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FOREWORD

The legal and regulatory landscape has continually adapted to shifts in market practices, emerging business models, technological progress, and the complexities arising from established frameworks. The past year witnessed a series of significant reforms, most notably the expansion of same-day settlement to the top 500 companies and the strengthening of insider trading regulations through a broadened definition of unpublished price-sensitive information. In addition, processes for rights issues have been streamlined, ESG disclosure requirements have been comprehensively tightened, and measures have been introduced to ease fundraising and disclosure for Qualified Institutions Placements. Other progressive changes include reforms to the regulatory framework for Alternative Investment Funds, the removal of structural separation requirements for merchant bankers, and enabling startup promoters to retain and exercise ESOPs post-listing.

The corporate and financial sphere today reflects both rapid transformation and increasing complexity, creating a rich space for thoughtful scholarship and critical engagement. Maharashtra National Law University, Mumbai (MNLU), has continued to strengthen its position as a leading forum for intellectual dialogue, advancing rigorous legal education and encouraging high standards of research and writing. This edition of the *Journal on Corporate Law & Commercial Regulations (CLCR)* carries forward that tradition, presenting carefully crafted contributions that illuminate contemporary questions in corporate and commercial law. The contributions in this volume demonstrate originality of thought, challenge established assumptions, and highlight new directions for research and policy. I extend my appreciation to the Editorial Board for curating this collection with discernment and commend the authors for their insightful and valuable contributions.

The contributions in this volume of the Journal appear at a moment when regulatory systems are being reshaped by the twin forces of innovation and expanding markets. Such change demands not only adaptability in the design of legal frameworks but also active dialogue across disciplines and with institutions of governance. For students of law, this context underscores the continuing importance of developing strong research and writing skills, which remain indispensable for meaningful participation in the profession. It is in this spirit that the Journal offers its readers a rich collection of perspectives, inviting engagement, critique, and fresh thought.

Sandeep Parekh
Managing Partner, Finsec Law Advisors

NOTE FROM THE EIC'S DESK

Dear Readers,

It is with immense joy and heartfelt gratitude that we present the second volume, first issue of the Journal on Corporate Law and Commercial Regulations (CLCR). What began as a humble initiative by students has, in a short period, grown into a platform that aspires to contribute meaningfully to discussions surrounding corporate law, regulatory mechanisms, and allied fields. Though still in its early stages, this journey reflects the passion, perseverance, and collective effort of many who have tirelessly worked behind the scenes.

At the outset, we extend our deepest gratitude to our Hon'ble Patron, Prof. (Dr.) Dilip Ukey Sir, whose encouragement and academic vision inspire us to take this initiative forward with clarity and purpose. We are equally indebted to Dr. Kiran Rai, our Faculty Coordinator and CTRCR's Director, for her constant guidance, patience, and nurturing of this Journal with unstinting support. Her wisdom has been instrumental in shaping our efforts into something more meaningful and impactful.

We also remain grateful to our distinguished Board of Advisors, whose generosity in mentoring us reaffirms the importance of scholarly contribution to the student community. A special acknowledgment must also go to our Peer Review Panel for their rigor and dedication in ensuring that each submission meets academic quality and contemporary relevance.

This issue, just like the earlier ones, stands as a testament to the tireless work of my fellow students, the very heart of this Journal. Their commitment, despite the countless academic and personal demands that law school entails, reminds me that the strength of a collective endeavor lies in intellect, passion, and perseverance.

The submissions we have curated for this issue reflect contemporary developments and pressing corporate and commercial law debates. They represent the curiosity, resilience, and adaptability of young scholars seeking to engage with real-world complexities while pushing the boundaries of legal understanding.

The first paper in this issue, and coincidentally the winner of the recently concluded First Edition of the National Article Writing Competition, 2025 on Insolvency and Bankruptcy Laws, has been authored by Mr. Ayush Singh Verma and Ms. Khushi Kumari. Their article, "*Rethinking Personal Data in Insolvency: Harmonising the Conflict between IBC and DPDP Act*", critically examines the tension between the value maximisation mandate under the Insolvency and Bankruptcy Code (IBC) and the consent-centric, purpose-limited framework for processing personal data under the Digital Personal Data Protection Act (DPDP). The paper provides a timely and insightful engagement with two areas of law that are rapidly emerging as pivotal to India's commercial landscape.

The competition runners-up, Mr. Mahanth and Ms. Maitreyi Shinde, contribute an engaging piece titled "*When the Code Collides with the Cloud: Navigating the Insolvency Labyrinth in the Age of Digital Privacy*." This paper addresses the evolving intersection between data protection regulation and insolvency law, two domains which, until recently, existed in relative isolation but now confront each other directly in the digital era. Their work underscores the challenges inherent in reconciling post-modern regulatory frameworks with traditional insolvency concerns.

Following this, we have the paper by Mr. Amitabh Kumar Saxena and Mr. Neil Patwardhan, titled "*India's Legal Gap: Monetising Personal Data Assets in Insolvency Liquidations*." This piece persuasively analyzes the vacuum in Indian law concerning treating personal data as an asset in insolvency, drawing thoughtful comparative insights from the U.S. and E.U., where privacy safeguards guide data sales. While ensuring that when companies collapse, their data does not become a liability, but instead serves as an ethically tapped lifeline.

Next, Mr. Yarabham Akshit Reddy and Mr. Adveer Singh Narang present their article, "*Fragmented Resolutions: Rethinking Corporate Resolution Through Asset-Wise Mechanisms*." The piece dissects the concept of asset-wise resolutions under the Corporate Insolvency Resolution Process (CIRP) Regulations, highlighting the ambiguities in their current implementation. Drawing on comparative frameworks from the U.S. and U.K., the authors propose a well-structured framework supplemented by additional regulations that would align seamlessly with the IBC's twin objectives of maximising value and ensuring prompt resolution.

Finally, rounding off the competition papers, Ms. Sejal Sahu and Ms. Anenya write on "*Wings of Ambiguity: Unpacking the Aircraft Objects Act's Override of India's Insolvency Code*." This paper critically examines the interplay between the Aircraft Objects Act, 2025 (AOA), the Cape Town Convention, 2006, and the IBC. The authors recommend a package of reforms, from statutory amendments and harmonisation of the AOA and IBC. Their recommendations aptly reflect the growing complexities of cross-border insolvency in specialised sectors such as aviation.

Next Ms. Sriya N. Naik writes on "*Social Stock Exchanges: Tracking its Regulatory Regime and Unearthing the Potential and Challenges of the Impact Investing Infrastructure in India.*" This paper examines the evolution of India's SSE framework, from SEBI's regulations to recent reforms easing issuances and formalising Social Impact Assessors. Drawing on global models, the paper calls for stronger incentives, transparency, and effective implementation.

Next, Dr. Priya Bhatnagar and Mr. Vinay Juneja in their paper titled, "*The Regulatory Paradox: India's Coal Story*" examine the complex transition of India's coal sector, which remains trapped between promises of phasing down coal and simultaneous efforts to commercialize mining. The authors argue for the urgent establishment of an independent regulator or structural reforms such as breaking up CIL, in order to ensure fair competition, attract private and foreign investment, and align India's energy sector with global sustainability commitments.

Following this we have a paper by Mr. Aashish G Darne titled, "*The Invisible Clause: How Inter-Corporate Loans Test the Scope of the Commercial Courts Act, 2015.*" This paper explores the interpretative ambiguities surrounding whether disputes over inter-corporate loans fall within the ambit of commercial disputes under the Act. The author argues that given the inherent commercial nature of these transactions, courts must adopt sociological and realist interpretive approaches to ensure substantive justice, while also recommending statutory clarification to explicitly cover inter-corporate loans.

Next, Ms. Komal Singh writes on "*Competition Crossroads: Demystifying the Impact of Killer M&A Of SMEs And Upstart Innovators.*" The author examines how mergers and acquisitions by dominant incumbents often stifle competition by absorbing small and innovative enterprises that drive India's economic growth. The article evaluates the challenges posed by such "*killer acquisitions*," drawing comparative insights from the EU, USA, and UK, while also considering their distinct implications in the digital economy.

Lastly, the paper "*Sustainable Development in Energy Sector*" by Mr. Kunal Sharma, Mr. Tanmay Banthia, and Ms. Nidhi Rathi analyzes the transition to sustainable energy systems, emphasizing renewable energy, efficiency, and policy frameworks. It concludes that sustained efforts and collaboration remain essential to overcoming challenges and ensuring a secure, inclusive energy future.

As law students putting together this issue, it is humbling and inspiring to witness such maturity of scholarship at an early stage of one's legal career. It reminds us that the future of legal academia in India is bright, built on critical thinking and a willingness to engage with the law's most pressing ambiguities.

This Journal is still a work-in-progress, and there is always much scope for learning and improvement. We humbly welcome our readers' feedback, as it will only help us grow and refine our efforts to craft a space that mirrors both academic rigor and accessibility.

As you turn these pages, we hope you experience the same sense of purpose we felt while putting this work together. May this issue encourage meaningful thought, debate, and reflection in the ever-evolving landscape of commercial law.

Warm Regards,
Arjun Kapur & Suhasini Thakur
Editor-in-Chief (2024-25)

RETHINKING PERSONAL DATA IN INSOLVENCY: HARMONISING THE CONFLICT BETWEEN IBC AND DPDP ACT

Ayush Singh Verma and Khushi Kumari[1]*

ABSTRACT

The enactment of Digital Personal Data Protection Act, 2023 marks a paradigm shift in treatment of personal data in India, with its implications reaching insolvencies under the Insolvency and Bankruptcy Code 2016. This article critically examines the conflict between value maximisation under IBC and DPDP's consent centric, purpose-limited framework for processing personal data. Deviating from the traditional view of treating data as a transferable asset, the authors argue that personal data constitutes a limited license rather than an ownership asset. This significantly impacts valuation, consent management, and asset transfer during insolvency. The paper proposes a dual-track solution along with a statutory safe harbour mechanism to harmonise the conflict. It further advocates for statutory clarity on fiduciary roles and compliance liabilities during insolvency. Essentially, the paper urges for a privacy-centric insolvency framework that balances individual rights with commercial objectives.

I. INTRODUCTION

In contemporary times, data protection has become a forefront issue in cybersecurity.[2] The stakes have been further increased by the problems brought forth by frequent organisational data

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[1] *Both Authors are 4th Year Law Students at Hidayatullah National Law University.

[2] S. Sirur, J.R. Nurse & H. Webb, *Are We There Yet? Understanding the Challenges Faced in Complying with the General Data Protection Regulation (GDPR)*, IN PROCEEDINGS OF THE 2ND INTERNATIONAL WORKSHOP ON MULTIMEDIA PRIVACY AND SECURITY 88 (2018).

breaches, social media, and the Internet of Things (IoT). Until 2023, India did not have separate data protection legislation, and the same was governed by the Information Technology Act, 2000.[3] After much deliberation, the parliament enacted the Digital Personal Data Protection Act, 2023 ('**DPDP**'), which is awaiting further action by the government for its implementation. The Act is based on the principle of *purpose limitation*, which gives data principals more control over their data by making *'consent'* the fundamental basis for processing personal data.

This evolving nature of personal data can have significant implications under the existing insolvency framework. The Insolvency and Bankruptcy Code, 2016 ('**IBC**') embodies the principle of *value maximisation* of assets along with balancing the interests of every stakeholder. The central problem lies with balancing value maximisation with purpose limitation, consent-based processing, and privacy rights. The interplay between these two statutes raises substantial concerns regarding the sale of digital data assets by a company during insolvency.

This paper critically examines the evolving treatment of personal data under the IBC-DPDP framework. It analyses statutory and operational challenges arising from the conflict of insolvency and privacy laws. Deviating from the traditional chain of thought of treating personal data as an asset owned by the company, the authors have argued that it is a limited authorisation akin to a licenses for processing data. Lastly, drawing upon statutory interpretations and cross-jurisdiction treatments, the authors have proposed a dual-track solution for harmonising the legislative gap comprising a conditional asset route and insolvency safe harbour.

II. IS DATA AN ASSET UNDER IBC?

The term asset is derived from the Latin term '*as satis*,' which connotes *'sufficiency.'* Through a legal lens, it signifies *capable of satisfying debts*.[4] The International Accounting Standards Board interprets an asset as *"a present economic resource controlled by the entity as a result of past*

[3] DLA PIPER, *Data protection laws in India* (last visited Jul. 31, 2025 8:30 PM). https://www.dlapiperdataprotection.com/?t=law&c=IN.

[4] David Alexander and Christopher Nobes, Financial accounting: An international introduction, (Essex: Prentice Hall, 2nd Edition, 2004).

events.[5]" However, in Indian jurisprudence, neither IBC nor any of the seven enactments referred to in Section 3(37) of IBC explicitly define what an asset is.[6]

On the other hand, data under the insolvency regime can be described as personal or business information, including customer databases, financial records, and other information.[7] Whereas personal data is defined as any information that relates to an identifiable individual.[8] Companies collect, process, and analyse personal data to understand customer behaviour, personalise services, and develop new products.[9] The increasing reliance on data in the digital age has highlighted its business and economic value.[10] However, there is uncertainty regarding whether personal data can be considered as an asset or not.[11]

Notably, Section 18(f) of the IBC obligates the Insolvency Resolution Professional ('**RP**') to take control and custody of an asset, including an intangible asset.[12] Additionally, according to IAS 38, intangible assets can be acquired through separate purchase, business combinations, asset exchanges, or internal development.[13] Sections 8 and 9(1) of the DPDP require an entity to implement appropriate technical and organisational safeguards, such as ensuring data security and minimising unauthorised processing, when it generates data or customer lists internally.[14] These compliance steps inherently involve the creation and storage of such data within the organisation.[15] Thus, it can be argued that such internally developed personal data qualifies as an intangible asset

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[5] International Financial Reporting Standards, *Conceptual Framework: Definition of an Asset*, (January, 2013) https://www.ifrs.org/content/dam/ifrs/meetings/2013/january/iasb/conceptual-framework/ap9a-definition-of-asset.pdf.

[6] Victory Iron Works Ltd. v. Jitendra Lohia & Anr., (2023) 7 SCC 227.

[7] Aayushi Choudhary and Vaibhav Gupta, *Navigating the Data Integration Conundrum: A closer look at IBC.* IndiaCorpLaw (September 19, 2023), https://indiacorplaw.in/2023/09/19/navigating-the-data-integration-conundrum-a-closer-look-at-ibc/.

[8] The Digital Personal Data Protection Act, 2023, §2(t), No. 22, Acts of Parliament 2023 (India).

[9] Douez v Facebook [2017] SCC 33.

[10] Green v SCL Group Ltd and others [2019] EWHC 954 (Ch).

[11] Marta Luize Srempa, *Data as an Asset in an Insolvency Procedure*, Riga Graduate School of Law (2021) https://dspace.lu.lv/dspace/bitstream/handle/7/56564/Srempa_MartaLuize.pdf?sequence=1.

[12] The Insolvency and Bankruptcy Code, 2016, §18(f), No. 31, Acts of Parliament 2016 (India).

[13] International Financial Reporting Standards, *IAS 38 Intangible Assets*, https://www.ifrs.org/issued-standards/list-of-standards/ias-38-intangible-assets/.

[14] The Digital Personal Data Protection Act, 2023, §8 and 9(1), No. 22, Acts of Parliament 2023 (India).

[15] *Ibid*.

under IAS 38. However, whether such an intangible asset is subject to the corporate debtor's ownership or not is a significant concern, which will be discussed in later sections of this article.

III. THE QUANDARY OF DATA VALUATION

One of the most important elements concerning the interest of creditors, shareholders, and other stakeholders in insolvency is the valuation of the business.[16] It involves identifying alternative scenarios for the business along with its overall value in each scenario. However, there is no specified standard prescribed under the IBC, and the valuers are required to adhere to internationally recognised valuation standards.[17] Over the course of proceedings, assets may need to be valued to determine the value of the claim and establish the debtor's position. During this period, it is possible that the value of such assets may depreciate, leading to a disadvantage for creditors. Therefore, it is crucial that the value of assets be preserved.[18]

Data, as an unconventional asset, is difficult to assess because there are no clear criteria for measuring its value.[19] Given its intangible character, numerous methodologies, such as market-based evaluations, economic models, and dimensional frameworks, have arisen, each with its own set of advantages and disadvantages.[20]

Valuation of personal data is a further daunting task where privacy consideration plays a key role. A privacy calculus evaluates the costs/risks versus the benefits of publishing and sharing personal information.[21] There does not exist a calculating method for personal data that can properly define and identify privacy cost-benefit concerns. Given the lack of a specific valuation model under the Indian insolvency framework, data valuation becomes a subjective task with varying values depending on the model employed. Different values for the same data can slow down the

[16] SUMANT BATRA, CORPORATE INSOLVENCY LAW AND PRACTICE 330 (1st ed. 2017).
[17] Insolvency And Bankruptcy Board Of India, *From Chaiperson's Desk: Standardising Valuation*, https://ibbi.gov.in/uploads/resources/766ad6caafb236d6b2a4fc1aa8a031be.pdf.
[18] SUMANT BATRA, CORPORATE INSOLVENCY LAW AND PRACTICE 331 (1st ed. 2017).
[19] Nishi Sharma, *Intangible Assets: A Study of Valuation Methods*, 5 BVIMR MGMT. EDGE 1 (2012).
[20] Mike Fleckenstein, *A Review of Data Valuation Approaches and Building and Scoring a Data Valuation Model*, 5 HARV. DATA SCI. REV. 1 (2023), https://doi.org/10.1162/99608f92.c18db966.
[21] Xio-Bai Li, *Valuing Personal Data with Privacy Consideration*, 52 DECISION SCI. 393 (2021), https://doi.org/10.1111/deci.12442.

insolvency proceedings, which can lead to a depreciated value of data assets, defeating the principle of asset maximisation as embodied under the IBC.

IV. IBC-DPDP INTERPLAY: ASSET MAXIMIZATION VIS-À-VIS PRIVACY COMPLIANCE

IBC recognises both tangible and intangible assets as part of a corporate debtor's estate, which are capable of being monetised during insolvency and liquidation proceedings.[22] Personal data, especially when systematically organised, can qualify as an intangible asset (an example can be voluntarily obtained customer lists).[23] Such databases are valuable for business activities, as they facilitate increasing productivity and profit margins.[24] Precedents like *In re Toysmart.com Inc. LLC* demonstrate the value of personal data in modern business practices.[25]

Under the code, the Insolvency and Bankruptcy Board of India ('**IBBI**') maintains a database of all sets of information regarding corporate entities through Information Utilities ('**IUs**').[26] Remarkably, Section 215(2) of the IBC mandates Financial Creditors and Operational Creditors to submit financial records and information in respect of assets with IUs.[27] Notably, IBC also incorporates various safeguards to maintain confidentiality and restricts the transferability of information collected and processed under the code.[28] For example, Section 29(2) obligates an IP

[22] The Insolvency and Bankruptcy Code, 2016, §18(f), No. 31, Acts of Parliament 2016 (India).
[23] Antony Gibbs Sons v. La Société Industrielle Et Commerciale Des Métaux (1890) 25 QBD 399 (Court of Appeal).
[24] Fabian Schafer, Heiko Gebauer, Christoph Groger, Oliver Gassmann, Felix Wortmann, *Data-driven business and data privacy: Challenges and measures for product-based companies,* 66(4) BUSINESS HORIZONS (July 2023) 493-504.
[25] In re Toysmart.com Inc. LLC, No. 00–13995 (Bankr. D. Mass., August 2000).
[26] The Insolvency and Bankruptcy Code, 2016, §210, No. 31, Acts of Parliament 2016 (India).
[27] The Insolvency and Bankruptcy Code, 2016, §215(2), No. 31, Acts of Parliament 2016 (India).
[28] Debanshu Mukherjee and Neha Lodha, *Data Protection and IBC: A New Frontier?* IBBI (2023) https://ibbi.gov.in/uploads/whatsnew/525cbe1dd3b1f9fd9866fe77676a96ae.pdf.

to comply with such measures.[29] Additionally, IBBI prescribes various guidelines for IUs to adhere to some technical standards while handling data.[30]

However, adoption of DPDP signifies a change in data protection landscape of India where processing of digital personal data will be governed under the statute. The Act relies heavily on consent as the basis for processing personal data which raises significant concerns regarding the harmonisation of DPDP with relevant statutes, particularly the IBC.[31] Though it can be argued that the IBBI, being a statutory regulator, will be covered under the exemptions provided by section 17 of DPDP,[32] but it is disputed whether other entities like IPs, IUs, liquidators, or resolution applications fall under its scope. Moreover, since right to privacy is a fundamental right under Article 21,[33] it underscores the need for a cautious approach while handling personal data during insolvency.[34] On the contrary, the compliance with data protection norms during insolvency will lead to a detrimental effect on the value maximisation of data as an asset which will be demonstrated below.[35]

V. THE OWNERSHIP DILEMMA: IS DATA REALLY TRANSFERABLE?

Imagine a bakery that maintains a customer database containing their birthdays, contact details, order histories, and preferences, alongside selling cakes. When this bakery becomes insolvent, this database is treated as a sellable asset during the proceedings. But now, with the enactment of new privacy laws, the bakery merely holds the data in trust as a data fiduciary. So, during insolvency, it cannot sell what it does not own. This shift from ownership to fiduciary responsibility creates a conflict between purpose limitation and value maximisation.

