n 42) 51.

85 The Law of Contract, The General Regime of Obligations, and Proof of Obligations, 2016 (French Civil Code), art 1142.

86 Kötz (n 58) 472; Treitel (n 42) 56.

87 Code CivilFrance art 1142 *c.f.* E. Allan Farnsworth (n 9) 930.

88 Kötz (n 58) 472; Treitel (n 42) 51; Code of Civil Proceudure 2005(ZPO) ss 883, 887, 888, 890.

the claimant in possession through force.[89] Delivery of goods or acts to be carried out by a person are enforced by permitting the purchase of replacement goods at the expense of a seller[90] or through a substituted performance at the expense of the party in breach.[91]

In France, specific performance is also carried out through the concept of *asterinte,* i.e., the payment of a fixed sum for each day or such other period that the party remains in default.[92] These judicial penalties[93] may be used for enforcement of negative injunctions. Similarly, enforcement of negative covenants is carried out through fine and imprisonment in Germany, and like the French system,[94] such fine is paid to the aggrieved party and not to the state.[95] Interestingly, Denmark has abandoned the remedy of specific performance due to the costs of enforcement and the need for constant supervision.[96]

It is important to note that once a party has claimed specific performance, the judges or the courts have limited latitude in deciding whether to grant the remedy or not.[97] In contrast to the considerations of a common law court, a judge, under civil law, would make rather narrow and objectively verifiable enquiries, namely, (a) Does the defendant have the concerned item? (b) Has the performance become impossible? (c)Is the defendant still capable of performing the contract? While the answers to these questions would end the scope of enquiry of a judge in a civil law jurisdiction, the same would mark the beginning of a more extensive analysis of the conduct and motivation of the parties, under common law.

Thus, under civil law, there are fewer bars to specific performance as compared to common law systems.[98] The doctrine of 'good faith' permits considerations of economic hardship.[99] The only considerations are that specific performance must be possible (in the practical and reasonable sense of the

[89] Code de procédure civile art 826 *c.f.* E. Allan Farnsworth (n 9) 930.
[90] Code Civil France art 1144 *c.f.* E. Allan Farnsworth (n 9) 930.
[91] Kötz (n 58) 472; Treitel, (n 42) 51; Code of Civil Proceudure, 2005(ZPO) ss 883, 887, 888, 890.
[92] Farnsworth (n 9) 930.
[93] Treitel (n 42) 59.
[94] Pargendler (n 53) 189.
[95] Kötz (n 58) 475; Treitel (n 42) 55.
[96] Pargendler (n 53) 167.
[97] Shael Harman, 'Specfic Performance: A Comparative Analysis' (1) (2003) 7 ELR 5, 25.
[98] Vanessa Mak, *PerforamanceOritented Remedies in European Sale of Goods Law* (Hart 2009) 99.
[99] *Ibid.*, 94; Bürgerliches Gesetzbuch (BGB) art. 275II *includes it as a factor that may limit the creditor's entitlement to specific performance. An analysis of Dutch law shows a similar development. In the Dutch case Multi Vastgoed/Nethou, it was held that, whilst a creditor, in case of delivery of non-conforming goods, in principle has a choice between nakoming and damages, in the exercise of his choice he is bound to the requirements of 'reasonableness and equiy'.*

word),[100] and must not be oppressive to the personal right of the defendant.[101] Further, the enforcement must be of an obligation in the contract directly and not that of a new obligation incidentally arising, as a result of the breach.[102]

Clearly, there are various points of convergence between the remedies of specific performance in common law and civil law systems. Consequently, even under civil law, specific performance is limited to instances where the claimant has a specific interest in performance, which is not satisfied by damages. Similarly, sometimes it is limited by procedural law, which does not provide for coercive measures to enforce performance of certain claims.[103]

IV. PART C

A. Comparing Specific Performance under the CISG, PICC and SRA

The 2018 Amendment can, at best, be characterised as the "Un-common Law"[104] as it recognises specific performance as a norm, despite the Indian Contract Act, 1872 ("**ICA**") making no reference to the concept of 'good faith'.[105] The obvious implication of this inconsistency is that the legal basis for the enforcement of promises continues to be a consideration under the ICA and yet the actual enforcement is under the concept of 'good faith'. Several such other inconsistencies or lacunae arise after the 2018 Amendment when compared to the CISG and the PICC. This is especially surprising since the 2018 Amendment was introduced to bring the SRA in line with the PICC.[106] This does not mean that the 2018 Amendment is a step in the wrong direction. An analysis of the hits and misses is provided below.

1. Steps in the Right Direction

---

100 Mak (n 99)97.

101 *Ibid.*, 105.

102 *Ibid.*, 120.

103 Kötz (n 58) 471.

104 Ajar Rab, 'Contract Law and Specific Relief: The "Un-Common" Indian Law' (*IJIEL Blog*, 25 November 2019) <https://ijiel.in/blog/f/contract-law-and-specific-relief-the-%E2%80%98un-common%E2%80%99-indian-law> accessed 20 December 2020.

105 Arpit Vihan, 'A Comparison of 'Doctrine of Good Faith' Under UNIDROIT PICC and the Indian Contract Act 1872' (2019) SSRN<https://ssrn.com/abstract=3389216> accessed 20 November 2020.

106 Expert Committee Report (n 3).

1. Removal of 'Volition of the Parties' (Personal Character)

Section 14(c) of the SRA provides that specific performance cannot be granted when "*a contract, which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms*". The amended provision omits the phrase "*or volition of the parties*" after 'personal qualifications' of the parties. The original rationale for such limitation is that contracts of personal character are excluded to protect the personal freedom of a contracting party and to limit disputes concerning the quality of the performance.[107]

Differing from the SRA, the PICC uses the phrase 'performance of an exclusively personal character', which is capable of varied interpretation. While common law denies any kind of specific performance in relation to services of personal character,[108] irrespective of whether the services are standard or not, civil law systems grant specific performance even to generic obligations.[109] Specific performance is denied only in case of non-generic obligations out of a service contract under German law.[110] Similarly, French law recognises the enforcement of 'to do' obligations with the aid of *astreinte*, unless the obligations are of a scientific or an artistic nature.[111]

The removal of the phrase 'or volition of the parties' aligns with the approach more to civil law jurisdictions as the general approach of denying specific performance is problematic. This is because such a remedy may be critical in commercial disputes such as rendering accounts, giving information, the conduct of an employee etc. Awarding only damages in such cases fails to adequately protect the interest of the claimant.[112] Hence, both civil law and common law systems grant specific relief such as injunctions to enforce negative covenants.[113] Likewise, awarding damages for the breach of negative covenant like restraint of trade is largely ineffective as such damages are extremely difficult to prove.[114] Therefore, the removal of the reference to the phrase 'volition of the parties' rightly narrows down the restrictions only to cases where personal qualifications are required from the performance of a contract.

---

107 UNIDROIT art 7.2.2.

108 Dan B Dobbs, *Dobbs Law of remedies: Damage, equity restitution* (2nd edn,. WPC 1993) 808; Gareth Jones and William Goodhart, *Specific Performance* (2nd edn,London 1996) 169.

109 Schwenzer (n 38) 299.

110 ZPO s 888 Ab s 2.

111 Schwenzer (n 38) 299.

112 *Ibid*., 300.

113 Rajasi Clerk, 'Civil Law And Common Law Systems Grant Specific Relief Such As Injunctions To Enforce Negative Covenants' (2016) 38 (1) JILI 83-89;

114 Schwenzer (n 38) 300.

Under Article 7.2.2 (d) of the PICC, only specific performance of obligations 'to do something' are barred and not those of 'to not to do something'.[115] Further, if the obligation to perform something can be fulfilled by a member of an obligated organisation, the same does not remain 'exclusively personal', neither do the tasks that can be delegated.[116] Given that the SRA does not use the phrase 'exclusively', a similar interpretation ought to be afforded to Section 14(c) of the SRA, post the 2018 Amendment.

2. Recognition of Partial Performance

Under Section 56 of the ICA, when substantial performance is possible, the contract cannot be said to be frustrated.[117] From this perspective, Indian law envisages partial performance of the contract. Section 12 of the SRA deals with this issue more directly. As per Section 12 of the SRA, the court may, as per its discretion, award specific performance of a part of the contract, and order compensation for the part that remains unperformed (similar to the duality of remedies allowed under the CISG).[118] However, this cannot be claimed by the buyer as a matter of right, which seems anomalous after the 2018 Amendment to Section 10 of the SRA.

It is interesting to note that the PICC is silent on partial specific performance. However, the domestic law equivalents such as section 275 of the German Civil Code ("**BGB**") restrict a claim for performance *in so far as it is impossible*. Even under the CISG the right to claim partial performance has not been addressed rather may be inferred from the fact that a claim for damages and specific performance may run concurrently.[119] However, when the seller only performs a part of the contract on her own accord, such as partial delivery of the goods, she will have breached the contract. In such a case, the delivery of the missing part can be claimed under Art. 46(1).[120] On the contrary, the delivery of goods, other than those agreed upon between the parties, will not be considered as a non-delivery subject to the remedy of specific performance under Art. 46(1). Rather, it would be considered as a

115 Official Comment to the PICC 249.
116 Vogenauer (n 22) 795.
117 *Gian Chand* v *York Exports Ltd.*, (2015) 5 SCC 609.
118 CISG art 61; Christoph Brunner and Olivier Luc Mosimann, 'Article 61 [Remedies Available to Seller]' in Christoph Brunner and Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Kluwer Law International 2019) 431-436.
119 *Ibid.*
120 J Honnold, *Documentary History of the Uniform Law for International Sales* (Kluwer Law and Taxation Publishers 1989) 428.

non-conforming delivery subject to the remedy of substituted delivery under Art. 46(2).[121]

The SRA, on the other hand, provides that if substantial performance is possible, and a contract is not frustrated, partial specific performance may be granted.[122] In fact, Section 12 (3) of the SRA goes a step further than the PICC and requires that the aggrieved party should identify and relinquish the right to the remaining portion of the performance.[123]

3. The Grey Areas

(a) Claims for Pre-Contractual Negotiations

A collateral implication of the acceptance of 'good faith' or the 'moral obligation'[124] maybe that pre-contractual negotiations would become admissible and possibly binding on the parties since there would be a moral obligation to negotiate in good faith.[125]

The common law refuses to recognise an obligation, arising out of pre-contractual negotiations, because such an obligation is too indefinite to be enforceable, and there is no way to calculate expectation damages as the terms of the contract might not have been finalised. However,the US courts have enforced such agreements where significant terms have been agreed upon,[126] calculating loss on the basis of reliance and loss of opportunity rather than loss of expectation.[127]

Given the implied acceptance to the 'moral obligation' of upholding contracts, post the 2018 Amendment, it may be possible to bring claims on pre-contractual negotiations. This would also affect the rule on parole evidence, i.e., once a contract is reduced to writing, no other evidence

---

[121] C Massimo Bianca & Michael Joachim Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987) 336.

[122] *Gian Chand* v *York Exports Ltd.*, (2015) 5 SCC 609 paras 13,14.

[123] *Shanker Singh* v *Narinder Singh*, (2014) 16 SCC 662 paras 24, 28, 29.

[124] Expert Committee Report (n 3) 50.

[125] T Sourdin, 'Good Faith, Bad Faith? Making an Effort in Dispute Resolution' (2012) Australian Centre for Justice Innovation, Good Faith Paper 1 <http://classic.austlii.edu.au/au/journals/DICTUMVicLawSJl/2012/4.html> accessed 26th March 2021; *United Group Rail Services Ltd.* v *Rail Corpn. New South Wales,* (NSW) (2009) NSWCA 177 : (2009) 74 NSWLR 618, 637-39; *Strzelecki Holdings Pty Ltd. v Cable Sands Pty Ltd.* (2010) WASCA 222 : (2010) 41 WAR 318paras 45, 47, 64, 109; Leon E. Trakman and Kunal Sharma, 'The Binding Force to Negotiate in Good Faith' (2014) (73)3 CLJ 598, 604, 611.

[126] Farnsworth (n 9) 918.

[127] *Ibid.*

may be led to show a contrary intention.[128] Civil law jurisdictions permit pre-contractual negotiations as evidence in order to satisfy the threshold of 'good faith'.[129] Since India has also aligned itself to this approach, the 2018 Amendment may result in the subversion of the rule of parole evidence and the admissibility of pre-contractual negotiations as evidence.

(b) The Discretion under the Sale of Goods Act, 1930

Specific performance is also addressed in Section 58 of the Sale of Goods Act, 1930 ("**SOGA**"). Despite the amendment to the SRA, Sec. 58 of the SOGA, still leaves this remedy to the discretion of the court.[130] While this would not practically affect the right to specific performance under the SRA, since Sec. 58 starts with, "*Subject to the provisions of Chapter II of the Specific Relief Act*", this should nonetheless be amended to bring it in line with the pro-specific performance approach of the SRA. This would also avoid any possible confusion since Sec. 58 of the SOGA and Section 10 of the SRA, before the amendment, have often been read in conjunction.[131] In fact, now that the SRA has largely been brought in line with CISG, India might as well ratify the CISG.[132] This would replace the SOGA and also correct the above mentioned inconsistency.

(c) Inconsistency of Remedies

Section 10 of the SRA recognises that the remedies will be accumulated because of the use of the language "in addition to, or in substitution of". Internationally, a claim for full damages and specific performance are incompatible, except clauses surviving termination.[133] Only damages for delay or

---

128 *Premanand Naik* v *Fabrica De Mandur Church*, 2020 SCC Online Bom 833; *Mukesh* v *Maya*, 2013 SCC Online Bom 825.

129 Nadia E Nedzel, 'A Comparative Study of Good Faith, Fair Dealing and Precontractual Liability' (1997) 12 TECLF 97, 98; Gregory J Marsden and George J Siedel, 'The Duty to Negotiate in Good Faith: Are BATNA Strategies Legal?' (2017) 14 BBLJ 127, 133.

130 The Sale of Goods Act 1930 (SOGA) s 58: "*Subject to the provisions of Chapter II of the Specific Relief Act, 1877 (1 of 1877), in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.*"

131 *Union of India* v *Prem Kumar Lihala* 2005 SCC Online Del 934 paras 12-13; *Embassy Property Developments Ltd.* v *Jumbo World Holdings Ltd.*, (2013) SCC Online Mad 1795 para 32.

132 Ajar Rab & Siddharth Jain, 'Can the Adoption of the CISG Save the Commercial Relationship of Parties in India? (*OBLB* 2020)<https://www.law.ox.ac.uk/business-law-blog/blog/2020/05/can-adoption-cisg-save-commercial-relationship-parties-india> accessed 9August 2020.

133 Vogenauer (n 22) 825.

consequential damages or partial termination of the contract are compatible.[134] However, due to the broad language in Section 10 of the SRA, it is now unclear whether it is possible to claim full damages along with specific performance. A possible reference may be found in Section 12(2) for deficiency. However, in some cases, damages would be inconsistent with specific performance. For example, the damages for non-delivery based on the difference between the contract and the market price. In such cases, a claim for damages would lie only if the contract is avoided.[135]

Therefore, the point of time at which a damages claim is brought is critical. In civil law jurisdictions, such point of time is decided using the general principles of good faith.[136] Similar principles are provided under Section 21(1) of the SRA. The broad idea is that damages, along with specific performance, should not result in unjust enrichment of the claimant, and the court will be guided by the principle specified in Section 73 of the ICA.

4. *The Drawbacks*

(a) Lack of Choice

After the 2018 amendment, specific performance is a statutory right and not a discretionary power granted to the courts as Section 10 of the SRA provides "*specific performance of a contract shall be enforced by the court*".[137] This is similar to article 7.2.2 of the PICC, which provides that a court "*must order performance*".

However, a vital point of divergence between the SRA and the PICC and the CISG is that under the PICC[138] and the CISG,[139] the claimant *may* require performance. Once a party opts for performance, the court has no discretion whether to grant the remedy or not.[140] On the contrary, post the 2018 Amendment, the SRA gives no such discretion and makes specific

[134] *Ibid*; CISG also permits concurrence of the remedies of damages and specific performance in arts 45(2) and 61(2).

[135] Treitel (n 42) 50-51.

[136] P Schlechtriem, *Commentary on the UN Convention on the International Sales of Goods CISG* (2nd edn) 378.

[137] The Specific Relief Act 1963 (SRA) s 10: 10. Specific performance in respect of contracts.—The specific performance of a contract shall be enforced by the court subject to the provisions contained in s 11(2), s 11, s 14, s 16.

[138] UNIDROIT art 7.2.1.

[139] CISG arts 46(1) & CISG art 62.

[140] Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat / UN DOC. A/CONF. 97/5, (1978) (Secretariat's Commentary) art 26, para 4.

performance compulsory, except as provided under Section 11(2), 14 and 16 of the SRA.

The option to require performance is not surprising since a party will normally turn to the international market only when it is unable to find the goods in its local markets or because the goods in the local market are not of good quality-[141] thus making damages a less preferred remedy. The only restriction to a claim for specific performance under the CISG is provided under Article 46(1) of the CISG, which provides that the claim shall be denied when the injured party has "*resorted to a remedy which is inconsistent*" with specific performance. These may be in the form of avoidance of contract[142] or price reduction[143] but does not include a claim for damages.[144] Thus, damages can run consistently with a claim for specific performance in placing the aggrieved party into as good a position as it would have been, had the contract been performed as agreed.[145]

The mandatory language contained in section 10 of the SRA provides no choice to the claimant to select the most appropriate remedy or to switch remedies if specific performance is ineffective.[146] A logical consequence of such mandatory language is that the SRA does not provide the opportunity to the breaching party to cure the non-performance, unlike the PICC.[147] Similarly, the use of such mandatory language ignores the possibility that parties opt for waiver of specific performance, in advance.[148] Further, the use of such mandatory language ignores the possibility of circumstances where a party may want to release itself from a contract knowing fully well that she may not be able to fulfil the same. In such situations, it would be unreasonable to insist on specific performance of the contract.[149] Thus, courts in the US and UK would most likely award only damages in such cases.[150]

Claims to unlimited performance of monetary obligations would lead to unjustified results where the goods have not been delivered, or the work is not yet completed.[151] More importantly, injured parties seldom claim specific

---

141 Boghossian (n 49).
142 CISG art 49, read with CISG art 81(1); CISG art 64.
143 CISG art 50.
144 CISG arts 45(2) & 61 (2).
145 Jussi Koskinen, CISG, 'Specific Performance and Finnish Law' (1999) <https://www.cisg.law.pace.edu/cisg/biblio/koskinen1.html#> accessed 10 October 2020.
146 Unlike UNIDROIT art 7.2.5.
147 UNIDROIT art 7.1.4.
148 Vogenauer (n 22) 890.
149 Schwenzer (n 38) 293.
150 *Hounslow London Borough Council* v *Twickenham Garden Developments Ltd.*(1971) Ch 233 : (1970) 3 WLR 538.
151 Schwenzer (n 38) 295.

performance since avoidance, cover and price reduction are more time and cost-efficient.[152] Hence, section 2 -709, paragraph 1 of the UCC requires delivery of goods or passing of the risk before requiring the payment of the price.[153] Even civil law jurisdictions such as Germany,[154] Switzerland,[155] and France[156] permit cancellation of a contract before the work is completed.

Post the 2018 Amendment, courts have no such leeway to make room for such considerations and will have to grant specific performance mandatorily.

(b) Willingness to Perform

A curious construct largely absent from the PICC, CISG or other jurisdictions, is that a party claiming specific performance must prove under Section 16 "*who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him*". The phrase 2018 Amendment substituted the phrase "*who fails to aver and prove*" with "*who fails to prove*". Further, the aggrieved party "*must prove performance of, or readiness and willingness to perform, the contract according to its true construction.*".[157] The rationale for this burden of proof seem counter-intuitive to the Expert Committee's view that specific performance should be the norm to foster commercial transactions.[158] It is rather illogical that an aggrieved party should at first instance prove that such party has always been capable and willing to perform her own duties under the contract. Such proof is a question of fact and not law.[159] Further, such willingness must be shown not only up till the time of filing the claim, but also at all times from the time of the contract till the suit and up to the decree.[160]

The Drafting Committee of the CISG specifically noted that incorporating such a threshold would "unjustifiably restrict" the buyer's right to require

---

152 Honnold (n 121) 302-303.

153 The Revision of Uniform Commercial Code Article 2- Sales, 1977 (UCC Draft) S. 2-822(a); Patrick Selim Atiyah, *The Sale of Goods* (8th edn. London, 1990) 471.

154 Schwenzer (n 38) 294.

155 *Ibid.*

156 Code Civil art 1794, *c.f. Ibid.*

157 The (unamended) Specific Relief Act 1963; Explanation to s. 16 (c) *the phrase used was "must aver"*; *Mehboob-ur-Rehaman* v *Ahsanul Ghani,* (2019) 19 SCC 415 : 2019 SCC Online SC 203; *Umabai* v *Nilkanth Dhondiba Chavan*, (2005) 6 SCC 243; *Vijay Kumar* v *Om Parkash*, (2019) 17 SCC 249 : 2018 SCC Online SC 1913.

158 Expert Committee Report (n 3) 66.

159 *Kamal Kumar* v *Premlata Joshi* (2019) 3 SCC 704 para 6-10.

160 *Gomathinayagam Pillai* v *Palaniswami Nadar*, AIR 1967 SC 868 : (1967) 1 SCR 227 para 6; *J.P.Builders* v *A. Ramadas Rao*, (2011) 1 SCC 429 para 27.

contract performance.[161] Similarly, the standard for performance, under the PICC, is strict. It does not require the demonstration of fault or blameworthy behaviour.[162] Fundamental breach does not require notice, whereas non-fundamental breaches may require notice before termination.[163]

The saving grace, if any, is a step in the right direction with the change in Section 10 of the SRA. Before the 2018 Amendment, under Section 10 of the SRA, the buyer had the burden of proving that the good is not easily obtainable in the market, as a pre-condition to demanding specific performance.[164] After the 2018 Amendment, this requirement has been omitted and is thus, no longer required.

(c) Removal of the Inadequacy Test

Section 14(a), before the 2018 amendment, provided that specific performance will not be granted in cases where compensation would be adequate,[165] an approach followed across jurisdictions.[166] Thus, damages were treated as the primary remedy, and specific performance was the exception. This was in line with the "efficient breach" theory,[167] according to which damages would supposedly put both parties in a better economic position as compared to specific performance.

The discretionary power of the court under Section 20 and the restrictive "inadequacy test"[168] under section 14(a) of the SRA were subsequently removed by the 2018 Amendment. Now, in line with the Statement of Objects and Reasons of the 2018 Amendment, specific performance is the rule.[169] This aligns with the approach under the PICC and CISG, and the principle

[161] Committee Report of the Draft Convention on the International Sale of Goods, in Report of the United Nations Commission on International Trade Law 10th Session (1977), 32 UN GAOR Supp (No. 17) annex 1, U.N. Doc. A/32/17 para 239.

[162] Kötz (n 58) 515; Treitel (n 42) 20.

[163] Vogenauer (n 22) 830.

[164] The (unamended) Specific Relief Act 1963 s 10, Explanation (ii)(a) *where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market."*

[165] The (unamended) Specific Relief Act 1963 s 14(1).

[166] *See generally* Alan Schwartz, 'The Case for Specific Performance' (1979) (89)2 YLJ 271-306; Ingeborg Schwenzer (n 38).

[167] Rab (n 133).

[168] Nilima Bhadbhade, 'Exceptional Nature of Specific Performance in the Indian Law' (2013) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2238909> accessed September 20, 2020.

[169] The Specific Relief Act (Amendment 2018), *The Statement of Objects and Reasons, expressly reads, "(3) In view of the above, it is proposed to do away with the wider discretion of courts to grant specific performance and to make Law, specific performance of contract a general rule than exception subject to certain limited grounds."*

of *pacta sunt servanda* as the expert committee report makes an explicit reference to the "moral obligation" to honour contractual promises.[170]

However, as noted earlier, civil law courts and international instruments,[171] continue to give weight to considerations relating to an award of damages. In such jurisdictions, specific performance is the primary remedy, subject to the consideration that an award of damages would be an adequate remedy. Thus, a claimant is entitled to the remedy of specific performance, unless the defendant proves, and the court comes to the conclusion that an award of damages is an adequate remedy.

Earlier, under the common law and the unamended Section 10 of the SRA, the possibility of claiming specific performance itself was barred. Hence, a claimant would have had to prove why an award of damages would be inadequate relief and only then the court would consider granting the remedy of specific performance. Effectively, this threshold placed the burden of proof on the claimant.

Therefore, while removing the inadequacy test from the statute was a much-needed step, the removal of such a consideration altogether may result in more enforcement problems, especially when parties would have been better off not incurring the high costs of enforcement. It may have been better to have given primacy to specific performance, and shifted the burden on to the defendant to prove why an award of damages would be adequate relief in the particular facts and circumstances. Given that the discretion of the courts has been taken away, and specific performance is no longer a remedy under equity, courts will face considerable hurdles to take recourse to equitable considerations of justice, equity, good conscience or fairness in order to justify why a mandatory statutory right to performance is not being granted to a claimant.

(d) Substituted Performance or Cover Transactions

The 2018 Amendment and the Expert Committee Report take an inconsistent stand by expressly removing the 'inadequacy test' but making substituted performance discretionary, instead of mandatory. The result is the incongruous position of law that while the aggrieved party may effectively arrange for a substitute transaction by an award of damages, but chooses not to do so, the courts *shall* grant specific performance.[172]

---

[170] In fact, the Expert Committee Report (n 3), para *11.5.2: highlights the "moral obligation to honour contractual promises.*

[171] UNCITRAL Model Law art 17(2)(a).

[172] SRA s 10.

The 2018 Amendment has other disastrous consequences as well. Section 41 (h) of the SRA continues to provide that the specific relief of injunction may be refused when "*an equally efficacious relief can certainly be obtained by any other usual mode*". Therefore, given the possibility of a substitute transaction, the court will not grant an injunction but has to mandatorily grant specific performance of the contract, if the aggrieved party does not opt for a substituted transaction.

In contrast, if one invokes the right to a cover transaction, the remedy of specific performance cannot be granted under Article 7.2.2 (c) of the PICC. More importantly, as is the case in most civil law jurisdictions,[173] if the defaulting party can provide that a replacement or cover transaction is reasonably possible, specific performance will not be awarded. However, civil law jurisdictions usually make this an option for the aggrieved and not a mandatory exception.[174]

Under the PICC, a cover transaction is a mandatory provision and not a discretion at the option of the aggrieved. Hence, there is no explicit provision for a reasonable notice before pursuing a cover transaction. Though in practice, the right must be exercised without delay if the possibility exists. If the defaulting party can prove that a reasonable cover transaction was possible, then not only will specific performance not be granted, rather even additional damages may be refused for the failure to mitigate damages.[175]

Unlike the PICC, Section 20 grants the right to obtain substituted performance and a claim to costs from the defaulter.[176] It is pertinent to note that the remedy is at the discretion of the aggrieved,[177] exercisable after a thirty-day notice, in writing.[178] In fact, the 'inadequacy test' under the unamended SRA and generally under common law, proceeds on the assumption that a market economy ought to enable the claimant to arrange for a substitute transaction.[179] Therefore, an exception was made for land, which could not, under this economic rationale, be substituted, even by an award of damages.[180]

---

173 Civil Code of Netherlands (Dutch Civil Code) arts 7:36 and 7:37;French Civil Code art 1144.
174 Lando (n 71) 485.
175 UNIDROIT art 7.4.8.
176 SRA s 20 (1).
177 SRA s 20 (1): uses the phrase "*shall have the option of substituted performance*".
178 SRA s 20 (2).
179 Farnsworth (n 9) 931.
180 *Ibid*.

Thus, in case of fungible goods or standard services, a claimant may opt for substituted performance, instead of insisting on specific performance,[181] even though common law courts and Swiss law[182] in such circumstances, would rather protect the interest of claimant by an award of damages.[183] However, with the removal of the inadequacy test, courts in India would be mandated to grant specific performance even in instances where the grant of damages would have been a preferable option to protect the interest of the claimant.

(e) The Misplaced Criteria of Determinable Contracts

The word 'determinable' under Section 14(d) of the SRA means 'a contract which can be put to an end'.[184] The court explained that "*the Court shall not go through the ideal ceremony of ordering the execution of deed or instrument which is revocable and ultimately cannot be enforced as specific performance cannot be granted of a determinable contract.*"[185] Thus, all revocable deeds, voidable contracts[186] and contracts that are terminable on a particular event[187] would fall withing 'determinable contracts'.[188] Ironically, the court referred to an English case,[189] which had recognised the possibility of terminating a contract by reasonable notice. Therefore, every contract, by its very nature, is determinable.[190]

Unfortunately, the leading view about contracts being 'determinable' is a confusion between contracts terminable at the occurrence of an event and contracts being terminable unilaterally without assigning any reasons. The genesis of this confusion is the lack of clarity in the judgement in *Indian Oil Corporation Ltd.* v. *Amritsar Gas Service,*[191] which failed to distinguish

---

181 SRA s 20; Schwenzer (n 38) 297.

182 Code of Civil Procedure Basel s 251.

183 Farnsworth (n 9) 860.; Dobbs (n 109)169; Jones (n 109) 32; Treitel, (n 42) 64; Steven Walt, 'For Specific Performance Under the United Nations Sales Convention' (1991) 26 TILJ 211, 224.

184 *Turnaround Logistics (P) Ltd .* v *Jet Airways (India) Ltd.*, 2006 SCC Online Del 1872 para 27.

185 *Ibid.*

186 *Indian Oil Corpn. Ltd.* v *Bhagwan Bala Sai Enterprises* 2013 SCC Online Mad 1445.

187 *Indian Oil Corpn. Ltd.* v *Amritsar Gas Service* (1991) 1 SCC 533; *Jindal Steel and Power Ltd.* v *SAP India (P) Ltd.*, 2015 SCC Online Del 10067; *Spice Digital Ltd.* v *Vistaas Digital Media (P) Ltd.*, 2012 SCC Online Bom 1536.

188 *Turnaround* (n 185)27.

189 *Staffordshire Area Health Authority* v *South Staffordshire Waterworks Co.*, (1978) 1 WLR 1387 : (1978) 3 All ER 769.

190 *Rajasthan Breweries Ltd.* v *Stroh Brewery Co.*, 2000 SCC Online Del 481; *Inter Ads Exhibition (P) Ltd.* v *Busworld International Coop. Vennotschap Met Beperkte Anasprakelijkheid,* 2020 SCC Online Del 351.

191 *Indian Oil Corpn.* (n 187).

between two termination clauses, i.e., one which provided for a notice without assigning any reason and the other which provided for termination on the occurrence of certain specified events.[192] The said judgement has been followed subsequently and applied to situations when the contract only contained a termination clause on specified events.[193]

A more lucid interpretation was referred to in *Narendra Hirawat* v. *Sholay Media,*[194] where the court held that the word 'determinable' means "at the sweet will of a party", without any breach, eventuality, or circumstance, i.e., a unilateral right to termination without assigning or having any reason to terminate.[195] Therefore, the court held that a license is not determinable as the contract could be terminated only on the occurrence of a breach. Since the determination depends on an eventuality, which may or may not occur, the contract cannot be held to be determinable.[196] The court distinguished the leading authorities[197] and held that in all three cases, there was a clause in the agreement, which permitted termination of the contract by a notice of thirty days without assigning any reason. Hence, such contracts, which can be terminated by either party (such as a partnership at will),[198] without any reason, are by their very nature 'determinable'.[199]

The effect of this misplaced jurisprudence is that an injunction can never be granted when the contract is determinable as Section 41(e) of the SRA denies the grant of an injunction when the contract cannot be specifically enforced. This excludes a majority of commercial contracts and runs afoul to the mandate of "minimum interference" by courts as suggested by the Expert Committee.[200] Surprisingly, the Expert Committee Report does not even make a mention of 'determinable contracts,' probably because such a requirement is absent in every other jurisdiction. At best, its roots can be traced to the Specific Performance Act, 1877, which denied specific performance when the contract was 'revokable'.[201] Hence, the rationale for contin-

---

[192] *Jumbo World Holdings Ltd.* v *Embassy Property Developments (P) Ltd.*, 2020 SCC Online Mad 61 para 23; *KSL Industries Ltd.* v *National Textiles Corpn. Ltd.*, 2012 SCC Online Del 4189 para 77.

[193] *Gujarat Chemical Port Terminal Co. Ltd.* v *Indian Oil Corpn. of India*, 2016 SCC Online Bom 2605.

[194] *Narendra Hirawat and Co.* v *Sholay Media Entertainment (P) Ltd.*, 2020 SCC Online Bom 391.

[195] *Ibid.,* para 8.

[196] *Ibid.*

[197] *Amritsar Gas Service* (n 188); *Jindal Steel* (n 188); *Spice Digital* (n 188).

[198] *Jumbo World*(n 193)para 23.

[199] *T.O. Abraham* v *Jose Thomas*, 2017 SCC Online Ker 19872 para 18.

[200] Expert Committee Report (n 3).

[201] *T.O. Abraham* (n 200)18.

uing with the exception to performance is quite unclear, though the result is effectively leaving room to defeat the objectives of the amendment.s

(f) The Blanket Ban on Supervision by Courts

Section 14 (b) of the SRA denies the grant of specific performance if the enforcement of the contract would require a continuous duty which the court cannot supervise.[202] This is rooted in the concerns of practicality and efficiency.[203]

However, the impossibility of court supervision should not be a ground to deny relief.[204] If a court can determine with sufficient precision what the defendant must do, any breach would be punishable by contempt of court.[205] A distinction can be drawn between achieving a result and carrying on an activity[206] as it is difficult to determine the level of trade, the areas of trade or the kind of trade.[207] However, the enforcement may take place by the grant of an injunction.[208]

Under the PICC, the rule exempting grant of specific performance would extend to situations where the enforcement of the performance is burdensome for the court.[209] Nonetheless, it is relevant to highlight that under the civil law, the burden to supervise is on the aggrieved party, whereas in the common law, the burden is on the courts itself.[210] Given any explicit limitation in Section 14 of the SRA, the courts in India may well direct independent third parties or the claimant to supervise the performance, with regular reports to the court. To deny relief only on the ground of burdensome supervision, without damages providing adequate relief, largely fails to protect the interest of the aggrieved party.

(g) Lack of Exceptions

The PICC provides for five exceptions to specific performance namely, (a) impossibility; (b) unreasonable burden,i.e., hardship; (c) cover transactions or substituted performance; (d) personal character; and (e) request within a

[202] *Shantidevi P. Gaikwad* v *Savjibhai Haribhai Patel*, (2001) 5 SCC 101 paras 58-60.
[203] *Ibid.*
[204] *Shiloh Spinners Ltd.* v *Harding*, 1973 AC 691 724 : (1973) 2 WLR 28.
[205] Anson (n 19) 579.
[206] *Co-operative Insurance Society* (n 76).
[207] *Mortlock* v *Buller* (1804) 10 Ves 292; *Walters* v *Morgan* (1861) 45 E.R. 1056 (1861) 3 De GF & J 718; *Sang Lee Investment Co.* v *Wing Kwai Investment Co.*, (1983) 127 SJ 410.
[208] Anson (n 19) 581.
[209] UNIDROIT art 7.2.2.(b).
[210] UNIDROIT art 7.2.2 (Illustration b).

reasonable time. Surprisingly, despite the reliance on the PICC by the Expert Committee, Indian law only recognises the exception contained in (c) and (d).

5. Impossibility

An important and obvious, yet a missing aspect under the SRA, is the exemption from performance on account of the impossibility of performance. Under Article 7.2.2 (a) of the PICC, specific performance may be refused when there is an impossibility in fact or law, e.g. the failure to obtain necessary statutory permission for a service.[211] It is necessary to note that such impossibility only removes the remedy of specific performance and does not frustrate the contract as a whole.

On the contrary, Art. 79 of the CISG only exempts the party from liability to pay damages. All other remedies are still available to the injured party.[212] Thus, impossibility does not seem to excuse the breaching party from specific performance. However, some scholars advocate for an exemption from performance in line with the *spirit* of Art. 46(1).[213]

This has not been addressed in SRA, despite the recommendation by the Expert Committee.[214] Similar to the CISG, there is no provision expressly exempting specific performance by reason of *force majeure*. In fact, the Expert Committee on the 2018 Amendment, recognised that a change in circumstances should *not* limit the right to specific performance.[215]

The closest equivalent is the explanation provided in Section 12 of the SRA, which provides that '*a portion of the subject matter existing at the date of the contract as ceased to exist*'. However, this aligns more with Section 56 of the ICA, which pertains to the frustration of contracts as a whole and the discharge of all obligations and all remedies[216] rather than an exemption from only performance. A harmonious interpretation can be made and an exemption on account of impossibility may be read into Section 12based

211 UNIDROIT art 7.2.2 (Comment 3 a).

212 Secretariat's Commentary (n 141) art 79 para 8.

213 Schlechtriem (n 137) 378: "*It would be inconsistent to allow a buyer to require performance where performance is prevented by an impediment which, by virtue of Article 79, the seller is not required to overcome.*"

214 Expert Committee Report (n 3) para 12.2.2-12.2.3: recommending adoption of UNIDROIT art 7.2.2 and Principles of European Contract Law art 9:102, *both of which account for impossibility or unreasonable burden of performance.*

215 Expert Committee Report (n 3) 11: "*Rise or fall in prices or market value or change in circumstances after entering into the contract shall not be a factor for refusal of relief.*"

216 *Satyabrata Ghose* v *Mugneeram Bangur & Co.*, AIR 1954 SC 44.

on the explanation as Section 12 of the SRA refuses specific performance. However, such an interpretation would only extend to the ceasing of the 'subject matter' of the contract and not other circumstances or events, which may render performance impossible.

6. Hardship or Unreasonable Burden

It is rather surprising that while the Expert Committee made explicit reference to Article 7.2.2 of the PICC, it failed to recommend an exemption from performance, if the result would be unreasonably onerous on the party required to perform. Under the PICC, such an exemption is extended to cover circumstances *at the time of the Court's decision* that would make performance unreasonably burdensome or expensive according to principles of *good faith and fair dealing.*[217]

It is necessary to note that some scholars[218] prefer using the standard of 'unreasonably expensive' as a more objective economic assessment of the cost to the defaulter versus the benefit to the aggrieved. An alternative standard is that of 'change in equilibrium'[219] or commercial uniqueness.[220] If the circumstances give rise to hardship, the defaulter is entitled to request renegotiation under Article 6.2.1 of the PICC, notwithstanding the obligation to perform the remaining. The SRA affords no such options.

Art. 7 of the CISG requires provisions to be interpreted in good faith. Thus, although Art. 46 provides specific performance to the buyer as a matter of right, this may be constrained by Art. 7: a) If the seller proves that the buyer is seeking this remedy to inflict undue pain on the seller;[221] or b) The remedy was claimed only after a delay that permitted the buyer to speculate at the expense of the seller – as when a buyer seeks to compel delivery (rather than damages) only after a sharp rise in the market.[222] This may also be found when the cost of performance is disproportionate to the benefit received.[223] However, since the good faith restriction is not explicit, there is

217 Official comment to PICC 245.
218 Vogenauer (n 22) 893.
219 *Ibid.*, 895.
220 UCC s 2-716(1).
221 A Kastely, 'The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention' (1988) 63 WLR 607, 619.
222 Albert H Kritzer, 'Guide to Practical Applications of the United Nations Convention on the on Contracts for the International Sale of Goods' (1994 Boston) 383.
223 J Klein, 'Good Faith in International Transactions' (1993) 15 LLR 115, 131.

still scope for parties to abuse the discretion provided to them by the CISG scheme.[224]

While courts in India have in the past refused to grant specific performance in similar circumstances, the same may not be possible now given the mandatory language contained in Section 10 and the lack of an explicit exception, on account of hardship or unreasonable burden.

7. Reasonable Time

Article 7.2.2 (e) of the PICC provides that specific performance should be claimed within a reasonable time, failing which the remedy of specific performance may be barred, with other remedies still surviving.[225] The right subsists not from the actual discovery of the breach, rather the expected discovery of the breach.[226] Further, parties may contractually increase or decrease the import of 'reasonable time'.

Indian law does not address the issue of raising a claim within a reasonable time once the claimant becomes aware of the non-performance. Therefore, a claim, as per the Limitation Act, 1963, may be brought within three years of the non-performance.[227] Parties can neither limit[228] nor expand[229] this period. Though an implied limitation on the ground of laches would be recognised by courts,[230] it remains unclear when the period would commence as there exists no specific duty to examine. The closest similarity would be the rule of *caveat emptor*, with respect to the sale of goods.[231]

Permitting a party to bring a claim of specific performance, beyond a reasonable time, may destroy the entire commercial viability of the contract, drastically shift the equilibrium of the parties, and make performance excessively burdensome.

---

[224] Disa Sim, 'The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods' (2001) <https://www.cisg.law.pace.edu/cisg/biblio/sim1.html#196> accessed 10 November 2020.

[225] Dutch Civil Code art 6:89 is anexception where all remedies will be exhausted.

[226] CISG art 38; BGB s. 377; Dutch Civil Code art 7:23.

[227] The Sales of Goods Act 1930 (SOGA) s 54.

[228] ICA s 28.

[229] The Limitation Act 1963 (LA) s 3.

[230] *Consolidated Engg. Enterprises* v *Irrigation Department*, (2008) 7 SCC 169.

[231] SOGA s 16.

(a) No Distinction of Type of Obligations

An issue closely tied to hardship and commercial viability is the lack of distinction between the type of obligations. Despite the 2018 Amendment, an issue which is still under a cloud is whether the right to performance extends to repair and replacement. Article 7.2.3 of the PICC explicitly provides for the right to require repair and replacement. Therefore, the right to require performance applies to the defective performance of monetary obligations, e.g., payment in the wrong account and non-monetary obligations.[232] However, this view is criticised from an economic point of view. The Principles of European Contract Law, therefore, extend the right to performance only in cases of defective performance of non-monetary obligations,[233] i.e., obligations 'to deliver' or obligations 'to do'. The remedy may comprise repair, replacement, or any other measure.[234]

The civil law recognises specific performance to cure defects in generic goods,[235] repair in contracts for work and services, if undue costs arise.[236] The CISG also adds a threshold of reasonability, while considering whether a remedy ought to be granted or not.[237] As per Arts. 47(1) and 63(1) of the CISG, the buyer and seller respectively may set an additional time for the performance of obligations. During this time, known as the *Nachfrist* period, she may not require specific performance.[238] Even the court can grant a grace period for performance.[239]

This issue is not addressed under Sec. 11(2), 14, and 16, which are the recognised exceptions to specific performance under Sec. 10. It is doubtful whether the right to provide additional time for performance can be claimed under Indian law.

Further, Art. 46(1) of the CISG does not make any distinction between different types of obligations, rather only mentions that the seller may be required to perform "his obligations". This may be in the form of completion of delivery, or delivery of conforming goods.[240] However, as per Art. 41, the seller has an obligation to deliver goods that are free from third party claims. It is unclear whether the obligation to deliver unencumbered

[232] Schwenzer (n 38) 301.
[233] European Principles 1997 art 9.102(1).
[234] Schwenzer (n 38) 301.
[235] *Ibid.*
[236] *Ibid.*
[237] CISG art 46 paras 2 & 3.
[238] Jussi Koskinen, 'CISG, Specific Performance and Finnish Law' (1999) <https://www.cisg.law.pace.edu/cisg/biblio/koskinen1.html#27> accessed October 10, 2020.
[239] CISG art 45(3) read with CISG art 61(3).
[240] CISG art 35.

goods is also subject to the right to specific performance under Art. 46(1). On one hand, scholars argue that since Art. 41 falls under the Chapter titled "Obligations of the Seller", the obligation to provide goods free of third-party claims should fall within the scope of Art. 46(1).[241] On the other hand, the Secretariat's Commentary clearly distinguishes between the obligation to deliver *conforming* goods and *unencumbered* goods,[242] and proposals to expressly subject Art. 41 to the buyer's right under Art. 46(1), were defeated.[243] Thus, the position remains unclear.

Since the 2018 Amendment does not distinguish between the type obligations that can be specifically enforced, except those expressly falling within the ambit of Section 14 of the SRA, the effect of the 2018 Amendment is to provide for specific performance of all obligations, irrespective of the commercial prudence or practical impossibility in enforcing such an obligation, that too without any limitation on the ground of 'good faith',as compared to civil law jurisdictions.

(i) Applicability – Retrospective or Prospective

In the absence of a savings clause, it is unclear whether the 2018 Amendment will have a retrospective effect or not. A statute, which affects substantive rights, is presumed to be prospective in operation and unless made retrospective, either expressly or by necessary intendment, can only apply prospectively.[244]

Generally, an amendment cannot be applied retrospectively, subject to two exceptions, i.e., (i) retrospective amendments can apply to procedural rules applicable to a person;[245] and (ii) a retrospective amendment can apply to substantive rights that have not yet been vested.[246] One view suggests that the amendments to the SRA would be procedural.[247] However, since the amendment results in loss to offer damages, it is bound to cause hardship.

---

[241] Bianca (n 122) 339-340; Walt (n 184) 215.

[242] Secretariat's Commentary (n 141) art 39, para 7.

[243] *Conference on Contracts for the International Sale of Goods, Mar. 10 -Apr. 11, 1980, Official Records, First Committee Deliberations (17th mtg.)*, para. 67, U.N. Doc. A/CONF.97/C.1/SR.17 (1980).

[244] *Hitendra Vishnu Thakur* v *State of Maharashtra*, (1994) 4 SCC 602, para 26.

[245] *Memon Abdul Karim Haji Tayab* v *Custodian General*, AIR 1964 SC 1256, para 4.

[246] *Arcelormittal India (P) Ltd.* v *Satish Kumar Gupta,* (2019) 2 SCC 1.

[247] Nigam Nuggehalli, 'The Retroactive Effect of Statutory Amendments: Assessing the Impact of Recent Amendments to the Specific Relief Act, 1963' (*NLSIR Online,* 11 February 2018) <http://www.nlsir.com/?p=778> accessed 10 November 2020.

Therefore,it would be a substantial matter and hence ought to be prospective in nature.[248]

The provision which touches a right in existence at a time of passing of statute, cannot be applied retrospectively.[249] Furthermore, even procedural laws, which affect the rights of the parties, cannot be applied retrospectively.[250]

The next question is whether the rights have become vested by virtue of pending litigation. Since the amendment only takes away the discretion of the judge, it does not take away the vested rights of any of the parties.[251] In view of Section 6(c) of the General Clauses Act, 1897, it is more reasonable to take the view that the right to offer an alternative remedy, under Section 20 of the Relief Act, was a right in privilege of the parties and cannot be taken away retrospectively.[252] A similar view was expressed by the Supreme Court[253] that the effect of substitution of certain clauses in an Act, through an amendment, can only have a prospective application from the date of introduction of the provision. However, the view of the Supreme Court has not been consistent.[254]

Following the latter approach, the High Court of Calcutta, in *Church of North India* v *Ashoke Biswas,*[255] held that any suit in which a decree was not passed on the date of coming into force of the 2018 Amendment, i.e., 01.10.2018 would fall within the scope of the amendment. The court was of the view that the enforcement of contract has to be considered at the time of passing of the decree and not the date of institution of the suit. Therefore, the 2018 Amendment will apply retrospectively, and all pending suits will fall within its ambit.

Along the same lines, the Allahabad High Court[256] has held that the effect of the substitution of new provisions is that the old ones are repealed and are

---

248 *Ibid.*

249 *Jose Da Costa* v *Bascora Sadasiva Sinai Narcornim*, (1976) 2 SCC 917, para 31; *Delhi Cloth and General Mills Co. Ltd.* v *Income-Tax Commissioner*, 1927 SCC Online PC 76.

250 *Thirumalai Chemicals Ltd.* v *Union of India*, (2011) 6 SCC 739, paras 24, 31.

251 *Arcelormittal* (n 247); *Swiss Ribbons (P) Ltd.* v *Union of India*, (2019) 4 SCC 17 : 2019 SCC Online SC 73.

252 *Ardee Infrastructure (P) Ltd.* v *Anuradha Bhatia*, 2017 SCC Online Del 6402 para 30; Nuggehalli (n 248).

253 *National Agricultural Coop. Marketing Federation of India Ltd.* v *Union of India*, (2003) 5 SCC 23.

254 *Surinder Singh Deswal* v *Virendar Gandhi*, (2019) 11 SCC 341 : 2019 SCC Online SC 739 para 8.1: the court applied the amendment to the Negotiable Instruments Act retrospectively despite it affecting substantial rights.

255 *Church of North India* v *Ashoke Biswas,* 2019 SCC OnLine Cal 3842, para 101.

256 *Mukesh Singh* v *Saurabh Chaudhary*, 2019 SCC OnLine All 5523.

no longer available. Therefore, only the substituted provisions can be made applicable, and the General Clauses Act is not attracted.[257]

Contrary to this interpretation, though of limited precedent value, the Bangalore City Civil Judge[258] held that the 2018 Amendment can only apply prospectively. The purpose of the 2018 Amendment was to bring the law up-to-speed with the rapid economic growth and expansion of infrastructure activities needed for the overall development of the country.[259] Therefore, a prospective application would make the amendments futile. The view taken by the Calcutta High Court is judicially sound and in consonance with the objectives of the amendment.

V. CONCLUSION

The 2018 Amendment was inarguably a much-required step in giving a fillip to the regime of contract enforcement in India. The recognition of the intrinsic value of the bond to execute promises, as a moral obligation, recognises the value of contracts and the need to grant legal sanctity to the intention of the parties to seek enforcement of the terms of the contract. While the 2018 Amendment unequivocally changes the philosophy of contract enforcement and recognises the inadequacies of damages not fully achieving the expectation from a contract, the 2018 Amendment requires a comprehensive re-look in order to truly fulfil its objective.

The above mentioned comparisons between specific performance in common law and civil law jurisdictions show a significant convergence in the practical implementation of the right to specific performance. However, the current positions of law in India seems to be stuck between its historical dependence on the common law and its practical acceptance of the civil law approach, thus, creating the "uncommon law". In the absence of a necessary and consequent amendment to the ICA and the full acceptance of the civil law approach, the 2018 Amendment is likely to fuel more legal challenges before the court instead of resolving the ambiguities and problems of the past.

---

[257] *After considering the entire law laid down in State of Punjab* v *Mohar Singh*, AIR 1955 SC 84; *Udai Singh Dager* v *Union of India*, (2007) 10 SCC 306 paras 62-71; *Bhagat Ram Sharma* v *Union of India*, 1988 Supp (l) SCC 30 paras 17-19; *State of U.P.* v *Hirendra Pal Singh*, (2011) 5 SCC305 para 22; *K.S. Puttaswamy* v *Union of India*, (2019) 1 SCC 1 para 1466.

[258] *Somashekar* v *Appu Ramanand Sharma* O.S. No. 5395 of 2011 decided on 29-11-2018 (not found).

[259] The Specific Relief (Amendment) Act 2008, Statement of Objects.

It appears that the 2018 Amendment has adopted the recommendation of the Expert Committee in a cherry-picking manner, without entirely going into the depth of the rationale of such recommendations. Further, the Expert Committee report has not adequately considered actual convergence between different jurisdictions, in relation to specific performance and has blindly removed the inadequacies test, which will most likely result in fetters on the power of the court to accommodate different circumstances.

Though a re-look into the ICA and the SRA together would have been ideal, for now, a comprehensive second look is required into the SRA in order to completely align its provisions and the regime on contract enforcement with other international jurisdictions and instruments. Without such a re-look, the 2018 Amendment neither follows the historical approach of the common law and neither the approach of the civil law, thus creating the "Un-common Law" on specific performance in India.

Foreign Investments in Emerging Economies: Do Competition Laws Help or Hinder?

Raju Parakkal[*]

The recent literature on the determinants of foreign direct investments (FDI) has missed to evaluate the role competition laws play in encouraging, or deterring, FDI inflows. The present study fills that gap by theoretically and systematically examining the effect of national competition laws on 155 emerging economies during the period 1970-2019. The findings provide strong evidence of a substantially positive relationship between competition laws and FDI inflows, even after controlling for other possible determinants of these capital flows. The results are particularly instructive for India's enactment of its Competition Act, 2002 and its subsequent positive effect on the country's foreign investment inflows. The findings and conclusions of this cross-country empirical study inform scholars and policymakers in developing and transition countries of the importance of competition laws in encouraging FDI in their economies.

[*] Associate Professor of International Relations, College of Humanities and Sciences, Thomas Jefferson University, 4201 Henry Avenue, Philadelphia, Pennsylvania, USA. Email: Raju.Parakkal@Jefferson.edu Acknowledgement: I would like to thank Anshul Butani, Ananya H. S. and Vishu Surana, students at the National Law School, Bengaluru, India, for their research assistance on this project.

I. Introduction

Emerging economies, such as India, have for long depended on foreign investments[1] as a key factor in their economic growth and development strategy. This was particularly true after these economies embarked on an economic liberalization and globalization drive that started in the 1980s but gained substantial momentum in the 1990s and beyond. In India's case, for instance, attracting foreign investments constituted a cornerstone in the package of economic reforms and liberalization that was championed in the early 1990s by the then Indian Finance Minister, Manmohan Singh. Similarly, China signaled its readiness to welcome foreign investors much earlier in the late 1970s and 1980s, as part of Chairman Deng Xiaoping's drive to accelerate China's economic development. Other emerging economies in Africa, Latin America, Central and Eastern Europe, and the rest of Asia displayed similar eagerness to amend their foreign investment laws or to institute new legislation to facilitate the entry of multinational corporations (MNCs) into their respective countries.

As well-documented in the relevant literature,[2] China has been the top recipient of this foreign investment largesse—for example, for the decade of the "roaring 1990s," China ledall emerging economies by a discernible margin, as presented in figure 1.[3] The average FDI China received in the 1990s dwarfs even its nearest fellow recipient, Brazil, by more than double. Overall, the decades since the 1970s witnessed noticeable increases in FDI inflows in almost all developing and transition economies.[4]

---

1 In this study, foreign investments refer only to foreign direct investments (FDI) and does not include foreign portfolio investments (that is, investments in stocks and bonds). FDI is defined as "an investment reflecting a lasting interest and control by a foreign direct investor, resident in one economy, in an enterprise resident in another economy (foreign affiliate)" (UNCTAD, '2020 e-Handbook of Statistics—Foreign Direct Investment' <https://stats.unctad.org/hand book /EconomicTrends/Fdi.html>).

2 See, for example, Luo, Yadong, *Multinational Corporations in China: Benefiting from Structural Transformation* (Copenhagen Business School Press 2000); Joseph Johnson, Gerard Tellis, 'Drivers of Success for Market Entry into China and India' (2008) (72) Journal of Marketing 1-13.

3 All FDI data used in this study are from the World Bank's World Development Indicators database's Oct 15, 2020 release.

4 The terms "emerging economies" and "developing and transition economies" are used interchangeably in this study.

Figure 1: Top 20 FDI Recipients Among Emerging Economies (average for 1990-1999; in current USD billion)

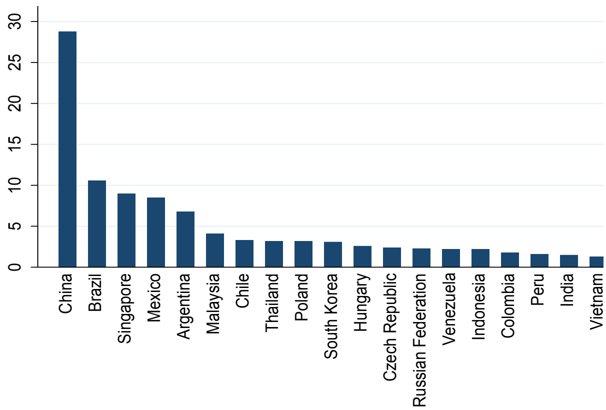
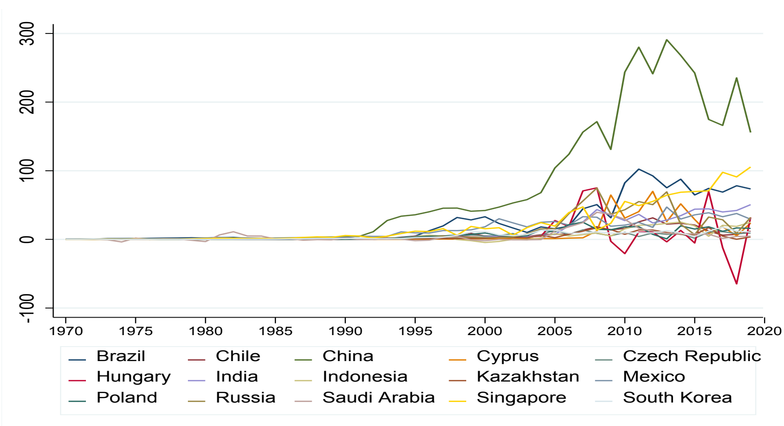


Figure 2 demonstrates this reality for the period 1970–2019, where the uptick in foreign investment inflows are more conspicuous starting from the 1990s. While China again leads this group of countries in receiving foreign investments, it is evident from figure 2 that almost all of the developing and transition countries managed to considerably increase their levels of FDI inflows, relative to the 1970s and 1980s.

Figure 2: Top 15 FDI Recipients Among Emerging Economies (average for 1970-2019; in current USD billion)



As discussed in the relevant literature, many factors contributed to this flow of foreign investments to developing and transition economies.[5] This constantly growing literature on the determinants of FDI has identified many host-country economic and financial factors, such as economic size, as measured by either the gross domestic product (GDP) or the size of the population; the purchasing power of the population, as measured by the GDP per capita; the current rate of economic growth; macroeconomic stability, as measured by inflation; economic openness and business friendliness; taxes and wages; and the investment treaties signed. This line of research has also evaluated some non-economic factors pertaining to emerging economies, such as the nature of the political system;[6] political or country risk;[7] corruption and bureaucratic quality;[8] and political and social globalization.[9] This non-exhaustive list of factors analyzed and, in some studies, identified as determinants of FDI inflows demonstrates the extensive nature of this literature.

A gap that is, however, present in recent FDI literature is a systematic evaluation of national competition laws in emerging economies as a possible contributory factor that could possibly encourage, but may also deter, foreign investment inflows into such countries. This gap is particularly noteworthy since the need to evaluate the effects of competition policies, as a subset of government economic policies, on foreign investment inflows was highlighted a while ago.[10] Although many cross-country empirical studies evaluating this relationship were carried out since then, most are not recent and, collectively, returned mixed results.[11] Given this status of the recent FDI

---

5 For early surveys of most of this vast literature, see Bruce A.Blonigen, 'A Review of the Empirical Literature on FDI Determinants' (2005) (33) Atlantic Economic Journal 383–403; and Ewe-Ghee Lim, 'Determinants of, and the Relation Between, Foreign Direct Investment and Growth: A Summary of the Recent Literature' (2001) (WP/01/175) IMF Working Paper <https://www.imf.org/-/media/Websites/IMF/imported-full-text-pdf/external/pubs/ft/wp/2001/_ wp01175.ashx> accessed 17 August 2020.

6 Nouha Bougharriou, Walid Benayed, FouedBadrGabsi, 'Under Which Condition Does the Democratization of the Arab World Improve FDI?' (2020) Comparative Economic Studies<https://doi.org/10.1057/s41294-020-00140-1> accessed 9 November 2020.

7 Matthias Busse, Carsten Hefekar, 'Political Risk, Institutions and Foreign Direct Investment' (2007) (23) European Journal of Political Economy 397–415.

8 HN Luu, NM Nguyen, HH Ho, VH Nam, 'The Effect of Corruption on FDI and its Modes of Entry' (2019) (11) (2) Journal of Financial Economic Policy 232-250.

9 Raju Parakkal, 'Economic Returns from Social and Political Globalization: Does Signaling Help Developing and Transition Countries to Attract Foreign Direct Investment?' (2019) (13) (1) ACTA VŠFS Economic Studies and Analyses 8-28.

10 Thomas L Brewer, 'Government Policies, Market Imperfections, and Foreign Direct Investment' (1993) (24) (1) Journal of International Business Studies 101–120.

11 For a brief review of these studies, see Joseph A. Clougherty, Nan Zhang, 'Foreign Investor Reactions to Risk and Uncertainty in Antitrust: U.S. Merger Policy Investigations and the Deterrence of Foreign Acquirer Presence' (2020) (52) Journal of International Business Studies 454–478.

literature, coupled with the rapid and widespread adoption of competition laws by emerging economies in recent decades, it is both urgent and prudent to undertake a comprehensive empirical analysis focused on this large group of countries.

Very broadly, competition laws seek to keep markets competitive by providing a legal framework for the promotion of market competition, including the free entry of competitors, and the adjudication of anticompetitive business practices. In theory, therefore, the presence of national competition laws would be encouraging to foreign investors who are potential entrants and competitors in various markets in emerging economies. On the other hand, highly competitive markets might be a deterrent as the possibility of earning abnormal profits are *a priori* absent. Against this theoretical backdrop and state of the FDI literature, the present study seeks to examine whether the presence of national competition laws in developing and transition countries help or hinder the inflow of foreign investments.

Arguably, part of the reason why the recent FDI literature has overlooked competition laws as a potential determinant is that the global spread of competition laws from the industrialized countries to developing and transition countries is a relatively recent phenomenon and has, therefore, received limited systematic and empirical evaluations concomitantly. This adoption of competition laws by developing and transition economies picked up major urgency in the 1990s and since then, "there has been a steady increase in the number of countries with national competition laws across the world."[12] At the moment, there are over 100 countries with national competition laws that, for the most part, address the key elements of market competition and anticompetitive practices.[13] Consequently, it is imperative that research into the determinants of FDI inflows includes competition laws as a possible factor. This is especially so as a major objective for developing and transition countries to institute national competition laws was to accelerate their economic growth and development via the establishment of a market economy that was based on market competition and private property rights rather than state intervention.[14] Given those broad economic objectives, increasing FDI inflows was a key intermediary goal for emerging economies. The present study, therefore, empirically and systematically evaluates whether the instituting of national competition laws in these economies has, in fact,

---

[12] Raju Parakkal, 'Political Characteristics and Competition Law Enactment: A Cross-Country Empirical Analysis' (2011) (56) (3) The Antitrust Bulletin 609-629.