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[29] "The Insolvency and Bankruptcy Code, 2016, §29(2), No. 31, Acts of Parliament 2016 (India).

[30] Insolvency And Bankruptcy Board of India (Information Utilities) Regulations, 2017, Regulation 13 and 22; Guidelines for Technical Standards for The Performance of Core Services and Other Services Under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, Clause 2.6.

[31] Debanshu Mukherjee and Neha Lodha, *Data Protection and IBC: A New Frontier?* IBBI (2023) https://ibbi.gov.in/uploads/whatsnew/525cbe1dd3b1f9fd9866fe77676a96ae.pdf.

[32] The Digital Personal Data Protection Act, 2023, §17, No. 22, Acts of Parliament 2023 (India).

[33] K.S. Puttaswamy v. Union of India 2017(10) SCC 1.

[34] *Ibid*.

[35] Debanshu Mukherjee and Neha Lodha, *Data Protection and IBC: A New Frontier?* IBBI (2023) https://ibbi.gov.in/uploads/whatsnew/525cbe1dd3b1f9fd9866fe77676a96ae.pdf.

Currently, data is treated as a saleable asset during insolvency, as evidenced by the Jet Airways insolvency case.[36] However, after the DPDP Act comes into play, one can argue that the corporate debtor does not actually own the data asset but merely has non-exclusive access to it. In India, data privacy is treated as a part of the right to privacy.[37] This poses a question—whether there is any ownership over the personal data of a third party?

An analogy can be drawn from Section 30[38] of the Indian Copyright Act, which provides that the owner of the copyright can grant any interest in the right by way of a license to a third person. Nevertheless, he retains moral rights to claim authorship over the work even if the copyright is assigned.[39] Sections 6(1)[40] and 7[41] of the DPDP Act embody the principle of *purpose limitation* by providing that consent should be given for a specific purpose and usage of such personal data should be for such specified purpose only. Section 6(4)[42] also confers the right on the data principal to withdraw her consent anytime. Section 9[43] provides that consent of a guardian or parent must be obtained before processing personal data of a child.

Thus, it is evident that DPDP puts a lot of emphasis on consent for processing personal data. It can be logically followed that consent is a non-exclusive right to use personal data as a license, comparable to Section 30 of the Copyright Act. This *authorisation* is limited to the consent given by the data principal, which is further bound by purpose limitation. Section 18 of the IBC excludes assets of third parties that are in possession of the debtor under trust from being a part of insolvency proceedings and is limited to assets over which the debtor has ownership rights.[44] Section 36(4)[45]

[36] Jet Airways (India) Limited vs State Bank of India 2019 SCC OnLine NCLAT 385.
[37] Shiv Shankar Singh, *Privacy and Data Protection in India: A Critical Assessment,* 53 JOURNAL OF THE INDIAN LAW INSTITUTE, 663-677, 663 (2011) http://www.jstor.org/stable/45148583 .
[38] The Copyright Act, 1957, § 30, No. 14, Acts of Parliament, 1957 (India).
[39] The Copyright Act, 1957, § 57, No. 14, Acts of Parliament, 1957 (India).
[40] The Digital Personal Data Protection Act, 2023, §6(1), No. 22, Acts of Parliament, 2023 (India).
[41] The Digital Personal Data Protection Act, 2023, §7, No. 22, Acts of Parliament, 2023 (India).
[42] The Digital Personal Data Protection Act, 2023, §6(4), No. 22, Acts of Parliament, 2023 (India).
[43] The Digital Personal Data Protection Act, 2023, §9, No. 22, Acts of Parliament, 2023 (India).
[44] The Insolvency and Bankruptcy Code, 2016, §18, No. 31, Acts of Parliament 2016 (India); Director of Enforcement v. Manoj Agrawal 2021 SCC OnLine NCLAT 121.
[45] The Insolvency and Bankruptcy Code, 2016, §36(4), No. 31, Acts of Parliament 2016 (India).

of the Code provides that the liquidation estate does not include such assets over which the debtor merely has usage rights.

Hence, the interplay between IBC and DPDP can give rise to the problem of ownership over data assets, as the debtor merely possesses an authorisation over personal data. This can further have implications for valuation and asset maximisation, as now, the data is not being treated as an asset of the company but merely as an authorisation (right to use). This implies that it is left out of the insolvency estate, reducing the overall recoverable value, and it is not freely transferable as it is heavily consent reliant. Even if such right to use is transferred, the corporate applicant would be required to take fresh consent of data principals if it intends to use such data for any other purpose than for which it was formerly given. Thus, there is a need to balance the privacy rights of data principals and the commercial interests of corporate applicants.

V. CONSENT AND CONTROL: UNCERTAINTY IN RESOLUTION PLANS

The transfer and sale of personal data under insolvency proceedings come under the ambit of legitimate use as provided under Section 7 of DPDP.[46] However, such legitimate processing is bound by the consent requirement and purpose limitation.[47] It means that, to conduct such processing of data in insolvency, an explicit purpose-specific consent is required. Now, ensuring such prior approval to the point of data collection is very rare, as no company at the time of its incorporation or at the time of collecting data of its customers could have foreseen that they would become insolvent one day.[48]

Notably, DPDP provides that when further processing differs, the data fiduciary needs to take a fresh consent specifying the purpose.[49] Furthermore, Section 6(4) of the DPDP Act provides that the data principal shall have the right to withdraw her consent at any time.[50] Though it is provided that such withdrawal shall not affect the legality of processing of the personal data based on

[46] The Digital Personal Data Protection Act, 2023, §7, No. 22, Acts of Parliament, 2023 (India).
[47] *Ibid*.
[48] Marta Luize Srempa, *Data as an Asset in an Insolvency Procedure,* Riga Graduate School of Law (2021) https://dspace.lu.lv/dspace/bitstream/handle/7/56564/Srempa_MartaLuize.pdf?sequence=1.
[49] The Digital Personal Data Protection Act, 2023, §6(1), No. 22, Acts of Parliament, 2023 (India).
[50] The Digital Personal Data Protection Act, 2023, §6(4), No. 22, Acts of Parliament, 2023 (India).

consent before its withdrawal,[51] it creates a critical inconsistency in the insolvency context. Even if the data principal initially consents to the resolution plan involving selling/transferring their personal data, they still have the right to withdraw their consent at any later point in time.

This right to withdraw consent from the further transferability of data remains with the Data Principal, even after the resolution plan has been approved by the Committee of Creditors (**'CoC'**) and the National Company Law Tribunal (**'NCLT'**). Now, section 31 of IBC mandates that if a plan has been approved by CoC, it cannot be further modified or withdrawn and is binding on all stakeholders.[52] Thus, in case the data principal withdraws its consent post approval of the plan, the plan will still be binding on all stakeholders,[53] but the buyer will encounter legal and operational hurdles with respect to the transferability and utility of such personal data. Consequently, such unpredictability makes data less attractive or even unusable for the resolution applicant, ultimately undermining the valuation of data and hampering the goal of value maximisation of the asset.

The second concern is regarding the stringent consent management system post the introduction of the Business Requirement Document (**'BRD'**).[54] While the introduction of BRD has provided clarity to the framework, it complicates the operationalising of data by seriously compromising the usability and transferability of data. BRD mandates a highly granular and purpose-specific consent mechanism.[55] It not only adds another layer of documentation and regulatory complexity by mandating cookie consent banners but also necessitates consent renewal at each stage of data transfer.[56] Particularly, in data-driven companies, where user databases or behavioural analytics

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[51] Archana Iyer and Sumit Ghoshal, *Data Protection Laws and Regulation India 2025,* ICLG (July 21, 2025) https://iclg.com/practice-areas/data-protection-laws-and-regulations/india.

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

[53] IBC Law, *The Submitted Resolution is binding and irrevocable between the Coc and the successful resolution applicant | Insolvency Law does not allow modifications or withdrawals of the resolution plan*, (November 12, 2024) https://ibclaw.in/the-submitted-resolution-plan-is-binding-and-irrevocable-between-the-coc-and-the-successful-resolution-applicant-sra-insolvency-law-does-not-allow-modifications-or-withdrawals-of-the-resolution-pl/.

[54] Ministry of Electronics and Information Technology, *Business Requirement Document for Consent Management under the DPDP Act, 2023*, (June, 2025) https://d38ibwa0xdgwxx.cloudfront.net/whatsnew-docs/8d5409f5-d26c-4697-b10e-5f6fb2d583ef.pdf.

[55] *Ibid*.

[56] *Ibid*.

account for a significant portion of corporate value, such rigid consent policies cause data assets to depreciate.[57]

Additionally, insolvency practitioners will be legally restrained from transferring these assets to a resolution applicant without first reobtaining the approval of each data principal. This is operationally and legally cumbersome, especially under a strict time-bound framework of IBC. This decreases the attractiveness of the asset, potentially leading to fire-sale valuations and frustrating the objective of value maximisation.

VI. THE COMPLIANCE COST CONUNDRUM

The third challenge is who is going to bear the cost of implementing the rights of the data principal under the DPDP. Since the implementation cost is typically covered from corporate assets, should there be a maximum cost limit for implementation? When an insolvent company is in administration or liquidation, granting data principals an unrestricted right to request access to information/withdraw consent at any point in time increases the costs of the process and may reduce the amount of assets that can be distributed.[58] Low returns on creditors' investments resulting from deteriorating company assets may eventually discourage corporate lenders from offering reasonable financing for operational purposes.[59]

Notably, the case of In *Re Southern Pacific Personal Loans Ltd*. reveals that implementing the data protection law's privacy rights could be extremely expensive and that the cost bearer is often not clearly defined, particularly when the corporate debtor is no longer a going concern.[60] Additionally, the case demonstrates how corporate stakeholders, including creditors, directors,

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[57] Mackinsey Global Institute, *Big Data: The next frontier for innovation, competition and productivity*, (June 2011) https://www.mckinsey.com/~/media/mckinsey/business%20functions/mckinsey%20digital/our%20insights/big%20data%20the%20next%20frontier%20for%20innovation/mgi_big_data_full_report.pdf.

[58] Joseph Agburuwhuo Nwobike, *Unresolved Tensions in the Intersections of Corporate Insolvency, Data Protection and Conflict of Laws Under the Nigerian Legal Framework*, 16(1) Beijing Law Review (March, 2015) https://www.scirp.org/journal/paperinformation?paperid=138903#ref2019.

[59] *Ibid*.

[60] Re Southern Pacific Personal Loans Ltd [2013] EWHC 2485 (Ch).

employees, and shareholders of a corporate debtor, are impacted during an insolvency process due to the amounts deducted for the implementation of personal data rights.[61]

VII. BRIDGING THE GAPS: SUGGESTIONS FOR DATA TREATMENT

A. Share Deal and Conditional Asset route

The problem of ownership over data assets can be resolved in two ways: *firstly*, by a *share-deal scenario*, and *secondly*, by treating data as a *conditional asset*. We have already established that transferring the right to usage over data could be problematic and fruitless in the insolvency process. Another option is to work out a share deal.[62] Regulation 37(c) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016[63] ('**IBBI Regulations**'), provides that a resolution plan may contain measures for the substantial acquisition of shares of the corporate debtor. In the case of *CIT* v. *Panchratan Hotels*, it was ruled that a change in the identity of the shareholders does not change the identity of the company, as it is a separate legal entity.[64] In a share-deal arrangement, the buyer (corporate applicant) will potentially take the place of the seller (corporate debtor) by acquiring shares in the company. The applicant will get usage access over personal data without attracting DPDP provisions, as there is no transfer of data taking place.

However, there is a problem with this arrangement—a company might not want to dilute its equity and rather opt for a slump sale or other sale agreements. In this scenario, it would be better to treat data as a *conditional asset*. This can be done by introducing an *opt-out model* similar to the one enshrined in the California Consumer Privacy Act, 2018 ('**CCPA**').[65] Under CCPA, consumers have the right to opt out of the sale of their personal data to third parties. Further, in the *RadioShack* insolvency case, similar concerns were raised where personal data of about 65 million customers

[61] *Ibid*.
[62] Ronny Hauck, *Personal Data in Insolvency Proceedings: The Interface between the New General Data Protection Regulation and (German) Insolvency Law,* 16, EUROPEAN COMPANY AND FINANCIAL LAW REVIEW, 724-745, 743 (2019) https://edoc.hu-berlin.de/items/a699b94c-8161-4b19-8a1a-e8e9b5eae3a4.
[63] Insolvency And Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 37(c).
[64] CIT v. Panchratan Hotels 2009 SCC OnLine HP 315.
[65] California Consumer Privacy Act of 2018, Cal. Civ. Code §§ 1798.100–1798.199.100.

was auctioned as an asset.[66] The Delaware Bankruptcy Court allowed for selling the data principals to the condition that data principals must be notified and provided with a clear chance to opt out of such a transaction.[67]

In India, Regulation 37 of the IBBI Regulations can be amended to incorporate the *opt-out* model where the RP could provide the data principals with such an option. Thus, treating data as a conditional asset could enable partial monetisation while upholding informational privacy.

B. An Insolvency Safe-Harbour

The unpredictability of the data concerning its future transfer and utility during the insolvency resolution of the debtor company can be reduced by introducing a *statutory safe harbour* regime for insolvency. Typically, a data fiduciary (corporate debtor) will ask for consent from the data principals to use their data in the insolvency proceedings. It means the data principals will have the option to either choose to let their data be used in the proceedings or to restrict their data from such proceedings.

Now, under this mechanism, those who have given their consent to the data fiduciary will be covered under the safe harbour provision. Accordingly, their consent will be frozen for the duration of the whole insolvency proceeding. It indicates that those data principals will not be able to withdraw their consent till the completion of the insolvency proceeding and the transfer of the data to the successful resolution applicant.

This mechanism does not completely extinguish the rights of the data principals but merely suspends their right to withdraw their consent for a certain period to prevent disruptions of the resolution plan. Additionally, it preserves utility and value data and helps in time-bound resolution. Notably, section 17 of DPDP recognises certain exceptional situations where the rights of the data

[66] Paula Rosenblum, *Bankrupt RadioShack's Attempts To Sell Customer Data Meets Resistance,* FORBES (MARCH 24, 2015) https://www.forbes.com/sites/paularosenblum/2015/03/24/bankrupt-radioshacks-attempts-to-sell-customer-data-meets-resistance/.

[67] Christopher G. Bradley, *Privacy for Sale: The Law of Transactions in Consumers' Private Data*, 40 Yale Journal on Regulation 127 (2023).

principal can be restricted.[68] Thus, a safe harbour mechanism will not circumvent the provisions of DPDP, while balancing the objectives of IBC with the privacy rights of individuals.

*C. **Clearing the Wind around Cost***

Lastly, the situation of *Southern Pacific Personal Loans Ltd*. demonstrates that sometimes the cost of implementing data principals' rights can be exorbitant.[69] In such cases, the insolvency practitioners might choose security interest rights over the data principals' rights.[70] This raises a significant question as to who is going to take the liability of the breach. DPDP is clear on this point that a data fiduciary is always held liable for such breaches.[71] Once NCLT admits the insolvency application and appoints an RP, the corporate debtor loses its management control over the company.[72] Consequently, the corporate debtor no longer holds the position of the data controller and thus cannot be made liable.

This raises a further question: whether the RP holds the position of the data controller for the duration of insolvency and is held liable for breach of data principals' rights. However, the case of *Southern Pacific* clarified that an RP merely acts as an agent of the company, and it cannot be held liable for the data that was initially collected for the corporate debtor's business.[73] Accordingly, this position indicates that if the RP refuses to comply with the rights of data principals, they cannot be made liable for the breach. Therefore, there is an urgent need for statutory clarity to be provided on who holds the position of data fiduciary in such cases so as to ensure both compliance with data protection obligations and certainty for stakeholders.

VIII. CONCLUSION

The introduction of DPDP 2023 marks a significant shift in how personal data is treated during insolvency proceedings, as it redefined data from a freely transferable asset to a consent-based

[68] The Digital Personal Data Protection Act, 2023, §17, No. 22, Acts of Parliament, 2023 (India).
[69] Re Southern Pacific Personal Loans Ltd [2013] EWHC 2485 (Ch).
[70] *Ibid*.
[71] The Digital Personal Data Protection Act, 2023, §8(5), No. 22, Acts of Parliament, 2023 (India).
[72] Axis Bank Ltd. v. Asset Reconstruction Company (India) Limited, 2024 SCC Online NCLAT 1248.
[73] Re Southern Pacific Personal Loans Ltd [2013] EWHC 2485 (Ch)."

authorisation. While the IBC prioritises value maximisation, the DPDP grants the primacy of individual consent and privacy. The latter, being recognised as a fundamental right, cannot be ignored. This means the insolvency proceeding must abide by the consent requirement and purpose limitation. However, as the data principals are vested with significant control over their data, including the right to withdraw consent, this causes various operational, and valuation challenges.

These inconsistencies can be harmonised by way of conditional asset models, opt-out mechanisms, or temporary consent safe harbours. However, statutory clarity with respect to ownership and liability is required. As the implementation of DPDP is imminent, India needs to develop a clear privacy-centric insolvency framework that can create a balance between the rights of data principals and the commercial utility of data and ultimately promote the objective of value maximisation.

WHEN THE CODE COLLIDES WITH THE CLOUD: NAVIGATING THE INSOLVENCY LABYRINTH IN THE AGE OF DIGITAL PRIVACY

Mahanth P.A. and Maitreyi Shinde[74]*

ABSTRACT

*In the modern age, where information is valued as a physical property, the fate of personal data in corporate insolvency has taken the situation to a new level. The maxim pursued by insolvency jurisprudence is to maximize asset valuation and make equitable distribution to creditors. With the introduction of the Indian Digital Personal Data Protection Act, 2023 ("**DPDP Act**"), a new friction arises: could personal data gathered in business be considered as an asset during insolvency proceedings? This paper challenges the interchange between data protection regulation and insolvency law, two areas of post-modern law that existed in a vacuum but now approach each other head-on. It outlines the legal definition of personal data, followed by a review of Information Utilities ("**IUs**") as subjects to sensitive information storage. It then decomposes a multi-layered question: who can use or transfer such data amid the Corporate Insolvency Resolution Process ("**CIRP**") and on what terms? This reflects the practices of insolvency*

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*professionals who face dual fiduciary duties under the Insolvency and Bankruptcy Code, 2016 ("**IBC Code**"), and the DPDP Act. As insolvency practices become digitalized, these professionals have evolved from custodians of assets to data fiduciaries. Finally, the paper highlights regulatory gaps and a pathway to harmonize them, emphasizing the need to balance privacy rights and business revival. Ultimately, it aims to ensure that individual privacy and company recovery can coexist meaningfully.*

I. INTRODUCTION

The company once trusted with health record privacy, financial transactions and browsing history has gone into insolvency, triggering serious ethical and legal questions. One question concerns data stewardship: *where does the data go? Is it still safe? Who possesses it? Moreover, if the struggling business is sold and revamped, does the buyer have right to the related information with equity?* More importantly, there is need to evaluate whether the new custodian can be granted fiduciary trust. As revealed in this discussion, while there might have been an initial tendency toward the affirmative, the facts point to the contrary.