[13] *Ibid.*

[14] Frank Emmert, Franz Kronthaler, Johannes Stephan, 'Analysis of Statements Made in Favour of and Against the Adoption of Competition Law in Developing and Transition Economies' (2005) (1) Halle Institutfür Wirtschaftsforschung <https://ssrn.com/abstract=2341766> accessed 16 December 2020.

led to increased FDI inflows. As appropriate and relevant, this study also makes pointed references to the Indian economy and its experience with the Competition Act, 2002 and subsequent FDI inflows.

II. COMPETITION LAWS AND FDI: THE THEORETICAL FRAMEWORK AND TESTABLE HYPOTHESES

As commonly understood, competition laws are meant to improve market competition and prevent anticompetitive practices. These laws are fundamentally about influencing economic behavior and business practices through the use of law.[15] The end goals are, however, varied, and range from the immediate goal of increasing consumer welfare[16] to the expansive goal of advancing economic development, the latter being of more relevance to developing countries. For instance, India's Competition Act, 2002 begins by stating unequivocally:[17]

> "An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."

While the end goals of competition laws might differ across jurisdictions, the core objective of ensuring contestable markets remains constant.[18] For most developing and transition countries, the goal of ensuring contestable markets meant the gradual yet certain shift to a free market economy. However, the attainment of contestable markets and a free market economy were not ends in themselves for most of these emerging economies. These were means to encourage those economic activities, such as foreign inward investments, that would propel these countries to higher levels of economic growth and development. However, it is also a fact that for many emerging economies, these laws were also legislations that allowed them to regulate

---

15 Bruce M Owen, 'Competition Policy in Latin America' (2003) (3) (003) Stanford Institute for Economic Policy Research <https://papers.ssrn.com/abstract=456441> accessed 17 December 2020.

16 For a detailed examination of the goals of competition law, see Daniel Zimmer (ed), *The Goals of Competition Law* (ASCOLA Competition Law Series, Edward Elgar 2012).

17

18 Note, however, that the *process* to achieve the core goal of ensuring contestable markets is debated across various jurisdictions, most notably between the U.S. and European ones. See William J Kolasky, 'What is Competition? A Comparison of U.S. and European Perspectives' (2004) (49) (1) The Antitrust Bulletin 29-53.

any possible anticompetitive and welfare-reducing behaviors of foreign firms in their countries. Two national competition laws and their administrative structures are instructive in this context. Under the Russian competition law, "On the Protection of Competition", and its administrative regime, the relevant enforcement agency is the Federal Antimonopoly Service, which is also the competent authority for handling filings under Russian laws on foreign investments.[19] Similarly, in the face of increased economic globalization and out of concern for the anti-competitive behaviours of foreign nations or corporations that could threaten the welfare of its consumers, the Korea Fair Trade Commission—South Korea'scompetition authority—expanded its jurisdictional reach overseas at the turn of the century.[20]

The preceding discussion and examples of Russian and South Korean competition regimes provide important insights into the thinking of competition authorities regarding the relationship between competition laws and foreign investments. While the competition law and the concerned authorities wished to promote foreign investment inflows by providing conditions for free and fair competition in their domestic marketplace, there also existed an awareness of the need to ensure that afree market economy would not be hijacked by firms abusing their market power or engaging in anticompetitive business activities. This is because the presence of a free market economy, by itself, is not a guarantee for market competition. As argued in the relevant literature, "Without the right legal framework, a free market economy could see the benefits of competition reduced by anticompetitive behavior."[21] In particular, the importance of competition laws in the presence of liberalized FDI regimes is underscored by the need to provide legal protection against anticompetitive investments and business practices. For example, around the time when India's Competition Act, 2002 was beginning to get enforced many years after its enactment, the utility of competition legislation to effectively discipline a foreign corporation that became dominant on its own or managed to scuttle local competition through parent company mergers was noted by policy observers.[22]

---

[19] Stefan Weber, Tatiana Dovgan, Artem Kara, 'Russian Federation: Merger Control' (Noerr, 11 November 2018) <https://www.mondaq.com/russianfederation/maprivate-equity/753690/merger-control> accessed 6 February 2021.

[20] Youngjin Jung, Seung Wha Chang, 'Korea 's Competition Law and Policies in Perspective Symposium on Competition Law and Policy in Developing Countries' (2006) (26) (3) Northwestern Journal of International Law & Business 687.

[21] Emmert, Kronthaler, Stephan, 'Analysis of Statements Made in Favour of and Against the Adoption of Competition Law in Developing and Transition Economies' (n 14) <https://ssrn.com/abstract=2341766> accessed 19 March 2021.

[22] Madhav Mehra, 'Competition Law and Inclusive Growth' *The Economic Times* (20 November 2010).

The overwhelming theoretical arguments are, however, still in favor of competition laws being a motivator of FDI inflows. One argument that is often cited for the ability of competition laws to attract FDI is that MNCs, which are mostly from economically advanced countries that have a longer history of national competition laws, would find the business law environment in emerging economies to be a more familiar territory with the presence of competition laws.[23] It is further argued that competition laws would level the playing field between foreign and domestic firms, a matter of significant concern to MNCs.[24] For example, the presence of competition laws would constrain domestic firms in a particular industry to exploit their incumbent status to deter the entry of foreign firms.[25]

The importance accorded to competition laws to promote FDI flows is further evidenced in the historical efforts by regional trade and integration associations to emphasize the adoption of competition laws by member nations.[26] Such an emphasis has traditionally been at the heart of the European Union and its trade and market integration efforts. Similarly, the creation of the North American Free Trade Agreement (NAFTA) in 1994 prompted Mexico to adopt a modern competition law. These examples provide evidence of some of the strong links between competition laws and FDI. Apart from protecting foreign investors from anticompetitive practices by domestic firms, competition laws also monitor the competitive behaviors of multinational firms, all of which accord competition laws a confidence-building character in the context of FDI flows.[27]

Notwithstanding the above arguments, scholars have argued that competition laws could be seen as FDI-inhibiting. As reviewed by Clougherty and Zhang,[28] this strand of the relevant literature posits that "governments prefer domestically-owned entities; hence, authorities conduct competition policy—especially the sub-policy of merger control—in a manner as to deter foreign ownership and encourage domestic ownership of local businesses". This argument was particularly on display when China enacted its Anti-Monopoly Law in 2007: The concern was the law would be used to protect

---

[23] *Ibid.*

[24] *Ibid.*

[25] Marcus Noland, 'Competition Policy and FDI—A Solution in Search of a Problem?' (1999) (99) (3) Peterson Institute for International Economics <https://www.piie.com/publications/working-papers/competition-policy-and-fdi-solution-search-problem> accessed 31 January 2021.

[26] UNCTAD, 'World Investment Report: Transnational Corporations, Market Structure and Competition Policy' (United Nations 1997) https://unctad.org/system/files/official-document/wir1997_en.pdf> accessed 7 February 2021.

[27] *Ibid.*

[28] Clougherty, Zhang, 'Foreign Investor Reactions to Risk and Uncertainty in Antitrust: U.S. Merger Policy Investigations and the Deterrence of Foreign Acquirer Presence' (n 11).

China's domestic firms at the cost of the rapidly increasing number of foreign firms in the Chinese economy.[29] An early merger case that received much attention in this context was the failed attempt in 2008 by US-based Coca-Cola Co. to acquire Huiyuan Fruit Juice Company, China's then largest juice maker.[30] Being a highly successful Chinese firm that succeeded in the face of foreign competition, Huiyuan's proposed acquisition by a foreign MNC, which was also extremely popular in China at that time,was not received positively by a vast majority of the Chinese public and, arguably, by the Chinese authorities. Apparently, these early perceptions and negative experiences do not seem to have dented China's attractiveness as an FDI destination, as evidenced by the country's top position in FDI receipts over the last few decades.[31] Nonetheless, the concern remains that competition laws could be used as a policy tool and legal instrument for government intervention in the local economy and, thereby, detract from its free-market properties. This concern is especially pressing for newer competition jurisdictions, such as most of the ones included in this study, as their nascent character and transition from a largely statist economy arguably place greater pressure on their antitrust authorities to rule at least in a quasi-protectionist manner. As such, the theoretical discussion in this section, which has provided abundant arguments for an *a priori* ambivalent relationship between competition laws and FDI inflows, leads to the following mainand alternate hypotheses, respectively, to be tested in this study:

Ho: *Competition laws are positively related to foreign investment inflows.*

HA: *Competition laws are negatively related to foreign investment inflows.*

[29] See, *e.g.,* Kevin Li, Ming Du, 'Does China Need Competition Law?' (2007) Journal of Business Law 182; Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (2005) Cambridge University Press.

[30] Britton Davis, 'China's Anti-Monopoly Law: Protectionism or a Great Leap Forward?' (2010) (33) (2) Boston College International and Comparative Law Review 305 <http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/5> accessed 31 January 2021.

[31] In 2020, China passed the United States—for the first time ever—as the top destination for FDI inflows, as per data released by the United Nations Conference on Trade and Development. See Sara Hansen, 'China Passes U.S. As No. 1 Destination for Foreign Investment As Coronavirus Upends Global Economy' *Forbes* (24 January 2021) <https://www.forbes.com/sites/sarahhansen/2021/01/24/china-passes-us-as-no-1-destination-for-foreign-investment-as-coronavirus-upends-global-economy/?sh=8b2761b12525> accessed 24 January 2021.

III. Research Design

The empirical examination of the true relationship between competition laws and FDI inflows requires a systematic study of these variables over an extended period of time. As such, this study uses data on competition laws, FDI inflows, and other relevant variables over a 50-year period starting from1970. The outcome, or dependent, variable is FDI inflows, data for which are obtained from the World Bank's World Development Indicators and measure net foreign investment inflows—net of any divestments—in current US dollars. In line with the literature, the net FDI inflows data are converted to natural logs for the regression analyses. However, as there are negative values for the FDI data, the following procedure was used to log-transform the data for the FDI variable:[32]

$$LnFDI_{it} = \ln\left(FDI_{it} + \sqrt{((FDI_{it})^2 + 1)}\right)$$

The variable of interest—*competition law*—was hand-collected from various sources and was confirmed for veracity using at least two independent sources. The data for competition law adoptions by countries included in this study are provided in appendix B. The other relevant variables in the study comprise the control variables that account for the factors identified in the FDI literature as determinants of FDI inflows, namely,GDP,[33] population size, GDP per capita, economic growth rate, inflation, bilateral investment treaties, political system, economic system, and political risk. Together, the main variable of interest—*competition law*— and the control variables constitute the independent variables in this study. The data sources for these variables and descriptions of their measurements are provided in appendix C. The descriptive statistics for all the variables are provided in table 1. The data availability is not uniform across the variables, as is evident from the variation across the variables in the values under the column for observations, titled "Obs."[34] This is because data for some variables—for example, economic system and political risk—are available only from the mid-1990s.

---

[32] See Matthias Busse, Carsten Hefekar, 'Political Risk, Institutions and Foreign Direct Investment' (2007) (23) European Journal of Political Economy 397-415, 404.

[33] Due to multicollinearity, the GDP variable will be dropped from the analyses and the market size measured by the population variable. See explanation later in this section.

[34] From a statistical standpoint, there are still enough observations for the validity of the results.

Table 1: Summary Statistics

Variable	Obs.	Mean	Std. Dev.	Min.	Max.
FDI (bln US$)	6,850	2.05	11.69	-64.83	290.92
Competition Law	7,032	.34	.47	0	1
Population (mln)	7,719	30.37	125.11	.04	1397.71
GDP per capita ('000 US$)	6,462	5.85	9.55	.16	116.23
Economic Growth	6,458	3.94	6.62	-64.04	149.97
Inflation	5,627	29.67	395.60	-60.49	23773.13
BITs	7,750	9.24	15.82	0	109
Political System	5,918	.11	6.90	-10	10
Economic System	2,673	6.30	1.08	2.43	8.70
Political Risk	3,694	.30	.73	-1.99	2.56

The data used in this study span the period from 1970–2019, which allows for 50 years' worth of information on most of the included variables. The 155 countries that form part of the study are drawn from the group of developing and transition economies that are primarily located in Africa, Asia, Central and Eastern Europe, and Central and South America.[35] The data are annual observations for each variable per country, albeit with missing data, as discussed earlier in this section. The data, therefore, have both a longitudinal dimension of 50 years from 1970–2019 and a cross-sectional dimension with 155 countries. The panel data that result from the longitudinal and cross-sectional dimensions dictate the choice of the econometric techniques and models employed for the empirical analyses. For example, one of the important considerations with the choice of panel data regression models is whether excluded time-invariant country-specific characteristics matter for the analysis.[36] In the event that they do, as is the case in the present study, econometric theory instructs that a fixed effects (FE) model be used for the analysis.[37] An FE model is also appropriate for the present study given the interest in estimating the variation in FDI inflows over time for the

[35] The list of countries included in the study is provided in appendix B.

[36] Some examples of excluded time-invariant country-specific characteristics for the present study would be historical factors like colonial or communist pasts and any relevant institutional or cultural aspects like language or business culture. These are "fixed" characteristics that might have an impact on FDI inflows but are not specifically controlled for in the econometric models used in the study.

[37] The competing model is a random effects (RE) model, where it is not assumed that the subjects of the study—countries, in this case—have time-invariant characteristics that are omitted from the study. This is, however, a serious assumption for the present study, and is,

same country.[38] Based on these theoretical and statistical considerations, the present study uses FE models for the empirical analyses.

A well-known problem, however, with econometric studies that use panel data is one of endogeneity. In general, endogeneity can arise from reverse causality and non-independence among the independent variables included in the model. In the present study, for example, reverse causality could be present if MNCs succeeded in pressuring developing and transition country governments to enact national competition laws in countries where these laws did not exist. In that case, FDI inflows could very well impact the adoption of competition laws, which is a reversal of the causal direction theorized in this study. The second source of endogeneity—the non-independence of independent variables from each other, which is an assumption of these econometric models—would prevail if two or more independent variables are correlated.[39] For example, the antitrust literature has documented the positive relationships between competition laws and both democracy and free market economy.[40] Besides endogeneity, regressions using panel data could also suffer from cross-sectional dependence—this is also known as "spatial" dependence where entities included in the data are not completely independent of each other and could "exhibit complex patterns of mutual dependence" among them.[41] For example, in the present study, it is quite possible that many of the policy actions undertaken by the countries included in the sample are influenced by similar actions undertaken by other countries in their political, economic, or policy "neighborhoods."[42] To address the first of the two endogeneity problems, the FE models lag the independent variables by one, two, and three years, thereby avoiding the possibility of reverse

therefore, not advisable. Apart from these theoretical considerations, a Hausman test was undertaken to statistically confirm the choice of the FE model over the RE model.

[38] This is usually referred to as the "within-group variation", with "group" in this context referring to countries.

[39] In regression models, the estimated coefficient value for a particular independent variable represents the change in the dependent variable for a one-unit change in that independent variable, assuming all other independent variables are constant. In other words, it assumes that the one-unit change in the independent variable does not cause any change in the other independent variables included in the regression model. That is, the independent variables are independent of each other. A serious violation of this independence leads to a problem known as "multicollinearity," which is explained later in this section.

[40] Franz Kronthaler, Johannes Stephan, 'Factors Accounting for the Enactment of a Competition Law—An Empirical Analysis' (2007) (52) (2) Antitrust Bulletin 137; Raju Parakkal, 'Political Characteristics and Competition Law Enactment: A Cross-Country Empirical Analysis' (2011) (56) (3) The Antitrust Bulletin 609-629; Raju Parakkal, Sherry Bartz-Marvez, 'Capitalism, Democratic Capitalism, and the Pursuit of Antitrust Laws' (2013) (58) (4) The Antitrust Bulletin 693-729.

[41] Daniel Hochele, 'Robust Standard Errors for Panel Regressions with Cross-Sectional Dependence' (2007) (7) (3) The Stata Journal 281–312.

[42] For an early discussion of the policy convergence literature, see Daniel W. Drenzer, 'Globalization and Policy Convergence' (2001) (3) (1) International Studies Review 53-78.

causality between FDI inflows and the independent variables. While the theoretical possibility of non-independence between independent variables still exists, a check of the data for multicollinearity among the variables was undertaken, and the few instances of multicollinearity were addressed before proceeding with the analyses.[43] The final issue of cross-sectional dependence is eliminated by the use of estimation techniques proposed by Driscoll and Kraay.[44] Finally, to account for the argument that FDI inflows possess "memory", that is, the inflows in one year are possibly influenced by inflows in the immediately preceding year(s), the study adopts a dynamic panel data model by including lagged value(s) of the dependent variable.[45],[46] The FE model, therefore, takes the following general form:

$$FDI_{it} = FDI_{it-1}\beta_1 + CLaw_{it-1}\beta_2 + Z_{it-1}\gamma + \alpha_i + u_{it-1}$$

[43] Multicollinearity occurs when variables are correlated with each other, thereby making the coefficient signs and estimates unreliable and extremely sensitive to variations in the regressors included in the model. A common test for multicollinearity is to estimate the Variance Inflation Factor (VIF) values of the independent variables after running a linear regression model. This test confirmed the presence of multicollinearity for three variables—GDP, GDP per capita, and population—due to GDP per capita being a variable constructed from both GDP and population. As such, the GDP variable was dropped from the analyses and the size of the market was measured by the population variable. The effect of GDP will still be accounted for through the GDP per capita variable. A correlation matrix for the independent variables is provided in appendix A.

[44] See John Driscoll and Aart Kraay, 'Consistent Covariance Matrix Estimation with Spatially Dependent Panel Data' (1998) (80) (4) The Review of Economics and Statistics 549-560. Following Hoechle (2007), an adjusted Driscoll-Kraay estimator was used, which produces standard errors that are robust to heteroskedasticity, autocorrelation, and cross-sectional (spatial) and temporal dependence. In Stata, the panel data regression command used is xtscc. [Daniel Hochle, 'Robust Standard Errors for Panel Regressions with Cross-Sectional Dependence' (2007) (7) (3) The Stata Journal 281–312.]

[45] An Arellano-Bond dynamic panel data model based on Generalized Method of Moments (GMM) was considered but not adopted since the Arellano-Bond GMM model is appropriate for panel data with "small *T*, large *N*," meaning the number of years is very small and the number of panels (that is, countries) is very large (see Roodman 2009: 86). In this study, however, the panel data contain both a large number of countries and a large number of years. Furthermore, the Sargan test rejected the null hypothesis of the validity of overidentifying restrictions. [David Roodman, 'How to do Xtabond2: An Introduction to Difference and System GMM in Stata.' (2009) (9) (1) The Stata Journal 86-136.]

[46] While the use of a lagged dependent variable as an independent variable makes the model dynamic, it also introduces an endogeneity problem because the lagged dependent variable is not independent of α_i, which is included in the model as the unobserved time-invariant intercept consisting of country-specific characteristics. This endogeneity introduces bias and inconsistencies in the coefficient estimates, which is known in the literature as the "Nickell bias". However, this bias is inversely related to the number of years, *T*, in the data used and becomes progressively reduced with the increasing number of years in the data (see Nickell (1981)). Since the data in the present study contain a large enough *T*, this particular endogeneity problem is not too severe to substantially affect the coefficient estimates. [Stephen Nickell, 'Biases in Dynamic Models with Fixed Effects' (1981) (49) (6) Econometrica1417-1426.]

where, $i = 1 \ldots 155$ (countries in the sample)

$t = 1970 \ldots 2019$ (data period)

$FDI_{it} =$ FDI inflows in current year (measured in natural logs)

$FDI_{it-1} =$ FDI inflows in previous year (measured in natural logs)

$CLaw_{it-1} =$ Competition law variable (presence/absence previous year)

$Z_{it-1} =$A vector of control variables in previous year

$\beta_1, \beta_2, \gamma =$Coefficients for FDI_{it-1},$CLaw_{it}$, and Z_{it}, respectively

$\alpha_i =$Unobserved time-invariant country-specific characteristics

(for example, historical and institutional factors)

$u_{it} =$Error term

Some of the independent variables used in the analysis—GDP per capita, economic growth rate, and inflation—are measured using time series data that needed to be checked for stationarity, especially given the long time period in the study.[47] While economic growth and inflation displayed stationarity, GDP per capita did not and had to be converted to logs to ensure stationarity.[48]

A key consideration in this study is the measurement of the main variable of interest—*competition law*. During the early part of the period under study, some of the countries adopted or already had on the books, laws that were meant to prevent anticompetitive practices but not to explicitly promote competition. For example, India's Monopolies and Restrictive Trade Practices Act of 1969 had the objective that "the concentration of economic power in private hands did not operate to the common detriment" and that the law was expected to "control and regulate monopolistic and restrictive trade practices."[49] Pakistan too had anidentically titled law that had a similar focus.[50] Sri Lanka's Fair Trading Commission Act of 1987, which served as the country's competition law until a new law was enacted in 2003, "dealt

47 Time series data are stationary if the statistical properties of the data, such as the mean, variance, and autocorrelation structure, are constant over time. Stationarity is of particular concern while using time series data as these data could consistently increase over time, resulting in statistical properties that do not remain constant over time and, thereby, producing spurious results.

48 The stationarity tests were conducted using a Fisher-type unit-root test based on augmented Dickey-Fuller tests.

49 The Monopolies and Restrictive Trade Practiced Act 1969.

50 Monopolies and Restrictive Trade Practices Ordinance 1970.

with the control of monopolies and mergers and prevention of anti-competitive practices."[51] The focus of this earlier set of laws was very clearly on the prevention of anticompetitive acts and price-fixing rather than the explicit promotion of market competition, as is the case with competition laws that were adopted by most emerging economies in the 1990s and beyond. For example, both India and Pakistan adopted new competition laws in 2002 and 2007, respectively, that expressly promoted free competition and the sustenance of competitive markets.[52] While the prevention of anticompetitive and monopolistic practices would no doubt promote market competition, the fact remains that most of these erstwhile laws were less concerned with using the provisions of the law to promote a free market economy, a fact that is consequential for the theorized relationship between competition laws and FDI inflows. Put differently, there are qualitative differences in competition laws enacted by countries during the 50-yearperiod under study that lead to questions such as: Do India's MRTP Act, 1969 and Pakistan's MRTP Ordinance, 1970 qualify as competition laws for this study, although these laws did not explicitly target the promotion of market competition as modern competition laws do? This study, therefore, employs three measures of the dependent variable—a first measure that treats as a competition law only those that explicitly promote market competition, a second measure that counts as a competition law only those that were enacted in 1990 or later,[53] and a final measure that denotes all legislations targeting anticompetitive and monopolistic practices as competition laws, regardless of whether these laws explicitly targeted the promotion of market competition and a free market economy. The initial analyses are undertaken using the third measure, while the first and second measures are included as part of the robustness checks.

IV. Empirical Results and Discussion

The analyses begin by first evaluating the control variables that were identified from existing FDI literature. Table 2 presents the results from running

[51] Dianarthy Suthakar, 'Beyond 'More Economics-Based Approach': A Legal Perspective on Competition in Sri Lanka' (2018) Proceedings of the 11th International Research Conference General Sir John Kotelawala Defence University Sri Lanka 23 <http://ir.kdu.ac.lk/handle/345/2568> accessed 23 January 2021.

[52] Pakistan's Competition Ordinance, 2007 was subsequently replaced with the Competition Act, 2010.

[53] This measurement is based on the observation that most competition laws enacted in the post-1990 era of market reforms and economic globalization in most developing and transition countries explicitly targeted the promotion of free competition and an open economy, among other objectives. As noted in the literature, the 1990s represent the beginning of a marked departure in the attitudes of most of the emerging economies towards foreign competition and investments—from an erstwhile skeptical approach, the attitude changed to a welcoming one. See James R. Markusen, Anthony J. Venables, 'Foreign Direct Investment as a Catalyst for Industrial Development' (1999) (43) European Economic Review 335-356.

four FE dynamic panel data models. The models do not include the competition law variable, as this preliminary analysis seeks to evaluate only the control variables and how they relate to the dependent variable, FDI inflows. Model 1 includes five of the most commonly used variables in FDI research and reports results that are consistent with the literature: All five variables are highly statistically significant at the 1% alpha level and take the hypothesized signs. Foreign investments are, therefore, positively attracted to larger markets with more wealthy consumers; these investments seek emerging economies with higher growth rates and lower inflation; and, finally, emerging markets that have signed more BITs receive relatively more FDI.

Table 2: FE Dynamic Model Results for Control Variables

	Dependent Variable: FDI Inflows (logged)			
Variable	**Model 1**	**Model 2**	**Model 3**	**Model 4**
Population	4.48*** (.372)	3.17*** (.329)	3.21*** (.449)	2.65*** (.895)
GDP per capita	.999*** (.175)	.813*** (.173)	.673*** (.205)	1.00*** (.263)
Economic Growth	.044*** (.009)	.049*** (.010)	.088*** (.019)	.049*** (.013)
Inflation	-.000*** (.000)	-.000*** (.000)	-.000 (.000)	-.001 (.001)
BITs	.037*** (.006)	.041*** (.007)	.018** (.008)	.019* (.009)
Political System		.031** (.015)	.013 (.013)	-.005 (.024)
Economic System			.627*** (.112)	
Political Risk				-.943*** (.267)
Countries	147	128	121	128
Observations (N)	5113	4456	2295	2700
F-stat	170.30***	149.27***	263.48***	25.40***
R-squared (within)	.22	.21	.20	.05

*Note: *p< 0.1, **p< 0.05, ***p< 0.01; Driscoll/Kraay standard errors in parentheses; estimated values for the constant term are not shown; all independent variables are lagged by one year*

Models 2, 3, and 4 progressively add more variables to the analysis. *Political system* takes the expected positive sign and is statistically significant in model 2, thereby signifying that more democratic countries receive more FDI than less democratic countries. The statistical significance for this variable is, however, absent in models 3 and 4, possibly from the drastic reduction in the number of observations in these two latter models due to the inclusion of the economic system and political risk variables. *Inflation* too loses its statistical significance in these two models, most likely due to the reduced number of observations. Both the variables, *economic system* and *political risk*, are statistically significant and take the expected signs.[54] The positive coefficient for *economic system* indicates that more free-market economies receive higher levels of FDI inflows. Meanwhile, the negative coefficient for *political risk* supports the hypothesis of depressed FDI inflows for more politically risky host countries. Taken together, the coefficient estimates of all the four models in table 2indicate that the control variables included in this study confirm the findings of existing FDI literature.

The main variable of interest, *competition law*, enters the analysis through inclusion in models 1 through 5 in table 3. Model 1 is a baseline model that contains only the competition law variable. The positive and highly statistically significant coefficient for *competition law* signifies that the presence of national competition laws has a positive effect in attracting more FDI inflows. Models 2 through 5 return similar results for this variable, after controlling for the effects of other determinants of FDI inflows. In terms of the size of the effect, we find it to be substantial: Taking the model 3 estimates as a representative example,[55] the presence of anational competition law leads to a77% increase in FDI inflows, after controlling for the effects of other determinants.[56] The fact that the positive and statistically significant effect of *competition law* holds through all five models is strong evidence of the robustness of the results. To further check for robustness, the lags for the full set of predictor variables were changed to two and three years. Unreported results from these two sets of analyses returned coefficient estimates for *competition law* that were very similar in magnitude and identical in sign to those for the one-year lag. Therefore, the results are not sensitive to the choice of the lag period for the independent variables.

---

[54] *Economic system* and *political risk* are not included in the same models because of the relatively fewer observations for both of these variables and the consequent implications for the model estimates of an overall reduced number of observations in the models.

[55] Of the five models in table 3, model 3 has a reasonably high number of observations and includes most of the control variables.

[56] Since the FDI data are in natural logs, the 0.572 coefficient value for competition law was exponentiated to obtain the percentage effect. That is, *exp* (.572) » 1.77. Therefore, the percentage effect is [(1.77 – 1) x 100] = 77%.

An additional robustness check was undertaken with respect to the measurement of the competition law variable. Since the models in table 3 measured competition laws without qualitatively evaluating them for their competition-promoting goals, versus the traditional anti-monopoly objective, two additional measures of *competition law* were employed.

Table 3: Competition Laws and FDI Inflows: FE Dynamic Model Results

	Dependent Variable: FDI Inflows (logged)				
Variable	**Model 1**	**Model 2**	**Model 3**	**Model 4**	**Model 5**
Competition Law	3.38*** (.326)	.531*** (.100)	.572*** (.105)	.364* (.192)	.512*** (.131)
FDI (lagged)		.400*** (.032)	.385*** (.034)	.238*** (.080)	.297*** (.055)
Population		1.84*** (.272)	1.65*** (.264)	2.29*** (.418)	1.30 (.765)
GDP per capita		.424*** (.125)	.343*** (.126)	.330 (.201)	.545** (.214)
Economic Growth		.026*** (.008)	.030*** (.009)	.065*** (.022)	.029** (.011)
Inflation		-.000*** (.000)	-.000*** (.000)	-.000 (.000)	-.001 (.001)
BITs		.018*** (.004)	.020** (.005)	.013 (.009)	.011 (.008)
Political System			.022** (.010)	.023** (.011)	.007 (.022)
Economic System				.430*** (.062)	
Political Risk					-.592** (.277)
Countries	155	147	128	121	128
Observations (N)	6675	5079	4434	2290	2693
F-stat	197.71***	223.13***	233.08***	433.44***	38.83***
R-squared (within)	.14	.35	.33	.25	.14

*Note: *p< 0.1, **p< 0.05, ***p< 0.01; Driscoll/Kraay standard errors in parentheses; estimated values for the constant term are not shown; all independent variables are lagged by one year*

The first measure examined the text of competition laws enacted prior to 1990 to identify any explicit evidence of competition-promoting language and goals, in which case the legislation was accepted as a competition law for this analysis. For example, Israel's Economic Competition Law, 1988 was marked as a competition law for this measurement of *competition law* while those of Brazil and India, along with a few others, were not. The second measure identified all competition laws enacted in 1990 and later as expressly competition-promoting in its objectives, on the assumption that modern competition laws enacted in the post-1990 period largely adopted pro-competition principles, in addition to anti-monopoly provisions. Unreported results of these robustness checks for all three timelags did not reveal any change in the sign or statistical significance of *competition law* in its relationship with FDI inflows. The coefficient values also remained largely the same, with evidence of even stronger positive effects of the presence of competition laws on FDI inflows.

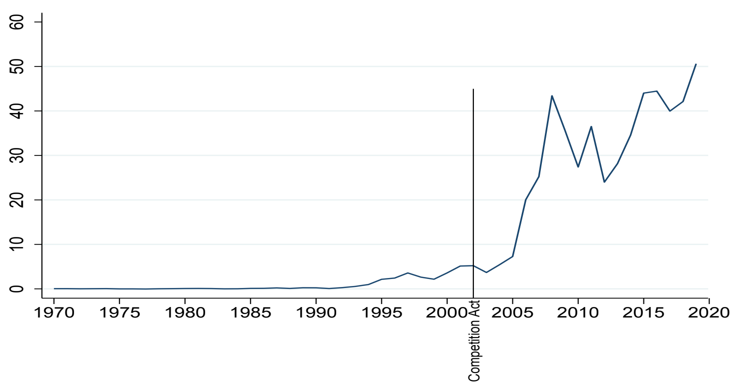


Figure 3: India's FDI Inflows, 1970-2019 (in USD billion)

The results of the cross-country empirical analyses provide strong evidence that the presence of competition laws in a host country encourages foreign investors to choose that country when they seek favorable locations to invest. India's experience in this context is particularly illustrative, as evidenced from the information presented in figure 3. India's FDI inflows remained relatively flat for the first two and a half decades of the study period. But by the mid-to-late-1990's foreign investment inflows picked up momentum, and in the years after the enactment of India's Competition Act 2002, FDI inflows took off quite noticeably. While it would be far-fetched to attribute this remarkable and sustained increase in FDI inflows entirely to the adoption of the Competition Act, there is compelling evidence from both the cross-country analyses and the evidence presented in figure 3 that the new competition law was at least one of the many key motivating factors in India's case. Very clearly, the adoption of the competition law did not deter foreign investors from increasing their investments in India.

The evidence of increased FDI inflows in India's case is further revealing when analyzed in the context of the text of India's Competition Act, 2002 pertaining to combinations and abuse of dominance that apply to all investments in India, including by foreign investors. According to Sec. 6 (1) of the Competition Act, "No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void."[57] These combinations include mergers and acquisitions involving a foreign and an Indian entity, and thus apply to foreign investments as well. Certain combinations—for example, mergers, acquisitions and amalgamations, including foreign-to-foreign transactions—will have to be notified to the competition authority, the Competition Commission of India (CCI), for scrutiny and clearance. Evidently, the CCI's goal is to ensure that a combination does not cause an appreciable adverse effect on competition in the relevant market in India, even if the investor is foreign. In addition to combinations, foreign investors are also prohibited from entering into anti-competitive agreements, and from abusing their dominant positions. These provisions are provided in Sections 3 and 4, respectively, read with Sec. 19 of the Competition Act, and apply equally to domestic and foreign investors. By examining India's Competition Act, 2002 as an illustrative example, it becomes abundantly clear that the provisions of the country's competition law did not hamper FDI inflows to India and instead, evidently provided an impetus to these inflows. India's experience, therefore, mirrors the broader finding of a positive association between competition laws and foreign investments.

V. Conclusions

This study sought to fill a gap in the recent FDI literature that missed to systematically examine the effect of competition laws on FDI inflows in developing and transition economies. The findings provide overwhelming evidence that competition laws promote these investment inflows in these emerging economies. These laws certainly do not deter them, as argued in some of the early literature on this topic. These findings permit both scholarly and policy-relevant conclusions and implications.

[57] The Competition Act 2002, s 6(1).

First, the findings demonstrate that MNCs, while being apprehensive of the possible misuse of competition laws—especially in newer jurisdictions—are generally cognizant of the long-term positive effects of these laws on their investments in emerging economies. Foreign investors have arguably discounted into their future cashflows from these foreign outlays any setbacks they might encounter from possible business-unfriendly applications of these laws. Given that FDI typically has a long horizon, MNCs possibly assume emerging economies with new, or even mature, competition law structures will eventually ignore any demands for protection to local firms and industries in favor of the promotion of open competition and a free market economy.

An immediate derivative of the first conclusion above is the second understanding that pertains largely to competition laws as adopted and developed in developing and transition countries. MNCs, and quite likely the wider community of scholars and practitioners of competition laws, expect the administration and enforcement of national competition laws in new jurisdictions to ultimately pivot to a less interventionist and more pro-market disposition, if they were not so from the beginning. This expectation arguably underpins the willingness of MNCs to overlook any negative perceptions of a new competition law in an emerging economy and to instead accept the more positive aspects of this new competition law. Additionally, and as especially relevant for the evolution of competition laws in new emerging market jurisdictions, this understanding points to the channels of communication and knowledge-sharing that exist in global competition networks where competition authorities in newer jurisdictions are increasingly "socialized" to a version and nature of competition laws that eschew interventionism for a hands-off approach to the application of these laws.

Third, a conclusion from these findings that has policy implications is the need to further emphasize the importance of competition laws as a tool to promote foreign investments. Policymakers in countries without a competition law can derive additional impetus for any proposed plans to adopt national competition laws in their jurisdictions. Of the many positive outcomes generally argued for the installation of a competition regime, the pro-FDI properties of these laws would undeniably be an effective one to include.

Finally, despite the fact that the FDI literature is extremely vast, there still exist determinants that have received relatively less attention in recent times from scholars and academics for detailed and systematic analyses. Competition law is one such example, as can be concluded from this study. There are potentially other factors that could have an encouraging or deterring effect on FDI flows. Future research in this area should be targeted to unearthing these hitherto unexamined or underexamined variables to further enrich this literature.

APPENDIX A: CORRELATION MATRIX*

Variable	CL	Pop.	GDPPC	EG	Inf.	BITs	PS	ES	PR
Competition Law (CL)	1								
Population (Pop.)	0.128	1							
GDP per capita (GDPPC)	0.101	-0.074	1						
Economic Growth (EG)	-0.020	0.069	0.014	1					
Inflation (Inf.)	-0.009	0.000	-0.023	-0.070	1				
BITs	0.555	0.292	0.190	0.023	-0.029	1			
Political System (PS)	0.405	0.011	0.062	-0.053	0.018	0.255	1		
Economic System (ES)	0.336	-0.075	0.365	0.011	-0.098	0.355	0.481	1	
Political Risk (PR)	-0.192	0.057	-0.603	0.072	0.150	-0.230	-0.353	-0.695	1

* *Correlations based on pairwise deletion.*

APPENDIX B: LIST OF COUNTRIES AND COMPETITION LAW ENACTMENT DATES*

Afghanistan (2011); Albania (1995); Algeria (1995); Angola; Antigua and Barbuda; Argentina (1980; 1999); Armenia (2000); Azerbaijan (1993); Bahamas, The; Bahrain (2018); Bangladesh (1972; 2012); Barbados (2002); Belarus (1992); Belize; Benin; Bhutan; Bolivia; Bosnia and Herzegovina (2001); Botswana (2009); Brazil (1962; 1994); Brunei Darussalam (2015); Bulgaria (1991); Burkina Faso (1994); Burundi (2010); Cambodia; Cameroon (1998); Cape Verde (1999); Central African Republic; Chad; Chile (1959; 2003); China (2007); Colombia (1959; 1992); Comoros (2016); Congo, Dem. Rep. (2018); Congo, Rep.; Costa Rica (1994); Cote d'Ivoire (1991); Croatia (1995); Cyprus (1989; 1999); Czech Republic (1993); Djibouti; Dominica; Dominican Republic (2008); Ecuador (2011); Egypt (2005); El Salvador

(2004); Equatorial Guinea; Eritrea; Estonia (1993); Ethiopia (2003); Fiji (2010); Gabon (1998); Gambia, The (2007); Georgia (1996); Ghana; Grenada; Guatemala; Guinea; Guinea-Bissau; Guyana (2004); Haiti; Honduras (2005); Hungary (1990); India (1969; 2002); Indonesia (1999); Iran (2008); Iraq; Israel (1988); Jamaica (1993); Jordan (2004); Kazakhstan (1992); Kenya (1988; 2010); Kiribati; Kuwait (2007); Kyrgyz Republic (1994); Lao PDR (2004); Latvia (1991); Lebanon; Lesotho; Liberia; Libya; Lithuania (1992); Macedonia, FYR (1999); Madagascar (2005); Malawi (1998); Malaysia (2010); Maldives; Mali (1992); Mauritania; Mauritius (2003); Mexico (1992); Moldova (1992); Mongolia (1993); Montenegro (2012); Morocco (2000); Mozambique (2007); Myanmar (2015); Namibia (2003); Nepal (2007); Nicaragua (2006); Niger (2015); Nigeria (2019); Oman (2014); Pakistan (1970; 2007); Panama (1996); Papua New Guinea (2002); Paraguay (2013); Peru (1991); Philippines (2015); Poland (1990); Qatar (2006); Romania (1996); Russian Federation (1992); Rwanda (2012); Samoa (2016); Sao Tome and Principe; Saudi Arabia (2004); Senegal (1994); Serbia (1996); Seychelles (2009); Sierra Leone; Singapore (2004); Slovak Republic (1993); Slovenia (1992); Solomon Islands; Somalia; South Africa (1955; 1998); South Korea (1980); Sri Lanka (1987; 2003); St. Kitts and Nevis; St. Lucia; St. Vincent and the Grenadines (1999); Sudan (2009); Suriname; Swaziland (2007); Syria (2008); Tajikistan (1992); Tanzania (2003); Thailand (1999); Togo; Tonga; Trinidad and Tobago (2006); Tunisia (1991); Turkmenistan; Uganda; Ukraine (1992); United Arab Emirates (2013); Uruguay (2000); Uzbekistan (1992); Vanuatu; Venezuela (1992); Vietnam (2004); Yemen (1999); Zambia (1994); Zimbabwe (1996)

** The year of enactment of the first competition law is given in parentheses after a country. If more than one year is given for a country, the second year is the year of any enactment of the first updated competition law in the post-1990 period. If no year is given in parentheses for a country, that country does not have a competition law.*

APPENDIX C: VARIABLE DESCRIPTION AND DATA SOURCES

Variable	Description	Source
FDI	Foreign direct investment, net inflows (current US$). Net of any divestments. Foreign direct investment refers to direct investment equity flows in the reporting economy.	World Bank World Development Indicators (WB WDI) Database (Oct 15, 2020 release). Source URL:

Variable	Description	Source
	It is the sum of equity capital, reinvestment of earnings, and other capital. Direct investment is a category of cross-border investment associated with a resident in one economy having control or a significant degree of influence on the management of an enterprise that is resident in another economy. Ownership of 10 percent or more of the ordinary shares of voting stock is the criterion for determining the existence of a direct investment relationship.	https://datacatalog.worldbank.org/dataset/world-development-indicators Hereafter referred to as WB WDI 2020.
Competition Law	Binary variable measured per year as 1 = Competition Law and 0 = No Competition Law	Author-collected dataset; see appendix B
Population	Total population of a country; all residents regardless of legal status or citizenship.	WB WDI 2020
GDP per capita	GDP per capita (constant 2010 US$); GDP per capita is gross domestic product divided by midyear population.	WB WDI 2020
Economic Growth	GDP growth (annual %); annual percentage growth rate of GDP at market prices based on constant local currency. Aggregates are based on constant 2010 U.S. dollars.	WB WDI 2020
Inflation	Inflation, consumer prices (annual %); inflation as measured by the consumer price index reflects the annual percentage change in the cost to the average consumer of acquiring a basket of goods and services that may be fixed or changed at specified intervals, such as yearly. The Laspeyres formula is generally used.	WB WDI 2020

Variable	Description	Source
BITs	This is the net total number of bilateral investment treaties (BITs) in force during that year for a country. Therefore, the number reflects deductions made for any BITs that were terminated that year.	Author-collected dataset. Source URL: https://investmentpolicy.unctad.org/international-investment-agreements
Political System	The scale ranges from -10 (strongly autocratic) to +10 (strongly democratic).	This is the Polity2 variable from the Polity V database 2018. Source URL: https://www.systemicpeace.org/inscrdata.html
Economic System	The index ranges from 0 to 10, with higher values signifying higher levels of economic freedom. The EFW index measures the degree to which the institutions and policies of countries are consistent with economic freedom.	This is the Economic Freedom of the World (EFW) Index scores from the 2020 release of the Fraser Institute, Canada. Source URL: https://www.fraserinstitute.org/economic-freedom/dataset
Political Risk	A composite index comprising the following 5 indices from the World Bank Worldwide Governance Indicators (WGI) dataset: Political Stability, Government Effectiveness, Regulatory Quality, Rule of Law, and Control of Corruption. Higher values indicate higher political risk (the original data were reverse-coded to be consistent with the variable name).	World Bank Worldwide Governance Indicators (WGI). Source URL: http://info.worldbank.org/governance/wgi/

Procedural Fairness in Securities Enforcement

*Shruti Rajan**

Whilst there are a number of metrics, both objective and subjective, to assess the progress of a legal system, how it all stacks up against first principles of jurisprudence is, more often than not, a very dependable indicator of its maturity. The formulation of a reliable and consistent justice delivery system depends not only on nuanced legal interpretation and consistent judicial precedent, but equally on the even-handed application of procedural methodologies.

Such appraisals are particularly relevant for quasi-judicial proceedings today, especially since they are conducted under the aegis of regulatory bodies that don multiple hats and concurrently perform administrative, law-making and quasi-judicial roles. With a focus on the Securities and Exchange Board of India ("SEBI") and its appellate body, the Securities Appellate Tribunal, this paper analyses how securities enforcement has performed over the years against the touchstone of principles of natural justice and the importance accorded to procedural fairness.

In doing so, we adopt a three-pronged approach - first, examining decisions that expound upon the role of bias and the acceptable degrees of separation of powers; second, evaluating audi alterem partem, how it has been interpreted and the various facets of a fair hearing; and lastly, concluding with an analysis on some home improvements that may be worthwhile to embark on.

---

* Shruti Rajan is a Partner in the Mumbai office of Trilegal, and a regulatory and enforcement lawyer in the financial services space. The author would like to thank Khushi Maheshwari and Shubranshu Prabhakar for their research assistance.

I. Introduction

The reason this analysis is particularly relevant for a regulatory body such as SEBI, is because of the significant powers it wields across corporate India and the securities market. From listed companies, to market intermediaries and investors, SEBI is mandated to supervise the entire ecosystem of corporate India. In order to do so effectively, as is the case with several regulators, SEBI too is legislatively conferred with executive, rule-making and "hear and determine" powers.

Even within the microcosm of its quasi-judicial functions, the securities market regulator has multiple enforcement tools at its disposal and retains the discretion to deploy whatever is necessary to tackle the issues at hand. For instance, it can initiate proceedings under Section 11B of the SEBI Act, and issue directions that can have commercial and monetary consequences for the parties. SEBI may initiate adjudication proceedings where imposition of only a monetary penalty is justified. For specific intermediaries who have demonstrated deficiencies in compliance, SEBI may initiate inquiry proceedings, which may result in substantive restrictions on the intermediary's ability to do business.

The common thread running through all of the above though is the natural justice pre-requisite. Since quasi-judicial functions occupy a different footing from administrative processes *simpliciter*, and are bound by certain processes and rules of conduct, principles of natural justice emerge as the primary litmus test. This is known as the "*duty to act judicially*". Courts have consistently held that[1] a judicial decision is made according to law, whereas an administrative decision is made according to administrative policy. A quasi-judicial decision is, therefore, a decision which is subject to a certain measure of judicial procedure and hence, the decision-making authority has a concomitant responsibility to act judicially.

[1] *See National Securities Depository Ltd.* v *SEBI*, (2017) 5 SCC 517 : 2017 SCC OnLine SC 256; *Province of Bombay* v *Kusaldas S. Advani* AIR 1950 SC 222 : (1950) SCR 621; *Neelima Misra* v *Harinder Kaur Paintal,* (1990) 2 SCC 746 : (1990) 2 SCR 84.

II. Absence of Bias

The absence of bias is a concern inherent in the dual/multiple functions that regulators perform, which necessitate an analysis of how conflict of interest is ascertained, managed and avoided. Over the years, within SEBI itself, the lines of demarcation have been driven by specific codes of conduct and rigorous internal segregation through different departments, divided across intermediaries and subject matters, thereby ensuring that each department operates as a distinct silo. Each such division is led by department heads also known as whole time members. Such members, in their capacity as senior officers, also preside over quasi-judicial proceedings but only on matters pertaining to departments over which they exercise operational supervision. This enables objectivity and ensures that persons engaged in investigative roles or prosecutorial roles are kept separate from those discharging a judicial responsibility. However, SEBI's journey up until this point has not been without its learnings.

There have been interesting situations alleging institutional bias against SEBI. For instance, in a case before the High Court of Bombay, pertaining to certain accreditation courses offered by a sister institute of SEBI, the petitioners challenged SEBI's mandate on the grounds that making courses by a sister institute mandatory in order to obtain securities market licenses showed bias and such a mandate should therefore be struck down. The Court held that only where actions of regulatory bodies are vitiated by *mala fides* is judicial review permissible and in matters of certifications and accreditations there are experts who have advanced certain criteria. Therefore, it is not for courts to substitute their views as they are not experts in the field.[2] On another occasion, relying on a notification by the Ministry of Corporate Affairs on 'shell companies', SEBI pre-emptively restricted the trading activities of such companies. In this case, institutional bias was alleged by a company since an inquiry was being undertaken in parallel to these restrictions being put in place. It was observed here that there is no rigid enquiry procedure prescribed under the SEBI Act and the scheme is predominantly inquisitorial. Hence, it cannot be said that the power to seek information ceases when a quasi-judicial proceeding commences and that efforts to do so must be thwarted by the principle of bias. The order found no bias exhibited by the whole-time SEBI member and correctly held that there is no bar on SEBI to seek and rely on information gathered from the notice after the quasi-judicial proceeding has begun.[3]

---

2 *Financial Planning Standards Board India* v *National Institute of Securities Markets,* 2015 SCC OnLine Bom 7202.

3 *Nu Tek India Ltd., In re*, 2018 SCC OnLine SEBI 198.

However, the spotlight was firmly cast on such concerns when an investigation against NSDL in relation to the IPO scam and its potential conflict of interest with the tenure of the then Hon'ble Chairman C.B. Bhave (who was the NSDL head during the investigation period), garnered a fair amount of media attention and debate.

In 2008 though, SEBI introduced a commendable fix vide the Code on Conflicts of Interest for Members of the Board. This Code expressly articulates safeguards and disclosures that must be maintained by members of the SEBI board to ensure objectivity in decision making and also safeguard public confidence in regulatory processes. For instance, not only does it require the chairman and whole-time members to disclose any potential interest in matters on the agenda or an enforcement action, it ensures that conflicts are avoided with past employment/fiduciary positions, personal and familial relationships as well as honorary positions in organizations.

The show-cause notice process itself has also come under judicial scrutiny and has been challenged on the grounds of bias, stating that the allegations, as framed in these notices, are reflective of SEBI's bias in its own quasi-judicial proceedings. For instance, in an enforcement action against misstatements made in One Life Capital Advisors' prospectus, the noticees contended that SEBI made pre-determined findings in its SCN and reached a definite conclusion on the noticees liability. Placing reliance on the decision of the Hon'ble Supreme Court in *Haryana Financial Corporation,*[4] the order held that a show-cause notice is a self-contained document that contains all the allegations and charges against the noticees and does not violate any principles of natural justice and rejected the contention that the SEBI reached any pre-determined findings in its show-cause notice.[5]

III. The fair hearing postulate and its various components

As a non-derogable principle of any judicial process, the principle of the right to a fair hearing traverses much beyond the ability to avail of a hearing

4 The theory of reasonable opportunity and principle of natural justice have been evolved to uphold the rule of law and to assist the individual to indicate his just rights. Whether, in fact, prejudice has been caused to an employee or not on account of denial to him of the report has to be considered on the facts and circumstances of each case. Even in cases where procedural requirements have been complied with, action cannot be ipso facto illegal or void, unless it is shown that non-observance has prejudicially affected the delinquent; *Haryana Financial Corpn.* v *Kailash chandra Ahuja,* (2008) 9 SCC 31, ¶ 19.

5 SEBI Order in *Onelife Capital Advisors Ltd., In re*, 2013 SCC OnLine SEBI 171.

before the decision-making authority. It encompasses a just and even-handed approach towards the whole adversarial process itself, including clarity in the charges levied, transparency in the evidence obtained, ability to cross-examine, etc. Whilst it will be difficult to examine every such aspect comprehensively, for the purposes of this analysis we shall focus on a few recurrent themes.

An intrinsic feature of any enforcement proceeding is the ability to decipher the scope and source of the allegations. The show-cause notice of course, acts as the primary receptacle of any regulatory charge, but it is the documents and information referred to therein that help unravel and understand the crux of the matter at hand. Whilst a lot of such information is often annexed to the notice itself, some of the background data, including compelling information collected from co-noticees and other third parties is often not shared. The evidentiary basis for investigations is often far more complex, especially when the factual background involves prolonged time periods, multiple parties and non-linear chains of cause and effect. In such cases, appreciation of evidence, both exculpatory and inculpatory is critical, as is examining the position of other parties interconnected with the case itself.

A. Accessing Underlying Documents

The rationale behind granting parties an opportunity to access underlying documents is to ensure a fair opportunity to defend oneself. The main question which has arisen with predictable frequency in quasi-judicial proceedings is on the degree of access that must be provided and the boundaries cast on such rights. The landmark decision of the Hon'ble Supreme Court in *ML Sethi* v *RP Kapur*,[6] observed that usually a party is entitled to inspect all documents which are in the possession of the other party.

In *Price Waterhouse* v *SEBI*,[7] one of the questions was whether the appellants are entitled to copies of documents relied upon in the show-cause notice issued by SEBI. The appellants filed the petition because their request for inspection of documents was only accepted for some documents and rejected for others. The minority view in this judgment was noteworthy, in that it observed that the appellants are entitled to all the material and documents that might have been gathered by the Board during the course of the inquiry, irrespective of whether the same was relied on in the show cause notice or

---

[6] *M.L. Sethi* v *R.P. Kapur* (1972) 2 SCC 427.

[7] *Price Waterhouse & Co.* v *SEBI* Appeal No. 8 of 2012 (Securities Appellate Tribunal) dated June 1, 2012 .

not. The rationale was that in this process, the Board is not acting in the capacity of a prosecutor but that of an adjudicator.

The majority view in this case, however, did not agree with the minority. It was held that the "*...the application of principles of natural justice depends to a considerable extent on the facts and circumstances of the case, the framework of the law under which the inquiry is held and the constitution of the Tribunal or body of persons appointed for the purpose*." The fact that the Act itself is silent on access to information also played an important role in the decision of court.

This interpretation allows for considerable discretion in the hands of SEBI, in deciding the extent of a party's right to access and inspect all documents.

Another factor which is also considered while deciding cases in respect of opportunity to access documents is whether the party seeking access to such documents is disadvantaged in any manner due to denial of access. The issue of discrimination is not taken into consideration if the party is not at a disadvantage due to denial of access.[8]

In this context, it is relevant to examine the decision in *Phillip Commodities*,[9] which held that where parties were not disadvantaged due to denial of access to additional documents and had all information necessary to make their representations on a notice, no case for discrimination can be made out. SEBI further stated that it would not accede to the request for grant of inspection of all the documents collected during examination, and interpreted the principles of natural justice as being adequately met once documents that were "relied upon" by the regulator were shared.

These decisions are in tandem with the order of the Hon'ble Supreme Court in *Kanwar Natwar Singh* v *Directorate of Enforcement*,[10] where it held that "*...even the principles of natural justice do not require supply of documents upon which no reliance has been placed by the Authority to set the law into motion. Supply of relied on documents based on which the law has been set into motion would meet the requirements of principles of natural justice*." The principle behind this decision was that nothing which has not been brought to the notice of the person should be used against him.

Principles regarding access to documents were most recently analysed in the matter of *Shruti Vora* v *SEBI,*[11] where an appeal was filed in relation to the

---

8 *India Infoline Commodities Ltd., In re*, 2018 SCC Online SEBI 162.
9 *Phillip Commodities India (P) Ltd., In re*, 2018 SCC OnLin SEBI 126.
10 *Kanwar Natwar Singh* v *Director of Enforcement,* (2010) 13 SCC 255.
11 *Shruti Vora* v *SEBI*, 2020 SCC OnLine SAT 19.

ambit of documents that can be demanded in an inspection. Dismissing the appeal, the tribunal, in line with precedents, limited the scope of information only to documents relied upon in the show-cause notice itself. What makes these observations in this case particularly noteworthy is that it involved a market conduct allegation regarding transmission of price sensitive information on the WhatsApp platform. In such cases, where SEBI investigates multiple unrelated parties, gleans a pattern and then issues a notice to show cause, all the information collected through its investigation assumes critical significance in the defence. Where the facts and issues involved are not linear and are predicated on the acts and/or omissions of unrelated third parties, SEBI should consider allowing wider access to investigation documents, to substantively meet the natural justice thresholds.

B. Post Decisional Hearings

In addition to bias and access to information, a key limb to assessing compliance with natural justice is to understand the circumstances in which the quasi-judicial authority can issue *ex-parte orders* and the limitations therein. A post decisional hearing is, as the name suggests, a hearing which takes place after a provisional decision has been given. This principle was recognized in the landmark decision of *Maneka Gandhi* v *Union of India*,[12] where the Hon'ble Supreme Court recognized that in situations where quick action was needed and it would be impractical to have a hearing before reaching a decision, a remedial hearing, also called a post decisional hearing, should be given. In *Liberty Oil Mills,*[13] The Hon'ble Supreme Court held that when ad-interim orders are passed *ex-parte*, such orders themselves provide an opportunity to the aggrieved party to be heard at a later stage at their request.

SEBI's powers to issue *ex-parte* orders and then initiate post decisional hearings are legislatively recognised in Section 11(4) of the SEBI Act, which empower it to take a multitude of measures pending investigation or inquiry, including restraining persons from trading in securities and impounding proceeds of transactions under investigation

This power was interpreted by the Hon'ble Bombay High Court in the landmark decision of *Anand Rathi*,[14] which correctly observed that the principles of natural justice would be satisfied if the affected party is given a post decisional hearing, as a pre-decisional hearing is not always mandatory in situations where ad-interim orders are passed.

---

[12] *Maneka Gandhi* v *Union of India*, (1978) 1 SCC 248.
[13] *Liberty Oil Mills* v *Union of India,* (1984) 3 SCC 465.
[14] *Anand Rathi* v *SEBI,* 2001 SCC OnLineBom 381.

The Hon'ble Rajasthan High Court in *Avon Realcon*[15] delved into the interpretation of Section 11 of the SEBI Act, 1992. The second proviso to this section provides that noticees would be given the opportunity of hearing either before or after passing of orders. After passing the impugned order, the petitioners were called upon to submit their objections within a period of 21 days. The objective was to provide the petitioners an opportunity of hearing before the final decision is taken thereby satisfying requirements of post decisional hearing. A recent SEBI order confirmed the position adopted in the above decisions. The order passed before a pre-decisional hearing noted that an opportunity for post decisional hearing was provided and was therefore in compliance with the principles of natural justice.[16]

Whilst this position on post decisional hearings in itself is legally sound and relevant for regulators who work in dynamic environments that require prompt actions and quick fixes, they cannot be interpreted in isolation. Limited access to investigation material has a far more aggravating impact on post decisional hearings, where parties must complete the adjudicatory process while already constrained by legal sanctions.

IV. An Assessment

Natural justice is more than just a sum of its parts and while quasi-judicial proceedings before SEBI are not accompanied by procedural guarantees akin to what civil actions bestow, jurisprudence has evolved to take intricate facts and sophisticated markets into consideration. The procedure followed by quasi-judicial bodies assumes significance because of the impact that processes are bound to have on the success of the resultant delivery of justice and the faith reposed in it.

However, in addition to the judicial keenness in bringing clarity to such procedural elements, the time has come to consider clearer rules on the process that must be followed by the regulator while discharging its quasi-judicial and adjudicatory functions, which is, as on date, undertaken entirely based on SEBI's discretion as well as past practice. A case in point here is the rules of process and procedure issued by the Securities Exchange Commission (SEC) in USA, articulating the procedural minutiae involved in the entire length of the matter, i.e., from ascertainment of a cause of action up until issuance of an order and imposition of a penalty. Applicable to administrative proceedings held by the SEC, these rules expound upon discovery and

---

[15] *21st Century Entertainment (P) Ltd.* v *Union of India,* 2010 SCC OnLine Raj 3814.

[16] *Pine Animation Ltd., In re*, 2016 SCC OnLine SEBI 329.

production of documents, depositions and cross examinations, appreciation of evidence pre-show cause notice submissions as well as time periods associated with each of these steps. SEBI will also do well to consider such a procedure code, that will delineate applicable practical steps, create more certainty, predictability and overall, entrench the procedural fairness of quasi-judicial action.

The Meld Model: The Holy Grail of Indian Corporate Jurisprudence

*Rahul Singh**

Is a model of a theory of Indian corporate jurisprudence effable? This paper posits that jurisprudence of Indian corporate law is desirable and possible.

Given the relative nascence of the Companies Act 2013, Insolvency & Bankruptcy Code 2016 and the Competition Act 2002, this paper undergirds the possibility of jurisprudence through modelling– the meld model – which is, jurisprudentially speaking, a synthesis between 'exclusive legal positivism' and 'law and economics'.

The paper instantiates the utility and desirability of the meld model through test suites – i.e., select case laws in the context of company, competition, and insolvency laws. With the help of test suites i.e., precedents from Indian company, insolvency and competition law, this paper iterates a compelling justification for a 'meld model' i.e., a synthesis of exclusive legal positivism and law-and-economics.

It finds that the meld model is a lucidly workable model for Indian corporate jurisprudence.

* Associate Professor of Law, National Law School of India University, Bangalore. I am grateful to Harshit Goyal, Ishit Patel, Megha Khandelwal, Pallavi Khatri, Rajat Maloo, Saurabh Gupta, Subhashini Damodhran, Vignesh R and Vishu Surana for excellent research assistance. I owe debt of gratitude to Vasu Aggarwal for his persistent nudges. An earlier version of this paper was presented at the faculty seminar at the National Law School of India University, Bangalore. Separately, a preliminary outline version of the presentation is available at (https://www.youtube.com/watch?v=BnlqNKqFdhA). I remain grateful for comments. All errors are mine.

I. INTRODUCTION

A popular quip about theory and practice goes on the lines set out below.

Theory: everything is clear, but nothing works;

Practice: everything works, nothing is clear;

And sometimes theory meets practice: nothing works; and nothing is clear.

Regardless of the obvious element of humour above, is it possible to model a theory of Indian corporate jurisprudence which lucidly works? And is such a model effable? This paper answers in the affirmative and posits that jurisprudence of Indian corporate law is desirable, effable and possible.

Interestingly, the triumvirate of Indian corporate laws – company law, competition law and insolvency law – are of relatively recent vintage. Whilst company law stems from the Companies Act of 2013; the insolvency law owes its origin to the Insolvency and Bankruptcy Code of 2016. And although competition law is christened as the Competition Act of 2002, the year of legislation is a misnomer. The conduct-related aspects of the Competition Act are being enforced from 20 May 2009. And merger control provisions were notified (to be enforced) from 1 June 2011.[1] This means that the bulwarks of Indian corporate law are of relatively recent origin in terms of their enforcement jurisprudence.