In the modern landscape of hyperconnectivity, where the Internet enables communication and interweaves lives, businesses, and economies worldwide, the interdependence of digital infrastructure has risen to uncharted levels.[75] This interdependence enables the flow and storage of immense personal data, with the issue becoming more dangerous due to potential data leakage and privacy exposure.[76] In response, many governments have begun recalibrating their legislative systems to address challenges of unregulated data circulation.[77] The COVID-19 highlighted structural weaknesses in countless companies' financial stability. Many companies, especially in service and technology industries, faced business failure as lockdowns and economic shocks eliminated their income sources. Information, specifically personal data such as consumer

[75] JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 176 (Oxford Univ. Press 2006).
[76] IAN CLARKE et al., *Freenet: A Distributed Anonymous Information Storage and Retrieval System*, in DESIGNING PRIVACY ENHANCING TECHNOLOGIES 46, 46–66 (Hannes Federrath eds., Lecture Notes in Computer Science 2009); Hanbyal Choi, *The Role of Privacy Fatigue in Online Privacy Behavior*, 81 COMPUTERS IN HUMAN BEHAVIOR, 42, 42-51 (2018).
[77] Lillian Colonna, *Addressing the Responsibility Gap in Data Protection by Design: Towards a More Future-Oriented, Relational, and Distributed Approach*, 27 TILBURG L. REV. 1, 1-21 (2022).

demographics and behavioral analysis, played the role of an inimitable corporate asset that enabled strategic recalibration and rebuilding processes.[78] However, information is guarded under strict data-protection frameworks, primarily the General Data Protection Regulation ("**GDPR**") and the DPDP Act. This paper raises a legal and ethical question: Is it morally right that in insolvency proceedings, the utilization of personal data in possession of an insolvent business can be monetized without violating data protection norms?[79] Data is becoming central to corporate valuation, and its duality as both cash-generating property and an object of fundamental privacy rights is becoming a regulatory challenge.[80] To navigate this dilemma, Personal Data is explained under the existing legal context, followed by investigation of the IUs' functional model and regulatory structure of data access after insolvency. Then, the position encountered by insolvency professionals and the need to balance statutory duties with data protection laws are examined. The article suggests a harmonized approach that preserves individual privacy while allowing corporate entities to use digital resources within legal restrictions.

II. PERSONAL DATA AS DIGITAL ASSET: THE DUAL IDENTITY OF VALUE AND PRIVACY IN INSOLVENCY PROCEEDINGS

An asset is a resource that an entity controls based on past transactions and is expected to yield future economic benefits. Under digital capitalism, data have gained their place in the asset table as regrowing capital. As Bill Schmarzo puts it, data are the new sun: inexhaustible and illuminating new value pathways when harnessed, reused, and recombined.[81] Not all data are equal; personal data rank at the top of this information pyramid. It is a behaviorally, transactionally, and contextually rich dataset, recognized by the World Economic Forum as a new asset class that drives predictive algorithms, platform personalization, and monetization.[82] In modern company

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[78] Rishi Pareek & Onika Arora, *Insolvency for the Digital Economy: Balancing Data Protection and Asset Maximisation under the IBC and DPDP Act*, BUSINESS & COMMERCIAL LAW REVIEW (May 12, 2024) <Insolvency for the Digital Economy: Balancing Data Protection and Asset Maximisation under the IBC and DPDP Act> (Last accessed on July 28, 2025).
[79] Rishi, *supra* note 4.
[80] *Ibid.*
[81] Bill Schmarzo, *How to Monetise Your Data to Fuel Growth in Your Business: Chat with Bill Schmarzo*, HYPERIGHT (Aug 4, 2021), <https://hyperight.com/how-to-monetise-your-data-to-fuel-growth-in-your-business-chat-with-bill-schmarzo/> (Last accessed on 28 July, 2025).
[82] *Personal Data: The Emergence of a New Asset Class,* World Economic Forum (2011), <Personal Data: The Emergence of a New Asset Class> (Last accessed on July 29, 2025).

valuation, including technology giants, personal data has become the undetectable skeleton of market power, a medium of digital trust, and a central indicator of future earnings.[83] Therefore, personal data is a two-dimensional object, as it is a commercial engine and legal tightrope, a property that can think, recollect, and speak through law.

In the digital economy, personal data has become a strategic lifeblood. Companies mine this data to obtain behavioral answers, personalize services, and commercialize themselves.[84] This increased reliance has brought risks of abuse, hacking, and privacy infringements. To address these concerns, states worldwide are placing regulatory controls over data governance, recognizing that personal data requires oversight. The European Union has taken a prominent role. The Charter of Fundamental Rights defines privacy in Article 8 as a fundamental human right rather than administrative practice.[85] The GDPR expands on that by broadly defining personal data, covering established personal identifiers[86] like names and identification numbers, and intimate identifiers like DNA data, fingerprints, and health reports. The need for legal protection has led India to present the DPDP Act, 2023, creating a framework to guide the collection, processing, storage, and transfer of personal data in electronic format.[87] The Act takes a broad stance, defining data as any representation of information that can be communicated or processed by automated means, targeting digital personal data in electronic form, whether acquired online or digitized from offline sources.[88] This definition brings a crucial change to the legal treatment of privacy and data autonomy in India's legal framework. Data are no longer a relic of Internet use; they have become a legal status linked to individual human dignity and self-determination.

Contemporary discussions on corporate insolvency show that personal data's economic importance yields material returns to creditors. When a company collapses, personal data can be treated like

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[83] Ludwig Siegele, *A deluge of data is giving rise to a new economy,* ECONOMIST (Feb. 20, 2020), <A deluge of data is giving rise to a new economy> (Last accessed on July 29, 2025).
[84] Candice Malcolm, *Behavioural Analytics: Understanding Your Customer's Decision-Making Process*, INTERACT RDT (May 21, 2024), <https://www.interactrdt.com/blog/2024/05/21/behavioural-analytics/> (Last accessed on July 29, 2025).
[85] *Data Protection in the European Union: The Role of National Data Protection Authorities (Strengthening the Fundamental Rights Architecture in the EU II)*, EU AGENCY FOR FUNDAMENTAL RIGHTS (FRA) (2010).
[86] Regulation (EU) 2016/679 on the protection of natural persons with regard to the pro cessing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 Art. 4(1).
[87] The Digital Personal Data Protection Act, No. 22, Acts of Parliament, 2023 (India).
[88] The Digital Personal Data Protection Act, 2023, § 2(n), 2(t), 2(h).

any asset to be sold off, raising legal and privacy questions often overlooked. Previously, practices focused on liquidating physical plants, but now such assets are secondary to customer feedback, transactional histories, and mailing lists, which are essential advantages for most companies. For data-driven businesses, these digital assets are crucial due to few physical assets, increasing their importance during insolvency. The 2013 Toysmart case in the US[89] demonstrates this; a bankrupt toy chain attempted to sell customer data, prompting government intervention to protect consumer privacy. The Italian Shardna case[90] is illustrative, where a bankrupt biobank tried to sell genetic samples; courts stated this material is so closely tied to identities that it cannot be anonymized and should not be marketed. Modern insolvency literature grapples with balancing data utility, business survival, and personal privacy. These aspects heighten existing fears, warranting comprehensive evaluation of these dynamics.

III. THE DATA ORACLE: IUS AND THE PRICE OF KNOWING TOO MUCH

The collection of data during insolvency proceedings raises privacy concerns, especially regarding India's evolving digital data protection norms. Information Utilities, created under the IBC, act as official record-keepers, collecting and verifying details about company debts and defaults for use as proof during insolvency cases.[91] The Insolvency and Bankruptcy Board of India ("**IBBI**") registered[92] the first and only IU on 25th September 2017 - National E-Governance Services Limited ("**NeSL**"). Recognized by the Working Group on IUs and Bankruptcy Law Reforms Committee ("**BLRC**"),[93] IUs are critical to the IBC's architecture.

[89] FTC v. Toysmart.com, LLC, FTC File No. 002 3145 (2000).
[90] Stephanie Kirchgaessner, *Ethical Questions Raised in Search for Sardinian Centenarians' Secrets*, THE GUARDIAN (Dec. 08, 2016), <https://www.theguardian.com/world/2016/aug/12/ethical-questions-raised-in-search-for-sardinian-centenarians-secrets> (Last accessed on July 29, 2025).
[91] Veena Sivaramakrishnan & Sumant Prashant, *Insolvency: What Is Important About 'Information Utilities'*, SHARDUL AMARCHAND MANGALDAS & CO. (Sept. 25, 2022), <https://www.amsshardul.com/insight/insolvency-what-is-important-about-information-utilities/> (Last accessed on July 29, 2025).
[92] Ministry of Corporate Affairs, Insolvency and Bankruptcy Board of India (IBBI) registered National E-Governance Services Limited (NeSL) today as an Information Utility (IU) under the IBBI (Information Utilities) Regulations, 2017 (Issued on Sept. 21, 2017).
[93] Ministry of Corporate Affairs, *Report of Working Group 4 to Recommend the Rules and Regulations for Information Utilities* (Jan. 10, 2017), <https://ibbi.gov.in/wg-04report.pdf > (Last accessed on July 29, 2025).

Functioning as an institutional cornerstone, IUs are entrusted with accepting electronic submissions, recording, authenticating and verifying financial information, and facilitating processes under the Code.[94] Financial creditors must submit financial records and information about secured assets to IUs.[95] This reinforces transparency and virtualization of insolvency proceedings. The timely availability of accurate information about insolvent companies is vital to authenticate creditor claims and ensure value maximization during revival. Interestingly the BLRC originally envisioned a competitive market of private IUs rather than a single, government-controlled system.[96] This decision aimed to prevent monopolistic control over financial information and encourage multiple regulated entities. However, this pluralistic model raises privacy issues. As more IUs seek approval under IBC 2016, the potential for data misuse grows. Each IU becomes custodian of sensitive data, from loan defaults to transaction histories. Without harmonized data protection norms, this could lead to compliance risks. Different IUs may adopt varying protocols without uniform standards. As more IUs are approved, private entities will handle vast amounts of personal data, potentially creating data mishandling risks without proper harmonization under the DPDP.

Second, a cardinal rule of data governance in global frameworks, such as the GDPR and DPDP Act, 2023, is the *principle of data minimization*.[97] This principle mandates that only the personal data that is necessary for a specific and lawful means should be collected, used, or shared, ensuring that data collection remains both proportionate and purposeful.[98] Within the context of IUs usage, this principle provokes a pressing inquiry: Do India's IUs comply with the data minimization standard? The IBC Code requires creditors to share certain personal information that is essential for verifying their claims. However, it is not uncommon for additional data, such as the date of birth or address of a creditor, to be voluntarily submitted. Since these details are usually auto-filled into these digital records, it widens the scope of disclosure. Even if the act may appear to collect

[94] Debanshu Mukherjee & Shreya Prakash, Vidhi Centre for Legal Policy, *Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017: Developing a legal framework for information utilities under the Insolvency and Bankruptcy Code,* VIDHI CENTRE FOR LEGAL POLICY, (Mar. 31, 2017), <https://vidhilegalpolicy.in/research/insolvency-and-bankruptcy-board-of-india-information-utilities-regulations-201/> (Last accessed on July 29, 2025).
[95] The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, (India), § 215(2).
[96] The Insolvency and Bankruptcy Code, 2016, § 214(h).
[97] General Data Protection Regulation, 2016, Art. 5 (1)(c); The Digital Personal Data Protection Act, 2023, § 6.
[98] *Ibid.*

data based on the pretext of implied consent, this does not lift the responsibilities of IUs. Hence, a fair and respectful data process should always stick to its purpose and avoid going overboard with data collection.

IV. KEYS TO THE VAULT: DEMYSTIFYING DATA ACCESS IN IUS AND REGISTERS

The digitalization of insolvency proceedings, by means of insolvency registers or IUs, marks a consequential step towards transparency. However, this development brings considerably more complex issues of privacy and data security, especially as even sensitive personal information about the concerned stakeholders is subjected to constant scrutiny on the Internet.[99] Released into the digital sphere, such information becomes a target of quick spread, unlimited storage, and numerous points of contact, increasing the risks of misuse and the organization of barriers to the individual who care about the preservation of their personal information.[100] To that end, the use or disclosure of any personal data should be consistent with the principles and obligations of data protection as originally established by instruments such as the Charter of Fundamental Rights of the European Union, which further posits that data processing should be justified, necessary, and proportionate to its intended use.[101]

Until the digital age, the personal data of these individuals were traditionally stored physically either in the courts or in the administrator's offices and could be accessible only to the directly involved parties, that is, creditors, trustees, and the insolvency court. Third parties do not usually have direct access, which automatically limits exposure and eliminates creditor privacy. This access is extended by the move to online insolvency registers, but in many cases, they lack a high level of necessary controls.[102] The European Court of Human Rights thus emphasized a sensitive balance, with the fundamental obligation of the common good to engage in supervision, and yet the individual right to maintain the privacy of their personal data, as well as demanding the evaluation on a case-by-case basis of the need and extent of personal data release.[103] The ruling

[99] Kateřina Hrabánková, *Electronification of Insolvency Proceedings in the Light of the Protection of Creditors' Fundamental Rights*, 8 EU & COMP. L. ISSUES & CHALLENGES SERIES 455, 455–72 (2024).
[100] *Ibid.*
[101] Charter of Fundamental Rights of the European Union, Art. 52(1).
[102] L.B. v. Hungary, App. No. 3635/16, Grand Chamber, European Courts of Human Rights (Mar. 9, 2023).
[103] Kateřina, *supra* note 25.

also reinforces a foundational principle of India's DPDP Act,[104] such as controlled access, requiring user authentication and demonstration of legitimate interest before accessing personal data in public registers.[105] Moreover, the BLRC, deliberating on privacy concerns arising from IUs, recommended partial public access to information and complete release of information to participants in the insolvency resolution process.[106] Furthermore, normative guidelines may have to be provided for the purposes and the period for which such information shall be accessed, thereby ensuring that such processing remains squarely within the legitimate use exception and the exemptions envisaged under the DPDP Act.[107]

This culminates in a deeply consequential dilemma for India's insolvency ecosystem: Who gets access to data stored in the insolvency register, and should they? While digitization was meant to streamline and demystify insolvency processes, it may have inadvertently unshackled a new era of personal data vulnerabilities. The regulatory silence on this front is both deafening and dangerous.

V. CUSTODIANS OF THE DIGITAL ESTATE: WHEN IPS INHERIT MORE THAN JUST DEBT

When a business entity enters insolvency proceedings, appointing an Insolvency Professional ("**IPs**") shifts specific tasks to that individual.[108] In the European legal system, the practitioner becomes a data controller under the EU's GDPR; thus, he is custodian of both physical resources and personal data the company possesses.[109] Under the current IBC framework, these professionals must safeguard all stakeholders' interests.[110] This governance aligns with BLRC's proposal for regulated professionals to guide companies through restructuring.[111] Globally, insolvency professionals' role is recognized in the UNCITRAL Legislative Guide,[112] which states: "An insolvency representative plays a key role in making sure the insolvency process runs smoothly

[104] The Digital Personal Data Protection Act, 2023, § 12, §13.
[105] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), Council of Europe (1981).
[106] Report of the Bankruptcy Law Reform Committee*: Volume I – Rationale and Design*, Bankruptcy Law Reform Committee, ¶ 4.3.7 (2015).
[107] *Ibid.*
[108] The Digital Personal Data Protection Act, 2023, § 4, §33–37.
[109] General Data Protection Regulation, 2016, Art. 2(5).
[110] The Insolvency and Bankruptcy Code, 2016, §17 r/w § 23.
[111] *Supra* note 32.
[112] Legislative Guide on Insolvency Law, United Nations Commission on International Trade Law (UNCITRAL) (2005).

and fairly. They manage the debtor's assets, protect their value, and balance the interests of creditors, employees, and others involved".

In modern insolvency law, a key issue is whether IPs are personally liable for data breaches during their tenure.[113] The decision in I*n re Southern Pacific Personal Loans Ltd*[114] provided precedent: the UK High Court held that insolvency practitioners act as the company's agent, making them immune against pre-insolvancy breaches but liable post-insolvency. In the Indian IBC framework, when a CIRP starts, Section 17 entrusts the debtor's management to the IP, creating a management-agent relationship. In this framework, the agent must pursue the debtor's assets and interests for all stakeholders.[115] Accordingly, default of fiduciary duties during CIRP will impose personal liability. Hence, once in office, any failure to comply with the DPDP Act, such as mishandling personal data or ignoring data subjects' rights can trigger major penalties.[116]

Let us now examine a particularly complex challenge concerning the responsibility of IPs in navigating the crossroads between insolvency resolution and data protection frameworks during the *possibility of data transfer* in corporate distress. Practitioners must balance competing obligations instituted by statute into creditor recovery maximization and by international and domestic data protection regimes. In restructuring insolvent companies where assets are bundled, personal sensitive information of stakeholders is included. Data can be measured in value and under a more legalistic structure than physical counterparts. Through principles of lawful processing, purpose limitation, consent, and confidentiality established by EU GDPR[117] and DPDP Act 2023,[118] IPs must balance maximizing liquidation value with implementing data protection measures.

A complex issue emerges when personal data collected with limited consent are repurposed during insolvency proceedings. This occurs when data initially collected in business relationships, with

[113] KATRIEN BRUYNSEELS & JEROEN VAN DEN HOVEN, *How to Do Things with Personal Big Biodata*, in SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES 122, 122–40 (Béatrice Roessler & Dorota Mokrosinska eds., Cambridge Univ. Press 2015).
[114] Re Southern Pacific Personal Loans Ltd, [2013] EWHC 2485 (Ch) (Aug 8 2013).
[115] The Insolvency and Bankruptcy Code, 2016, § 17.
[116] New Okhla Indus. Dev. Auth. v. Amit Agarwal, Resolution Prof'r, COM A (Insolvency) No. 305 of 2021 (India); Victory Iron Works Ltd. v. Jitendra Lohia, CA No. 1743 of 2021 (India).
[117] General Data Protection Regulation, Art. 5.
[118] The Digital Personal Data Protection Act, 2023, § 6, §7.

permission for specific uses, are later used in asset sales.[119] This repurposing indicates administrative change and material transformation of initial purpose. This has been noted in data protection guidelines and corporate insolvency commentary, where processing initiatives may deviate from original consent.[120] Moreover, Article 5(1)(b) of GDPR[121] sets limits for personal data retention and deletion of personal sensitive data when no longer needed. Additionally, the DPDP Act 2013 requires clear, specific consent for each data use or transfer beyond original purpose.[122] Repurposing data on outdated consent is restricted unless legitimate use or statutory exemption applies.[123] This limitation challenges insolvency professionals selling personal data as assets, as they cannot rely on outdated permissions. The IP's duty to maximize estate value may conflict with the need to obtain renewed consent from thousands of data principals, which can be time-consuming and complex.

VI. RIGHTS AND RECOVERY COLLIDE: STITCHING TOGETHER CODE, CONSENT, AND CORRECTIVES

Given the tensions between insolvency proceedings and data protection guidelines, we must focus on actionable reforms. To ensure insolvency proceedings remain lawfully valid and effective, harmonized recommendations are needed.

Reinforcing data minimization standards in IUs: Current practices of IUs raise concerns regarding personal data collection. Our recommendations are two-fold: First, procedural safeguards must *separate obligatory and optional information*. Optional information should be subjected to anonymization protocols, access control, or redacted from public views. We recommend Indian regulators consider reintroducing a risk-based approach similar to *IT Rules 2011*.[124] Then, six categories of sensitive personal data were identified and protected based on potential harm if

[119] General Data Protection Regulation, Art. 5(1)(b).
[120] *How Should We Obtain, Record and Manage Consent?*, INFORMATION COMMISSIONER'S OFFICE, <Consent | ICO> (Last accessed on July 29, 2025); Ashlea Cartee, *How Does Consent Affect Data Retention?*, ONETRUST (Aug 29, 2022), <https://www.onetrust.com/blog/how-does-consent-affect-data-retention/> (Last accessed on July 29, 2025).
[121] *Supra* note 45.
[122] The Digital Personal Data Protection Act, 2023, §6(1),§6(3), §7.
[123] The Digital Personal Data Protection Act, 2023, §4, §5, §6(3), and §7.
[124] Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, Rule 3.

misused. This categorization guides institutions through data minimization and privacy-by-design principles, ensuring only necessary data is shared for research.[125] It balances public transparency with individual privacy, particularly for directors or employees where mishandling risks reputational damage.

Our second recommendation is *the right to be forgotten*, empowering individuals to seek data removal from platforms when consent is withdrawn or processing lacks legal basis.[126] Under this principle, controllers must erase data and remove associated links or replications. This right was demonstrated in 2014 when the Court of Justice of the European Union formally recognized it, allowing individuals to request search engines remove personal information links under certain conditions.[127] By March 2017, Google deactivated approximately 732,000 links, showing practical enforcement and EU's commitment to protecting sensitive data online.[128] The CJEU's *Schufa* ruling[129] strengthened this principle, holding that private credit agencies' retention of discharge data post-removal from official registers undermines data minimization and hinders debtors' fresh start. Indian courts have interpreted this right under Article 21 of the Constitution. In *Justice K.S. Puttaswamy v. Union of India*,[130] Justice Sanjay Kishan Kaul recognized privacy rights include controlling personal data, aligning with EU laws. The judgment outlined principles including removal of inaccurate data while retaining necessary public interest information.[131] Subsequently, the BN Srikrishna Committee (2017)[132] emphasized normative scaffolding, recommending data subject rights, including erasure and consent withdrawal, for future data protection regimes.

Clarifying access protocols for insolvency registers: Regarding privacy concerns raised by online availability of personal data through insolvency registers and IUs, the key question is: *Who has*

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[125] *Supra* note 4.

[126] Marion Fourcade & Daniel Kluttz, *A Maussian Bargain: Accumulation by Gift in the Digital Economy*, BIG DATA AND SOCIETY, (Feb. 3, 2020) <A Maussian bargain: Accumulation by gift in the digital economy - Marion Fourcade, Daniel N Kluttz, 2020> (Last accessed on July 30, 2025).

[127] Lindsay Hoffman, *Do We Have a Right to Be Forgotten?*, HUFFPOST, (July 16, 2015) <https://www.huffpost.com/entry/do-we-have-a-right-to-be_b_7812564.html> (Accessed on July 30, 2025).

[128] Matthew Weaver, *Google 'Learning as We Go' in Row Over Right to Be Forgotten*, THE GUARDIAN, (July 4, 2014), <https://www.theguardian.com/technology/2014/jul/04/google-learning-right-to-be-forgotten> (Last accessed on July 30, 2025).

[129] Judgment of the CJEU of 7 December 2023 in joined Cases C26/22 and C64/22.

[130] Justice K.S. Puttaswamy & Ors. v. Union of India, (2017) 10 SCC 1; AIR 2017 SC 4161 (India).

[131] *Ibid,* ¶ 69.

[132] *White Paper of the Committee of Experts on a Data Protection Framework for India,* Ministry of Electronics & Information Technology, Government of India (Dec. 18, 2017).

the right to access personal data of subjects in an insolvency register? This information is essential for insolvency professionals, trustees, resolution professionals, and insolvency courts to establish and confirm claimants, encouraging fair processes and discouraging false claims.[133] The register should act as an information portal with narrow access to personal information on a need-to-know basis. A stringent access-control procedure should require users to log in securely and prove genuine interest/ involvement in the insolvency process before accessing sensitive information.[134] Access should be limited to the insolvency court, appointed administrators to the case, and registered creditors. Limiting disclosure of personal information in insolvency registers to a well-understood group of interested parties meets the legal rules of the day and has practical advantages in resolving the plight of corporate debtors. This strategy balances insolvency administration transparency with individual privacy rights and prevents unwarranted intrusion into personal lives.

A practical guide for insolvency professionals handling personal data: As IPs must comply with DPDP Act, 2013, while maximizing asset value under IBC, 2016, analysis of gaps between statutes is necessary. One suggestion is expanding the *legitimate use test*[135] or adding an insolvency-specific legitimate-interest basis similar to GDPR Art 6(1)(f), allowing processing without new consent while protecting data-subject rights.[136] The insolvency administrator should combine information to data subjects with requests for consent to transfer personal data, enabling future processing by purchasers.[137] This approach aligns data handling with insolvency aims efficiently.

As part of the Expression of Interest (“**EOI**”) document in the formal insolvency process, creditors at large will strive to highlight the corporate debtor as a corporate entity that is a viable and asset-rich body.[138] Nevertheless, data-protection policies can represent a legal obstacle to data transfers in times of insolvency, and thus reduce the value of the debtor assets and discourage potential buyers. In order to strike a smooth process of resolving with legal validity, *anticipatory consent* provisions must be used where the users or individuals are clearly deemed that their information

[133] Kateřina, *supra* note 25.
[134] Kateřina, *supra* note 25.
[135] The Digital Personal Data Protection Act, 2023, § 7.
[136] General Data Protection Regulation, Art. 6(1)(f).
[137] German Federation of Consumer Organisations v Planet49 GmbH, Case C-673/17, ECLI:EU:C:2019:80, (Oct. 1, 2019).
[138] The Insolvency and Bankruptcy Code, 2016, § 34A.

can be moved in some cases like in insolvency.[139] It is through such clauses that legal trade in the pool of assets is allowed, buyer comfort is invested in, lack of legal ambiguity arises and facilitation in the ease of doing business ensues. If built into data collection initially, these policies would make asset transfers during insolvency smoother and ensure users are not caught off guard.

Another recommendation is exploring the *sandbox model* to test how personal data can be safely used in insolvency cases. In a sandbox setup, resolution professionals can handle personal data under *Data Protection Board* oversight. This approach protects data value while ensuring secure, fair, and compliant processing. Moreover, European legal practitioners have developed balancing tests and process protections that serve as workable examples for India.[140] Until harmonization is achieved, insolvency practitioners must be meticulous, construct clear notices, document consent, and consider balancing competing interests under law.[141]

VII. CONCLUSION

With data-driven business models, human information has become one of the most profitable yet insufficiently protected assets subject to liquidation during insolvency. Physical and financial property had been afforded priority as the IBC, 2016 placed it ahead. However, conflict exists between maximizing recoveries in bankruptcies and privacy rights in the DPDP Act, 2023, as enterprise value increasingly depends on personally identifiable information. The introduction of IUs, meant to increase transparency and streamline operations, has raised critical issues regarding the scope, sensitivity, and availability of information exchanged during insolvency. These concerns are compounded by insufficient granular access controls and procedural protection for data subjects. Insolvency Professionals, as information custodians, face a paradox; they must preserve and realize all available assets but lack clarity under statute and operational facilities to avoid privacy breaches. The procedural burdens of this legal incompatibility are significant: determining legal grounds for data transfer, re-obtaining consent from data principals, and resolving contradictory requirements between laws. Finding balance in this field is crucial. To

[139] Orla Lynskey, *Deconstructing Data Protection: The "Added-Value" of a Rights-Based Approach*, 4 Eur. Data Prot. L. Rev. 161, 168–69 (2018).
[140] Guidelines on Transfer of Personal Data in Insolvency, European Data Protection Board, (2021).
[141] Smaranda Bara v. Presedintele Casei Nationale de Asigurari de Sanatate, Case C-201/14, EU:C:2015:638 (Oct. 1, 2015).

achieve value maximization and time-bound resolution that the IBC aims for, data must be recognized as both liability and asset simultaneously. Our argument is analytical and practical. Such protections are not excessive regarding privacy and do not undermine insolvency processes. By aligning these laws, we ensure business reinstatement aligns with basic rights.

INDIA'S LEGAL GAP: MONETISING PERSONAL DATA ASSETS IN INSOLVENCY LIQUIDATIONS

Amitabh Kumar Saxena and Neil Patwardhan[142] *

ABSTRACT

As digital footprints grow more valuable than factory floors, data has emerged as a premium asset in liquidation proceedings across jurisdictions. This paper explores a grey zone in Indian insolvency law: the monetisation of personal data assets (PII) by liquidators. Despite the growing practice globally, India lacks a clear framework to govern such sales. The paper analyses the Indian legal vacuum, while drawing comparative insights from the U.S. and E.U., where privacy safeguards guide data sales. Key risks to monetisation of data assets include violations of consent, purpose limitation, and data security. To resolve this, the paper proposes a statutory mechanism allowing data sales conditioned on anonymisation, data subject rights, and independent oversight. It also identifies creative routes for monetisation, such as selling companies as going concerns so as to avoid directly transferring data as a standalone asset. In doing so, this paper proposes a path for India to unlock digital value ethically—ensuring that when companies die, their data doesn't become a liability, but a responsibly tapped lifeline for creditors.

I. INTRODUCTION

The corporation is dead. Long live its data. In the digital age, this phrase has never rung truer. First, because in today's commercial realities, companies that enter the insolvency process are picked apart and sold so as to ensure that the outstanding debts of the body corporate are settled, whether in part of full, as far as possible. No stone is left unturned in this process, and no avenue

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is left unexplored. Second, and more precisely, in many jurisdictions, the data assets of the insolvent company are monetised in liquidation proceedings.[143] In this way, the data assets of the insolvent company live on, and are exploited efficiently to settle debts with creditors and bring returns to shareholders, and therefore maximise the value of the estate of the corporate debtor.

What makes this trend remarkable is its novelty. The commercial value of data has soared, and data is not just part of the sale - it's the star of it. A striking example of this is the Interpublic Group's acquisition of Mumbai-based analytics firm Intelligence Node, driven by a strategic interest in its product and consumer databases (WSJ).[144] However, as with any novel concept, complexities are bound to emerge. These complexities are twofold - with India's insolvency regime remaining silent on the matter, and India's data protection legislation still in the works.

With no sufficient legislation on the matter, therefore, several questions arise; *what is the legality and validity of the sale of consumer and user data during liquidation under the Insolvency and Bankruptcy Code, 2016? How are data assets to be addressed in liquidation proceedings? What are the privacy considerations to be had when making such a sale? What gaps in the law need to be filled in? What steps can liquidators take in the current scenario of the law, and what steps can they take when the Digital Personal Data Protection Act, 2023, and its accompanying rules are notified fully and brought into force?*

This paper seeks to answer these questions, through a thorough analysis of current Indian Laws, expected laws, and make recommendations based on analyses of the position of the law in jurisdictions such as the United States of America, as well as the European Union.

The paper, therefore, is structured as follows. First, it outlines the digital assets and their scope under consideration in this article. As a necessary corollary, it will also describe the position of personal data assets in India, the position of the sale of such assets in liquidation proceedings, and the applicable privacy laws to such transfers of personal data assets. Next, it will consider the

[143] Jose M. Garrido & Wolfgang Bergthaler, The Use of Data in Assessing and Designing Insolvency Systems, INT'L MONETARY FUND (Feb. 4, 2019), https://www.elibrary.imf.org/view/journals/001/2019/027/article-A001-en.xml (accessed July 19, 2025).

[144] Megan Graham, Interpublic Group Buys Retail Analytics Company in Deal Valued at Nearly $100 Million, WALL ST. J., Dec. 5, 2024, https://www.wsj.com/articles/interpublic-group-buys-retail-analytics-company-in-deal-valued-at-nearly-100-million-4817de39 (accessed July 20, 2025).

position of such sales in the U.S. and the E.U, following which, it will consider the need to balance privacy with the goal of maximisation of debtor value. Finally, on the basis of these discussions, it will recommend policy changes and steps that liquidators can take in the context of the current legislative grey area in sales of personal data assets.

II. DATA AS A CONCEPT

Data, as defined by the Information Technology Act, 2000 ("*IT Act*"), is a representation of information.[145] In this respect, the word data may refer to a variety of concepts; it may refer to statistics, an online database of judgments, a dataset of vast amounts of email addresses and other such personal information, such as biometrics or sexual orientation, and it may also refer to metadata. However, in its reference to the word data, shall refer solely and exclusively to personal data, or Personally Identifiable Information[146] ("*PII*"), which means only data that relates to particular persons, and is capable of identifying the person or persons to whom that data relates.

III. THE INDIAN POSITION

In order to sufficiently address the problem and complexity of sale of PII assets in insolvency proceedings, it would be prudent to first explore the nature of data as an asset, and its treatment as such by Indian Law. In essence, does Indian Law, generally speaking, view data as an asset, and does it permit the transfer of PII?

Indian Law makes its position clear on whether data can be considered an asset or saleable good; the Income Tax Act, 1961 taxes sales of data. The Indian taxing statute, and therefore the law, in that regard, clearly view data as an asset, or good, that is capable of being transferred.[147]

The foremost pieces of legislation that would answer the question of transferability of PII, are laws on information technology and data privacy. Much talk on data privacy and personal information, in that regard, has, of late, revolved solely around the Digital Personal Data Protection Act, 2023 ("*DPDP Act*"), and the Digital Personal Data Protection Rules, 2025 ("*DPDP Rules*"). However,

[145] Information Technology Act, No. 21, § 2(o), Acts of Parliament, 2000 (India).
[146] What Is Personally Identifiable Information (PII)?, IBM (Dec. 6, 2022), https://www.ibm.com/think/topics/pii (accessed July 21, 2025).
[147] Income Tax Act, 1962, §9.

only certain provisions of the DPDP Act have been notified and enforced, while the DPDP Rules is still in its draft phase.

In the absence of the DPDP Act and the DPDP Rules, however, reference to the Information Technology (Reasonable Security Practices and Sensitive Personal Data or Information) Rules, 2011 ("*SPDI Rules*"), would be useful.

The SPDI Rules, in that regard, do not prohibit the transfer of PII, but merely regulate it, stating that a transfer of PII by a body corporate may be permitted - subject to the condition that such a transfer is necessary for fulfilling the contract between the body corporate and the person to whom the PII relates, or the person to whom the PII relates has consented to such a transfer.[148] Clearly, then Indian Law permits the transfer of PII between entities.

Generally speaking, then, the law permits the transfer and sale of data, but can the same be said in the context of liquidation proceedings under the Indian Insolvency Regime? The Insolvency and Bankruptcy Code, 2016 ("*IBC*"), therefore, prohibits assets owned by a third party which are held in trust by the corporate debtor from being included in the liquidation estate.[149] This is bad news for liquidators, as in India, PII belongs not to the Corporate Debtor, but belongs to the person to whom that PII relates. It is also unlikely that such ownership may be contractually waived, as such ownership is derived from the Fundamental Right to Privacy (through Article 21 of the Constitution of India).[150]

In light of this, the probable conclusion, in absence of Indian jurisprudence on the matter, must be reached that the IBC prohibits the sale of PII as an individual asset in liquidation proceedings.

IV. POSITION IN THE UNITED STATES

In the United States, PII is treated like any other estate asset and may be sold under Section 363 of the Bankruptcy Code.[151] A Section 363(b) motion will be filed, identifying the assets for sale.[152]

[148] Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, Rule 7.
[149] Insolvency and Bankruptcy Code, 2016, §35(4).
[150] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1.
[151] 11 U.S.C. § 363 (2022).
[152] 11 U.S.C. § 363(b) (2022).

The PII will then be auctioned or by private sale, subject to court approval, ensuring that data assets enter the market transparently and yield maximum recovery for the estate. The Bankruptcy Code also expressly prohibits transfer of PII in a way that contradicts a debtor's privacy policy.[153] If a proposed transfer is inconsistent with those policies, the court must appoint a Consumer Privacy Ombudsman (CPO) to evaluate the risks, advise on safeguards, and recommend whether the sale should proceed.[154] However, their opinion is not binding.[155] The logic behind such an appointment is that consumers submitted their data under specific terms, and bankruptcy does not give companies a license to sidestep those contractual promises. A change of purpose of the PII, courts may require additional consent.

Additionally, the Bankruptcy Code's transparency mandate does not override standing federal privacy statutes like the Health Insurance Portability and Accountability Act and the Gramm-Leach-Bliley Act.[156] These statutes ensure that sensitive data is not exposed merely because a company has gone bankrupt. Thus, while U.S. law enables monetization of data assets, it requires alignment with privacy protections.

Several cases illustrate this approach. For example, in *re RadioShack* (2015), a sale of 117 million customer records was proposed, and the court permitted only a narrow set of customer information to be sold and required explicit *opt-in* consent for any marketing.[157] Similarly, in *FTX Trading Ltd.* (2024), the court allowed redaction of wallet addresses and transaction hashes, recognizing that even pseudonymous data could reveal identity in blockchain-based systems.[158] In *re Celsius*

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153 11 U.S.C. § 363(b)(1) (2022).

154 Consumer Privacy Ombudsman (CPO), THOMSON REUTERS PRACTICAL LAW ,https://uk.practicallaw.thomsonreuters.com/Glossary/PracticalLaw/I90cffd167b9611e8a5b3e3d9e23d7429?transitionType=Default&contextData=(sc.Default)&firstPage=true (accessed July 27, 2025).

155 Woodrow Hartzog & Neil M. Richards, Privacy's Constitutional Moment and the Limits of Data Protection, 61 B.C. L. REV. 1687 (2020), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=4069&context=faculty_scholarship (accessed July 27, 2025).

156 Shane G. Ramsey, Data Privacy and Bankruptcy—Notable Non-bankruptcy Privacy Laws, NELSON MULLINS (Sept. 10, 2019), https://www.nelsonmullins.com/insights/blogs/red-zone/other-issues-affecting-bankruptcy-cases/data-privacy-and-bankruptcy-notable-non-bankruptcy-privacy-laws (accessed July 27, 2025).

157 In re RadioShack Corp., No. 15-10197 (BLS), 2015 Bankr. LEXIS 1674 (Bankr. D. Del. May 20, 2015).

158 El-Razek v. FTX Trading Ltd. (In re FTX Trading Ltd.), B.A.P. No. 24-62 (B.A.P. 3d Cir. Nov. 27, 2024).

Network LLC (2022), courts approved the use of intermediaries for creditor verification to prevent exposure of on-chain identifiers.[159]

V. THE POSITION IN THE EU

In the E.U., personal data is recognised explicitly as a marketable intangible asset, and is also recognised as such within insolvency proceedings.[160] Insolvency practitioners therefore include personal data among the liquidation estate's assets.[161] This state of affairs, however, is subject to strict restrictions, in accordance with the General Data Protection Regulation's ("*GDPR*") general approach to privacy.[162]

Article 4 of the GDPR defines "personal data" broadly to encompass any information relating to an identified or identifiable natural person, while "processing" covers collection, storage, transfer, and erasure.[163] Although consent under Article 6(1)(a) constitutes one lawful basis for transfer or sale, insolvency practitioners more commonly rely on the "legitimate interest" ground, applying the three-part test of interest, necessity, and rights balancing.[164] In parallel, the principles of purpose limitation (Article 5(1)(b)) and data minimisation (Article 5(1)(c)) require that only data strictly necessary for insolvency administration be processed and repackaged for sale.[165]

In the E.U., insolvency administrators do not automatically become Data Controllers, and therefore cannot unilaterally decide to sell the personal data, unless they make independent decisions regarding the use of the data. This was affirmed in Re Southern Pacific Personal Loans Ltd.[166]

[159] In re Celsius Network LLC, 644 B.R. 276 (Bankr. S.D.N.Y. Sept. 28, 2022).
[160] What Is Considered Personal Data Under the EU GDPR?, GDPR.EU, https://gdpr.eu/eu-gdpr-personal-data/. (accessed July 28, 2025),
[161] Study on Tracing and Recovery of Debtor's Assets by Insolvency Practitioners, EUROPEAN COMMISSION (2022),https://commission.europa.eu/system/files/2023-02/Final%20Report%20%20Study%20on%20tracing%20and%20recovery%20of%20debtor%E2%80%99s%20assets%20by%20insolvency%20practitioners%20-%20March%202022.pdf. (accessed July 28, 2025).
[162] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 Apr. 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), 2016 O.J. (L 119) 1.
[163] Regulation (EU) 2016/679, art. 4, 2016 O.J. (L 119) 1 (General Data Protection Regulation).
[164] Regulation (EU) 2016/679, art. 6(1)(f)), 2016 O.J. (L 119) 1 (General Data Protection Regulation).
[165] Regulation (EU) 2016/679, art. 5(1)(c), 2016 O.J. (L 119) 1 (General Data Protection Regulation).
[166] Re S. Pac. Pers. Loans Ltd., [2013] EWHC 2485 (Ch) (Eng.).