[1] Rahul Singh, 'India's Tryst with "the Clayton Act moment" and Emerging Merger Control Jurisprudence: Intersection of Law, Economics and Politics' in D Daniel Sokol Thomas K Cheng and Ioannis Lianos, *Competition Law and Development* (Stanford University Press 2013) [250-251].

Given the relative nascence of these enactments, the desirability of jurisprudence can hardly be overemphasized. Even so, this paper under girds the possibility of jurisprudence through modelling[2] – the meld model. Jurisprudentially, the meld model could be understood as the synthesis of Exclusive Legal Positivism ('**ELP**') and Law and Economics. In other words, the meld model 'melts' ELP in the context of Indian corporate law and 'welds' law-and-economics into it. The paper has a modest aim to establish the utility and desirability of the meld model through test suites – i.e. case laws in the context of company, competition, and insolvency laws.

The remainder of the paper is organized as follows. Section II of the paper lays down the analytical jurisprudential framework proposed to be utilized to assess Indian 'corporate' law. Section III applies this analytical tool kit to analyze different aspects of corporate law. Section III (A) applies the analytical framework to a couple of company law decisions and highlights how a more efficient solution would have been arrived at if the court kept the framework in mind in arriving at its decision. Section III (B) applies the analytical framework to leading precedents in competition law and insolvency law. Finally, Section IV concludes the paper.

II. Analytical Framework

Before discussing the manner in which the proposed framework can be utilized to assess corporate disputes in India, it is essential to give a brief overview of its constituents. Accordingly, this section summarizes the key features of ELP and law-and-economics. And then, explains its utility for Indian corporate law.

A. Exclusive Legal Positivism (ELP)

The ELP theory is based upon the sources thesis: legal validity is exhausted by reference to the conventional sources of law i.e. all law is source-based, and anything which is not source-based is not law.[3] Raz further claims that nothing is part of a legal system unless either it is a rule of recognition of the system, or the courts ought to recognize and apply it. To be a rule of recognition is sufficient to be counted as a law of the system, but to be a law that the

---

2 Thomas J Miceli, 'Economic Models of Law', in Francesco Parisi (ed) *The Oxford Handbook of Law and Economics Volume 1: Methodology and Concepts* (Oxford University Press 2018).

3 Andrei Marmor, 'Exclusive Legal Positivism' in JL Coleman, KE Himmak, and SE Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004) 11.

courts are obliged to apply is not. When courts apply laws of other countries these do not become part of the legal system.[4]

For Exclusive Legal Positivists, the law on a question is settled when legally binding sources provide its solution. According to Raz, in such situations, judges are merely supposed to apply the law, and since it is source-based, its application involves technical, and legal skills in reasoning from those sources and does not call for moral acumen.[5]This conception of legal authority entails the sources thesis (or provenance), since it requires that the law, *qua* an authoritative resolution, be identifiable on its own terms, that is, without having to rely on those same considerations which the law is there to settle.[6] Therefore, a norm is legally valid/ authoritative only if its validity does not derive from moral or other evaluative considerations about what it is there to settle.[7]

B. Law-and-economics

The paper considers two primary law and economics theories. First, Ronald Coase's theory on transaction costs. And second, Richard Posner's focus on wealth maximization using Kaldor-Hicks efficiency. Both are discussed below.

Ronald Coase asserts that regardless of how resources were initially allocated, they would always end up being allocated efficiently in a Pareto optimal outcome, if there were insignificant/no transaction costs involved.[8] Different economists have defined the term 'transaction cost' itself in varied ways, and legal scholars and debate continue how broadly or narrowly the term must be defined. It is often seen as costs which a bargainer would have to incur in order to identify a trading partner, negotiate an agreement, exclude free loaders,[9] and enforce an agreement.[10] In the context of strategizing a plan of action for a company, transaction costs would include the cost of planning, deciding, changing plans, resolving disputes, and after-sales, etc. In the context of a legal system, transaction costs would entail the cost of resources of the judiciary, the cost of investments in terms of time and effort for various actors in the legal system such as lawmakers, judges, or lawyers.

4 Joseph Raz, 'The Identity of Legal Systems' (1971) 59 California Law Review 795, 811.
5 Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press 1979) 49.
6 Joseph Raz, *Ethics in Public Domain* (Oxford University Press 1994).
7 AndreiMarmor (n 4) 10.
8 Ronald Coase, 'The Problem of Social Cost' (1960) 3 J Law & Econ 1.
9 Guido Calabresi, 'Transaction Costs, Resource Allocation, and Liability Rules-A Comment', (1968) 11.
[JL] & Econ 67, 68.
10 Pierre Schlag, 'The Problem of Transaction Costs' (1989) 62 S CAL L Rev 1661, 1673-75.

Given that there are barely any allocations without transaction costs, the primary resource allocation aim is to reach a situation as close as possible, and as cheaply as possible, to the allocation which would exist if bargaining in the market was actually costless.[11] In any legal system, this allocation can be achieved either by letting the market function freely, or through intervention of the Government. Calabresi identifies another form of costs to be considered while making this decision by stating:

> "It is precisely the province of good government to make guesses as to what laws are likely to be worth their costs. Hopefully it will use what empirical information is available and seek to develop empirical information which is not currently available (how much information is worth its costs is also a question, however)."[12]

Richard Posner, on the other hand, theorizes that resources must lie in the hands of those who value them the most to achieve wealth maximization. He relies on the Kaldor Hicks efficiency criterion which states that a reallocation of resources would be an improvement and can be justified if the winners in the same could potentially compensate the losers.[13] The question of whether the Kaldor Hicks efficiency criterion must be used in a specific situation, as per Posner, must be a pragmatic decision based on whether using the criterion would serve the goals we have.[14]

C. Baedeker to the Meld Model's Analytical Toolkit/ Framework

The analytical toolkit of the meld model has both positive (descriptive) and normative (ie prescriptive) limbs.

The summary of the law and economics approach in section II(B) above does not supplant statutes. Instead, it underpins the importance of statutory enactments. Such enactments are theorized to constitute government intervention to address market inefficiencies and arrive at an efficient outcome. As per this understanding, it becomes essential for a court of law to adopt an ELP perspective while interpreting such an instrument. This is because when a court does not rely on ELP in its judgments, that represents a reallocation of resources different from what the statute envisaged. If the assessment by the government while enacting any statutory instrument is assumed to be

---

11 Guido Calabresi (n 10) 67, 69.

12 *Ibid.*, 67, 70.

13 Richard Posner, 'Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers', (2000) 29 The Journal of Legal Studies 1153, 1154.

14 *Ibid* 1153, 1156.

correct, this would imply that at the stage of interpretation, the court has arrived at an inefficient outcome, and thereby not only rendering the costs incurred by the government in enacting the instrument as futile but also introducing additional costs for entities governed by such instrument. Law-and-economics provides an interesting vantage point to analyze the consequences of such a departure from the source thesis.

The steps set out below presage the discussion in section III (test suites) of the paper. (Note that the steps are in lexical priority. This means that in those contexts where step 3 conflicts with step 1 (or 2), step # 1 will trump).

Step # 1: Taking the text of the statutes seriously[15] (As delineated through case laws in test suites and explained in step #2 below, this does not necessarily mean being confined to only 'words' of the statute.)

Step # 2: To amplify, this means two things:

(a) rule in *Taylor v Taylor* case[16] ought to be taken seriously; and

(b) Lon Fuller's advice ought to be taken seriously ('Even in the case of statutes, we commonly have to assign meaning, not to a single word, but to a sentence, paragraph, or a whole page or more text.')[17]

Step # 3: Taking law-and-economics based consequences (such as Kaldor-Hicks efficiency, transaction costs) seriously.

An analysis of corporate disputes ought to involve the steps mentioned above. While (descriptively or positively speaking), the court must adopt an ELP lens to the facts of the case and apply the law as is on the facts of the case, any consequence of the application of the ELP lens ought to undergo a

---

[15] Wouldn't all schools of jurisprudence take the text of the statute seriously? Wouldn't this be a basic minimum, a common ground? Whilst attractive, two polar opposites of the schools are easy instances to negate this notion: (a) natural law theory (which doesn't necessarily rely upon statutes but 'morality') and critical legal studies (which questions the very idea of a 'rule of law'). Note that Ronald Dworkin's idea of 'principles' as instantiated in *Riggs v Parmer* stems *a priori* from the text of the statute. Further, an inclusive legal positivist such as HLA Hart finds a role for the judges to 'rule' albeit only 'at the fringe'. ('The statement that the court always had an inherent power to rule in this way would surely only be a way of making the situation look tidier than it really is. Here, at the fringe of these fundamental things, we should welcome the rule-sceptic, as long as he does not forget that it is at the fringe that he is welcome; and does not blind us to the fact that what makes possible these striking developments by courts of the most fundamental rules is, in great measure, the prestige gathered by courts from their unquestionably rule-governed operations over the vast, central areas of the law') HLA Hart, *The Concept of Law* (OUP 1961)[154].

[16] Where a statute states that a particular act is to be done in a particular manner it must be done in that manner or not at all.

[17] Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' 71 Harvard Law Review (1958) 630 [663].

law-and-economics assessment. The law-and-economics limb of the assessment will undergird a (prescriptive or normative) reading to underscore efficiency-based outcomes in light of goals (e.g. Kaldor-Hicks efficiency, transaction cost analysis) envisioned by the statute.

The utility of the meld model's analytical tool kit or framework is highlighted with the help of test suites in section III below.

III. Test Suites

This section establishes the utility and desirability of the meld model through test suites – i.e., case laws in the context of company, competition, and insolvency laws. Section III (A) applies the meld model to a couple of company law decisions and highlights how a more efficient solution would have been arrived at if the court kept the framework in mind in arriving at its decision. Section III (B) uses the analytical framework to leading precedents in competition law and insolvency law.

A. The Companies Act 2013

At first glance, the following case involving a typical *respondeat superior* based interpretation of a standard template on corporate directors and officials' liability may appear mundane. Yet this Supreme Court of India's precedent may be considered 'leading': the author Justice Ashok Bhushan has retired from the Supreme Court of India and been appointed as a chair of the National Company Law Appellate Tribunal (NCLAT) – the appeal tribunal responsible for hearing appeals from the Competition Act 2002, Companies Act 2013 and the IBC 2016. He will serve a five-year, non-renewable term in this office. This precedent captioned as '*ignorantia juris excusat*' due to its ignorance of a clause in the statute probably foreshadows what NCLAT jurisprudence has in store for next half-a-decade.

1. *Ignorantia juris excusat: Shailender Swarup* v *Enforcement Directorate*[18]

Shailender Swarup, the appellant, was one of the directors of Modi Xerox Ltd. The company had allegedly not submitted the requisite evidence pertaining to the import of goods into India. Pursuant to this, the company

[18] *Shailendra Swarup* v *Enforcement Directorate*, (2020) 16 SCC 561, ["***Shailendra Swarup***"].

and its directors had received a show cause notice from the Enforcement Directorate ('**ED**') as contemplated under section 51 of the Foreign Exchange Regulation Act ('**FERA**'), as to why adjudication proceedings should not be commenced against them. The ED decided to hold the proceedings pursuant to its perusal of the company's reply. The proceedings concluded in holding the company and the directors, including the appellant, in contravention of S. 8(3) and 8(4) of the FERA, which imposes various restrictions on dealing with foreign exchange, r/w Section 68 of the Companies Act, which deals with offences against companies.

The appellant pleaded that he was only a part-time non-executive director of the company, and therefore would not fall under the definition of a person responsible for the affairs of the company under S. 68 of the FERA. The appellant's argument essentially draws from the fact that a part-time director of a non-executive nature could not be involved in the regular functioning of the company, which is why, he ought not be considered responsible for the company's actions. The Adjudicating Authority, the Appellate Tribunal for Foreign Exchange, as well as the Delhi High Court rejected this plea; hence the matter was appealed before the SC.

a. Analysis

The case revolved around an alleged infringement of section 68 of FERA, which reads as follows:

> "*68. (1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time of the contravention was committed,* was in charge of, and was responsible to*, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place* without his knowledge or that he exercised all due diligence *to prevent such contravention.*
>
> *(2)* Notwithstanding anything contained in sub-section (1)*, where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company,*

> *such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.*
>
> *Explanation. – For the purposes of this section –*
>
> *(i) "company" means anybody corporate and includes a firm or other association of individuals; and*
>
> *(ii) "director", in relation to a firm, means a partner in the firm.*"

A bare reading of the provision shows that it has two parts. The first 'inculpatory responsibility' clause holds a person liable for the offence if that person was "*in charge of and was responsible to*" the company for the conduct of business at the time of the contravention. The *proviso* has an 'exculpatory *scienter* test', which would allow for a person to escape liability if he proves that the contravention took place without his knowledge, or that he exercised all due diligence to prevent such contravention.

The second clause, which starts with a non-obstante phrase, deems it an offence on part of the director, manager, secretary, or other officer of the company if "*it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect*" on the part of that person.

Surprisingly, the Supreme Court has restricted its analysis to only the first clause.[19] The Court held that since the appellant was a non-executive part-time director, he was not 'in charge of' and 'responsible to' the company for the conduct of business. The Court agreed with the appellant's argument that a part-time non-executive director cannot be expected to know about the day-to-day business of the company, and thus might not have been aware of the contravention. Consequently, the Court allowed the appeal, and the appellant was acquitted.

While the reasoning on the first clause of the provision may seem sound, the Court completely ignored the second clause of Sec. 68 of FERA in this case. This is in spite of the fact that the second clause begins with a non-obstante phrase, which means that nothing contained in the first clause should matter for analysis under the second clause. The second clause provides for a different threshold of analysis, and it is quite possible that a particular instance may fulfill the prerequisites under clause two without fulfilling those of clause one. In light of this, it becomes an interesting case of acquittal

---

[19] *Ibid* [38].

aided by the Court's ambivalence towards a complete reading of the charging section.

Viewed from an ELP standpoint, there is no scope to ignore a relevant provision when the Court pronounces judgment of an issue raised before it. Here the court failed to appreciate the black letter of the law. Therefore, without regard for the final conclusion of the court, an analysis using ELP would require the court to also consider the matter under the second clause of S. 68 of FERA. Additionally, since an entire provision has been ignored, from the vantage point of Law and Economics, this would cause transaction costs in society. Particularly, due to this judgment, there are two kinds of transaction costs that would be incurred, as explained below.

First, future litigation will have to be carried out on the same subject due to uncertainty about the legal position which takes away the court, lawyers', and parties' resources to focus on an issue which has already been agitated in a forum.

Second, ignoring a provision renders the legal position of a particular question ambiguous. This manifests itself in two types of costs:

(i) A reasonably clear statute would have to be re-interpreted again through more judgments on this issue. For example, the Supreme Court needs to once again constitute a bench and take away its limited resources to focus on the issue of whether S. 68(2) of the FERA or other similar provisions would apply, and what would be the standard of conduct required to fasten liability on a director or officer of the company.

(ii) On a macro level, this may lead to uncertainty about the conduct expected of a director or an employee of a company when dealing with the company's affairs. The statute provides that negligence or consent or connivance would be sufficient and even goes so far as to make employees liable, however, the Supreme Court has routinely ignored this in the past. Therefore, for an employee entering into transactions on behalf of the company, this creates uncertainty about his potential liability and may create transaction costs.

b. Key Takeaways

To be sure, the analysis above should not be understood to instantiate any outcome-based preference. In other words, the analysis is not meant to suggest that the second clause would not have allowed for such acquittal. On the contrary, the reasoning is methodology-based.

ELP provides us with a methodology that requires us to apply law as per the source. This means that there is no scope for ignoring a particular provision. The synthesis of Law and Economics to ELP, provides us with another vantage point, which is to not only analyze the law, but also its potential consequences.

Ultimately, when law is viewed as a regulator of human conduct, Law and Economics helps provide an invaluable perspective to understanding the transactions that occur on a daily basis and to minimize the costs incurred to create these transactions and make them more efficient. An application of the vantage points of ELP and Law and Economics in *Shailender Swarup* provides for both a descriptive and normative limb of an analytical framework.

2. Messiah complex: Union of India v Delhi Gymkhana Club[20]

The Companies Act, 2013 brought with it a specialized body – the National Company Law Tribunal ('**NCLT**') – to adjudicate on matters relating to company laws in India. Notably, the NCLT comprises of judicial members from a judicial background and technical members with more general commercial background. While analyzing corporate law framework from a synthesis of law & economics and ELP, it is imperative to examine the nature of decision-making at the forum where company law cases commence. In light of this objective, it would be apt to analyze the order in the *Delhi Gymkhana* case to assess whether the NCLT's decisions are in compliance with this theoretical framework. In particular, this NCLT precedent highlights a misplaced sense of redistribution which guides the judgment. This misplaced sense of redistribution doesn't have statutory basis. And is animated by 'messiah complex' ('saviour complex).

In June, 2020, the acting president B.S.V. Prakash Kumar of the principal bench of the NCLT, passed an interim order in the *Delhi Gymkhana* case. The order was passed under section 241(2) of the Companies Act in a case dealing with the oppression provisions of the Companies Act, 2013. The Union of India, through the Ministry of Corporate Affairs, initiated the company petition against Delhi Gymkhana Club Limited, alleging that the affairs of the club are being conducted in a manner prejudicial to public interest. The government sought to remove the incumbent directors of the club and sought the permission for the Central Government to nominate 15 persons as directors of the club to manage its affairs.

---

[20] *Union of India* v *Delhi Gymkhana Club Ltd.*, (2021) 226 Comp Cas 28 ["**Delhi Gymkhana**"].

Delhi Gymkhana Club is a hundred-year-old body corporate registered under the then Companies Act in 1913. The contention in the petition filed against the club was that the club is not granting memberships in accordance with its Articles and Memorandum of Association, and is restricting its membership to 'privileged people'. Because the club is situated on a land leased to it by the colonial government at a nominal charge, the petition claimed that the granting of memberships a matter concerning the public at large. It was alleged that the memberships were granted to certain individuals, dependents of green card holders, and others at the expense of other wait listed applicants who had paid the relevant fees and were kept waiting for the membership. This became the underlying basis for the allegations of mismanagement and that the club's affair being conducted prejudicial to the public interest. The NCLT held that the affairs of the club were against public interest and found a *prima facie* case of oppression and mismanagement.

a. Analysis

There are two levels on which this judgment has to be looked at. First is the application of constitutional law principles to a private law matter, and second is the reasoning of the NCLT to give an interim holding against the Delhi Gymkhana Club.

On the first issue, the order considered the issue from a public interest perspective in a purely commercial law matter. It invoked Article 14 of the Constitution of India in a company law matter to hold that as the club is operating from a land leased by the government, the constitutional provisions of equality must be extended to the Delhi Gymkhana club. The order reeked of similar basis of reasoning to make a case of prejudice to public interest.

On a preliminary analysis, it is unclear, unwarranted, and unreasonable for the NCLT to rely upon the constitutional provision of Article 14 in a company law case (not concerning the state). This is because of two reasons. First, the NCLT is not conferred the powers under the Companies Act, 2013 to apply or interpret the Constitution in any manner. Second, in any event, the fundamental rights provisions of the Constitution of India only apply to 'state' as defined under Article 12 and not to limited companies. Thus, the NCLT is not merely disregarding a legislation but indirectly and to a certain extent, the Constitution of India itself.

With this we turn to the second issue of the process of reasoning employed by the NCLT. The order decides the issue in absolute disregard of the statute, specifically section 241 of the Companies Act 2013, as well as the precedents on oppression and mismanagement. Precedents mentioned in the order only get a superficial analysis, if any. The order has failed to provide or build on to previous interpretations of the statute, in any manner. Admittedly, there is no Supreme Court precedent interpreting 'public interest' under section 241, however, the order does not deal with other cases on section 241 either, and fails to assess the correct objective of section 241 petitions. In doing so, the order militates against the the doctrine of *stare decisis*.

Additionally, it is discernible that the NCLT's underlying concern was to ensure that memberships are granted in a fair manner and without prejudice to certain individuals. By using section 241 as a means to resolve the problem of distribution, not only does the NCLT disregard the accepted principle of common law that a company has the permission to function autonomously within the bounds of the law, but it also disregards the objective of section 241.

When analyzing the order, in light of the above issues, from the perspective of ELP, it is clear that the basis of the NCLT's reasoning is not grounded in any source of law. Rather, the order explicitly moves away from the statute (referred to as 'law book' in ¶32 of the order) and provides an absurd and untenably wide interpretation to section 241. The case is a prime example of where the legislation has passed a statute, however, the adjudicators comply with neither the text of the statute, nor the past decisions on the issue. The holy grail of 'public interest' under section 241 and the absurd interpretation provided to it by the NCLT is bound to increase transactional costs. This is because the uncertainty of the application of law creates confusion and doubt in the minds of the subjects of the law as the actors in the corporate world become unsure of how the NCLT will deal with similar cases in the future. Orders such as these lead to uncertain situations where commercial parties are confused about the way they should conduct themselves. The transaction costs resulting from the order cannot be compensated from a single victory for the government in the present case.

b. Key Takeaways

It is essential for a legal system to ensure that the forums of first instance, where the highest number of cases is adjudicated, are equally, if not more than the higher courts, aligned with the theories of ELP and law & economics to adjudicate in a reasoned, and predictable manner. Although not prescriptive, the analysis of the NCLT's adjudication in *Delhi Gymkhana* showcases the utter disregard of the statute and precedents (sources of law).

The result is undoubtedly an undesirable increase in transaction costs for those subjected to the law.

B. (The Competition Act 2002) *Settled versus right dichotomy* in Excel Crop Care Ltd. v Competition Commission of India[21]

The Supreme Court of India in *Excel Crop Care* upheld the Competition Appellate Tribunal's ('**COMPAT**') decision of awarding penalty based on 'relevant turnover'. In the instant case, the Competition Commission imposed a penalty of 9% on the average turnover of the companies found to be operating in contravention of section 3 of the Competition Act. On appeal, COMPAT deemed it fit to introduce the concept of relevant turnover and limited the penalty to 9% of the relevant turnover. This means that for a company engaged in different areas of production, relevant turnover refers to the turnover from the product that forms the subject matter of the contravention. While coming to this decision, the court emphasized that a tribunal ought to be governed by the doctrine of proportionality in imposing penalties and that penalizing statutory violators on their entire turnover would not be a penalty proportional to the contravention.[22] It felt that adopting the criterion of 'relevant turnover' for the purposes of imposition of penalty would be more in tune with the ethos of the Act and legal principles which surround the matters pertaining to imposition of penalties.[23]

1. Analysis

The Supreme Court's interpretation has little textual basis. Instead, it goes against the letter of law. To understand whether the scheme of the Act provides any basis for relevant turnover, we need to look at Section 27(b) which authorizes the Competition Commission to impose penalties when there is a contravention of Section 3 or 4 of the Act.[24] The statute itself states in clear terms that the penalty is to be calculated in relation to the 'turnover' of the company. The Act does not mention that the proportionality of penalty is a relevant consideration for imposing penalty. A plain reading of the section makes it obvious that the provision imposes penalty on the entire turnover rather than a part of it. Notably, the Court makes a passing reference that the usage of the term relevant market may point towards a penal provision

---

[21] (2017) 8 SCC 47 ["**Excel Crop Care**"].
[22] *Ibid* [92].
[23] *Ibid* [83].
[24] The Competition Act 2002, s 27.

that is catered towards the consumer welfare taken away by the goods that form the subject matter of that relevant market.[25] However, this argument does not hold much merit in a situation where section 27(b) specifically refers to the entire turnover of the offending company.

To justify their decision of taking into consideration only relevant turnover, the COMPAT referred to the European Union ('**EU**') and Office of Fair Trading ('**OFT**') guidelines, holding that the guidelines were 'undoubtedly relevant'.[26] The court also relied on a judgment of the Appeal Court of South Africa, which made a similar insertion.[27] However, as highlighted earlier, from an ELP perspective, application of laws of other jurisdictions by courts does not make such laws a part of the domestic legal system.[28] According to this understanding, the sources which have been relied upon by the SC are not sources of 'law' in India. This shows that instead of basing their decision in the law, they have taken into account extra-legal considerations to come to this conclusion.

Moreover, the Supreme Court's reasoning is not in line with Raz's sources thesis and prevents the statute from being an 'identifiable authoritative directive'. This is because while deciding, the Court seems to derive the validity of the rule from the evaluative considerations it is there to settle in the first place. The statute, i.e. the Competition Act here, exists to decide what must be the competition rules in India including the rules on penalty. Therefore, as per Raz's thesis, the Competition Act itself cannot be interpreted using reasoning based on what is logical and what is absurd since it exists to do that very thing. By using other evaluative considerations like 'proportionality' in penalty, the court has tried to supplement their logic over that of the lawmakers, who have used these penalties as a deterrent for future behavior. Doing this will prevent the Competition Act from claiming the legitimate authority it needs to ensure compliance. If the Court is to prescribe the reasons outside the statute on subject matters the statute is present to cover, it is a violation of ELP.

Undoubtedly, proportional penalty as contemplated by the Court might be considered as a just and equitable punishment by many. However, going against the letter of the law in achieving this end by providing inadequate reasoning and not observing the implications of such a decision is of such a decision goes against the principles of ELP. This brings us to the second limb

[25] Excel Corp Care (SC) (n 22) [21].
[26] *Excel Crop Care Ltd.* v *CCI*, 2013 SCC OnLine Comp AT 149 [62].
[27] *Ibid* [83].
[28] Joseph Raz (n 5)795, 811.

of our framework to look at law and economics to assess the effect of such a deviation from ELP.

In the present case, the Competition Act 2002 can be seen as the legislature's conclusion that the creation of legal rules in the anti-trust domain was the best route to the ideal resource allocation. Furthermore, Section 27(b) of the Competition Act 2002 is a liability rule[29] which represented the formula adopted by the Parliament to determine the penalty. Such formula would have been determined through research, debate and consultation before it was finally written into law.

In other words, the Government incurred two kinds of transaction costs while determining the formula under Section 27(b).

First, in *Excel Crop Care*, by reading the word 'relevant' into Section 27(b), the Supreme Court changes this formula entirely, thus, rendering the Government's past efforts futile while also jeopardizing its future prospects of amending the provision based on new information on its allocative outcomes. This would lead to future litigation on the same subject due to uncertainty on the legal position created by the Court. By basing its reasoning on 'proportionality' the Court also ignores policy goals other than allocative efficiency which the Government based the provision on, for instance, a deterrent effect on bargainers of such transactions.

Secondly, ignoring the statute results in making jurisprudence on a particular law ambiguous. This manifests itself in two types of costs.

(i) A reasonably clear statute will have to be reimagined again in such a scenario through more judgments on that statute. The ignorance of the statute creates a need to clarify and 'create' the law in that area. This is because the new concept of 'relevant turnover' will lead to questions about what method to use to determine what forms the 'relevant' portion of the total turnover. These answers may differ in different sectors and will often be subject to facts and circumstances. This leads to additional burden on the court to make an assessment it would not have had to if the statute had been read as is. Thus, the court now will have to incur costs to gather empirical information, parts of which had already perhaps been used by the legislature to create the law in the first place. Additionally, any concrete clarification of the concept of relevant turnover may take several years as it will need a certain volume of cases for the Supreme Court to completely land on the suitable position of law. Thus, the overall development of jurisprudence will

---

[29] Guido Calaresi and Alexander Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', (1985) 85 Harvard L Rev, 1089, 1092.

be slowed down, uncertain, and will need a degree of creation of law by the judges which may not be in line with their constitutional role.

(ii) This ambiguity further leads to another form of transaction cost, i.e., costs to the parties to the suit, the lawyer, and other individuals who may have to approach the courts in this regard. The ambiguity in jurisprudence will lead to uncertainty about what the law actually is and how statutes or precedents will be used. For example, precedents on purposive interpretation were used in *Excel Crop Care* to justify the addition of 'relevant' as being more in line with the ethos of the act. Thus, a lawyer will incur higher informational costs in an attempt to predict the leanings of the court towards certain precedents in order to decide which arguments to make. The parties to the suits will also have to incur additional valuation and negotiation costs for their transactions which may be affected by Section 27(b).

Hence, it can be concluded that deviating from the sources thesis under ELP leads to myriad transaction costs along with the risk of misallocation, and of not achieving the desired policy goals which would not have arisen in the counter factual scenario. Particularly, qualifying the penalty to be restricted only to the relevant turnover may reduce the amount paid by the party, especially when it is a conglomerate involved in diverse sectors. It may also reduce the deterrent effect that a penalty on the total turnover may have had. Both of these consequences are a move away from the text of Section 27(b) and represent a reallocation of resources. If here, the court were to use the Kaldor-Hicks criterion, it can be seen that the ruling reduces the cost incurred by a party which violated Section 3 of the Competition Act and entered into an agreement which caused appreciable adverse effect on competition within India – such a party is thus a 'winner' in Posner's language. Yet, there does not seem to be any kind of compensation to the losers from this action, including the consumers, enterprises at different levels of the supply chain who may have been impacted, employees etc. Perhaps, this can enable us to conclude that stakeholders who were considered while enacting the Competition Act have not received the benefit that the act aimed to provide them. Thus, despite the Supreme Court's justification of this move from the statute as being more just and equitable, there is no certainty as to whether it leads to wealth maximization in the sense that it was actually desired by the statute.

2. Key Takeaways

It must again be emphasized that the above analysis is not to state that the introduction of the term 'relevant' has no merit at all. It is theoretically possible that a more efficient allocation of resources might be arrived at after adopting this approach. This, however, is not proven to be the case by the decision in *Excel Crop Care*, which it must have done while deviating from the clear statutory language. The critique here is more structural in nature in that the court has an obligation to merely interpret the law that the legislature has enacted subsequent to various measures such as consultations and balancing of interests. In the absence of such compliance with the language of the law, the burden to be placed on the court in demonstrating the necessity of the deviation is required to be high. This procedural certainty will possibly aid in ensuring both the confidence of the stakeholders in the legitimacy of the application of the intervention by a court of law, as well as the desired certainty and predictability,

C. (The Insolvency and Bankruptcy Code 2016) *Manifest arbitrariness* in Essar Steel India Limited v Satish Kumar Gupta30

The *Essar Steel* case decided a number of questions that arose in the context of the Corporate Insolvency Resolution Process ('**CIRP**') under the Insolvency and Bankruptcy Code, 2016 ('IBC'). The appeal before the Supreme Court was against the decision of the NCLAT in the matter of the CIRP of Essar Steel, and encompassed questions of the scope of judicial review over the decision of the Committee of Creditors ('**CoC**'), as well as the constitutionality of the amendments passed by the legislature to invalidate some portions of the NCLAT order.

On the question of the determination of the amount to be paid to the different classes of creditors in the CIRP, the Supreme Court deferred to the commercial wisdom of the CoC in deciding these matters.[31] In order to arrive at this conclusion, it relied on 'sources' of law such as the IBC (statute), the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (statutory instrument/ delegated legislation) and, to an extent, judicial decisions. As per the court, in the IBC itself, section 31 read with 30(2) [NCLT], and section 32 read with section 61(3) [NCLAT], provide limited grounds for judicial review of the decision of the CoC.[32] If these conditions are met, the adjudicating/ appellate authority must approve the resolution plan. Although Regulation 38, which fleshes out section 30(4), mentions that operational creditors must be given priority over financial creditors, the court held that this does not mean that

[30] 2020 8 SCC 531 ["**Essar Steel**"].
[31] *Ibid* [52].
[32] *Ibid* [62].

operational creditors must be paid in proportion to or on par with financial creditors.[33] It is sufficient if the CoC demonstrates that it has accounted for the interests of all stakeholders in light of the aim of maximizing the value of the assets of the corporate debtor. Thus, relying on these posited sources of law, the court held that the commercial wisdom of the CoC must be deferred to.