Later, in Green v SCL Group Ltd [2019] EWHC 954 (Ch), the court reaffirmed that while insolvency does not eliminate data subject rights, those rights must be weighed against creditor interests.[167] Practical cases illustrate how this balance plays out. When the bankrupt travel firm Travel Bird sold its customer database to Secret Escapes, affected users were allowed to opt out. Such transactions are permitted when the buyer's use aligns with the original purpose. However, if a buyer seeks to repurpose the data, additional safeguards must be in place, including potentially a Data Protection Impact Assessment under Article 35.[168]

Ultimately, the EU's approach to PII in insolvency hinges on a case-by-case balancing exercise integrating creditors' economic interests, the GDPR's protective strictures, and the procedural demands of insolvency law. Overall, GDPR permits the monetisation of personal data in insolvency but only under stringent safeguards. Transfers must either maintain continuity of purpose or be based on a new legal ground. Sensitive data attracts a higher threshold of protection, and supervisory authorities across the EU have shown a low tolerance for speculative or excessive use of data during liquidation.

VI. BALANCING PRIVACY AND LIQUIDATION GOALS

A primary goal of the IBC is to maximise the value of the assets of a corporate debtor.[169] This stated aim of the IBC means that the monetisation of the PII Assets would fall squarely within the ambit of the IBC, and would be well within the spirit of the IBC. However, insolvency and liquidation considerations cannot dominate the thought process behind permitting the monetisation of PII Assets, as this would result in a situation wherein the law would be permitting and facilitating rampant violations of privacy, through transfers of data, as such data is often collected through consent for a *specific purpose*, and legislatively permitting transfers without taking into consideration privacy factors may result in such data being used for different purposes. Further,

[167] Green v. SCL Grp. Ltd., [2019] EWHC 954 (Ch) (Eng.).
[168] Study on Tracing and Recovery of Debtor's Assets by Insolvency Practitioners, § 6.4, in *Fifth Public Bankruptcy Report*, TravelBird B.V. (Dec. 6, 2018), discussed sale of customer database to Secret Escapes with opt-out notice under GDPR (accessed July 28, 2025).
[169] Insolvency and Bankruptcy Code, 2016, preamble.

fairness is undoubtedly a goal of insolvency law.[170] Violating privacy would, therefore, naturally be violative of this principle of fairness.

Therefore, it is necessary while considering permitting the monetisation of PII Assets, several factors essential to privacy. However, it is necessary that any restrictions put into place on the sale of PII based out of privacy concerns are not so restrictive as to result in a throttling of liquidation goals, by making the process of sale of PII assets unreasonable, impractical, and burdensome. In that regard, a careful balancing exercise must be undertaken.

As such, the following factors may considered, as derived and distilled (for the purposes of effectively balancing privacy concerns with the goals of a liquidation proceeding) from the erstwhile Planning Commission's Report of the Group of Experts on Privacy;

a. ***Informed choice and consent for transfer:*** The person to whom the data or PII relates must consent, and make an informed decision to the transfer of the PII to another entity by the entity to whom consent was originally given for the collection and use of the PII.

b. ***Notice of specific change in use subsequent to transfer:*** In the eventuality that the purchaser of the PII in the liquidation sale plans, or may use the data in a manner inconsistent with the usage for which consent was previously given to the Corporate Debtor, a notice of such change, or possible change in usage must be attached with the notice asking for consent.

c. ***Continuity of PII Security:*** It is necessary that in the course of the transfer, the PII is not subjected to protection by lower standards of security than it was when in the possession of the Corporate Debtor to whom consent for collection and use was originally given.

d. ***Sensitivity of PII:*** PII may be categorised into sensitive, and non-sensitive PII, the former of which would include passwords, financial information, physical, physiological and

[170] Simge Aslan, Digital Assets and Automated Transactions in Insolvency, INT'L INSOLVENCY INST., https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Ffiles.constantcontact.com%2Fac3a44f1401%2Fd41e7d61-5896-4c10-8261-d62cf52d5c50.docx (accessed July 28, 2025).

mental health conditions, sexual orientation, medical records and history, and biometric information.[171]

The consideration of these four factors would, in essence, bring the sale of PII assets in liquidation proceedings under the Insolvency Regime in consonance with not only the current SPDI Rules, but also the forthcoming DPDP Act and DPDP Rules. However, it is important to ensure that the consideration of these factors do not impede the practical considerations of maximising the liquidation value of the PII Asset.

Primary amongst the privacy factors that risk impeding considerations of the liquidation value of the PII is the consent factor, as it may not be practically possible to obtain consent from all the data subjects in a dataset containing millions of individual sets of PII. In such scenarios, it would be more reasonable to anonymise the data, and therefore morph it into an abstraction of information from which it is impossible to identify the person to whom that data relates, and thereafter initiate its sale or transfer. This practice would be more practical from the perspective of a Liquidator, while also remaining compliant with the SPDI Rules, which only place restrictions on activities related to "personal data"; which is defined as information capable of identifying the person to whom that information relates.[172]

This approach would also be compliant with the forthcoming DPDP Act and DPDP Rules, which also only govern activities related to "personal data", which is similarly defined as information that is capable of identifying the person to whom that information relates.[173] Therefore, the anonymisation of PII would mean that it may be transferred freely, and without consent, as it is no longer *Personally Identifiable Information*. However, an important caveat must be remembered; the anonymisation must be irreversible, as pseudoanonymised data is still classified as PII. Further, it must be ensured that the data is still protected by the same standard of security post-liquidation.

[171] Report of the Group of Experts on Privacy, Government of India (Oct. 16. 2012), http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf (accessed July 29 ,2025).
[172] Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, Rule 2(1)(i)
[173] Digital Personal Data Protection Act, 2023, §2(t).

VII. POLICY RECOMMENDATIONS

India requires a regulatory framework that permits the selling of PII Assets in liquidation sales, bringing it further in line with the stated object of the IBC of maximising asset values of debtors. However, any framework for its sale or transfer must safeguard consumer privacy without stifling asset realisation.

Firstly, India's insolvency framework should explicitly recognise personal data as a monetisable asset under the IBC while conditioning its sale on privacy safeguards derived from the SPDI Rules and forthcoming data protection legislation. Primary amongst these safeguards is the requirement of consent prior to transfers or sales in all cases.

However, it may not be practical or even possible to obtain consent from all persons whose PII constitutes a large dataset. In these cases, it would be wisest and most reasonable to anonymise the data prior to its transfer, so as to ensure that it does not constitute PII any longer. Such a practice, of replacing consent with anonymisation requirements, would be in consonance with existing data privacy laws.

A primary aid in the practice of anonymisation could be the categorisation of PII as either sensitive or non-sensitive, the basis for which may be derived from Rule 3 of the SPDI Rules, which label passwords, financial information, biometric data, sexual orientation, medical records, and physiological conditions as "sensitive personal data".[174] PII that is categorised as sensitive must be recognised as *per se* required to be anonymised, as such PII is more likely to be identifiable or related to the person to whom the PII relates. Once rendered non-identifiable, such data may be sold freely as part of the resolution process. It is additionally necessary that the data be irreversibly anonymised, so as to ensure that the data remains incapable of being related to any person. An opt-out protocol instead of an anonymisation requirement would not be feasible, as India's forthcoming DPDP Act and the Rules issued under it recognise the need for an explicit, positive action to be deemed as consent.[175]

[174] Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, Rule 3.
[175] Digital Personal Data Protection Act, 2023, §6.

Second, a new clause in Section 35 of IBC,2016 should require liquidators to certify adherence[176] to the DPDP Act, 2023 and SPDI Rules before dealing with such data. This ensures data is not monetised without safeguards.

Third, India should introduce a statutory consent protocol. If customer data is being collected at the time of onboarding (say, by e-commerce or fintech platforms), the privacy policy and terms of data sharing, including the possibility of sale during insolvency must be visible, and not buried in fine print.

Fourth, mirror the U.S. Consumer Privacy Ombudsman model by empowering insolvency tribunals to appoint an independent Data Privacy Ombudsman ("*DPO*").[177] The DPO will audit proposed transfers, assess consumer harms, recommend filtering of data fields, and ensure due notification or consent procedures are followed. Without the consent of the DPO, the liquidator may not sell PII.

Finally, looking forward to the future, a dedicated regulatory guidance, jointly from IBBI and the future Data Protection Board should be issued to standardise how resolution professionals handle personal data as part of the corporate debtor's estate. This way, the dignity of the data principal with the economic goals of the IBC, and position India to handle data-rich insolvencies in the digital age, may be balanced effectively.

VIII. NAVIGATING PII SALES IN THE CURRENT SCENARIO

As discussed in early sections of this paper, these authors demonstrated that the IBC prohibits the sale of PII as standalone assets or, at the very least, that making such sales is commercially and legally grey, and therefore replete with risks. This, however, does not necessarily have to barricade a Liquidator from monetising PII, and using it to their advantage in liquidation proceedings. In this regard, the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations ("*Liquidation Process Regulations*") is highly relevant. *Regulation 32 (e) of the Liquidation*

[176] Insolvency and Bankruptcy Code, 2016, §35.
[177] Consumer Privacy Ombudsman (CPO), THOMSON REUTERS PRACTICAL LAW (July 27, 2025), https://uk.practicallaw.thomsonreuters.com/Glossary/PracticalLaw/I90cffd167b9611e8a5b3e3d9e23d7429?transitionType=Default&contextData=(sc.Default)&firstPage=true.

Process Regulations provides that the Liquidator may also sell the corporate debtor as a whole as a going concern.[178] This is crucial, as such a sale would naturally mean the monetisation of high value datasets and PII violating the prohibition contained in the IBC, as the PII itself would never be changing hands - only the corporate debtor itself would. In this manner, Liquidators may ensure that PII does not go unused, and the prohibition on sales of PII as standalone assets is bypassed.

IX. CONCLUSION

The monetisation of personal data represents a pivotal opportunity to enhance recovery values under India's IBC. In the absence of a dedicated statutory framework, however, India risks exposing sensitive information and eroding asset value. Drawing inspiration from both the U.S. and E.U., India can craft a hybrid model that treats PII as a legitimate estate asset while embedding privacy considerations. The appointment of an independent data ombudsman ensures judicial oversight over proposed data sales and enforces consistency with existing privacy commitments. From the E.U., the GDPR's principles of purpose limitation, and tiered safeguards for sensitive categories provide a robust blueprint.

This paper demonstrates that India's unique legal landscape marked by the IBC's creditor-centric objectives and emerging data protection statutes demands bespoke statutory amendments. In summation, first, the IBC should explicitly recognise PII under IBC conditioned upon compliance with India's SPDI Rules and the forthcoming DPDP Act. Second, insolvency professionals must perform data impact assessments and adhere to anonymisation protocols in place of consent. However, fresh opt-in consent mechanisms must be instituted when proposed uses extend beyond initial disclosures.

By synthesising global best practices with India's unique regulatory imperatives, this framework can unlock the latent value of digital datasets while preserving consumer trust. In doing so, India will not only bolster creditor recoveries but also fortify the integrity and fairness of its insolvency regime. Perhaps then India too can solemnly repeat, "the corporation is dead, long live its data.".

[178] Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, reg. 32(e).

FRAGMENTED RESOLUTIONS: RETHINKING CORPORATE RESOLUTION THROUGH ASSET-WISE MECHANISMS

Yarabham Akshit Reddy and Adveer Singh Narang[179]*

ABSTRACT

The Insolvency and Bankruptcy Code, 2016 primarily aims for timely resolution, yet resolving the company as a whole often fails for complex entities, leading to liquidation and diminished realisations. Asset-wise resolutions offer a crucial alternative, enabling separate resolution of individual assets or business units, leading to faster recoveries and greater value maximisation. While the Insolvency and Bankruptcy Board of India amended the Corporate Insolvency Resolution Process Regulations in 2022 and 2025 to facilitate this, successful implementation is hampered by a lack of clarity and guidance.

This article dissects asset-wise resolutions under the Corporate Insolvency Resolution Process Regulations, identifying ambiguities. It addresses challenges in valuation methodologies, including fair/liquidation value, interlinked assets, and data-room disclosures; voting thresholds, involving Committee of Creditors versus asset-specific secured creditors, and differing voting percentages; proceeds distribution, such as cross-collateralisation and residual claims; and liability appropriation, concerning clean slate sales and project-specific liabilities. Moreover, the fate of residual assets after partial resolution also lacks clarity. Drawing on US and UK insolvency frameworks, the article proposes a robust framework with supplementary regulations, aligning with the IBC's objectives of value maximisation and timely resolution.

I. INTRODUCTION

"Law must be continually remade to fit the needs of the time, or it will break under the strain of change."

[179] * Both Authors are 4th Year Law Students at Hidayatullah National Law University.

– Roscoe Pound.

The Insolvency and Bankruptcy Code, 2016 (**IBC**) has been enacted with the primary objectives of timely resolution of distressed companies, maximising the value of all the assets of the Corporate Debtor (**CD**) and promoting Entrepreneurship.[180] Corporate Insolvency Resolution Process (**CIRP**) of CD ensures that the distressed company is resolved as a Going Concern by enabling repayment of debts to creditors while preserving jobs and viable businesses. As per the Insolvency and Bankruptcy Board of India (**IBBI**)[181], resolutions are preferred over liquidations because of their higher and faster realisations for creditors, and it safeguards the interests of all the stakeholders involved in rescuing the company.

Under section 5(26)[182] of IBC, a resolution plan involves resolving the Company as a Going Concern, which includes all the assets of the Company. However, resolving the CD as a whole is not practically and commercially feasible in every instance. Companies like Real Estate Developers, conglomerates and infrastructure firms, with geographically scattered and independently functioning assets, find it difficult to find Successful Resolution Applicants (**SRA**) who are willing to take CD as a whole. Consequently, such companies are pushed into liquidations, which results in the sale of depreciated assets and significantly lesser realisations for creditors.

In such scenarios, Asset-Wise Resolutions provides a middle path where individual assets, businesses or undertakings are resolved separately. Such an approach would allow faster recoveries, greater bidder interest and increased value maximisation. Recognising its growing potential, the Insolvency and Bankruptcy Board of India amended the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), 2016 (**CIRP Regulations**) in 2022 to introduce Regulation 36B(6A)[183], which allows for the sale of one or more assets of CD

[180] Rajuptana Properties Private Limited v. Binani Industries Ltd and Ors, 2018 SCC OnLine NCLAT 52.
[181] Insolvency and Bankruptcy Board of India, *Improving Liquidation Outcomes* (accessed on 31 July 2025) <https://ibbi.gov.in/uploads/whatsnew/1885c0421a20cc4173386ba9c5dc3466.pdf>.
[182] The Insolvency and Bankruptcy Code, 2016, §5(26), No. 31, Acts of Parliament, 2016 (India).
[183] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), 2016, reg 36B(6A), (India).

by way of resolution. This replaces the traditional concept of submitting one resolution plan for the whole CD, where multiple resolution plans would be submitted by RAs for various assets.

Although the Concept marks a significant evolution under the IBC framework, the absence of judicial clarity and regulatory guidance complicates the successful implementation of asset-wise resolutions. Through this article, the authors analyse the concept of asset-wise resolution within the CIRP Regulations. Further, they analyse the existing challenges and inconsistencies in the framework, and provide suitable recommendations for a more suitable framework by comparing it with the US and UK insolvency frameworks.

II. ASSET-WISE RESOLUTIONS WITHIN THE IBC FRAMEWORK

Analysing Regulation 36(6B): From Rigidity to Flexibility

Under the earlier framework, Regulation 36B(1)[184] mandated the Resolution Professional (**RP**) to issue a request for resolution plans (RFRPs) for the CD as a whole. If no resolution plans are received or none are to the satisfaction of the Committee of Creditors (**CoC**), the RP may re-issue the RFRP, which is a mere continuation of the earlier process. This rigid mechanism created an all-or-nothing structure: either resolve the CD as a whole or be ordered to be liquidated by NCLT.[185]

Recognising this limitation, the 2022 Amendments introduced regulation 36(6B)[186], which allows the RP, with the approval of CoC, to issue an RFRP for the sale of one or more assets if he does not receive a resolution plan for the CD as a whole. The intent behind this is that bidders might be interested in acquiring specific assets or businesses, which may generate more value through competitive bidding rather than acquiring CD as a whole.[187] Ultimately, the RAs should be allowed

[184] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg 36B(1), (India).
[185] The Insolvency and Bankruptcy Code, 2016, §33(2), No. 31, Acts of Parliament, 2016 (India).
[186] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg 36(6B), (India).
[187] Srivastava, S. et al., *Critique on the Standing Committee Report on Implementation of Insolvency and Bankruptcy Code - Pitfalls and Solutions, Insolvency and Board of India, Mondaq, 10 September 2021,* (accessed on 31 July 2025), https://www.mondaq.com/india/insolvencybankruptcy/1110156/critique-on-the-standing-committee-report-on-implementation-of-insolvency-and-bankruptcy-code-pitfalls-and-solutions.

to partially resolve the company, if possible, as against liquidation and maximise the asset value for all the stakeholders.

Asset-wise resolution provides a more practical and granular approach by focusing on individual assets; undertaking an analysis of each asset's financial health, market health and its legal status. This allows RP to analyse and resolve the company's viable business units. Judicial decisions have also validated this approach. In NCLT Amaravati[188], a resolution plan was approved for resolving one hospital of CD without inviting for whole as the other asset was under dispute, upholding the commercial wisdom of CoC. Further, NCLT Mumbai[189] approved project-wise resolution for a real estate company and observed that once a resolution plan is approved by the CoC, it is bound to be accepted by the Adjudicating Authority (**AA**) and shall not be interfered with.

III. NAVIGATING ASSET-WISE RESOLUTIONS: A PRECARIOUS PATH OF REGULATORY UNCERTAINTY

Despite the promise of asset-wise resolution, Regulation 36(6B) still involves a sequential process where RP is allowed to invite plans for each of the assets only after failing to receive approval for the CD as a whole. This sequence might extend the CIRP timelines and risks value erosion, especially for companies with diverse business segments[190]. This tension was witnessed in *Jaiprakash Associates Limited*[191] before NCLT Allahabad, where the RP attempted to invite asset-wise resolutions given the diverse nature of the businesses of CD and to prevent delays and unnecessary costs. However, NCLT has taken a strict interpretation of the law and mandated the RP to follow the sequential process, creating an impediment in the expeditious resolution of CD.

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[188] Abhilash Lal (Resolution Professional of Sevenhills Healthcare Private Limited) v. Committee of Creditors of Sevenhills Healthcare Private Limited, IA (IBC) (Plan) No.1 of 2024 in TCP (IB) No.32/7/AMR/2019, NCLT Amravati.

[189] Bank of India v. Housing Development and Infrastructure Limited, C. P. No. 27/IB/C-III/2019.

[190] Insolvency and Bankruptcy Board of India, Discussion Paper on "Streamlining Processes under the Code: Reforms for Enhanced Efficiency and Outcomes", Insolvency and Bankruptcy Board of India, 4 February 2025, (accessed on 31 July 2025), https://ibbi.gov.in/uploads/public_comments/Discussion%20Paper%20on%20Streamlining%20Processes%20under%20the%20Code%20Clean.pdf.

[191] Sunil Kumar Sharma v. Mr. Bhuvan Madan (Resolution Professional of Jaiprakash Associates Limited), IA NO.27/2025 IN CP(IB) No.330/ALD/2018, NCLT Allahabad.

In a welcome move, IBBI amended the CIRP Regulations[192] to allow the RP to invite RFRPs for CD as a whole, or for sale of one or more assets, or both concurrently, with the approval of CoC. This amendment was well-intended to address more complex, multi-asset structure companies by segregating viable and non-viable business and focusing more on individual resolutions. However, there aren't any supplementary provisions and additional guidance from IBBI as to how asset-wise resolutions are to be conducted. Additionally, judicial intervention has offered minimal guidance, leaving significant ambiguity in implementation. As a result, several regulatory gaps and practical inconsistencies exist.

IV. ASSET-WISE RESOLUTIONS: A PROMISE AMIDST AMBIGUITY

The paradigm shift brought about by asset-wise resolutions under Regulation 36B(6A) of the CIRP Regulations is a quintessential example of the legal landscape pertaining to the Insolvency Law in India. The Insolvency Law in India is characterised as being progressive and constantly evolving with the commercial realities, but often suffers from the vice of a lack of regulatory certainty and constant changes. Similarly, though the amendment is necessary in tackling corporate insolvency of complex businesses spread out across various geographical locations or consisting of multi-asset companies, the amendment leaves room for ambiguities in the regulatory framework. The critical questions regarding valuation methodology, voting thresholds, creditor participation, distribution of proceeds and appropriation of liabilities are not completely addressed within the asset-wise resolution under the Regulation. Therefore, asset-wise resolutions must be reimagined within the IBC framework with a view to uphold the core objectives of IBC, being value maximisation, equitable treatment of creditors, timely resolution and keeping the companies alive as a going concern.[193]

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[192] Insolvency and Bankruptcy Board of India, Press Release, Insolvency and Bankruptcy Board of India amends the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, 31 May 2025, (accessed on 31 July 2025) https://ibbi.gov.in/uploads/press/7f04a7be2872335e4740f5d8738cee96.pdf.

[193] Gail India Ltd v. Ajay Joshi (Resolution Professional of Alok Industries Ltd & Ors), (2021) SCC OnLine NCLT 4360, NCLAT New Delhi.

V. NAVIGATING THE ASSET VALUATION CONUNDRUM: FAIR OR LIQUIDATION VALUE?

In determining the valuation of the assets in case of asset-wise resolution of the CD, the legislative intent behind bringing the amendment must be ascertained. The introduction of the amendment can be best understood by the thirty-second (32nd) report of the Standing Committee on Finance[194], which provided that the bidders in certain cases are interested in a selected class of assets and business units rather than maintaining the CD altogether as a going concern. Hence, a greater commercial outcome was sought to be achieved by way of asset-wise resolution. Therefore, it becomes evident that the viability of asset-wise resolutions must be measured against the anvil of commercial viability and value maximisation. Further, the principle of value maximisation has been the cornerstone of the IBC framework, evident through the flow of judicial ink in *Binani Industries Ltd. v. Bank of Baroda*[195] & *Swiss Ribbons Pvt. Ltd. v. Union of India.*[196]

Therefore, the first step in asset-wise resolutions must be to determine the fair and liquidation values of the assets from registered valuers as envisaged under Regulation 35 of the CIRP Regulations.[197] Hence, the regulations must provide valuation of assets alongside the valuation of the CD at both a fair value, maintaining the CD as a going concern, and the liquidation value of assets to prevent delay and value erosion. Following the valuation of the assets, a statutory safeguard can be put in place to provide the liquidation value of the asset as a minimum value which a resolution must provide before which the COC can approve the same.

Additionally, the valuation process must account for interlinked assets and that the fragmentation of certain assets can deteriorate the value of others. Furthermore, the valuation of assets must also provide for the value erosion the asset may face in case of delays, allowing for the COC to make a more informed decision. Lastly, to resolve issues arising out of information asymmetry and the

[194] Standing Committee on Finance, *Implementation of Insolvency and Bankruptcy Code – Pitfalls and Solutions* (32nd Report, 2020–21, Ministry of Corporate Affairs, (accessed on 31 July 2025) https://ibbi.gov.in/uploads/whatsnew/fc8fd95f0816acc5b6ab9e64c0a892ac.pdf.
[195] Binani Industries Ltd v. Bank of Baroda, [2018] SCC OnLine NCLAT 457.
[196] Swiss Ribbons Pvt Ltd v. Union of India, (2019) 4 SCC 17.
[197] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg 35 (India).

requirement of asset-based data-rooms for the bidders must be incorporated into the disclosure norms provided under Regulation 36(2).[198]

VI. THE VOTING DILEMMA

A pertinent issue with respect to asset-wise resolutions remains the right to vote over the resolution. A dichotomy exists in a two-fold manner: firstly, with respect to the threshold for the approval being fifty-one percent (51%) or sixty-six percent (66%) of the voting share for the issuance of an RFRP and secondly whether only the secured creditors with respect to the particular asset can vote on the same or the entire COC.

With respect to the threshold, a two-fold mechanism can be envisaged following Section 21(8) of the IBC[199] and Regulation 29 of the CIRP Regulations.[200] Under Section 21(8), it is clearly provided that the decisions of the COC must require the approval of fifty-one percent (51%) of the council. On the other hand, with respect to unencumbered assets, the sale can only proceed following an approval by sixty-six percent (66%) of the COC. Therefore, in case of an unencumbered asset, the regulation can be the guiding light, and the threshold can be sixty-six percent (66%) of the COC. On the other hand, in case of assets where a particular class of creditors maintain a charge, the voting threshold can be maintained at fifty-one percent (51%) of that class of creditors.

Currently, voting rights under the IBC are proportionate to total debt exposure, not asset-specific security. Hence, the authors recommend that to better fulfil the purpose of asset-wise resolution, which emanates from complex business structures and the fact that asset-wise resolution provides for value maximisation by way of a granular approach, a creditor with no charge on a resolved asset must not be provided with the right to vote on the same. A comparative guiding light for the same can be the Insolvency framework under the USA's Chapter 11,[201], where creditors are classified by security interest and only affected classes can vote proportionate to the value of their

[198] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg 36(2), (India).
[199] The Insolvency and Bankruptcy Code, 2016, §21(8), No. 31, Acts of Parliament, 2016 (India).
[200] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg 29, (India).
[201] 11 U.S.C ch 11.

debt. Similarly, under English Law, unsecured creditors and floating charge holders are consulted and are not provided with voting shares with respect to assets where secured creditors exist.[202]

Therefore, an adoption of a hybrid voting model with respect to the asset-wise resolution must be adopted, where secured creditors maintain control of their security instead of the same being appropriated for the benefit of a larger body of creditors. The same is in line with the commercial reality and legitimate expectations of creditors that find place in codes of countries such as the USA and the UK.

The creditors with a secured interest in the asset must have primacy in the decision-making regarding the same asset. By consultation of the CoC as a whole in asset-wise resolutions and providing secured creditors with the final say, the objectives of the IBC can be achieved, as any bearing that the class of assets have on the CD as a whole can be addressed by consulting the CoC, akin to the consultation with unsecured creditors envisaged under English Law. On the other hand, following the doctrine of commercial wisdom would provide the secured creditors to take charge of the asset and resolve their share effectively rather than allowing additional impediments by providing all creditors a say in the same. Hence, CoC approval should be bifurcated between asset-level approval by secured creditors of the asset proportionate to the value of their debt and entity-level approval by the entire CoC for transparency.

VII. DIVIDING THE PIE: PROCEEDS DISTRIBUTION AND LIABILITY APPROPRIATION

Another contentious issue with respect to asset-wise resolution remains the distribution of proceeds. Under the current framework, Section 53 of the IBC[203] prescribes a waterfall mechanism during liquidation. While in the event of a resolution as per Section 30(2)(b)[204], dissenting creditors are entitled to at least the liquidation value. Therefore, the dilemma with respect to asset-wise resolution arises, whether the proceeds should be earmarked for creditors secured on that specific asset or pooled for the larger COC? It is apposite to note that with respect to the distribution of

[202] Insolvency Act, 1986, §§ 245, 257 & Sch. B1 (U.K.).
[203] The Insolvency and Bankruptcy Code, 2016, §53, No. 31, Acts of Parliament, 2016 (India).
[204] The Insolvency and Bankruptcy Code, 2016, §30(2)(b), No. 31, Acts of Parliament, 2016 (India).

proceeds, the primary issues that remain are the cross-collateralisation of assets and residual claims of creditors.

Firstly, commercial practice indicates that lenders often undertake cross-collateralisation where multiple assets are encumbered for a single debt and in most cases, no single asset can resolve the entire debt amount. Not only does cross-collateralisation impact value maximisation as bidders seek clean slates for the assets, but it also disrupts pari-passu rights. A possible solution to the same could be either reorganisation of debts amongst the creditors to allow for a minimum number of creditors to hold security over a particular asset. Additionally, introducing a modified variation of per lien priority[205] akin to the Insolvency framework of the USA, where proceeds first flow to secured creditors, following which the remaining proceeds move to unsecured creditors on a pro-rata basis, can be adopted. Further, with respect to value maximisation and appropriation of liabilities, the US framework can be transposed to allow for assets to be sold on a clean slate basis,[206] encouraging bidders and providing for a lien on the proceeds of the sale to satisfy the charges. Similarly, the English legal system provides for a two-fold mechanism: where a fixed charge over the identifiable assets exists, the proceeds are used to pay the secured creditor, and where there is a floating charge over shifting pools of assets, such as stock, the proceeds are distributed in a statutory waterfall mechanism.[207]

However, "a law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified; it is rooted in the needs of the community, and if it is transplanted to foreign soil without regard to those needs, it will die."[208] Therefore, a strict transposition of the American or English Law would not serve the ends of the IBC suitably. Hence, in light of the guiding principle of IBC being commercial wisdom of the COC, value maximisation and maintaining business as a going concern, firstly, the assets must be sold in a clean slate manner, and the lien must be on the sale of proceeds. Creditor arrangements must be promoted within the CoC to untangle cross-collateralisation and simplify the distribution of proceeds through the same. Further, in the absence of a creditor arrangement providing priority to secured creditors of the asset

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[205] 11 U.S.C §§ 725, 506.
[206] 11 U.S.C § 363(f).
[207] Insolvency Act, 1986, Sch. B1, ¶ 71 (U.K.).
[208] Southern Pacific Co v. Jensen, 244 US 205, 222 (1917) (Holmes J, dissenting).

in question should be put in place, and the waterfall mechanism envisaged under Section 53[209], following the satisfaction of the secured creditors, should be implemented. However, the same must also put an adequate system of safeguards for residual claims by unsecured creditors. The same can be achieved by ensuring that the asset-wise resolutions also contribute to providing operational creditors with the equivalent of liquidation value as provided under Section 30(2)(b).[210] On the contrary, a carve-out provision akin to Section 176A of the Insolvency Act, 1986[211] can be provided; however, instead of enabling the administrator, i.e., the RP in this case, to earmark a portion of the proceeds for unsecured creditors, the same power can be assigned to the COC alongside judicial scrutiny to prevent abuse.

As provided above, the question of liability appropriation can be remedied through allowing for assets to be sold on a clean slate basis and providing a lien over their proceeds. However, in certain cases, judicial intervention must be accommodated to allow project-specific liabilities to flow alongside the asset in case the clean slate basis becomes the rule. In circumstances such as real estate projects where corresponding liabilities emanate due to the rights of homebuyers, the liabilities must flow alongside. Lastly, in order to bring greater clarity, supplementary regulations must be put in place to distinguish between transferable and residual liabilities under the insolvency framework.

VIII. HYBRID RESOLUTIONS: A PANACEA FOR RESIDUAL ASSETS

The fate of the remaining assets following partial resolution remains unclear and ambiguous under the current insolvency framework. The likelihood of resolution applicants to submit plans for a certain class of assets leaves the remaining assets in a limbo, as the current regulatory regime does not envisage a partial resolution cum partial liquidation state. The requirement of one or more plans to provide the CD entity as a going concern is required. In light of this regulatory vacuum, the same issue will end at the doorstep of the Judiciary. The same runs contrary to the principles of judicial restraint, primacy of commercial wisdom and greater legal certainty envisaged under

[209] The Insolvency and Bankruptcy Code, 2016, §53, No. 31, Acts of Parliament, 2016 (India).
[210] The Insolvency and Bankruptcy Code, 2016, §30(2)(b), No. 31, Acts of Parliament, 2016 (India).
[211] Insolvency Act, 1986, §176A (U.K.).

the code. Under the current framework, as per the MCA Paper[212], CIRP will only conclude once the NCLT approves the resolution plan for all the assets of the CD. Hence, by providing for a hybrid format where both partial resolution of assets alongside the liquidation of the remaining assets, greater certainty can be brought to the CIRP process by reducing judicial intervention, placing the control with the COC and value maximisation can be achieved through partial sale and reducing asset decay. Additionally, in the proposed regime, the liquidation of remaining assets can happen alongside the formalisation and execution of the asset-wise resolution plan.

Further, assets which remain unsold post an asset-wise resolution may be sold independently on a standalone basis, akin to the liquidation. Presently, the code remains silent on such sales during resolution, where potentially higher value (fair value) can be attached to the assets instead of liquidation value, which is typically lesser. Further, mandating such asset sales during liquidations would depreciate their value over time. To address this, Regulations 32 and 36 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 can be imported and moulded to permit such sale of assets under the resolution process itself, where Regulation 32 would allow standalone sales and Regulation 36 would mandate preparing a detailed asset sales report. In particular, the concept of private sales must also be enabled to allow the assets to be sold outside the traditional resolutions and liquidations. A comparable practice can also be found under Chapter 11 of the US Insolvency framework. Section 363 authorises the sale of assets prior to liquidation and allows them to be transferred free of liabilities, claims and encumbrances. This significantly increases bidder confidence, attracts competitive interest, and ensures that discrete or intangible assets do not lose value by proceeding to liquidation. These details must be clearly outlined in resolution plans prior to their submission to the AA, ensuring compliance with Regulation 37(m) of CIRP Regulations, which mandates specifying the manner of dealing with remaining assets that are not part of the resolution plan.

IX. CONCLUSION

"The life of the law has not been logic; it has been experience." – Oliver Wendell Holmes Jr.

[212] Ministry of Corporate Affairs, Invitation of comments from the public on changes being considered to the Insolvency and Bankruptcy Code, 2016, 18 January 2023, (accessed on 31 July 2025).

The evolution of asset-wise resolutions under the IBC framework marks a paradigm shift in India's insolvency framework from a rigid entity-level approach to a more granular and commercially responsive mechanism. The amendment brings increased bidder participation, alleviates decay of assets, thereby focusing on value maximisation for all stakeholders and ensuring faster recoveries. However, in the absence of legislative clarity and guidance on crucial aspects such as valuation methodologies, voting thresholds, distribution of proceeds, and liability appropriation, the success of the amendment is sparse and limited to a handful of cases, such as *Hindustan Photo Films*[213] & *Jaiprakash Associates Limited.*[214]

Comparative insights from relatively mature insolvency regimes such as the United Kingdom and the United States provide for a possible guiding light by introducing mechanisms such as the US' lien-to-proceeds structure and carve-out provision under UK law. However, direct transplantation of these models would not be possible due to structural differences, due to the existence of a debtor-led model in the US and greater emphasis on the commercial wisdom of the COC in India. Similarly, with respect to the difference in roles of the administrator and RP alongside the greater involvement of judicial wisdom in the UK, the two legal frameworks diverge.

Therefore, in order to operationalise and streamline asset-wise resolutions under the IBC framework, supplementary regulation must make way for valuation methodologies, data-room disclosures of assets, crystallisation of voting rights of secured and unsecured creditors and proper allocation of sale proceeds and liabilities. Hence, to serve the objective of the code, i.e., resolution, value maximisation and promotion of entrepreneurship, the asset-wise resolution must be more than just a procedural shift, but a recognition that insolvency law must be as dynamic and divisible as the enterprises it seeks to rescue.

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[213] CA M Suresh Kumar (Resolution Professional of Hindustan Photo Films Mfg Co Ltd) (NCLT Chennai Bench, TCP 1 of 2021; IA(IBC)-204(CHE)/2023).
[214] Jaiprakash Associates Ltd (Insolvency Proceedings*)* (NCLT Allahabad Bench, CP(IB) No 330/ALD/2018, admitted June 2024.

WINGS OF AMBIGUITY: UNPACKING THE AIRCRAFT OBJECTS ACT'S OVERRIDE OF INDIA'S INSOLVENCY CODE

Sejal Sahu and Anenya[215]*

ABSTRACT

India, in a bid to position itself as a global commercial aircraft leasing centre, which is projected by projects such as GIFT City, heavily depends on a reliable and predictable legal framework for repossessing aircraft in the event of lessee insolvency. However, there are major loopholes in the prevailing regulatory system in India that jeopardize this process. This paper is a critical analysis of the interplay between the Aircraft Objects Act, 2025 (AOA), the Cape Town Convention 2006, and the Insolvency and Bankruptcy Code, 2016 (IBC). It specifically targets the scenarios of parties wavering AOA Section 6(c) and where the Ministry of Corporate Affairs 2023 notification waives aircraft out of the IBC moratorium, leaving a legal vacuum. Such regulatory ambivalence compromises creditor demurrage, destroys insolvency uniformity, and encourages forum shopping. The paper suggests a package of reforms, some based on existing statutory amendments, to harmonise the AOA and IBC, coordinate with resolution professionals, allow controlled recognition of foreign interests in liquidation, adopt the UNCITRAL model law, and institutional innovations such as aviation-specific insolvency benches. The paper finally establishes that not only is it essential to fill this fragmentation to ensure investor confidence, but also to meet treaty obligations and raise India to a new level in international aviation financing.

Keywords: *The Aircraft Objects Act, 2025, The Insolvency and Bankruptcy Code, 2016, Cape Town Convention 2006, Repossession*

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I. INTRODUCTION

In the past few years, leasing has emerged as the backbone of the civil aviation industry in India, with more than 86.4 percent of the commercial aircraft being acquired by the industry via lease financing.[216] The major element of investor confidence in this area is the ease of repossessing aircraft in the case of default or insolvency, which is another important aspect since India is looking to establish itself as a global aircraft leasing hub, with projects such as GIFT City.[217] This confidence is, however, being eroded by the current fragmentation in the legal regime of aircraft repossession in India, specifically after the introduction of the Aircraft Objects Act 2025 ("**AOA**").[218] It majorly puts forth a two-fold legal challenge at the heart of it all.

Substantively, in cases where lessors choose not to follow Section 6(c) of the AOA,[219] and when aircraft are not subject to the Insolvency and Bankruptcy Code ("**IBC**")[220] moratorium through the Ministry of Corporate Affairs ("**MCA**") 2023 Notification, a significant legal vacuum occurs. The IBC protections, as well as the simplified remedies of the Cape Town Convention ("**CTC**"),[221] are not available. This conflicts with the core values of insolvency laws in India, that is, the equality of creditors, judicial control, and predictability of the process. Aircraft repossession does not require the intervention of the National Company Law Tribunal ("**NCLT**") or a Resolution Professional, and foreign lessors can side-step Section 53[222] waterfall through IBC. Legal uncertainty and inconsistency of regulations are also furthered by the conflicting non-obstante provisions of the AOA and IBC.

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[216] Namita Das, EXPLAINER: Protection of Interests in Aircraft Objects Bill, 2025, LEGAL BUSINESS ONLINE, (Jun. 30, 2025), https://www.legalbusinessonline.com/features/explainer-protection-interests-aircraft-objects-bill-2025.
[217] Abhijith Ganapavaram, India's parliament passes landmark bill in boost for aircraft lessors, REUTERS, (Apr. 03, 2025), https://www.reuters.com/business/aerospace-defense/indias-parliament-passes-landmark-bill-boost-aircraft-lessors-2025-04-03/.
[218] Aircraft Objects Act, 2025.
[219] The Protection of Interests in Aircraft Objects Act, No. 17 of 2025, § 6(c).
[220] The Insolvency & Bankruptcy Code, 2016, §7.
[221] Cape Town Convention on International Interests in Mobile Equipment, 2001.
[222] The Insolvency & Bankruptcy Code, 2016, §53.