Similarly, in deciding questions such as the role of the resolution professional,[34] the constitution of sub-committees,[35] etc., the court relied on the scheme of the IBC, the IBBI Regulations, and judicial precedent. Therefore, here too, there was a reliance on the statute, statutory instruments, and judicial precedents. The court, however, deviated from the statute in its interpretation of the time limit of 330 days for the completion of the CIRP under section 12,[36] holding it to be merely directory in nature despite the statute using the term 'mandatorily'. It noted that if sufficient reason is shown to the satisfaction of the court that it is in the interest of all stakeholders that the entity remains a going concern, and that the delay (which is not the fault of the applicants) does not exceed 330 days by a significant period, the court may relax the time limit and provide an extension. Noting that striking down the entire provision would be an extreme step, the court arrived at a compromise, in that the provision would be directory. Therefore, while *ordinarily* the time limit must be followed (in light of past experiences with delay in the context of Sick Industrial Companies Act, 1985), the court would have the discretion to relax the same in "exceptional cases" so as not to force liquidation.

1. Analysis

In order to strike down the word 'mandatorily', the court primarily relied on the doctrine of 'manifest arbitrariness'.[37] Neither the meaning of the doctrine nor its source has been adequately elucidated in the judgment. The court merely held that a mandatory time limit would excessively interfere with the litigant's "fundamental right to non-arbitrary treatment under article 14", as delays in legal proceedings are not the litigant's fault. It also reasoned that the fundamental right to carry on business under article 19(1)(g) would also be restricted unreasonably by the mandatory time limit.

[33] *Ibid* [88].
[34] *Ibid* [39].
[35] *Ibid* [99].
[36] Insolvency and Bankruptcy Code 2016, s 12.
[37] Essar Steel (n 31) [127].

In respect of such an employment of the doctrine of manifest arbitrariness to strike down as unconstitutional the word 'mandatorily' in the statute, ELP, especially the version embodied by Joseph Raz's 'sources thesis',[38] raises important questions. The doctrine of manifest arbitrariness is not posited in any conventionally identified 'source' of law. It is not part of the IBC or any of the delegated legislations under the IBC. It also does not find express mention in the text of the Constitution, neither in terms of fundamental rights nor in respect of legislative competence. An argument could be made that *Essar Steel*'sreading of the manifest arbitrariness doctrine into Article 14 is rooted in precedent. Indeed, it had been employed in *Shayara Bano* v *Union of India* ('**Shayara Bano**'),[39] which had subsequently been cited for the same by judgments such as *Navtej Singh Johar* v *Union of India*.[40] However, in a judgment with multiple opinions, the ratio, as per the 'narrowest grounds' doctrine, is the implicit consensus/ lowest common denominator between the various opinions addressing the facts of the instant case, rather than broader generalizations.[41] This would also ensure predictability. Thus, as per this doctrine, the manifest arbitrariness test in *Shayara Bano* was not its ratio. Therefore, subsequent cases which have relied on *Shayara Bano* for this point would also be infirm in this regard. Therefore, there is not much support by way of judicial precedents serving as sources declaring this doctrine as law.

If the doctrine had been prescribed by a conventionally identified source of law, it would have been a 'power-conferring' legal norm which is valid in the eyes of ELP.[42] This would mean that the law is directing the court, and giving it the 'directed' power, to use moral considerations in its decision-making.[43] However, in this case, the court is making the moral standard of 'manifest arbitrariness' a *part* of the law itself.

Therefore, as per ELP, in light of this doctrine not originating in posited sources of law, it is not 'law'. This in turn implies that *Essar Steel* was perhaps not decided by the Supreme Court in accordance with existing law. Instead of interpreting law, the court here has created law. It has, despite the clear wording of the statute, imported extraneous (moral/ political) considerations to decide what the statutory provision *should* be. It has also thus derived the validity of the law from those moral considerations or questions which the

---

38 Joseph Raz (n 7) 211.
39 (2017) 9 SCC 1 [101].
40 (2018) 10 SCC 1 [253].
41 R Cross and JW Harris, *Precedent in English Law* (4th edn, 1992) 40; MA Thurmon, 'When the Court Divides: Reconsidering the Value of Supreme Court Plurality Decisions' (1992) 42 Duke Law Journal 419, 428.
42 Andrei Marmor (n 4) 10.
43 *Ibid*., 11.

statute exists to settle in the first place, when, instead, the law is something which possesses independent, *de facto* authority. A direct consequence of this is that the public may well attempt to excuse their non-compliance with the law by challenging the moral considerations which the court has made part of, and used to justify, the law. Hence, it becomes important to turn to law and economics theory to analyze the implications of this departure from ELP.

The three costs similar to that highlighted for the *Excel Crop Care* case arise over here.

First of all, the use of the term 'mandatory' in Section 12 of the IBC 2016 was a deliberate resource allocation model adopted by the government after research and consultation. The costs incurred in arriving at this model are rendered futile by reading the provision down to only a directory provision. It also sidesteps the possible policy goals such as the speedy completion of the CIRP process, and raises costs of future possibilities of reaffirming this position due to the uncertainty created on the legal position by the Court.

Secondly, the growth and development of jurisprudence is impinged due to the ambiguity introduced by making the 330 days requirement as directory. This ambiguity manifests itself in two kinds of transaction costs.

(i) This would now require several clarifications in its application as against the earlier clear model proposed in the legislation. Instead of plainly applying the 330 days time line, the Court would now often have to determine whether the time line could be deviated from in a given situation. Based on its own ruling,[44] the Court would have to clarify two factors. First, it will need to elucidate the meaning of the term 'short period' up to which a delay would be admissible. Second, in each case, the court will need to assess whether it is in the interests of all stakeholders to keep the corporate debtor functioning or whether it was a circumstance where not following the time line could lead to any form of negative impact. This will not only lead to a lag of several years before any sense of certainty is attained, but also impart a role of creating the law to judges, a role they are not constitutionally envisioned to perform.

(ii) The transaction costs for all stakeholders in a CIRP process increases significantly due to this newly introduced ambiguity. For example, the established precedents on purposive interpretation were arguably ignored in *Essar Steel* by reading down the mandatory time line which had been added as a lesson learnt from the former SICA regime on insolvency. This leads to a

[44] Essar Steel (n 31) [79].

scenario where stakeholders can never be sure of how the courts will interpret and adjudicate their disputes. This raises the informational costs for a lawyer in determining how courts will treat precedents. In CIRP cases, the parties may now have to incur higher legal fees due to the possibility of the process stretching for longer than 330-days and then a possible subsequent challenge to the same in Court where it decides whether such delay was justified. Further, the valuation and negotiation costs will also increase for transactions affected by the ruling in *Essar Steel*.

The decision in *Essar Steel* militates against Kaldor-Hicks efficiency. The move from a 'mandatory' time line to a directory time line is justified by using the principle that a procedural delay must not cause an individual any harm. However, the court does not assess whether moving to a directory time line by ignoring the explicit intention of the legislature which was borne out of the experience under the SICA regime[45] may actually lead to a worse efficiency outcome and might go against the goals of the statute. It does not analyze whether the gains of the potential winners – corporate debtors who do not have to liquidate even when the CIRP extends beyond 330 days[46] – can compensate for the losers including corporate debtors who may be faced with a delayed CIRP when time is of the essence, and other stakeholders such as creditors for whom the best value may have been realized through liquidation itself. An analysis based on Kaldor-Hicks efficiency here could be useful as it would allow us to see that the losses of the creditors in a delayed proceeding could be far greater due to the corporate debtor being a going concern and its value further diminishing. Compared to this loss, the only gain a corporate debtor could see is that it is allowed to have a delayed process when this is caused by factors beyond its control. The identification of this imbalance in gains and losses could enable a court to decide in a manner which may fulfill the desired goals more effectively.

2. Key Takeaways

The above analysis indicates the importance for courts to adopt an ELP perspective as otherwise it might lead to inefficient outcomes as indicated by

---

45 KristinVan Zweiten, 'Corporate Rescue in India: The Influence of the Courts' (2015) 1 Journal of Corporate Law Studies 1.

46 In theory, it might be plausible to argue that had the Supreme Court interpreted 330-days timeline as mandatory, such an interpretation *could* increase transaction costs in those where the courts will need to disallow creditors' committee approved resolution plan merely because of lapse of 330-days. Note, however, that the reasoning adopted in this article is agnostic towards outcome. And failure of a resolution plan isn't a financial Armageddon. The IBC 2016, in terms of an ELP-based statute envisions dissolution of a corporate debtor.

Law and Economics. This is particularly problematic with the tendency of the Indian courts, the Supreme Court in particular given its vast complete justice powers, to go beyond the clear statutory provisions enacted by the legislature.

An introduction of a new and vague concept such as manifest arbitrariness to corporate law jurisprudence merely creates an uncertainty in the market without sufficient guidance for stakeholders to conduct themselves.[47] In doing so, the court adopts a role of lawmaking that it is both not allotted to as well as not suited to. This is important to consider since the process of enactment of legislation is carried out after a long-drawn assessment of the interests of varied stakeholders.

Courts are ill-placed to interject in the *modus vivendi* instantiated via statutes. This is due to what Fuller and Winston have reminded us about the 'poly centric' nature of adjudication of disputes:[48]

> 'We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "poly centric" situation because it is "many centered" – each crossing of strands is a distinct center for distributing tensions.'

Undoubtedly, the court's maladroitness stems from the varied interests while adjudicating a dispute containing limited parties based on the specific arguments raised in the specific hearings before them. Courts are unlikely to be privy to the nature of considerations behind the enactment of the legislation which traverse much beyond the limited set of facts a court deals with in a case. Accordingly, if a similar long-term effects-based approach would have been adopted by the court in *Essar Steel*, irrespective of impact on the final decision arrived at by the court, the nature of its reasoning and caution adopted by the court would have been vastly different.

---

47 Vasu Agarwal, 'Manifesting the Consistency in the Application of Manifest Arbitrariness Doctrine', 20 Statute Law Review (2021).

48 Lon L. Fuller and Kenneth I. Winston, 'The Forms and Limits of Adjudication', 92 Harvard Law Review 353, 395 (1978).

IV. CONCLUSION

The so-called Eisenhower Principle states: 'what is important is seldom urgent, and what is urgent is seldom important'. Even so, given the nascence of the triad of Indian company, insolvency and competition law, a jurisprudence-based model for Indian corporate law is both urgent and important.

Such a model of Indian corporate law doesn't suffer from *je ne sais quoi*. With the help of test suites i.e. precedents from Indian company, insolvency and competition law, this paper iterates a compelling case for a 'meld model' i.e. a synthesis of exclusive legal positivism and law-and-economics.

A brief summary of the sample set of test suites is set out below.

Test suites	**ELP (positive/descriptive)**	**Law-and-economics (normative/prescriptive)**
Swarup (*Ignorantia juris excusat*)	*Non obstante* limb of the statute	Incentives? TC?
Delhi Gymkhana (messiah complex)	The 'oppression' provision doesn't have an Article 14 limb	TC
Excel Crop (settled v right dichotomy)	'relevant'	Kaldor Hicks efficiency
Essar Steel (manifest arbitrariness)	Timelines?	Kaldor Hicks efficiency

In sum, the meld model i.e., a synthesis of exclusive legal positivism and law-and-economics is a lucidly workable model for Indian corporate jurisprudence.

Termination of Contracts During The Moratorium: Looking Beyond The 'Going Concern' Status

*Amrit Mahal**

The resolution of distressed companies on a going concern basis is a cornerstone of the corporate insolvency resolution process ("CIRP") introduced under the Insolvency and Bankruptcy Code, 2016 ("IBC"). This is critical to maintain the viability of the company, maximise the value of its assets and improve the likelihood of insolvency resolution. Section 14 of the IBC furthers this intent by instituting a moratorium from the date of commencement of the CIRP, until its conclusion. The moratorium prohibits persons in rem from undertaking certain actions against the corporate debtor, including the recovery of any property held by the corporate debtor and cessation of supply of goods and services critical for its operations.

The moratorium does not per se prohibit third parties from terminating contracts entered with the corporate debtor. However, insolvency tribunals have set aside the termination of lease agreements, supply contracts and other pre-existing arrangements with the corporate debtor, where termination would have the effect of breaching the moratorium or jeopardising the corporate debtor's going concern status.

This paper examines judicial and legislative developments in the IBC in connection with termination of contracts from critical and comparative perspectives. The paper first examines the ambiguities in the scope of the moratorium provisions; and

* Associate at Khaitan & Co, New Delhi and LL.M. candidate at London School of Economics and Political Science (2021-2022). I thank the editorial board of NLS Business Law Review for their assistance and the peer-reviewers for their feedback, both of which were key in refining this paper. The views expressed in this paper are personal. They do not constitute legal/professional advice and are not the views of Khaitan & Co. The paper reflects the position of law as of 15 March 2021.

second, highlights that the IBC's focus on the maintenance of the corporate debtor as a going concern often discounts hardships faced by contractual counter parties to the corporate debtor. Through a comparative study, the paper considers measures instituted in the United Kingdom and United States to balance the interests of such counter parties, while giving due regard to the overarching goal of insolvency resolution.

I. INTRODUCTION

As businesses struggle with the impact of the COVID-19 crisis on their operations and revenue streams, there has been renewed focus on assessing the risk of financial distress and insolvency. The risk of insolvency is, however,neither a novel concept nor a remote one in the business world. To safeguard against this risk, parties to a contract typically incorporate *ipso facto* clauses in the agreement. These clauses allow a contracting party to terminate the agreement, suspend further credit or enforce other contractual remedies if the counter party is faced with insolvency or other similar proceedings.

However, the right to suspend or terminate the contract may not be available to a contracting party, even if it is contractually stipulated through an *ipso facto* clause, where the counter party is admitted into the corporate insolvency resolution process ("**CIRP**") under Insolvency and Bankruptcy Code, 2016 ("**IBC**").This is pursuant to the moratorium provision set out under Section 14 of the IBC, which bars third parties from *inter alia*, (a) recovering any property occupied by or in possession of the debtor company (called the "**corporate debtor**");[1] and (b) terminating, interrupting or suspending supply of critical goods and services to the corporate debtor, during the CIRP.[2] These restrictions facilitate a key objective of the IBC – to maintain the corporate debtor as a going concern during the CIRP, in order

[1] Insolvency and Bankruptcy Code 2016 (IBC), s 14(1)(d).
[2] IBC, ss 14(2) and 14(2A).

to maximise the value of its assets[3] and obtain better realisation from interested buyers.

Notably, the moratorium provisions do not express lybar the termination of contracts, which suggests that third parties may terminate contracts with debtors during the moratorium.[4] However, where termination of the contract has the *effect* of either triggering the moratorium provisions mentioned above or preventing the corporate debtor from continuing as a going concern, insolvency tribunals have set aside the termination of contracts.[5] In the fast-evolving landscape of the IBC, the moratorium has posed a variety of challenges. While third parties have sought to limit their exposure to companies admitted into CIRP, insolvency resolution professionals ("**RP**")[6] have sought to ensure that the corporate debtor has the requisite assets, goods and services to continue its operations.

This paper attempts to examine recent judicial and legislative developments under the IBC in this domain from a critical and comparative lens.[7] From a critical perspective, the paper *first*, examines the ambiguities in the scope of the moratorium provisions. *Second*, the paper argues that the narrow focus on the maintenance of the corporate debtor as a going concern under the IBC, both in legislation and judicial interpretation, discounts the hardships faced by contractual counter parties to the corporate debtor. Through a comparative study, the paper draws on measures instituted in the United Kingdom ("**UK**") and the United States of America ("**United States**") to balance the interests of such counter parties, without diminishing the overarching goal of insolvency resolution.

Redressal of these lacunae in the IBC is crucial, more so in the COVID-19 era, where economic data signals a steep contraction of the Indian economy.[8] In these extraordinary times, compelling cash-strapped businesses to

---

3 IBC, Preamble.

4 See, for instance, *In the matter of Gujrat NRE Coke Limited* CP (IB) No 326/KB/2017 (NCLT Kolkata, 22 August 2017) where the insolvency tribunal allowed the termination of a contract for maintenance of certain windmills during the moratorium, due to failure of the corporate debtor to pay outstanding dues under the contract.

5 See, for instance, *Pepsico India Holdings Pvt Ltd v. Mr V Nagarajan* CP/564 (IB)/CB/2017 (NCLT Chennai, 28 May 2019);*Srei Infrastructure Finance Ltd v. Sundresh Bhatt* Company Appeal (AT) (Insolvency) No 781 of 2018 (NCLAT, 31 July 2019).

6 The resolution professional is a qualified insolvency professional appointed by the 'committee of creditors' constituted under the IBC. The resolution professional administers the CIRP and manages the operations of the corporate debtor until the CIRP is concluded.

7 The scope of this paper has been limited to examination of contracts executed between the corporate debtor and non-government counterparties. Contracts with central/state governments or government authorities have not been discussed.

8 National Statistical Office, Ministry of Statistics & Programme Implementation, 'Press Note On Second Advance Estimates Of National Income 2020-21 And Quarterly Estimates

perform contracts with companies under CIRP can have lasting detrimental effects on commercial operations – especially for small businesses. This makes an exploration of statutory safeguards for protection of such contractual counter parties a worthwhile endeavour. Added to this is the IBC's aspiration to balance the interests of *all* stakeholders in the insolvency resolution process, which further fuels the spirit of this venture.[9]

In this setting, section II of the paper undertakes a critical review of key case law dealing with termination of different kinds of contracts during the CIRP, including lease agreements and supply contracts. Section III deals with the introduction of Section 14(2A) in the IBC, which has empowered RPs to prevent termination of supply of goods and services which are in their view, "critical" to manage the operations of the corporate debtor as a going concern. Section IV comments on the recent trend in judicial decision-making, where courts and tribunals have prohibited the termination of contracts relying on the preamble and overarching goal of the IBC, rather than the express moratorium provisions. In each of these sections, the paper argues that the IBC moves in the right direction by protecting the interests of the corporate debtor, but falls short of addressing concerns of contractual counter parties to the corporate debtor. Section V briefly discusses jurisprudence on the payment of dues to counter parties compelled to continue contracts during CIRP and the section VI concludes the paper.

II. THE BAR ON RECOVERY OF PROPERTY

Section 14(1)(d) of the IBC prohibits the "*recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*" The provision is aimed at preventing owners and lessors from recovering "any property" from the corporate debt or from the date of commencement of CIRP until its formal conclusion. This includes both immovable property like land and building as well as moveable property like goods and equipment. Given the wide breadth of this provision, third parties have faced resistance from both RPs and insolvency tribunals where the termination of a contract is intertwined with the recovery of property held by the corporate debtor.

Of Gross Domestic Product For The Third Quarter (Q3) Of 2020-21' (2021) paras 5-8 <http://mospi.nic.in/sites/default/files/press_release/PRESS%20NOTE%20SAE%2026-02-2021.pdf> accessed 15 March 2021.

[9] IBC, Preamble.

This section focuses on key case law under the IBC on the termination of three types of contracts during the moratorium: (a) contracts dealing with immoveable property, (b) contracts vesting a license or right in respect of property in the corporate debtor, and (c) contracts dealing with moveable property. Through this discussion, the paper seeks to achieve a two-fold objective. *First*, an examination of this case law gives insight into judicial trends under the IBC in this domain and offers a review of evolving literature. *Second* and more crucially, the paper relies on the case law to critically examine Section 14(1)(d) of the IBC. To this end, sub-sections A and B examine judicial interpretation of Section 14(1)(d) and discuss the implications of a significant Supreme Court ruling on this provision. Sub-section C highlights that the current form of Section 14(1)(d) suffers from certain critical lacunae, much to the detriment of contractual counter parties to the corporate debtor.

A. Immoveable assets

The express language of Section 14(1)(d) prohibits the recovery of any property in the possession of the corporate debtor by a "lessor". Given the express bar on recovery by lessors, insolvency tribunals have unwaveringly barred the termination of lease agreements executed with the corporate debtor – holding such termination to be in clear violation of the moratorium.[10]

Outside of lease agreements, the Supreme Court has discussed the scope of Section 14(1)(d) in the context of immoveable property in *Rajendra Bhutta*.[11] Here, the court was dealing with the termination of a land development agreement, pursuant to which the Maharashtra Housing and Area Development Authority ("**MHADA**") had granted the corporate debtor license to undertake development of certain land owned by the MHADA. The termination of this agreement during the moratorium was challenged by the RP. He argued that the termination would have the effect of allowing recovery of the MHADA property granted to the corporate debtor for development activities, in direct violation of the bar on such recovery under Section 14(1)(d). The Supreme Court allowed this appeal and clarified the scope and application of Section 14(1)(d) of the IBC.

[10] *Navbharat Castings LLP v. Moser Baer India Ltd,* Company Appeal (AT) (Insolvency) No 323 of 2018 (NCLAT, 30 July 2018); *Raj Builders v. Raj Oil Mills Limited* Company Appeal (AT) (Insolvency) No 304 of 2018 (NCLAT, 8 August 2018); *Srei Infrastructure Finance Ltd* (n 6).

[11] *Rajendra K Bhutta v. Maharashtra Housing and Area Development Authority* Civil Appeal No 12248 of 2018 (Supreme Court, 19 February 2020).

It observed that in order to give proper effect to the language of Section 14(1)(d), the word “owner” must be read in conjunction with the expression “occupied by”,which refers to property which is *physically* occupied by the corporate debtor. In contrast, the word “lessor” should be read in conjunction with “in possession of”.This connotes *legal possession* being held by the corporate debtor and includes both actual possession and constructive possession.[12] Thus interpreted, Section 14(1)(d) bars an “owner” from recovering property when the corporate debtor is in physical occupation of such property, whereas “lessors” are barred from recovering property regardless of whether the debtor has physical or constructive possession under the lease agreement.

This view suggests that where a contract pertains to ownership of moveable property (such as goods and equipment) or immoveable property outside the context of a lease, the court would simply examine whether the corporate debtor is in physical occupation of such property. In contrast, where the termination pertains to a lease agreement, the court will test whether the corporate debtor would be deprived of actual possession over the property, or constructive possession vested in it pursuant to the lease agreement.[13] In the case before the Supreme Court, the development agreement was not in the nature of a lease. The court held that agreement vested the corporate debtor with a license to enter upon the property with a view to develop the property and undertake all actions thereon, and after such entry, the property had been physically occupied by it. Hence, the restriction under Section 14(1)(d) was attracted and MHADA was not entitled to terminate the development agreement.

B. Licenses and Contractual Rights in Property

The decision of the Supreme Court in *Rajendra Bhutta* appears to settle another hotly contested issue under the IBC – the reliance on Section 14(1)(d) to prevent the termination of licenses and usage rights which are vested in the corporate debt or in respect of a property. Notably, the IBC gives a non-exhaustive definition to the term “property” and includes within its scope both tangible property such as money, land and moveable property,

---

[12] Where, for instance, the right to exclusive possession has been granted contractually but has not been exercised.

[13] See also, *Embassy Property Developments Pvt Ltd v. State of Karnataka &Ors* Civil Appeal No 9170 of 2019 (Supreme Court, 3 December 2019) where the Supreme Court observed that Section 14(1)(d) will not be applicable to the termination of a mining lease which granted the corporate debtor the right to mine, excavate and recover iron ore over certain area of land, but did not grant exclusive possession over said land.

as well as intangible "interest" arising in or incidental to any property.[14] Given this definition, National Company Law Tribunals ("**NCLTs**") have held that the bar on recovery of "property" under Section 14(1)(d) will also prohibit third parties from depriving the corporate debtor of intangible interest granted to it in the form of licenses or usage rights in relation to a property.[15]

In *Rajendra Bhutta*, the court was presented with the argument that the license to enter the property created an "interest" in the land in favour of the corporate debtor, which would be covered within the ambit of "property" under Section 14(1)(d). The termination of the development agreement would therefore deprive the corporate debtor of "property" currently in its possession. However, the Supreme Court considered the question of grant of any "interest" in the property irrelevant to the facts of the case. It reiterated that Section 14(1)(d) speaks of recovery of property which is "occupied" by the corporate debtor i.e., property in physical possession of the corporate debtor and does not refer to any "right or interest" in the property.

While the court did not elaborate on this issue, the court's reasoning suggests that the wide definition of the term "property" under the IBC is curtailed by the context in which the term is used in Section 14(1)(d). Since the provision only refers to property which is "occupied" by the corporate debtor or is in its "possession" pursuant to a lease, parties cannot rely on Section 14(1)(d) to argue against deprivation of intangible "interest" in a property.[16] It therefore stands to reason that third parties are *not* barred from terminating licenses or agreements granting specific rights in respect of a particular property to the corporate debtor during the moratorium. This view does not however apply to licenses or rights granted by government

---

[14] IBC, s 3(27).

[15] *Vasudevan v. State of Karnataka and Others* CP/39/2018 (NCLT Chennai, 3 May 2019) where the tribunal set aside the termination of a mining lease for iron ore, since the sole business of the corporate debtor was the right granted to mine iron ore; *Pepsico India Holdings* (n 6) where the termination of an exclusive manufacturing agreement with the corporate debtor by Pepsico India was set aside *inter alia*, on the ground that the termination would deprive the corporate debtor of "interest" granted to it over trademarks and designs of Pepsico India; *Vijaykumar V Iyer v. Union of India* CP (IB)-298/(MB)/2018 (NCLT Mumbai, 27 November 2019) where it was held that the Department of Telecommunication cannot terminate the telecom license granted to Aircel Limited during the CIRP, since the license is intrinsic to Aircel's telecommunication business and its recovery would be in violation of the moratorium under Section 14(1)(d).

[16] Except in case of interest granted by way of constructive possession under a lease agreement since the Supreme Court has included constructive possession within the scope of "possession" under Section 14(1)(d).

authorities, which are separately dealt with under the IBC[17] and fall outside the scope of this paper.

C. Moveable Assets

The contours of the moratorium under Section 14(1)(d) as set out in the *Rajendra Bhutta* decision are equally applicable to moveable property. However, prior to the *Rajendra Bhutta* decision, NCLTs have taken conflicting views in relation to the recovery of moveable assets like raw material and equipment from the corporate debtor, during the moratorium. The following paragraphs discuss two decisions, i.e., the orders of NCLT, Chennai in *Pepsico*[18] *and NCLT, Chandigarh in Weather Makers*[19] to illustrate this conflict. Though this discussion, the paper identifies key lacunae in Section 14(1)(d) and considers feasible recommendations to address these shortcomings.

In *Pepsico*, the NCLT dealt with the termination of a manufacturing contract and recovery of certain equipment provided to the corporate debtor by Pepsico India Holdings Private Limited ("**Pepsico**"). Incidentally, the sole business of the corporate debtor was manufacturing, processing and packaging of goods for Pepsico, which were further distributed under certain trademarks licensed by Pepsico to the corporate debtor. The tribunal noted that the legislative notes to Section 14 explain that the moratorium is instituted to ensure that the corporate debtor is able to operate as a going concern during the CIRP and therefore, any action which frustrates the resolution process is prohibited under the IBC. Thus, Section 14 will require"*a contextual and purposive interpretation*" to give effect to the legislative intent. Since the business of the corporate debtor had an intrinsic link with the manufacturing contract terminated by Pepsico, the termination of the contract would effectively frustrate the CIRP since no buyers would submit a resolution plan to rescue the company.[20] Pepsico was barred from terminating the contract and recovering the equipment supplied to the corporate debtor. On appeal, the National Company Law Appellate Tribunal ("**NCLAT**") reaffirmed this

[17] See, explanation to Section 14(1) of the IBC which prohibits the central, state and local government, and any other authority constituted under law from terminating licenses, permissions, grants and other rights granted to a corporate debtor on the ground of its insolvency, provided that the corporate debtor has made requisite payments in respect of such rights during the moratorium.

[18] *Pepsico India Holdings* (n 6).

[19] *Weather Makers Pvt Ltd and Ors v. Parabolic Drugs Ltd and Ors* CP (IB) No 102/Chd/CHD/2018 (NCLT Chandigarh, 26 April 2019, 26 July 2019 and 11 September 2019).

[20] See also, *Vasudevan* (n 16); *Vijaykumar V Iyer* (n 16).

view.[21] The NCLAT order however warrants a separate examination and has been analysed in greater depth in section IV.

In contrast to *Pepsico,*[22] *NCLT Chandigarh allowed suppliers to recover certain raw material and equipment in Weather Makers*,[23] by carving out an exception to Section 14(1)(d).The NCLT examined the breadth of Section 18(f) of the IBC, which *inter alia* requires the interim RP[24] to take control and custody of assets *owned* by the corporate debtor. Notably, the explanation to the provision states that the term "assets" excludes assets which are owned by a third party, but are in possession of the corporate debtor under trust or contractual arrangements. The NCLT held that there was a "*fine distinction*" between the areas of operation of Sections 14 and 18of the IBC – while the moratorium provision under Section 14(1)(d) covered a wide range of "property" and provided for the general rule barring recovery from the corporate debtor, a narrower exception to this rule was later carved out in the explanation to Section 18, with the effect that the RP does not have control over assets held by the corporate debtor under trust or contractual arrangements. These assets are therefore exempt from the moratorium provision. Since both the raw material and the equipment were not owned by the corporate debtor but were provided to it under contractual arrangements, they would fall within the exception to the moratorium carved out under Section 18 of the IBC. This decision was reaffirmed by the NCLAT.[25]

The approach adopted by the NCLT in *Weather Makers*[26] *highlights that as Section 14(1)(d) currently stands, there is no exception to the bar on recovery of assets within the provision itself. While the NCLT's attempt to carve out an exception is laudable, the exception itself runs afoul of the language of the provision and the goal of the moratorium. To begin with,though the NCLT considered the applicability of Section 18to be "more appropriate*" to the issue, Section 18 deals with the *duties of the interim RP* and provides the series of actions which the interim RP is required to take upon the initiation of CIRP. Among other actions, the provision requires the RP to collect information regarding assets of the corporate debtor to assess its financial health. Since the assets held by the corporate debtor under trust

---

21 *Pepsico India Holdings Pvt Ltd v. V Nagarajan, Resolution Professional of Oceanic Tropical Fruits Pvt. Ltd.* Company Appeal (AT) Insolvency No. 686 of 2019 (NCLAT, 13 November 2019).

22 Ibid.

23 *Weather Makers Pvt Ltd* (n 20).

24 The interim RP is the insolvency professional appointed by the NCLT upon the commencement of CIRP to manage the operations of the corporate debtor and the CIRP. The interim RP forms the committee of creditors, which replaces the interim RP with the RP.