Procedurally, the AOA causes a vacuum along with confusion as to which governmental body has the authority to adjudicate repossession claims: the Directorate General of Civil Aviation ("**DGCA**"), the civil aviation law registering and deregistering aircraft; NCLT, the insolvency law that resolves insolvencies; or civil courts, the law enforcing contracts. This ambiguity contributes to delays, litigation, and contradicting orders-it is detrimental to India as regards its obligations under the CTC and to the very objectives of the AOA.

This paper explores the developing conflict between the repossession rights under the AOA, read with the CTC, and the rest of the Indian insolvency regime. It is carried out in three phases. First, it clarifies the inconsistencies and gaps in the doctrines and statutes that are present in the existing law. Second, it criticizes the problem of jurisdictional fragmentation, which jeopardizes enforcement, and suggests structural changes to restore coherence and investor confidence.

II. CTC TAKES OFF, IBC GROUNDED: THE REGULATORY LACUNAE IN AIRCRAFT ASSET REPOSSESSION

India has proactively implemented the CTC and Alternative A of the Aircraft Protocol via the Aircraft Objects Act, 2025. It mainly focuses on giving repossession of objects listed under Article 2(3) of the CTC, which includes airframes, aircraft engines and helicopters, railway rolling stock and space assets, to the lessor.[223] But such repossession is subject to a *'waiting period'* declared by each contracting state, which is the primary insolvency jurisdiction through its declaration.[224] India has declared this waiting period to be two calendar months.[225] This opens a sixty-day repossession window for the lessors, after which such remedies will not be blocked by any authority,[226] and even judicial intervention is not allowed after the waiting period. This gives creditors an unfettered right to take action to reclaim their aircraft objects. If the debtor wants to

[223] Cape Town Convention on International Interests in Mobile Equipment art. 2(3).
[224] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment art. XI(3).
[225] Declarations Lodged by the Republic of India Under the Cape Town Convention, U.N. INT'L INST. FOR THE UNIFICATION OF PRIVATE L. (UNIDROIT), https://www.unidroit.org/instruments/security-interests/cape-town-convention/states-parties/d-india-ct/ (last visited July 31, 2025).
[226] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment art. XI, Alternative A (9).

retain the same, they have to fix all the defaults or agree to perform all the future obligations within 60 days only, failing to which another extension in the waiting period will not be granted.[227]

Given this, the major provision governing the remedies on insolvency under Section 6 is applied at the discretion of the parties, meaning that the creditor and debtor, by mutual written agreement, can opt out of the application, including CTC-derived remedies such as speedy repossession and deregistration of aircraft objects.[228] This indicates that both parties will be completely excluded from the remedies under the IBC, excluding them from both DGCA and NCLT protection mechanisms, creating a regulatory lacuna. In addition to this, in 2023, the Ministry of Corporate Affairs officially notified that Section 14 of the IBC, which imposes a moratorium on the repossession of assets in order to provide time and breathing room in case of insolvency, does not apply to aviation objects.[229] The nature of this change was specifically intended to conform to the pro-creditor CTC Alternative A. In such a scenario, parties are forced to fall back on common contract and litigation for repossession and enforcement, without the benefit of direct, quick actions available under the CTC and IBC. The exclusion of the streamlined CTC regime and the IBC moratorium results in both lessors and lessees being subjected to more practical and legal risks. Lessors lose a clear statutory path to rapid repossession, whereas lessees lose protection under the moratorium, and all of this could lead to a sudden repossession of aircraft objects conducted abruptly without the orderly system that CTC was designed to provide them.

The main purpose of the act is the domestic implementation of India's commitment under CTC and aircraft protocol, particularly focusing on the remedies involving aircraft objects. It aims to create a uniform framework for recognising and enforcing international interests under Article 2 of the CTC, offering security to foreign lessors and financers.[230] But the extent to which it is adaptive to the Indian framework remains an issue of concern. While the act is a positive step, it doesn't bring any revolution in India's insolvency regime. It seems more of a reinforcement of the

[227] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment art. XI, Alternative A (7).
[228] The Protection of Interests in Aircraft Objects Act, No. 17 of 2025, § 6.
[229] Ministry of Corporate Affairs, S.O. 2660(E) (Notified on June 14, 2023) (India).
[230] Cape Town Convention on International Interests in Mobile Equipment art. 2.

international statute rather than a substantive reform.[231] It only gives the legal framework to operationalise global commitment of India in the field of aircraft leasing.

However, the act is silent on a crucial procedural issue, especially when it overrides the IBC in insolvency cases. Section 9[232] of the AOA provides the overriding effect over any other existing law in force, including the IBC. This means that in the aircraft leasing and repossession issues, when they go for insolvency, the creditor will be given an exemption from Section 14.[233] They will be allowed to repossess the aircraft even before the insolvency process is finalised. This contradicts Section 238 of IBC,[234] which has the same overriding effect over any other law. The presence of a *non-obstante* clause in both statutes establishes their supremacy in cases of inconsistency with other legislative enactments. This highlights a statutory discrepancy, risking the erosion of judicial clarity and creditor parity.

A. Repossession Without Resolution: The Quiet Erosion of Insolvency Oversight

Article XI (7) of the Aircraft Protocol (Alternative A)[235] places heavy timelines and requirements on the insolvency administrator. It states that the debtor is allowed to keep possession of the aircraft provided that it remedies all payment defaults and performs all obligations in the future. There is no mention made of the Resolution Professional ("**RP**") or the Committee of Creditors ("**CoC**"), which are two of the foundational pillars of the IBC. These boards are bound to specify whether aircraft leases have to be terminated, renegotiated, or retained as *going-concern* assets. However, under the Act, the Aircraft lessors can invoke repossession itself after the cessation of the waiting period, leaving RP supervision out. The lessee companies can end up reaching settlement agreements with lessors at the exclusion of the CoC and RP. This goes in opposition to the core of Section 20 of the IBC,[236] where the operations of the corporate debtor are put under the control of the RP during CIRP. To maintain coherence of the insolvency regime in India, the Act ought to

[231] Reinforcement, Not Reform: The Aircraft Objects Act, 2025, BW Legal World (July 28, 2025), Reinforcement, Not Reform: The Aircraft Objects Act, 2025 - BW Legal World.
[232] The Protection of Interests in Aircraft Objects Act, No. 17 of 2025, § 9.
[233] The Insolvency and Bankruptcy Code, 2016, § 14 (India).
[234] The Insolvency and Bankruptcy Code, 2016, §238 (India).
[235] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment art. XI, Alternative A (7).
[236] The Insolvency and Bankruptcy Code, 2016, §20 (India).

require coordination of creditors with the RP in any repossession or default cure action. Reclamation of any aircraft must be put under CoC endorsement, particularly where aircraft are crucial to business survival.

B. Foreign Creditors Win Over Domestic Stakeholders, a break application of IBC Waterfall

Article XI (12)[237] of the CTC states that *"any registered international interest (usually taken by aircraft lessors or financiers) gets priority, even over government dues, wages of employees, or operational creditors, unless the latter have been expressly preserved under Article 39 of the Protocol,[238] through declaration."* The problem surfaces when Section 53 of IBC comes into play, which lays down a calibrated waterfall in the liquidation of claims. However, the AOA, read with the Protocol, allows foreign lessors to leapfrog the hierarchy. Their interest is considered a registered interest, and they can recover the high-value assets before others. This goes against the equal treatment of claims in accordance with the IBC and puts a two-tier system of creditors in favor of international creditors against those of a domestic interest. The IBC Schedule can be revised to include the exceptions under Section 53[239] where the Cape Town priority is applicable, but with checks, as they would be conditioned or mitigated by requiring approval or authorisation by RP and CoC certification. Alternatively, the Aircraft Act should outline the boundary and extent of the priority rights, preserving certain classes of domestic claims.

III. NO CLEAR FLIGHT PATH: JURISDICTIONAL AMBIGUITY AND REGULATORY GAPS IN AIRCRAFT ENFORCEMENT

The Act tries to provide more investor confidence and ease cross-border leasing in India by giving DGCA powers to deregister aircraft and execute repossession procedures effectively.[240] Nonetheless, notwithstanding these significant developments, the Act is flawed in a number of

[237] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment art. XI, Alternative A (12).
[238] Cape Town Convention on International Interests in Mobile Equipment art. 39.
[239] The Insolvency and Bankruptcy Code, 2016, §53 (India).
[240] Nitin Sarin, Aviation Finance and Leasing, CHAMBERS AND PARTNERS (Jul. 04, 2025), https://practiceguides.chambers.com/practice-guides/aviation-finance-leasing-2025/india

critical ways that remain sources of jurisdictional ambiguity and regulatory intractability to lessors and financiers.

Among the greatest problems of the AOA is the case of its inability to completely address the disjointed jurisdictional system that regulates the repossession of aircraft. The DGCA has a definite regulatory role under the Act,[241] but because of the existence of the NCLT under the Insolvency and Bankruptcy Code, High Courts with writ jurisdiction, and civil courts with contract enforcement, there are overlapping and even conflicting layers of authority.[242] Whereas the 2023 notification of the MCA[243] relieving aircraft leases of the IBC moratorium reconciles some of these competing jurisdictions by permitting repossession upon insolvency to some degree, the AOA itself fails to explicitly resolve or align these competing jurisdictions. This legislative deficit places lessors in procedural limbo, and at the mercy of judicial and administrative decisions that are inconsistent. Section 9 of the AOA[244] has a general overriding provision to the effect that to the extent of their inconsistency, the Act prevails over inconsistent laws. However, it does not go to the extent of explicitly exempting the insolvency moratorium under Section 14 of the IBC.[245] Such omission blunts the force of assuring prompt enforcement in the light of the high-profile insolvencies in recent years where moratoriums have frustrated repossession. In the absence of the statutory carve-out, the courts and regulators are expected to interpret the Act together with the IBC, which may result in the contradictory decisions and delays. Such ambiguity negates the purpose of offering expeditious, treaty-based repossession rights to lessors, and dilutes the general predictability of the aircraft leasing industry.

The other issue is the wide rule-making authority that the Central Government has under the AOA. Delegated legislation is not uncommon and is frequently required so as to deal with technical and procedural points, but the broad discretion that it grants runs the danger of arbitrary or uneven use. When procedural safeguards and transparency requirements are not enforced rigorously, lessors can be subject to inconsistent regulations practices and even delays in enforcement. The

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[241] Aircraft Objects Act, 2025, §4.
[242] Neha Singh, Reinforcement, Not Reform: The Aircraft Objects Act, 2025, BW LEGAL WORLD (Jul. 28, 2025), https://www.bwlegalworld.com/article/reinforcement-not-reform-the-aircraft-objects-act-2025-565120.
[243] MCA Notification No. S.O. 4321(E), (Notified on October 3, 2023).
[244] Aircraft Objects Act, 2025, §9.
[245] The Insolvency & Bankruptcy Code, 2016, §14.

Gramophone doctrine[246] of the Supreme Court ("**SC**") dictates that when Parliament is determined to give effect to the treaties in the domestic context, the outcome must have legislative coherence and integrity. The AOA needs to keep in mind that the breadth of rule-making authority cannot be allowed to operate at the expense of this principle by perpetuating the fragmentary and inconsistent regulation of aircraft leasing under Indian law. The Act also does not provide any special institutional dispute resolutions of disputes that may arise as a result of aircraft leasing and insolvency. The continued existence of various forms of deciding insolvency cases, deregistration, writ petitions, and civil courts contributes to forum-shopping and multiplicity of litigation. This is a dynamic that makes delays and legal uncertainty more pronounced and beats the intent of the AOA of making repossession and enforcement faster. Jurisdiction could be more consolidated, overlaps minimized and dispute resolution simplified by setting up specialized arbitration panels or even aviation insolvency benches which would better serve the interests of stakeholders.

Lastly, the AOA has failed to provide a comprehensive solution to the problem of the High Courts intervening in the name of public interest which in most cases leads to interim stays or inconsistent orders regarding the registration of aircraft and liquidating companies. Albeit being a good Samaritan judicial activism in some instances leads to a lack of predictability and inconsistency in the supremacy of NCLT insolvency mandate and regulatory powers of the DGCA. Explicit mechanisms of restriction or reconciliation of these interventions may contribute to less jurisdictional anarchy and improved legal certainty.

V. RECALIBRATING THE REGULATORY COMPASS

A. Harmonization of the AOA and the IBC

Among the reforms that are needed is the amendment of the statutes to either Section 238 of the IBC or the Section 9 of the AOA to clarify the non-obstante conflict. The legislative intent has often been considered by the Courts to be predominant in concluding the inconsistencies between two special statutes, such as in *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd.* The amendment would bring about predictability in judgments given by the courts and abridged ambiguity in interpretation. However, enforcement may be countered by operational creditors who

[246] Gramophone Company of India Ltd. v. Birendra Bahadur Pandey, AIR 1984 SC 667 (1984).

are afraid of reduced chances of recovery. Further, retrospective application may create litigation on pending cases, and Parliament would have to be very careful not to derail the collective resolution process that is at the heart of the IBC.

B. RP and CoC in Repossession Role

In order to achieve procedural safeguards and insolvency goals, an institutionalized consultation process between the RP and CoC prior to repossession must be put in place. Sections 20 and 25 of the IBC already present an obligation on the RP to safeguard the worth of assets of the debtor. A procedural aspect to interact with the RP would not impair the substantive rights of the creditor under the CTC but would bring repossession in line with value maximization of the enterprise, as in Swiss Ribbons v. Union of India. Nonetheless, this mechanism should be limited to avoid undue delay. Any challenge put forward by the RP must be decided in quick succession, which may be within a time frame set by the NCLT.

C. Controlled Priority of Liquidation

A fair solution would be to consider international interests that are established under CTC as having priority in the liquidation, but on a conditional basis under judicial assessment or RP supervision. Article 39 affords contracting states some latitude, although Article XI(12) is in support of such priority. The proposed amendment of Section 53 of the IBC to incorporate a proviso to that effect, in order to recognize CTC-recognised interests, would conform with India-treaty obligations. However, such interests may attract legal action by the employees or even the taxman in case their dues take secondary priority. The proviso can be designed in such a way that such concerns are assuaged by ensuring the proviso is narrowly tailored enough to not erode constitutional protections granted by carve-outs of necessities of public service or sovereign claims.

D. Implementation of the UNCITRAL Model Law

India ought to move faster in coming up with the cross-border insolvency legislation based on the UNCITRAL model. The Model Law, under Article 6, guarantees that the foreign proceedings will not stand against the domestic public policy and therefore leaves a large degree of discretion to states in the area of recognition. There was inefficiency in the case of *Jet Airways* due to the absence of legislative clarity, as parallel proceedings in India and the Netherlands resulted in conflicting proceedings. India would benefit by adopting the Model Law to deal with concurrent jurisdiction as an indicator of maturity in law. Objections can also be encountered on the issue of judicial sovereignty, and capacity-building of the NCLT and its appellate institutions would be necessary.

E. Article XI Declaration

India needs to come out with a formal statement that they are adopting Alternative A with the requirement of the 60-day waiting period. This would eliminate confusion on repossession schedules and strengthen India as a contracting state that can be depended upon under the CTC. Article XI declares are not only conventional, but they are also very essential to the consistency of enforcement mechanisms. The lack of disclosure jeopardises the reputation of India in the international aviation leasing market. Matters of coordination between ministries, especially between the Ministry of Civil Aviation, MCA, and the Ministry of External Affairs, can also pose an execution problem, but inertia can be broken by a legislative instruction under Article 253 of the Constitution.

F. Consolidation of Jurisdiction through Aviation Insolvency Panels

Institutional competence and consistency could be significantly increased through the formation of specialized aviation insolvency benches of the NCLT or a statutory adjudicatory type under AOA. The constitution of India has validated the existence of specialized tribunals in the case of Delhi Science Forum v. Union of India as long as they are manned by subject-matter experts. Such benches could rule on cases of conflicts between IBC moratoriums and repossession rights, thereby reducing the occurrence of forum shopping. However, a High Court jurisdictional clash may follow under Articles 226 and 227. This risk can be alleviated by clarifying the role of the High Court as a court of judicial review and not one of appellate jurisdiction.

G. Statutory Protections on Delegated Rulemaking

Lastly, one should have stronger procedural protections within the delegated legislation under the AOA. This will entail compulsory consultation with the public, a definite schedule on the stakeholder response, and ex-post-facto parliamentary scrutiny. It is constitutionally questionable to delegate too much without legislative instructions, as held in *Gramophone India Ltd. v. Birendra Bahadur Pandey*. Increased oversight may slow down the rule-making process, but exceptions of urgency may be issued in those cases where a review clause is mandatory.

VI. CONCLUSION

In the future, India should fill the gap that exists between the Aircraft Objects Act, 2025 (AOA) and the Insolvency and Bankruptcy Code (IBC) to ensure that aircraft insolvency do not enter a regulatory black hole. As illustrated in this paper, repossession is not statutorily clear when the parties choose to exclude themselves to AOA under Section 6(c) and the aircraft objects are outside the Section 14 moratorium of the IBC-thus compromising the creditor rights and procedural fairness. To address this, the legislature must contemplate to amend AOA to include minimum procedural safeguards and to introduce coordination with the IBC institutions like Resolution Professionals (RPs) and Committees of Creditors (CoCs) particularly when repossession takes away viability of the debtor. Moreover, India needs to balance the conflicting non-obstante provisions of AOA and IBC, preferably with interpretive assistance or a statutory clarification on the law that dominates in event of a clash. Also, the priority rights of foreign creditors as stipulated by Cape Town Convention should be well balanced with the home waterfall as contained in Section 53 of the IBC in order to maintain creditor parity.

Finally, bringing the AOA into line with the Indian insolvency system will create a more predictable, treaty-consistent, and fair system which will serve to encourage foreign investment in the sector and promote insolvency integrity in India.

SOCIAL STOCK EXCHANGES: TRACKING ITS REGULATORY REGIME AND UNEARTHING THE POTENTIAL AND CHALLENGES OF THE IMPACT INVESTING INFRASTRUCTURE IN INDIA

Sriya N. Naik[247]*

I. INTRODUCTION

Financial inclusion and the ability to raise funds in the capital markets is an activity not limited to profit driven companies alone. In order to promote financial inclusion in its entirety, the government, businesses, organisations and stakeholders alike must integrate the concept of social welfare into business operations and day to day working to create an ecosystem conducive to financial growth, literacy while providing livelihoods to communities. It is with this objective in mind that the concept of a Social Stock Exchange was brought into fruition in India by the Central Government. The Indian Institute of Banking and Finance defines Social Stock Exchange as "an electronic fund-raising platform for the listing of Profit Social Enterprises and Not-for-Profit organisations working for the social welfare to raise capital as equity, debt or as units like a Mutual Fund[248]." Thus, the concept of a social stock exchange integrates fundraising and profit making with an objective of attaining social welfare. Regulation 292A (i) of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022[249] elucidates the meaning "Social Stock Exchange" as a distinct segment of the existing recognized stock exchange having the authority to list the securities issued by "Not for Profit Organizations" and to register "Not for Profit Organizations".

The Social Stock Exchange is a way toward mobilising impact investing to precipitate righteous output in society. Impact investing aims at generating sustainable and socially beneficial activities by means of utilising profits arising out of fundraising by institutions that propel social change. This acts as a pillar for eschewing underfunding of activities that could enable social and

[247] * Law Graduate from CHRIST (Deemed to be) University, Bangalore.
[248] INDIAN INSTITUTE OF BANKING AND FINANCE, https://www.iibf.org.in/documents/Brochure/Social%20Stock%20Exchange.pdf (last visited May 12, 2024).
[249] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022, Reg. 292A (i).

environmental transformation. Impact investing has its philosophical underpinnings in the Kantian deontological ethics and consequentialism[250]. While consequentialism through the lens of impact investing focuses on attaining the ends of social welfare irrespective of the means used and its morality, the deontological school focuses on the moral means used in generating the socially desirable output[251]. Thus, it can be observed that instilling deontological morals in impact investing can bring about the desired social transformation while also not compromising on the morality of the means used in bringing about the transformation. Not only is the output maximised but it is also ensured that such output is maximised by employing the rightest and ethical means.