25 *Orbit Lifesciences Private Limited v. Raj Ralhan, PwC professional Services LLP* Company Appeal (AT) (Insolvency) No 846 of 2019 (NCLAT, 4 February 2020).

26 Ibid.

or contractual arrangements will not be considered in valuing the corporate debtor, the provision provides for a specific exclusion of such assets by the RP. Section 18 thus deals with the assets of the corporate debtor, whereas Section 14(1)(d) deals with assets owned by third parties, which are held by the corporate debtor. Further, neither Section 18 nor the definition of "*assets*"therein makes any reference to the moratorium under Section 14–calling to question the connection drawn by the NCLT between these provisions. The inapplicability of Section 18 to the moratorium was also highlighted by the Supreme Court in *Rajendra Bhutta,* where it observed that Section 14(1)(d) does not pertain to assets of the corporate debtor and therefore, a reference to Section 18 of the IBC is "*wholly unnecessary*" in deciding the scope of Section 14(1)(d).This view of the Supreme Court would preclude third parties from placing reliance on the rationale in *Weather Makers* to seek recovery of their assets during CIRP.

The second criticism to the exception in *Weather Makers* stems from the language of Section 14, which bars "*recovery of any property by an owner or lessor*". A plain reading suggests that the provision seeks to prevent owners and lessors, i.e., third parties, from recovering property held by the corporate debtor during the moratorium. Since corporate debtors will usually hold property belonging to a third party under trust or contractual arrangements, the exclusion of such arrangements from the purview of the moratorium renders the exception as wide as the rule itself. Third, the purpose of the moratorium is two-fold – to give the corporate debtor a breathing spell from its troubles by imposing a statutory *status quo* and to facilitate its operation as a going concern.[27]The bar on recovery of assets which are held under contractual arrangements is crucial to achieve this, since the loss of key assets will disrupt the operations of the corporate debtor and plunge its value.

Yet, there is merit to the argument that there should be exceptions to the rule barring recovery, albeit not as wide as the exception carved out in *Weather Makers*. At present, Section 14 does not empower the RP to surrender any third party property held by the corporate debtor, even if such property is not required for the operations of the corporate debtor– for instance, where the operations have been downscaled or where the asset is perishable and has no foreseeable use. For third parties, this issue is compounded by the fact that the IBC does not impose any specific obligations on the RP to preserve the assets of third parties and there may be little incentive for the RP to incur incremental expenses in the CIRP for ensuring such maintenance.

[27] Insolvency and Bankruptcy Code Bill, 2015, Notes on Clauses, p. 118, <https://www.prsindia.org/sites/default/files/bill_files/Insolvency_and_Bankruptcy_code,_2015.pdf> accessed 15 March 2021.

Viewed from this perspective, a sweeping ban on the recovery of assets during the moratorium may not always be necessary and instead, may be harmful to owners and lessors. Carving out a suitable exception to the rule under Section 14(1)(d) is critical to ensure that the IBC accounts for interests of such third parties.

Illustratively, the moratorium provisions applicable to administrations[28] in the UK allow for recovery of assets with: (a) the consent of the insolvency representative,[29] or (b) the permission of the court.[30] Similarly, bankruptcy law in the United States prevents the insolvency representative from continuing a contract unless defaults in the underlying contract (including payment defaults) are cured or adequate assurance to this end is provided by the insolvency representative.[31] These measures have ensured that third parties have some form of recourse to seek recovery of their assets, or otherwise minimise risk through payment of outstanding dues and performance of contractual obligations by the corporate debtor.

In the Indian context, the model followed in the United States appears less feasible. It will require RPs to cure all defects in the contract in order to seek its continuation. This is a difficult feat to achieve since RPs will *first*, need to raise interim finance from banks or other lenders to cure any payment defaults subsisting under the contract. This will also result in the corporate debtor making out-of-turn payments to select operational creditors with whom it seeks to continue contracts–a significant departure from the current framework under the IBC where all operational creditors receive pay-outs only once the CIRP, or alternatively liquidation, has concluded. *Second*, the RP will need to have suitable manpower, expertise and tools to cure any other non-performance under the contract, such asa breach in the manufacture of contractually stipulated quantities under a production contract.

Instead, the legislative framework in the UK appears more aligned with the Indian regime. In adopting this, the IBC canem power RPs to give consent for recovery of assets, where such recovery would have little bearing on the corporate turn around. Illustratively, the RP may allow termination of an agreement for lease of equipment where the equipment is neither utilised

[28] The administration process in the UK is akin to CIRP under the IBC and involves placing the debtor company under the control of an insolvency practitioner to enable revival as a going concern, or liquidation where the sale of the company's assets would achieve better realisation.

[29] In this paper, insolvency representative refers to the insolvency practitioner (including one appointed on an interim basis) who supervises the debtor company's activities and is authorised to administer the reorganisation of the debtor in the referenced jurisdiction. The insolvency representative is akin to the RP under IBC.

[30] Insolvency Act 1986, Schedule B1, Paragraph 43.

[31] 11 U.S.C, Title 11, Bankruptcy Code, s 365(b)(1).

for the ongoing operations of the corporate debtor nor critical to maximise its value. Alongside, the IBC can provide judicial recourse to third parties, where: (a) the RP is hesitant to permit recovery of a particular asset without the blessing of the insolvency tribunal; or (b) exceptional circumstances support the recovery of property, such as concerns regarding maintenance of the asset or a threat of significant depletion in its value. This will allow insolvency tribunals to give due regard to the interests of the counter parties to the corporate debtor.

III. SUPPLY OF CRITICAL GOODS AND SERVICES

In addition to the prohibition on the recovery of property under Section 14(1)(d), third parties are prohibited from terminating, suspending and interrupting the supply of "essential goods and services"[32] to the corporate debtor under Section 14(2) of the IBC. The expression "essential goods and services" has been defined narrowly under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 ("**CIRP Regulations**") and refers only to four supplies, namely electricity, water, telecommunication services and information technology services.[33] The four supplies are considered basic requirements for any corporate debtor to remain a going concern and are not meant to be supplied in large quantities to make a commercial profit.[34]

In practice, NCLTs have not only restored the supply of these items to the corporate debtor, but have gone beyond the scope of this provision to order continuation of other supplies which were considered critical to the operations of the corporate debtor.[35] In a report examining issues in implementation of the IBC[36] ("**February Report**"), the Insolvency Law Committee ("**ILC**")[37] noted that insolvency tribunals were being approached by RPs to

32 IBC, s 14(2).

33 To the extent that such supplies are not a direct input to the output produced by the corporate debtor.

34 Insolvency and Bankruptcy Board of India, *Discussion Paper on Corporate Insolvency Resolution Process*, p. 2 <https://ibbi.gov.in/uploads/whatsnew/b6be2f41ed8a1b8f4ac1ed2838ac9fcc.pdf> accessed 15 March 2021.

35 For instance, the supply of printing ink, printing plates, printing blankets and solvents has been included in "essential goods and services" where the company was in the business of print media (*Canara Bank v. Deccan Chronicle Holdings Limited* CP No IB/41/7/HDB/2017(NCLT Hyderabad, 19 July 2017)).

36 Ministry of Corporate Affairs, *Report of the Insolvency Law Committee*<http://www.mca.gov.in/Ministry/pdf/ICLReport_05032020.pdf> accessed 15 March 2021.

37 The ILC is a standing committee of experts in the field of insolvency law, appointed by the Ministry of Corporate Affairs, Government of India to act as an advisory body in connection withissues pertaining to the implementation of the IBC.

seek continuation of various goods and services on a case-by-case basis. The ILC concluded that the four specified supplies may not be sufficient to run the corporate debtor as a going concern and other "critical" supplies, such as input supplies, may be required.[38] It also noted that private negotiations with suppliers to continue existing contracts during the CIRP were not always successful, especially where supplies are not easily replaceable and existing suppliers demand "ransom payments" to keep upsupply.[39]

The ILC suggested that the IBC be amended to provide flexibility in determination of which goods and services may be considered essential to the operations of the corporate debtor.[40] The introduction Section 14(2A) to the IBC gives legislative effect to this view and allows RPs to prevent the termination of supply of goods and services, which they consider "*critical to protect and preserve the value of the corporate debtorand manage the operations of such corporate debtoras a going concern*". However, suppliers need not continue to supply to the corporate debtorif the debtorfails to pay for supply during the moratorium period.[41] While more clarity on the implementation of this amendment is awaited, a recent discussion paper suggests that where the RP considers a particular supply to be critical, shewill be required to submit an application to the relevant NCLT for this purpose and obtain a declaration that a particular good or service is essential and should continue during the moratorium period.[42]

A. Ambiguities in the Amendment

Neither the IBC nor the proposed amendments to the CIRP Regulations provide any guidance to determine which supplies would be considered "critical". Illustratively, will critical supplies be limited to aircrafts and fuel in the airlines business? Or will they also extend to maintenance and ground staff services? Will the supply be "critical" if the corporate debtor can arrange engage alternate suppliers? What if engagement of alternative supply is not time efficient? Different stakeholders may construe the scope of the term "critical" differently. The ILC has recommended that RPs should consider factors such as whether the supplies have a significant and direct relationship with keeping the corporate debtor operational, and whether the supplies may be replaced easily. However, these yard sticks have not been incorporated

---

[38] Ibid 38.

[39] Ibid.

[40] *Report of the Insolvency Law Committee*(n 37) 40; *Discussion Paper* (n 35) 4.

[41] IBC, s 14(2A).

[42] Ibid.

into the amended law. This has rendered the scope of critical supplies ambiguous and its interpretation, subject to judicial discretion.

While an exhaustive list of critical supplies would defeat the goal of the amendment, clear legislative yardsticks to assess the scope of critical supplies are still required. Such guidance will allow suppliers and resolution professionals to *inter se*, determine whether a particular supply can be terminated and avoid formal adjudication mechanisms. This will save time and costs in the resolution process and ease the case load on insolvency tribunals. Where parties approach insolvency tribunals for a formal decision, such yardsticks can introduce uniformity and predictability in adjudication.

B. Absence of assurance of payment

As means of protection to critical suppliers, Section 14(2A) requires the corporate debtor to make payments for goods and services received during the CIRP. In case the corporate debtor fails to make due payments, suppliers are entitled to terminate supply. While this provides a remedy *after* a default in payment has occurred, suppliers are not provided any formal assurance of payment to keep up supplies. Critical suppliers therefore have no option but to carry the daunting risk of default by the corporate debtor, much like the Sword of Damocles. This risk is compounded where the contract contemplates payment of goods after completion of delivery of goods or performance of service, or where payments are made in specific time cycles rather than on a current basis.[43]

Other jurisdictions offer more concrete protections to critical suppliers, such as assurance of payment in the form of guarantees or other agreed means[44] and personal liability of the insolvency representative for payment of supplies.[45] These feature sensure that critical suppliers are guaranteed payment despite the insolvency of the corporate debtor,and protects them from economic loss in case the corporate debtor suffers commercial or operational setbacks during the resolution process. The UNCITRAL Legislative Guide on Insolvency Law ("**UNCITRAL Guide**") also supports the inclusion of statutory protection for critical suppliers. It mentions that a policy in this regard should weigh a number of factors, including the importance of the contract to the proceedings, the cost to the proceedings for providing the necessary protections, whether the debtor will be able to perform the

---

[43] United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law* (2005) 127 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf> accessed 15 March 2021.

[44] 11 U.S.C, Title 11, Bankruptcy Code, s 365(b).

[45] Insolvency Act 1986, s 233 (UK).

obligations under a continued contract and the impact of forcing the counter party to assume the risk of non-payment.[46]

In the Indian context,incorporation of protections for critical suppliers can not only offer requisite comfort to such suppliers, but also encourage non-critical suppliers to continue "business as usual", enhancing the value and viability of the corporate debtor. From a legislative perspective, it may be worthwhile to consider leveraging the IBC's creditor-driven framework to seek assurance of payment. Where the committee of creditors ("**COC**") constituted to spearhead the CIRP considers the corporate debtor to be a viable enterprise, a financial creditor in the COC can provide assurance in the form of a bank guarantee, letter of credit or other agreeable means on behalf of the corporate debtor. The financial creditor need not bear this liability alone – the COC members may *inter-se* bear the cost of such assurance, proportionate to their voting rights.[47] Any expenses incurred upon invocation of such payment assurance can be recouped as part of "insolvency resolution process costs" ("**IRP Costs**"), which are regarded as senior debt and paid in priority to all other dues of the corporate debtor.[48]

First, this mechanism will ensure that dues payable to critical suppliers for provision of goods and services during the moratorium are not impacted due to the CIRP. *Second*, in case the bank guarantee, letter of credit or other assurance provided by a financial creditor is invoked, such amount can be justifiably included in IRP Costs, since it would correspond to costs duly incurred towards procurement of critical supplies for the operations of the corporate debtor.

Notably, this mechanism may be more feasible for a COC comprising of banks and financial institutions. For a small company where there are few to no financial creditors on the COC, it may be difficult to arrange for such assurance to keep up supply. Therefore, for cases where formal means of assurance of payment are not viable, the IBC may consider other statutory protections, such as a requirement for advance payment for procurement of critical supplies. The aforementioned suggestions are however drawn from a comparative study and seek to conceptualiset he statutory protections which may be feasible in the Indian insolvency frame work. Any imposition of financial liability as part of the insolvency resolution process would naturally require careful deliberation.

46 *Legislative Guide on Insolvency Law* (n 44) 127.

47 See for instance, *Newogrowth Credit Private Limited v. Resolution Professional, Bhaskar Marine Services Private Limited &Ors.* Company Appeal (AT) (Insolvency) No. 1053 of 2020 (NCLAT, 10 December 2020) where the NCLAT directed a financial creditor on the COC to bear its share of the IRP Costs as agreed by the COC.

48 See, section V below for further discussion on IRP Costs.

C. Exceptions to Continuation of Supply

In some instances, continuing the supply of goods and services to the corporate debtor may not be commercially feasible for suppliers, especially small businesses. For instance, if the terms of payment were negotiated at a discount relying on future projections (such as anannual increase in purchase volumes by the corporate debtor), such projections may no longer hold true. The supplier will need to revisit the contract to ensure that continuation of supply at discounted rates will not impact its own commercial viability. A similar assessment may also be required if the supplier faces some other hardship, for instance, due to the impact of the COVID-19pandemic on its business. The IBC, however, does not create any exceptions to the mandate for continuation of critical supply. By forcing performance, it exposes critical suppliers to insolvency risk. As recourse, it may be open to suppliers to renegotiate key terms of the contract with the RP, since renegotiations of existing contracts is not barred under the IBC. This, however, is merely a contractual remedy and such negotiations will remain at the discretion of the RP.

This emphasises the need for legislative measures allowing for suspension or termination of critical supplies in exceptional circumstances. To this end, the IBC may empower insolvency tribunals to suspend or terminate a critical supply or pass other appropriate directions, where the supplier is able to establish that continuation of supply would cause hardship. The insolvency framework in the UK follows this approach.[49] This ensures that there is a balancing of interests between the maintenance of the corporate debtor as a going concern and the hardship faced by the counter party to further this goal. The IBC is yet to account for these contingencies or undertake a balancing of interests of this nature.

There is no doubt that the introduction of Section 14(2A) in the IBC will aid corporate debtors in obtaining a continuous supply of goods and services from key suppliers. However, ambiguities in the language of the amendment and the absence of adequate protection for critical suppliers warrants further legislative reforms.

IV. Expanding the Scope of the Moratorium

The discussion above suggests that as a general rule, courts and tribunals assess the validity of a contract terminated during the moratorium in light of the language and scope of Section 14 of the IBC. Outside of Section 14, the

[49] Insolvency Act 1986, s 233A(4).

IBC does not contain express provisions that bar third parties from undertaking actions against the corporate debtor. More recent judicial development, however, highlights a second, more discretionary approach adopted by tribunals while dealing with termination of contracts. In at least four instances,[50] tribunals have set aside the termination of a contract by placing reliance on the overarching goal of the IBC– the maintenance of the corporate debtor as a going concern. This trend raises concerns of judicial activism, especially since these decisions were not grounded under any express provisions of the IBC. In fact, two of these decisions are in the context of liquidation,[51] where the moratorium is far narrower than Section 14 and only bars the initiation of suits or legal proceedings by or against the corporate debtor.[52]

At the heart of this trend is the *Astonfield*[53] *case, where a dispute regarding the validity of termination of a power purchase agreement (*"**PPA**") during the moratorium reached the Supreme Court. The discussion below dissects the developments in this domain and examines the implications of the Supreme Court's ruling.

A. Saving critical contracts

In *Astonfield*,[54] the corporate debtor (Astonfield Solar (Gujarat) Private Limited) was solely engaged in the business of generation of power for Gujarat Urja Vikas Nigam Limited ("**GUVNL**") under the terms of a PPA. The PPA embodied an *ipso facto* clause which provided that the initiation of insolvency proceedings against the corporate debtor would constitute an event of default under the PPA. If such default was not cured within 30 days from the delivery of notice of default, GUVNL would be entitled to terminate the PPA. Relying on this provision, GUVNL issued a default notice to the corporate debtor upon initiation of its CIRP and thereafter terminated the agreement.

50 *Pepsico India Holdings* (n 6); *Yes Bank Limited v. Gujarat Urja Vikas Nigam Ltd* CP (IB) No. HI/07/HDB/2017 (NCLT Hyderabad, 6 May 2020); *Astonfield Solar (Gujarat) Private Limited v. Gujarat Urja Vikas Nigam* CP. No. (IB)-940(ND)/2018 (NCLT Delhi, 29 August 2019);*Tata Consultancy Services v. Vishal Ghisulal Jain* Company Appeal (AT) Insolvency No. 237 of 2020 (NCLAT, 24 June 2020) upholding the order of NCLT Mumbai in *BMW India Financial Services Private Limited v. SK Wheels Private Limited* CP. (IB) 4301/2018 (NCLT Mumbai, 18 December 2019).

51 See, IBC, s 33(5).

52 While this paper is focused on the termination of contracts during the moratorium, these cases are relevant to establish the judicial trend which places reliance on the overarching goal of the IBC to bar termination of contracts.

53 *Astonfield*(n 51).

54 Ibid.

The RP challenged this termination before NCLT, Delhi which set aside the default notices and the termination of the PPA on two grounds. *First*, the tribunal noted that GUVNL was the sole purchaser of the power generated by the corporate debtor. Termination of its singular purchase contract would cause serious prejudice to the maintenance of the corporate debtor as a going concern and jeopardise its resolution, since no resolution applicants would submit a resolution plan without the assurance of a subsisting PPA to generate future revenue. *Second*, the NCLT observed that the *ipso facto* clause under the PPA compelled the corporate debtor to exit the CIRP within 30 days of issue of the notice of default, or otherwise face termination of the PPA. The IBC however statutorily provides a period of 330 days for completion of resolution. Given the conflict between the terms of the PPA and the IBC, the NCLT held that the IBC would prevail over the PPA by virtue of Section 238 of the IBC, which grants overriding effect to the IBC over such agreements. Therefore, the *ipso facto* clause under the PPA was not available to GUVNL to terminate the PPA. On appeal, the NCLAT reaffirmed this view, emphasising that there had been no default in the supply of the electricity to GUVNL by the corporate debtor and the PPA could not be terminated *solely* on the basis of initiation of CIRP.[55] A further appeal was filed before the Supreme Court. Before venturing into the Supreme Court's ruling on this issue, it is useful to briefly discuss the *Yes Bank*[56]*case –anotherinstance where the termination of a PPA by GUVNL was set aside, this time in the context of liquidation.*

*The Yes Bank*case involved a PPA executed between the corporate debtor (Lanco Infratech Limited) and GUVNL for supply of power to GUVNL. When the corporate debtor entered into liquidation, GUVNL issued a notice of default under the PPA solely on this ground and thereafter terminated the PPA. The corporate debtor's power plant had been built by availing financial assistance from Yes Bank Limited to the extent of INR 63.5 crores, which was secured by a charge over all moveable and immoveable assets of the power plant. Yes Bank challenged the termination of the PPA relying on the preamble to the IBC and argued that the termination would prevent the maximisation of value of the assets of the corporate debtor, since the plant would be rendered unviable for sale as a going concern without a subsisting PPA. The NCLT was persuaded by this argument. It noted that the termination of the PPA directly affected the security interest of Yes Bank, in that it would not be able to realise the maximum value from the secured assets. The NCLT therefore set aside the termination of the PPA, observing that

[55] *Gujarat Urja Vikas Nigam Ltd v. Mr. Amit Gupta* Company Appeal (AT) Insolvency No. 1045 of 2019 (NCLAT, 15 October 2019).

[56] *Yes Bank* (n 51).

the tribunal "*has to see the object of the Code, which is maximisation of value of the asset.*" In October 2020, the NCLAT reaffirmed this decision.[57] This ruling is unusual since, as mentioned above, the moratorium under the liquidation process only bars the initiation of suits or legal proceedings by or against the corporate debtor.[58] No prohibition on the termination of contracts is expressly or impliedly imposed at this stage.

Both the *Astonfield* and *Yes Bank* decisions barred the termination of PPAs, *inter alia*, on the ground that the corporate debtor *should* be maintained as a going concern to ensure resolution under the IBC. A similar view was also taken in respect of another PPA by NCLT, Kolkata and subsequently reaffirmed by the NCLAT.[59] The PPA, however, is in the nature of a contract for supply of power *by* the corporate debtor to a third party to generate income. It is neither barred under the moratorium imposed under Section 14 of the IBC (which deals with supplies *to* the corporate debtor), nor under liquidation provisions of the IBC. By placing reliance on the preamble to the IBC and its overarching goal, the aforementioned decisions concretise the view that tribunals will prohibit termination of contracts where it can be proved that the contract is critical to attempt a successful resolution.

However, it is a settled position of law that the preamble to a legislation or its legislative intent can neither be relied upon to override the express provisions of the legislation,[60] nor to give new meaning to the plain words of the statute.[61] The Indian Supreme Court has categorically held that the preamble cannot be the starting point for construing the provisions of the legislation and should be resorted to only if the language of the legislation is unclear.[62] An examination of contracts on a case-by-case basis in light of the preamble thus contravenes an established principle of interpretation of

---

[57] *Gujarat Urja Vikas Nigam Ltd v. Yes Bank Limited,* Company Appeal (AT) (Insolvency) No. 601 of 2020 (NCLAT, 20 October 2020).

[58] See, IBC, s 33(5).

[59] *Hemant Khaitan v. Alex Green Energy Private Limited* CP (IB) No. 1439/KB/2018 (NCLT Kolkata, 14 October 2019); *GRIDCO Limited v. Surya KantaSatapathy and Ors* Company Appeal (AT) (Insolvency) No. 1271 of 2019 (NCLAT, 14 July 2020) where both NCLT, Kolkata and the NCLAT held the termination of a PPA to be in contravention of Section 14(1) of the IBC, without specific analysis of the provisions. The NCLAT decision can be distinguished from *Astonfield*above, since the ruling was largely based on the invalidity of the termination notices and the lack of objection by GRIDCO Limited (the terminating party) to finalisation of a resolution plan premised on the subsistence of the PPA. The decisions however highlight that tribunals did not specifically examine *how* the termination of the PPA contravened Section 14 of the IBC.

[60] *Burrakur Coal Co. Ltd v. The Union of India and Others* AIR 1961 SC 954; *Motipur Zamindari Co. (Private) Limited v. State of Bihar* AIR 1962 SC 660; *Arnit Das v. State of Bihar* (2000) 5 SCC488; *Union of India v. Elphinstone Spinning and Weaving Co. Ltd.* (2001) 4 SCC 139; *State of Rajasthan and Ors v. Basant Nahata* (2005) 12 SCC 77.

[61] Ibid, *Motipur Zamindari Co. (Private) Limited.*

[62] Ibid, (*Burrakur Coal* Co).

statutes. It also instils considerable unpredictability in the law and diminishes the sanctity of contractual bargains – especially for counter parties seeking to assess whether contractual remedies agreed under the contract are available to them. If greater flexibility to tribunals is to be granted, clear legislative amendments to the moratorium provisions of the IBC should be made.

This view also finds support in the Supreme Court decision in *Astonfield*.[63] In its ruling, the court gave regard to the fact that the PPA was of "enormous significance" for the success of the corporate debtor's insolvency resolution.[64] At the same time, the court took cognizance of rolling effects of judicial intervention in setting aside commercial agreements. *First*, reaffirming the decision of the NCLT to set aside the PPA would open floodgates for intervention by insolvency tribunals in negotiated commercial contracts. In the absence of any statutory basis, this would undermine foundational principles of contract law and the sanctity of commercial bargains. *Second*, there was no express embargo under the IBC against the enforcement of *ipsofacto* clauses in commercial agreements. Section 14 of the IBC only stays their operation in case of: (a) licenses, permits and legal rights granted by Central, state or local governments or other government authorities;[65] and (b) the supply of critical goods and services.[66]

The court noted that in the absence of clear legislative guidance on the enforceability of *ipso facto* clauses in the Indian insolvency regime, its intervention would need to be guided by legislative intent –derived from the provisions of the IBC. The court reiterated that the moratorium provisions under the IBC are intended to preserve the corporate debtor as a going concern. It also observed that the legislature had amended Section 14 on several occasions to ensure that the going concern status of the corporate debtor was not impeded by circumstances which were not contemplated during the introduction of the IBC. Thus noting, it held that the NCLT's intervention in the matter was justified bearing in mind the goal of preservation of the corporate debtor during the CIRP. However, there needed to be a "textual hook" for the NCLT to have exercised its jurisdiction– mere spirit or overarching objective of the IBC would not suffice.

Recognising the gap in the NCLT's ruling, the court placed reliance on Section 60(5)(c) of the IBC. This provision vests the NCLT with wide

---

63 *Gujarat Urja Vikas Nigam Limited v. Mr. Amit Gupta &Ors* Civil Appeal No. 9241 of 2019 (Supreme Court, 8 March 2021).

64 Ibid.

65 IBC, explanation to s 14(1).

66 IBC, explanation to ss 14(2), 14(2A).

residuary powers to adjudicate on any question of law or fact "arising out of or in relation to" the insolvency resolution process, notwithstanding anything to the contrary contained in any other law in force. Since the PPA was terminated solely on account of the insolvency of the corporate debtor, the matter arose out of the insolvency of the corporate debtor and was connected with it. It would therefore squarely fall within the jurisdiction of the NCLT under Section 60(5)(c). Thus, on both jurisdiction and merit, the court found the NCLT's decision to set aside the termination of the PPA valid. Notably, the appellants had strongly contended that Section 14 of the IBC clearly established the scope of the moratorium and there was no statutory basis for the NCLT to adjudicate on the validity of the PPA's termination. Dismissing this contention, Supreme Court observed that "*residuary jurisdiction under Section 60(5)(c) would be rendered otiose if Section 14 is held to be the exhaustive of the grounds of judicial intervention contemplated under the IBC in matters of preserving the value of the corporate debtor and its status as a going concern.*"[67]

The Supreme Court's ruling is pragmatic, having stitched together a quick fix to resolve a gaping void in the moratorium provisions of the IBC. There is no doubt that some degree of flexibility is required under the IBC to deal with contracts which are critical to the corporate debtor, but are not covered within the ambit of the moratorium under Section 14. However, contrary to recent judicial trend, reliance on the overarching objective of the IBC to maintain the corporate debtor as a going concern is unfounded in law. The Supreme Court ruling recognises the absence of a legal basis for the NCLT's intervention. In effect, the ruling provides NCLTs with statutory grounds for adjudicating on such matters, so long as the termination is connected with the insolvency of the corporate debtor. To RPs, it gives the option to seek a stay on the termination of contracts critical for the revival of the corporate debtor, where the moratorium under Section 14 would not come to their aid.

At the same time, the ruling recognises that such judicial recourse could open a pandora's box – allowing NCLTs to rely on residuary powers to exercise complete judicial discretion in dealing with the termination of contracts. It therefore casts clear restrictions on the exercise of judicial intervention under Section 60(5)(c) in this regard. *First*, the termination of a contract must have nexus with the insolvency of the corporate debtor. Such nexus would be established, for instance, where a contract is terminated based on an *ipso facto* clause, pursuant to initiation of CIRP of the corporate debtor.[68] Without a nexus between the termination of the contract and the insolvency

[67] *Astonfield, Supreme Court* (n 64).
[68] Ibid 132.

of the corporate debtor, the NCLT cannot rely on its residuary jurisdiction.[69] This will allow counter parties to validly terminate the contract where the corporate debtor is in breach of contract, irrespective of whether or not the contract is critical to the going concern status of the corporate debtor. *Second*, the termination of the contract *must* lead to certain 'corporate death' of the corporate debtor, i.e. the contract should be critical for resolution of its insolvency. This is a high threshold to satisfy. In fact, the ruling expressly mentions that where termination of the contract would merely lead to dilution of the value of the corporate debtor, intervention by the NCLT will not be justified. This means that insolvency tribunals cannot set aside the termination of a contract for value maximisation of the corporate debtor, contrary to judicial trend.[70]

Thus, as the law currently stands, contractual counter parties to the corporate debtor will now need to assess legal risks associated with termination of contracts in a two-step process. At the outset, they will need to assess whether the termination of the contract would trigger the moratorium under Section 14. If the termination is not barred by the express moratorium provisions, parties will need to assess whether: (a) the termination has a nexus with the insolvency of the corporate debtor; and (b) the contract is critical for the survival of the corporate debtor. If the answer to both these prongs is in the affirmative, there may be likelihood of a challenge to the termination of the contract.

B. What about liquidation?

In the concluding paragraphs of the judgement in *Astonfield*,[71] the Supreme Court mentions that it would not adjudicate on the question of whether the termination of the PPA would have been valid in case the corporate debtor was in liquidation. It considered this question purely academic since the corporate debtor was under CIRP.[72] Yet, more clarity on this issue would have helped interpret discretionary rulings by tribunals in cases where contracts are terminated during liquidation.

---

69 Ibid.

70 See, *Yes Bank* (n 51); *BMW India Financial Services* (n 51); *Tata Consultancy Services* (n 51) where the NCLAT set aside the termination of an agreement for provision of certain services to Tata Consultancy Services Limited to ensure "smooth functioning" of the corporate debtor, to further its operation as a going concern and preserve the value of its assets. Note that this NCLAT decision is pending in appeal before the Supreme Court (*Tata Consultancy Services Limited v. Vishal Ghisulal Jain* Civil Appeal No 3045/2020).

71 *Gujarat Urja Vikas Nigam, Supreme Court*(n 64).

72 Ibid 135.

For instance, in the *Yes Bank*[73] *case discussed in sub-section A above, the NCLAT set aside the termination of the PPA in order to maximise the value of the corporate debtor and protect the interests of its financial creditor, Yes Bank. In the Pepsico*[74]*case as well, the NCLAT set aside the termination of a manufacturing and supply agreement during the liquidation of the corporate debtor. Similar to the PPAs discussed in sub-section A above, this was the sole customer contract of the corporate debtor. Here, the tribunal grounded its decision in the NCLAT's decision of Shivram Prasad,*[75] noting that even during the liquidation process, the liquidator "*is to ensure*" that the corporate debtor remains a going concern. Failing such sale, the liquidator would be forced to sell the assets of the corporate debtor piecemeal. Only at this stage would Pepsico be entitled to terminate the contract and recover its equipment.

However, unlike Section 14, there is no provision in respect of the liquidation process under the IBC which is focussed on the preservation of the corporate debtor as going concern during liquidation. Further, neither the Supreme Court in *Astonfield* nor the NCLAT ruling in *Shivram Prasad* manifest this intent. In *Shivram Prasad*, the NCLAT had held that the liquidator *should* take steps to revive the corporate debtor even at the liquidation stage, first by attempting to enter into a scheme of arrangement under Section 230 of the Companies Act, 2013 and failing so, attempting to sell the corporate debtor as a going concern. If both these attempts to revive the corporate debtor fail, the assets of the corporate debtor may be liquidated.[76] While the decision encourages revival of the corporate debtor during liquidation, it does not make it *an obligation* on the liquidator to ensure that the corporate debtor remains a going concern.

In fact, the ILC specifically deliberated whether NCLTs should mandate liquidators to conduct a going concern sale in the February Report and noted that this may not be feasible in some situations, for instance where the business of the corporate debtor is found to be economically unviable or there is lack of funds to continue operations.[77] It concluded that the choice to proceed with a going concern sale of the business of the corporate debtor should vest with the liquidator, in consultation with the committee of creditors and other stakeholders.[78] Thus, the active facilitation of preservation of a debt-

[73] *Yes Bank, NCLAT*(n 58).

[74] *Pepsico India Holdings, NCLAT* (n 22).

[75] *Y Shivram Prasad v. S Dhanpal& Ors*, Company Appeal (AT) (Insolvency) No. 224 of 2018 (NCLAT, 27 February 2019).

[76] This view has been incorporated into law under Regulation 2B and Regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016.

[77] *Report of the Insolvency Law Committee* (n 37), 72-73.

[78] Ibid.

or's going concern status by insolvency tribunals has the potential to cause more harm than good, especially to counter parties compelled to continue contracts with an unviable corporate debtor. Notably, GUVNL has filed an appeal against the NCLAT decision in the *Yes Bank* case, which is currently pending adjudication before the Supreme Court.[79] This ruling will perhaps shed light on the validity of termination of contracts during the liquidation process, providing much needed clarity in this domain.

V. PAYMENT OF DUES ARISING DURING THE MORATORIUM

This section of the paper briefly reflects on the legislative framework and evolving jurisprudence on the payment of dues to contractual counter parties for performance of contracts during the moratorium. Recognising that third parties are critical in keeping the corporate debtor afloat during the CIRP, the IBC classifies the costs incurred by the RP in making payments to such third parties as IRP Costs. IRP Costs are regarded as senior debt and are paid in priority to all other dues of the corporate debtor upon the successful conclusion of the CIRP[80] and failing resolution, during the liquidation.[81] The CIRP Regulations expressly include the amounts due to: (a) persons who are prejudicially affected due to the bar under Section 14(1)(d); and (b) suppliers of essential goods and services,within IRP Costs.[82] Further, a residuary provision has been incorporated to cover "any costs" incurred by the RP in running the corporate debtor within the purview of IRP Costs,[83] thus including any amounts paid by the corporate debtor for other critical supplies, or amounts which are which are not expressly covered within (a) or (b) above.

Typically, the RP makes payments to lessors, suppliers and other contractual counter parties on a current basis during the moratorium period. Insolvency tribunals have followed this approach and directed RPs to make payments accrued to suppliers during the moratorium, where such payments were not being made.[84] The NCLAT has also gone a step further and allowed

---

79 *Gujarat Urja Vikas Nigam Limited v. Yes Bank Limited &Anr* Civil Appeal No. 3956/2020.

80 IBC, s 30(2)(a).

81 IBC, ss 52(8), 53(1)(a).

82 CIRP Regulations, regulation 31.

83 Ibid.

84 *Innoventive Industries Ltd v. Maharashtra State Electricity Distribution Co. Ltd* Company Appeal (AT) (Insolvency) No 156 of 2017 (NCLAT, 6 October 2017); *Uttarakhand Power Corporation Ltd v. ANG Industries* Ltd Company Appeal (AT) (Insolvency) No 298 of 2017 (NCLAT, 24 January 2018); *Dakshin Gujarat Vij Co Ltd v. ABG Shipyard Ltd* Company Appeal (AT) (Insolvency) No. 334 of 2017 (NCLAT, 8 February 2018);*JAS Telecom (P) Ltd v. Eolane Electronics Bangalore (P) Ltd* Company Appeal (AT) (Insolvency) No. 37 of 2018 (NCLAT, 21 March 2018); *In the matter of Rave Scans Pvt Ltd* (IB)-01(PB)-2017

suppliers to terminate essential supplies such as electricity, where the RP is unable to pay the dues accruing during the moratorium on a current basis.[85] The absence of funds for essential supplies indicates that the corporate debtor is so far in debt that there is little hope of rescue. The developing case law under the IBC thus suggests that insolvency tribunals will stand in favour to termination of contracts for critical supplies, if the corporate debtor is unable to pay dues on a current basis.

It is also worth noting that unlike the bankruptcy process followed in the United States, there is no obligation on the RP to make payments for outstanding sums before continuing with a contract during the moratorium. The arrears of payments due to lessors and suppliers for the period *prior* to the commencement of CIRP are not considered a part of IRP Costs. Rather, these dues must be filed as claims with the RP, along with other creditors of the corporate debtor.[86] This rule has been applied by tribunals strictly, with NCLAT decisions holding that suppliers cannot apply payments received from the RP during the moratorium towards satisfaction of dues outstanding for the period prior to insolvency.[87] This means that suppliers cannot negotiate any out-of-turn payments with the RP, as consideration for continuation of supply under the IBC.

Given the discussion above, contractual counter parties to the corporate debtor can draw comfort from the fact that the IBC requires that at the very least, the dues payable for provision of services during the CIRP are paid to them on an on-going basis. In case the corporate debtor defaults in making such payments, insolvency tribunals have permitted third parties to terminate the underlying agreements.

(NCLT Principal Bench, 17 October 2018); *Asset Reconstruction Company (India) Ltd v. R Venkatakrishnan and Ors* Company Appeal (AT) (Insolvency) No. 232 of 2019 (NCLAT, 23 July 2019).

[85] *Uttarakhand Power Corporation Ltd* (n 85); *Innoventive Industries* (n 85) where the NCLAT allowed the electricity board to take 'appropriate steps' in case of failure of the RP to make payments on a current basis.

[86] *Andhra Bank v. Oracle Home Textile Ltd* CP(IB)-1842/(MB)/2018 (NCLT Mumbai, 7 May 2019); *JAS Telecom (P) Ltd*; *Innoventive Industries* (n 85).

[87] *Indian Overseas Bank v. Dinkar T. Venkatsubramaniam Resolution Professional for Amtek Auto Ltd* Company Appeal (AT) (Insol) No. 267 0f 2017 (NCLAT, 15 November 2017); *MSTC Limited and Ors v. AdhunikMetalliks Ltd* Company Appeal (AT) (Insol) No. 519 of 2018 (NCLAT, 15 March 2019); *Asset Reconstruction Company (India) Ltd* (n 85); *JSW Steel Ltd and Ors v. Mahender Kumar Khandelwal and Ors* Company Appeal (AT) (Insol) Nos 957of 2019 (NCLAT, 17 February 2020); *Vijay Kumar V Iyer v. Bharti Airtel Ltd Company Appeal* (AT) (Insol) No.530 & 700 of 2019 (NCLAT, 30 July 2020).

VI. CONCLUSION

The moratorium provisions under the IBC play a key role in protecting the corporate debtor and facilitating a successful resolution. While this can pose significant obstacles for third parties, it is encouraging to see that the jurisprudence on Section 14is evolving to take the concerns faced by third parties into account. There is still however a need for re-evaluation of these provisions. The current language of Section 14(1)(d) does not provide exceptions to the bar on recovery of property. Similarly, Section 14(2A) does not clarify the scope of which goods and services would be considered "critical" to the corporate debtor and does not provide adequate statutory protections to critical suppliers, despite compelling them to keep up supplies. These issues have been compounded by the recent trend in judicial decision-making, where tribunals have set aside the termination of contracts by relying on the overarching goals of the IBC rather than the express moratorium provisions. The Supreme Court decision in *Astonfield* offers some respite to third parties in this regard.

While the success of a law is greatly enhanced by its efficiency and predictability, these ambiguities in the moratorium provisions often render the termination of contracts during CIRP subject to the views of insolvency tribunals, decided on a case-to-case basis. It is important therefore, to empower the RP to deal with the assets of third parties as may be feasible, and to build in protections for third parties continuing contracts with the corporate debtor. The need for these legislative changes also finds support of the UNCITRAL Guide, which recommends that insolvency laws should define the scope of powers granted to the insolvency representative to deal with on-going contracts of the debtor and should identify the types of contract that should be excepted from the exercise of these powers.[88] Incorporation of these nuances in the IBC will go a long way to truly balance the interests of "all stakeholders" in the insolvency process.

[88] *Legislative Guide on Insolvency Law* (n 44) 132.

Case Note: Judgment of the Supreme Court in the Essar Steel Case

*Rajat Sethi and Aditi Agarwal**

By a judgment dated November 15, 2019, the Supreme Court of India in the case of Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others delivered its final verdict on the acquisition of Essar Steel India Limited under the Insolvency and Bankruptcy Code, 2016. The proceedings under the IBC in relation to the acquisition of Essar Steel lasted for more than two years and laid down precedents on several questions arising out of the then newly introduced insolvency legislation in India. This paper is a comment on this judgment. It critically analyses the decision of the Supreme Court and the impact of the judgment on insolvency law in India.

I. Introduction

By a judgment dated November 15, 2019, the Supreme Court of India ("**Supreme Court**") in the case of *Essar Steel India Ltd.* v *Satish Kumar*

* Rajat Sethi is a partner and Aditi Agarwal is an associate at S&R Associates. The authors are based out of the firm's Mumbai office.

Gupta[1] delivered its final verdict on the acquisition of Essar Steel India Limited ("**Essar Steel**") under the (Indian) Insolvency and Bankruptcy Code, 2016 ("**IBC**"). Essar Steel was one of India's largest steel manufacturers. Its overdue debt of about INR 55,000 crore was the largest among the companies being resolved under the IBC. Pursuant to the IBC process, a joint venture between Arcelormittal and Nippon Steel acquired Essar Steel in December 2019.

The proceedings under the IBC in relation to the acquisition of Essar Steel lasted for more than two years and laid down precedents on several questions arising out of the then newly introduced insolvency legislation in India.

II. BACKGROUND

Insolvency proceedings were initiated against Essar Steel on August 2, 2017 by an order[2] issued by the National Company Law Tribunal, Ahmedabad Bench ("**NCLT**") admitting an application filed by Standard Chartered Bank ("**Standard Chartered**") and the State Bank of India. Initially, resolution plans were submitted by Arcelormittal India Private Limited ("**Arcelormittal**") and Numetal Limited ("**Numetal**"), both of whom were found ineligible by the resolution professional under Section 29A of the IBC. Pursuant to a fresh invitation, a resolution plan from Vedanta Limited was also received.

In the legal proceedings that ensued, the Supreme Court by its order[3] dated October 4, 2018 declared Arcelormittal and Numetal to be ineligible resolution applicants under Section 29A of the IBC. However, the Supreme Court granted Arcelormittal and Numetal two weeks from the date of the judgment to pay off the non-performing assets ("**NPAs**") of their related corporate debtors to cure their ineligibility. Consequently, the committee of creditors ("**CoC**") of Essar Steel was required to reconsider and vote on the resolution plans submitted (including the plan submitted by Vedanta). If no plan had been accepted with the requisite majority by the CoC, Essar Steel would have gone into liquidation.

Arcelormittal after having made payments in accordance with the aforementioned Supreme Court order, resubmitted its resolution plan and emerged as the successful resolution applicant for Essar Steel when its resolution plan was approved by the CoC on October 25, 2018.

1 *Essar Steel India Limited* v *Satish Kumar Gupta,* (2020) 8 SCC 531.
2 *Standard Chartered Bank* v *Essar Steel India Ltd.*, 2017 SCC OnLine NCLT 10751 [34].
3 *Arcelormittal India (P) Ltd.* v *Satish Kumar Gupta,* (2019) 2 SCC 1 [116].

A. Arcelormittal's Resolution Plan

Under Arcelormittal's resolution plan, the manner of distribution of funds among the secured financial creditors was left to the discretion of the CoC. The resolution plan of Arcelor Mittal provided for an upfront payment of INR 42,000 crore and an equity infusion of INR 8,000 crore. Unsecured financial creditors were to be paid about 4% of their admitted claims. Operational creditors having claims of less than INR 1 crore, workmen and employees were to be paid their dues in full. Operational creditors with claims of INR 1 crore and above were not to be paid any amounts.

The plan also provided that upon payment to the financial creditors, all security documents (excluding corporate or personal guarantees provided by the erstwhile promoter group in relation to Essar Steel's loans) would be deemed to be assigned to Arcelormittal and those documents that were not capable of being assigned were to be terminated. Further, upon approval of the resolution plan by the NCLT, all guarantees invoked prior to the effective date of the plan and claims of any guarantor on account of subrogation under such guarantee would be deemed to be extinguished. However, the rights of the financial creditors to enforce the corporate or personal guarantees against the erstwhile promoter group were to remain enforceable.

B. Proceedings before the NCLT

The NCLT by its order[4] dated March 8, 2019 conditionally approved Arcelormittal's resolution plan. The NCLT "suggested", *inter-alia*, that to avoid discrimination, the CoC reconsider the manner of distribution of funds proposed to be paid under Arcelormittal's resolution plan to facilitate higher recovery for the operational creditors (having claims over INR 1 crore) and Standard Chartered (a financial creditor).

The approval of Arcelormittal's resolution plan was challenged by various parties, including Standard Chartered, several operational creditors, the suspended board of directors and former promoters of Essar Steel.

C. Proceedings before the NCLAT

The NCLAT by an interim order[5] dated March 20, 2019 had directed the CoC to convene a meeting and make a decision further to the NCLT's

---

4 *Resolution Professional for Essar Steel India Ltd., In re*, 2019 SCC OnLine NCLT 750 [27].

5 *Standard Chartered Bank* v *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 937.

directions. Pursuant to such order, the CoC approved (i) *pro rata* distribution of funds to all secured financial creditors except Standard Chartered and (ii) *ex-gratia* payment of INR 1,000 crore to operational creditors having claims above INR 1 crore.

According to the CoC, Standard Chartered was differently placed from the other secured financial creditors as (i) it was not a direct lender to Essar Steel (it had been issued a guarantee by Essar Steel for an offshore subsidiary's debt); and (ii) its debt was secured by a pledge over Essar Steel's shares of the offshore subsidiary (the fair value of such shares was marginal in comparison to the debt) and not a charge over the project assets of Essar Steel. Based on the nature and value of Standard Chartered's security, the CoC proposed to pay Standard Chartered approximately INR 61crore resulting in a 1.7% recovery.

By an order[6] dated July 4, 2019 ("**NCLAT Order**"), the NCLAT, *inter-alia*,: (i) approved ArcelorMittal's resolution plan, (ii) modified the distribution of amounts so that all creditors (secured, unsecured and operational) were treated at par[7] (resulting in approximately 60.7% recovery for all the creditors), (iii) increased the admitted claims of operational creditors to almost four times the original amount, (iv) granted operational creditors, whose claims had not been admitted by the NCLT or the NCLAT, the liberty to institute or continue appropriate proceedings against Essar Steel after the conclusion of its insolvency resolution process, and (v) held that the guarantees issued in respect of Essar Steel's debt come to an end upon clearance of the underlying debt.[8]

D. Developments in the law

Appeals were filed before the Supreme Court challenging various aspects of the NCLAT Order, including the role of the CoC, and the scope of jurisdiction of the NCLT and NCLAT. While these appeals were pending, the Insolvency and Bankruptcy Code (Amendment) Act, 2019 dated August 6, 2019 (the "**IBC Amendment Act**") was introduced with retrospective effect. The IBC Amendment Act included provisions which directly related to the issues under consideration in this matter and therefore, the Supreme Court

---

[6] *Standard Chartered Bank* v *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388.

[7] The NCLAT determined that security and security interests of the creditors were irrelevant at the stage of resolution for purposes of allocation of payments.

[8] Accordingly, the NCLAT held that the question of the right of subrogation and the right to indemnification (under Indian contract law) of the erstwhile promoter group who had provided such guarantees would not arise at all.

also heard the writ petitions challenging these provisions along with the challenges to the NCLAT Order.

The IBC Amendment Act provided that (i) the minimum payment to operational creditors under a resolution plan should be the higher of the two amounts; the amount that would be payable to them in the event of liquidation and the amount payable to such creditors if the resolution amount was distributed in accordance with Section 53 of the IBC,[9] (ii) any dissenting financial creditors should be paid a minimum of the amount that would be payable to them in the event of liquidation, and (iii) the committee of creditors may approve a resolution plan after considering the manner of distribution of funds under the plan, taking into account the respective priority of creditors under Section 53(1) of the IBC (including the priority and value of security of a secured creditor). An explanation to Section 30(2)(b) of the IBC was also introduced, which expressly clarified that a distribution in accordance with such section would be considered "fair and equitable".

Further, the IBC Amendment Act also required all corporate insolvency resolution processes to be "mandatorily" completed within a period of 330 days from the insolvency commencement date. For the resolution processes that were already underway (including those subject to litigation) a grace period of 90 days from commencement of this IBC Amendment Act was granted.

III. THE VERDICT OF THE SUPREME COURT

By way of the judgment dated November 15, 2019 ("**SC Judgment**"), the Supreme Court laid down several important precedents in relation to Indian insolvency laws. The decision of the Supreme Court on the issues arising in this matter were driven by certain fundamental principles in line with the objectives of the IBC. This note identifies such basic principles and then briefly summarizes the decision in the SC Judgment on each issue.

A. The Indian insolvency law favors a market and creditor driven process

The Corporate Insolvency Resolution Process ("**CIRP**") under the IBC is based on a flexible model where market participants (as resolution applicants)

9 Insolvency and Bankruptcy Code 2016, s 53. It provides the order of priority in which the proceeds from the sale of the liquidation assets are required to be distributed.

can propose solutions for revival of the corporate debtor. The Supreme Court made it clear that the CoC is in the driver's seat for directing the insolvency resolution process. The underlying assumption was that the financial creditors are fully informed about the viability of the corporate debtor and feasibility of any proposed resolution plan. This assumption is based on the fact that financial creditors being in the business of money-lending, having undertaken a detailed study and exercising due diligence while granting the loan to the corporate debtor, are well placed to make such assessment. Reiterating the ratio in the *K. Sashidhar* v *Indian Overseas Bank*[10] the Supreme Court observed – "*… it is the commercial wisdom of this majority of creditors, which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place.*"[11]

The Supreme Court held that while the ultimate business decision lies with the CoC, such decision should indicate adequate consideration of the objectives of the IBC. Accordingly, the Adjudicating Authority should ensure that the decision of the CoC takes into account the following factors: (i) the corporate debtor should continue as a going concern during the resolution process, (ii) value of assets of the corporate debtor should be maximized, and (iii) interests of all stakeholders should be balanced. In the event that the Adjudicating Authority, on a review of the facts of the case, concludes that the aforesaid factors have not been considered, it may send the resolution plan back to the CoC (but not alter the resolution plan of its own accord).

More recently, the Supreme Court in *Karad Urban Coop. Bank Ltd.* v *Swwapnil Bhingardevay*[12] while reiterating the same principle observed that – "*If all the factors that need to be taken into account for determining whether or not the corporate debtor can be kept running as a going concern have been placed before the Committee of Creditors and the CoC has taken a conscious decision to approve the resolution plan, then the adjudicating authority will have to switch over to the hands off mode…*". Therefore, while it appears that a decision of the CoC may be challenged on the basis that relevant information or all necessary factors were not considered by the CoC, it remains uncertain how a party seeking to challenge the decision of the CoC would provide the necessary evidence to make such a case.

The Supreme Court while discussing the role of resolution applicants, stressed the importance of the right of the resolution applicant to receive

---

10 (2019) 12 SCC 150 : 2019 SCC OnLine SC 257.

11 *Essar Steel India Ltd.* v *Satish Kumar Gupta*, (2020) 8 SCC 531 [62], [64].

12 *Karad Urban Coop. Bank Ltd.* v *Swwapnil Bhingardevay*, (2020) 9 SCC 729 : AIR 2020 SC 4381 [14].

complete information about the corporate debtor. In the same vein, the Supreme Court, while understanding the need for extensive negotiations with the prospective resolution applicants, upheld the right of the CoC to form sub-committees for negotiating and performing other ministerial/administrative tasks, provided that the ultimate decision/analysis was approved by the entire CoC. This would be necessary given that the most important management and business decisions in respect of the corporate debtor would be taken by the CoC.

Similarly, the Supreme Court held that the decision to allow Arcelormittal to reduce its offer made before the court was a consequence of the negotiations by the CoC and could not be faulted by the court. The Supreme Court while upholding the supremacy of the creditors in deciding the viability of a resolution plan, including the manner of distribution under the plan, also recognized that the committee of creditors does not owe any fiduciary duty to any group of creditors but is required to take a business decision with the requisite majority, which binds all stakeholders including any dissenting creditor.

B. Equitable treatment of all creditors

Overturning the NCLAT Order, the Supreme Court held that the principle of "equality" could not be interpreted to mean that all creditors (irrespective of their security interest or their status as operational or financial creditor) should get equal recovery under a resolution plan.

The Supreme Court further held that even within a class of secured financial creditors, differential treatment based on the value of security of such creditors would be permissible. The Supreme Court observed that if the security interest of the creditors was disregarded during the CIRP, many creditors would be incentivized to vote for liquidation rather than resolution. This would defeat the key objective of the IBC, i.e. to ensure resolution of the distressed asset. Further, any bankruptcy law which delays, weakens or de-prioritizes security on insolvency, would destroy the purpose of creation of security in the first place.

The Supreme Court noted that financial creditors and operational creditors by virtue of their business relations with the corporate debtor can never be equally placed and that the IBC itself contemplates operational creditors as a separate class of creditors. However, the IBC provides for certain safeguards, such as priority in repayment to ensure the fair and equitable dealing of such operational creditors' rights. Therefore, the Supreme Court held that as long as the provisions of the IBC were complied with, the CoC could approve and even negotiate for a resolution plan which provided for differential payment to financial and operational creditors.

The Supreme Court while upholding the supremacy of the CoC in deciding the distribution among the various classes of creditors held that such financial creditors are required to also protect the interest of the operational creditors. However, there is an inherent conflict of interest as lenders are primarily motivated to ensure maximum recovery for themselves. The checks imposed on the committee of creditors by the Supreme Court as mentioned above may be insufficient to negate such conflict of interest. Perhaps, recognizing this issue, the Report of the Insolvency Law Committee (February 2020) noted that in due course of time it may be assessed if operational creditors should be given voting rights in the committee of creditors.

C. Ensuring a fresh start for the resolution applicant

Relying on the principle that a prospective resolution applicant would need to know the total debt of the corporate debtor before acquiring it and should be allowed to start the business of the corporate debtor on a "fresh slate", the Supreme Court upheld the provision in ArcelorMittal's resolution plan which required that there would be no right to subrogation in respect of any amounts paid by the erstwhile promoter group under the guarantees extended for Essar Steel. While the claims of guarantors on account of right of subrogation stood extinguished, the Supreme Court did not opine on the merits of the pending litigation proceedings arising from invocation of guarantees provided by the erstwhile promoters/promoter group of Essar Steel.

The Supreme Court in arriving at its decision on the question of extinguishment of the right to subrogation relied on the decision in *State Bank of India* v. *Ramakrishnan*.[13] The Supreme Court, in that case, while holding that personal guarantors would be outside the purview of the moratorium under Section 14 of the IBC, relied on, *inter-alia*, Section 31 of the IBC. The Supreme Court opined that Section 31 of the IBC binds even guarantors of the corporate debtor as the approved resolution plan could provide for payments to be made by such guarantors as well.

Based on the same principle of providing the successful resolution applicant a "fresh slate", the Supreme Court also held that all "undecided" claims of the corporate debtor would stand extinguished once a resolution plan was accepted. Therefore, no creditor may pursue any claims against the corporate debtor after the completion of the CIRP.

[13] *SBI* v *V. Ramakrishnan,* (2018) 17 SCC 394 [25], [26].

The concept of extinguishment of liability for past criminal offences has now been statutorily implemented by the introduction of Section 32A in the IBC. This provision provides for immunity from liability to the corporate debtor and its assets for offences committed by the erstwhile management of the corporate debtor, prior to initiation of the insolvency proceeding, subject to certain conditions. Recently, the Supreme Court in *Manish Kumar* v *Union of India*[14] while recognizing the importance for the new management "*to make a clean break with the past and start on a clean slate*", has rejected the challenge to the constitutional validity of Section 32A of the IBC.

D. The need for expediency in the insolvency resolution process

The Supreme Court recognized that the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debts Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 failed in resolution of stressed assets due to the legal proceedings under these legislations being dragged on for years. Therefore, to ensure maximization of realization of value of the assets of the stressed company in line with the objectives of the IBC, the Supreme Court did not consider it fit to strike down Section 4 of the IBC Amendment Act which provided for a mandatory timeline within which the CIRP (including legal proceedings) needed to be completed.

Instead, the Supreme Court read down such provision by striking down the word "mandatorily" before the stated timeline to ensure its constitutional validity. Therefore, the CIRP should ordinarily be completed within the prescribed 330-day timeline. Further, the Adjudicating Authority may provide exemptions in certain exceptional cases where the failure to adhere to such timelines could not be attributed to any fault of the relevant litigants.

E. The resolution professional does not have an adjudicatory function

The Supreme Court discussed at length the role and responsibilities of a resolution professional to demonstrate how the resolution professional forms the procedural backbone of the entire CIRP. The Supreme Court unequivocally stated that the resolution professional is only required to collect, collate and admit claims without adopting an adjudicatory role. These claims are required to be finally negotiated and decided by the CoC.

---

14 *Manish Kumar* v *Union of India,* (2021) 5 SCC 1 : 2021 SCC OnLine SC 30 [280], [282].

While in theory restricting the resolution professional to a non-adjudicatory function sounds feasible, in practice this may present difficulties. The admission and rejections of creditors' claims may not always be straightforward and often involves legal questions requiring a *prima facie* evaluation of the merits of the claim. Therefore, it is not surprising that various creditors (especially operational creditors) have challenged the treatment of their claims before the NCLT, NCLAT and the Supreme Court in this matter itself. This question becomes even more relevant now that the judicial for a have to operate within the timeline of 330 days.

This anomaly is accentuated by the Supreme Court's earlier judgment in *Swiss Ribbons (P) Ltd.* v *Union of India,*[15] where the Supreme Court recognized that while the resolution professional has a merely administrative role, the determination by a liquidator under Section 41 of the IBC is of 'quasi-judicial' nature. Notably, there is no difference in the qualifications for appointment as a liquidator or a resolution professional.

IV. CONCLUSION

In the authors' view, the Supreme Court correctly reinforced the supremacy of the financial creditors in decisions relating to the assets, liabilities and business of the corporate debtor (including the distribution of proceeds among creditors), and clarified the narrow confines within which courts may interfere. The Supreme Court also correctly applied the "equality among equals" doctrine by appreciating the difference between financial and operational creditors, and secured and unsecured creditors. The NCLAT Order, if it had been upheld, would have resulted in catastrophic consequences on the Indian banking sector, including more stressed assets being sent for liquidation as opposed to resolution through the CIRP.

The Supreme Court's ruling on extinguishment of all past claims (including undecided claims) also brings much respite to resolution applicants, who may otherwise have been unwilling to invest in insolvent companies under the IBC due to the threat of unknown and prolonged litigation proceedings continuing even after acquisition. Further, by emphasizing on the need for timely resolution (ordinarily within 330 days) the Supreme Court has sought to address the issues which plagued the preceding regulations governing resolution of stressed assets. In the view of the authors, the SC Judgment is consistent with the economic and financial foundational principles of the

[15] *Swiss Ribbons (P) Ltd.* v *Union of India,* (2019) 4 SCC 17 : AIR 2019 SC 739 [90], [91].

banking sector and has provided an efficient means of resolution by way of the CIRP under the IBC.

However, the Supreme Court did not take the opportunity to opine conclusively on the issue of permissibility of invocation of guarantees against the erstwhile promoters of a corporate debtor pursuant to acquisition of the corporate debtor by a successful resolution applicant. A separate judgment of the Supreme Court will be needed on that issue.

Information for Contributors

The *NLS Business Law Review* (NLSBLR) is accepting submissions on a rolling basis to its third issue (Volume 7) under the following categories:

- Articles (6,000 – 10,000 words) are comprehensive publications that analyse important themes, and may adopt comparative perspectives
- Essays (4,000 – 6,000 words) typically identify a specific issue, which may be of contemporary relevance, and present a central argument.
- Case Notes, Legislative Comments, Book/Article Reviews (1,500 – 3,000 words)

Submissions may be made in electronic form (strongly recommended) or in hard copy. All submissions must be word processed, and formatted in Times New Roman, point 12, 1.5 line spacing. All word limits are inclusive of footnotes.

References and citations must be in the form of footnotes (not endnotes) and must conform to the latest edition of Bluebook. Footnotes must be formatted in Times New Roman, point 10, 1.0 line spacing.

All submissions must contain the name of the author, academic qualifications, professional information (including institutions to which they are affiliated), the title of the manuscript, and contact information. Joint authorship of papers by individuals of the same or different institutions is welcomed.

Submissions must be accompanied by an abstract of not more than 250 words.

Submissions are accepted for publication on the condition that they do not infringe the copyright or any other rights of any third parties.

Submissions made to NLSBLR are on an exclusive basis and must not be concurrently under consideration by any other publication.

The last date for submissions to Volume 7 is December 10, 2020. Submissions made after this date may be considered for subsequent issues.

Submissions may be emailed to nlsblr@nls.ac.in under the subject title "NLSBLR (Volume 7) – [Submission Category] – [Name(s) of Author(s)]," or addressed to:

Chief Editor
NLS Business Law Review
National Law School of India University
Nagarbhavi, Bangalore – 560072
Website: www.nlsblr.in
Email: nlsblr@nls.ac.in

ORDERING COPIES

Price (inclusive of shipping) of the NLS Business Law Review is as follows:

Hard Copy for 2021	Rs.
Hard Copy for 2019	Rs. 650
Hard Copy for 2018	Rs. 600
Hard Copy for 2017	Rs. 600
Hard Copy for 2016	Rs. 600
Hard Copy for 2015	Rs. 600

Order online: www.ebcwebstore.com

Order by post: send a cheque/draft of the requisite amount in favour of 'Eastern Book Company' payable at Lucknow, to:

Eastern Book Company,

34, Lalbagh, Lucknow-226001, India

Tel.: +91 9935096000, +91 522 4033600 (30 lines)