II. GROWTH TRAJECTORY OF THE SOCIAL STOCK EXCHANGE IN INDIA

The integration of a Social Stock Exchange to the existing stock exchanges in India was envisioned by the Finance Minister, Nirmala Sitharaman during the announcement of the Union Budget in July, 2019[252]. This announcement accelerated the momentum towards attaining India's first Social Stock Exchange to promote financial inclusion and fundraising almost on par with mutual funds. For this very purpose, the Securities Exchange Board of India proposed the formation of a working group to deliver a report on exploring the viability of a social stock exchange in India and coming up with an infrastructure conducive for its efficient functioning with transformational impact on society.

The main highlights of the working group report on social stock exchange include[253]- the role of a social enterprise in revolutionizing the entire way in which businesses are conducted. A social enterprise envisions the use of investors' funds in producing a social benefit over that of profits for the enterprise. The main goal of the enterprise as such is not to make profits but rather to use these profits for activities that are impactful to society. "Social impact" is mainly used as the metric for analysing the performance of a social enterprise. Social impact has a much broader connotation than corporate social responsibility. It is beyond the contours of monetary gain and is hence

250 Renita D'Souza, *Impact Investments in India: Towards Sustainable Development*, 256 ORF 1, 9 (2020), https://www.orfonline.org/wp-content/uploads/2020/06/ORF_OccasionalPaper_256_ImpactInvestments.pdf.
251 Ibid.
252 Ministry of Finance, Union Budget proposes creation of a social stock exchange- under the regulatory ambit of Securities and Exchange Board of India (SEBI) for listing social enterprises and voluntary organizations, DSM/RM/BB/SVS/MKV/YK (Jul. 5, 2019).
253 SECURITIES AND EXCHANGE BOARD OF INDIA, https://www.sebi.gov.in/reports-and-statistics/reports/jun-2020/report-of-the-working-group-on-social-stock-exchange_46751.html (last visited May 22, 2024).

difficult to assess. It has a qualitative tinge to it as compared to monetary results or quantitative metrics. To facilitate accurate reporting, the "minimum reporting standard" has been framed.

For ease of tackling differences arising due to variance in activities of numerous social enterprises, the reporting inculcates a problem-specific and target-based approach to measure the impact of activities on individuals. The working report also suggested covering certain regulatory shortfalls by specially targeting increase in corporate social responsibility funding by allowing Non Profit Organisations to raise funds on the Social Stock Exchange. The report also recommended that foreign investors be allowed to invest in the enterprises listed on SSE. The report suggested offering multifaceted tax benefits to various stakeholders making contributions in the form of exemptions from Securities Transaction Tax, Capital Gains Tax etc. By granting tax benefits to corporations and philanthropic organisations alike, the SSE could source out funds for creating awareness on SSE and developing the overall skeletal framework for SSE.

The report has recognised the hindrances in the measurement of impact and has suggested the incorporation of metrics developed by international bodies like the "United Nations Development Program's SDG Impact Practice Standards for Private Equity Funds" and "Global Impact Investing Rating System" to name a few. The report has also noted the challenges in impact investing such as any hindrances arising out of the social and environmental sphere, which include circumstances having certain interconnected effects due to dynamism in an area arising out of variance in externalities.

Hence short term impact can not in all actuality mean that there is a colossal change in the impact. To sum it up, there are certain factors that will not reflect in a company's financials but addressing it might prove to be essential in bringing about an actual impact. The NSE received SEBI nod in February 2022 whereas the BSE got the SEBI approval to set up its Social Stock Exchange in December 2022[254]. At present, there are 53 registered entities with BSE SSE[255] and 51 entities registered with NSE SSE[256].

[254] INDIA P2P, https://www.indiap2p.com/blogs/Redefining-Impact-Investing-Navigating-the-NSEs-Social-Stock-Exchange-SSE (last visited May 23, 2024).
[255] BSE SOCIAL STOCK EXCHANGE, https://www.bsesocialstockexchange.com/static/Listofnotforprofitorganisation.aspx (last visited May 23, 2024).
[256] NSE INDIA, https://www.nseindia.com/list-registered-ngos (last visited May 23, 2024).

III. WEAVING TOGETHER THE REGULATORY YARNS GOVERNING INDIA'S SOCIAL STOCK EXCHANGE

The principal authority having regulatory control over the Social Stock Exchange in India is the Securities and Exchange Board of India (SEBI).

1. The SEBI Act, 1992

Section 30 of the SEBI Act, 1992[257] grants the power to the Board to make any regulations that are in consonance with the provisions of the Act and that would enable facilitation in carrying out the purposes of the Act.

2. The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022

The SEBI exercised its power under the Section 30 of the SEBI Act, 1992[258] to amend the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018[259] to cement the idea of Social Stock Exchange into the regulatory walls of stock exchanges in India. Some of the significant definitions under Regulation 292A of the The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022[260] include:-

a. As per Regulation 292A (c)[261], a "For Profit Social Enterprise" means any social enterprise operating for profit but is not inclusive of a Section 8 company of the Companies Act, 2013[262] established for a charitable purpose.

b. Regulation 292A (e)[263] defines a "Not for Profit Organization" as a social enterprise established for a charitable purpose either under a Trust of any statute, a charitable society or a Section 8 company or any other organisation specified by the SEBI.

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[257] Securities and Exchange Board of India Act, 1992, §30, No. 15, Acts of Parliament, 1992 (India).
[258] Ibid.
[259] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.
[260] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022, Reg. 292A.
[261] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022, Reg. 292A (c).
[262] Companies Act, 2013, § 8, No. 18, Acts of Parliament, 2013 (India).
[263] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022, Reg. 292A (e).

c. Regulation 292A (h)[264] defines a "Social Enterprise" to include both "For Profit Social Enterprise" or "Not for Profit Organization" as aforementioned.

Regulation 292D[265] mandates the establishment of a "Social Stock Exchange Governing Council" with a minimum of 7 members to keep a check on the operations of the Social Stock Exchange. The Governing Council shall mainly look into the growth and development of the Exchange, keep a check on compliance and listing obligations of the social enterprises whereas Regulation 292E[266] prescribes the eligibility criteria for an entity to be considered a "Social Enterprise". Supremacy is given to the intent of the enterprise being social in nature. A list of activities falling under the purview of social nature of an enterprise is listed ranging from bringing about gender parity, generating employment, women empowerment, ending hunger, alleviating poverty, access to education, cultural preservation, enhancing rural sports, building sustainable livelihoods, access to land and housing facilities and providing access to financial facilities.

3. Zero Coupon Zero Principal Bonds- Regulatory Oversight

SEBI unveiled the "Zero Coupon Zero Principal Instruments" to fall within the ambit of securities under Section 2(h)(iia) of the Securities Contracts (Regulation) Act, 1956[267]. These instruments are issued by not-for-profit organisations and they shall be authorised with the Social Stock Exchange. They are not traded like stocks on the exchange. Rather, they slightly resemble bonds in the way of garnering funds, but they do not function like bonds, as on the maturity date of the instrument, the NPO is under no obligation to either return the principal or the interest amount. Regulation 292I[268] deals with the entity having the power to issue Zero Coupon Zero Principal Instruments as Not for Profit Organizations only.

Additionally, unlike a bond, no amount is payable to the investors on the date of maturity of the instrument. The eligibility criteria for the issuance of Zero Coupon Zero Principal Instruments is

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[264] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022, Reg. 292A (h).
[265] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022, Reg. 292D.
[266] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022, Reg. 292E.
[267] Securities Contracts (Regulation) Act, 1956, §2(h)(iia), No. 42, Acts of Parliament, 1956 (India).
[268] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022, Reg. 292I.

mentioned in Regulation 292J[269]. Firstly, the main criteria for issuing Zero Coupon Zero Principal Instruments is that the only entity authorized to issue it is a Not for Profit Organization. Secondly, an NPO can release Zero Coupon Zero Principal Instruments only for the purpose and duration specified in the instrument. This purpose must be in consonance with all the activities listed for an organization to be considered a Social Enterprise.

The procedure for issuing Zero Coupon Zero Principal Instruments publicly falls under Regulation 292K[270]. A "draft fundraising document" will be filed by the NPO which will be scrutinized by the Social Stock Exchange and also be made available on their website to involve public opinion. The Social Stock Exchange must intimate its acceptance or suggestions within 30 days from the date of filing. In case of suggestions by the exchange, the NPO must instill those suggestions before the final registration of the instrument.

On the contrary, Regulation 292L[271] entails the procedure for issuing Zero Coupon Zero Principal Instruments privately which also applies to "Social Impact Funds". The procedure of issue of Zero Coupon Zero Principal Instruments in such a case is the same as that employed for public issuance. There are further conditions for the issuance of Zero Coupon Zero Principal Instruments such as a minimum issue size of Rupees One Crore, a minimum application size of Rupees Two Lakhs and a minimum threshold of subscription set at 75% as mentioned under Regulation 292N[272]. These conditions have been drastically altered by the SEBI Circular released in December 2023, where the minimum issue size of the instrument has been reduced to Rupees Fifty Lakhs and the minimum application size has been reduced to Rupees Ten Thousand.[273] The minimum subscription threshold on the other hand continues to be the earlier 75%.

This Circular is a welcome move as it creates a broader platform for NPOs to raise funds easily and with relaxed requirements by doing away with the stringent minimum issue and application

[269] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022, Reg. 292J.
[270] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022, Reg. 292K.
[271] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022, Reg. 292L.
[272] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022, Reg. 292N.
[273]Securities and Exchange Board of India, Framework on Social Stock Exchange("SSE"), SEBI/HO/CFD/PoD-1/P/CIR/2023/196 (Dec. 28, 2023).

threshold that was present earlier. The termination of the Zero Coupon Zero Principal Instruments is mentioned under Regulation 292P[274] which happens in two circumstances namely, attainment of the object of listing such instruments with a submission of a certificate to the Exchange and expiry or fulfillment of the tenure of Zero Coupon Zero Principal Instrument. The SEBI Circular released in May, 2024 has molded the concept of a "Social Impact Assessor" to be any person who is a part of a self regulatory organization under the ambit of the Institute of Chartered Accountants of India or any such organization prescribed by the SEBI provided that the "Social Impact Assessors Certification Examination" has been cleared by them[275].

IV. EFFECTIVENESS OF SOCIAL STOCK EXCHANGE REGULATIONS IN INDIA- AN ANALYSIS

SEBI's Consultation Paper on "Review of Framework for Social Stock Exchange in India" published on January 20th, 2025 sheds light on the effectiveness of the existing provisions for Social Stock Exchange in India in conjunction with the modifications necessary for its betterment ranging from definitions, disclosure requirements, range of activities to be included and reporting norms. According to this report, INR 22 Crores have been raised through 10 NPOs by issuing Zero Coupon Zero Principal Instruments with the total number of NPOs registered in Indian Social Stock Exchanges-BSE SSE and NSE SSE at 111 as of December 31st, 2024[276].

SEBI has also extended the timeline for annual disclosures through circulars to enable NPOs to meet the regulatory requirements with ease. The Social Stock Exchange Advisory Committee has identified certain concerns with the existing provisions dealing with Social Stock Exchanges in India and has proposed certain modifications to the same. Firstly with respect to the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018[277], the Committee has suggested the expansion of certain definitions falling within the ambit of these regulations such as that of Not for Profit Organization, Social Impact Assessment Firm and expansion of the tenure of NPOs for registering with the SSE.

[274] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022, Reg. 292P.
[275] Securities and Exchange Board of India, Self Regulatory Organizations for Social Impact Assessors in the context of Social Stock Exchange ("SSE"), SEBI/HO/CFD/PoD-1/P/CIR/2024/0060 (May 27, 2024).
[276] SECURITIES AND EXCHANGE BOARD OF INDIA, https://www.sebi.gov.in/reports-and-statistics/reports/jan-2025/consultation-paper-on-review-of-framework-for-social-stock-exchange_91022.html (last visited Jul. 11, 2025).
[277] SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018.

Further, the scope of eligible activities to be considered a Social Enterprises has been further expanded keeping in mind employability, inclusivity, sustainability, cultural diversity, innovation and technological development. This is a welcome move as it will further enhance the number of entities considered as Social Enterprise resulting in change at a macro level. Additionally the SSEAC has recommended changes to the percentage of activities to be considered as eligible activities wherein an organization having business income more than 20% of its revenue in the last annual year must have a minimum of 67% of its activities to be within the scope of activities mentioned[278]. This will ensure that the social intent of the organization is clearly visible.

Secondly, the SSEAC has proposed mainly two recommendations to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015[279] which are related to disclosures by Not for Profit Organizations and submission of Social Impact Reports. The SSEAC has recommended that segregation of disclosures be based on financial and non-financial nature and this would help better categorize the disclosures as some are reliant on audited statements while others are not. The timelines of disclosures are also suggested that they be revised based on the end of the financial year.

The Committee has also suggested bifurcation of the Annual Social Impact Report based on listed projects and non listed projects with non listed projects being self reported along with a moratorium period of two years for NPOs to get listed on SSE.[280] This segregation will reduce the opportunity costs involved in reporting. Finally the SSEAC has proposed certain modifications to the SEBI Circular dated September 19, 2022[281] which deals with certain requirements to be met by NPOs, especially reporting. These include expansion of criteria for registration, including 'Project/Programme Proposal' with the disclosure of funds and widening the scope of disclosures, setting up a logical model for implementation of projects and timelines, governance disclosures and the use of Key Performance Indicators.[282]

[278] SECURITIES AND EXCHANGE BOARD OF INDIA, *supra* note 29.
[279] SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.
[280] SECURITIES AND EXCHANGE BOARD OF INDIA, *supra* note 29.
[281] Securities and Exchange Board of India, Framework on Social Stock Exchange ("SSE"), SEBI/HO/CFD/PoD-1/P/CIR/2022/120 (Sep. 19, 2022).
[282] Ibid.

These modifications will help enhance implementation, promote inclusivity of important factors such as cultural and environmental factors and regular reporting of the listed projects. Thus, the implementation of the proposed modifications to the existing provisions recommended by the SSEAC would bridge the gap between the lacunae in the existing provisions and the recommended changes for Social Stock Exchanges in India by ensuring better timelines, diversification and bifurcation of activities and projects making it easier to measure its impact and making the entire process simpler for investors to comprehend thereby inviting more participation and investment opportunities in this arena.

V. IMPEDIMENTS TO THE GROWTH OF SOCIAL STOCK EXCHANGES IN INDIA

1. ***Inadequacy of metrics available for measurement of social impact:*** The main hindrances in the measurement of social impact could be attributed to its dynamism and qualitative nature. Unlike financials and numericals alike where the root cause for a negative trend can be identified and reversed, social impact has a lot of factors involved where issues might be mitigated at a surface level rather than addressing it at the grassroot levels. Social impact unlike financial results cannot be tracked accurately in chronological order. Tracking its everyday advancement is nearly impossible as it is not that easily visible until a significant change occurs. Thus social impact measurement must be a long term manifestation in order to reap the benefits of the efforts put into generating such impact. Social impact has certain subjective elements to it.

   An example for the same includes when two individuals are given the same resources, the way they utilize it might be completely different hence bringing about a difference in the output. When two employees are granted the same resources to improve their skills, how these resources are applied could differ depending on their morale, motivation, pre-existing skills and their aptitude and quench for knowledge. Thus there can be no two equal levels of output arising out of different individuals' actions. The same applies to abstract concepts such as happiness, level of knowledge etc. To come up with tools to measure the same especially with maintaining standardization with the tools used globally will emerge as another challenging factor in social impact measurement.

2. ***Lesser availability of investment benefits as compared to a regular stock exchange:*** From an investor's viewpoint, Zero Coupon Zero Principal Instruments do not have any payouts during the tenure of investment nor is the principal amount granted at the time of maturity let alone the interest unlike a regular bond on which the principal amount and interest is returned to the bondholder on the date of maturity. Equity investors have diversified benefits that arise out of dividend payments, stock split, bonus shares and rights issue. The excess volatility and liquidity invites colossal profits depending on the movement of the market and the interplay of fundamentals of the specific company. Debt instruments although produce lesser returns as compared to equity, have a guaranteed payment of the principal and interest on the expiry of its tenure. Thus when compared to other investing options available, the majority of investors will gravitate to the profitable options available on BSE and NSE. As social impact is hard to measure, investors can not witness the same level of outcome that a profit oriented enterprise produces.

3. ***Regulatory vacuum with respect to Social Impact Assessors:*** The genesis of a Social Impact Assessor as mentioned in the SEBI Circular issued in May, 2024 does not expressly mention the role, responsibilities, powers and functions of a Social Impact Assessor[283]. SEBI has to carve out the regulatory boundaries within which Social Impact Assessors must function. By setting standards for their functioning, SEBI can ensure that their assessment reflects transparency, accuracy and authenticity. Therefore as advised by the Social Stock Exchange Advisory Committee Social Impact Assessment Organizations must collaborate with Self-Regulatory Organizations that have a minimum of two Social Impact Assessors with an experience of at least three years in the same field along with the existing qualifications[284].

4. ***Lack of robust infrastructure for investment by retail investors:*** Retail investors' investment is only limited to instruments issued by For Profit Social Enterprises[285]. Investment in securities issued by Not for Profit Organisations is restricted to Institutional

[283] SECURITIES AND EXCHANGE BOARD OF INDIA, *Supra* note 28.
[284] SECURITIES AND EXCHANGE BOARD OF INDIA, *Supra* note 29.
[285] SSE INDIA, https://sseindia.in/faq/ (last visited Jun. 1, 2024).

and Non-Institutional investors. This forms a hindrance for retail investors who genuinely want to invest in instruments of Not for Profit Organizations and participate in socially responsible investments.

5. ***Difficulty in encapsulating the fund deployment trail:*** Although Social Auditors have been set up in keeping up with the auditing compliances of Social Enterprises, a lot depends on the corporate governance structure of the Social Enterprise. In profit-oriented companies listed on the BSE and SSE, a lot of attention is paid to the prominence of corporate governance. The shareholder versus director conundrum has persisted in the corporate tracks for time immemorial. It is this conundrum however that prevents misuse of powers on part of the directors of the company due to the increasing accountability they hold to the shareholders and the company alike. Thus regulations have to keep in check the amount of power available to those managing social enterprises and how accountable they are to the stakeholders. Absence to maintain the same on their part will invite suspicions regarding the veracity of the fund utilisation raised on the Social Stock Exchange. The accountability standards of a Social Enterprise should be on par with that of the companies listed on the BSE and NSE.

VI. AN ANALYSIS OF THE IMPACT OF SOCIAL STOCK EXCHANGES ACROSS BORDERS

Initially up to 7 Social Stock Exchanges were set up in the UK, Jamaica, Singapore, Canada, Portugal and Brazil out of which only the ones in Jamaica, Singapore and Canada are still up and running[286].

A. Active Social Stock Exchanges

Singapore's Impact Investment Exchange(IIX) has witnessed many remarkable and transformational accomplishments making it one of the most successful Social Stock Exchange globally. The 2023 Impact Report highlights the programs undertaken by the IIX in mobilizing access to financial resources to all genders, taking proactive steps against climate change and

[286] Divya J Shekhar, *Can India's social stock exchange flourish where others have failed?*, FORBES INDIA (Jul. 14, 2023 04:21 PM), https://www.forbesindia.com/article/take-one-big-story-of-the-day/can-indias-social-stock-exchange-flourish-where-others-have-failed/86659/1.

providing platforms to create monumental changes[287]. The Orange Movement™ is one the most impactful movements in bringing about gender parity and women empowerment in the financial sector. It encompasses a financial infrastructure conducive to gender equality and utilisation of this infrastructure helps in leveraging sustainable opportunities. In 2024, the IIX has launched a data driven initiative called the IIX Intelligence™ to provide a solid ground for revolutionising the data infrastructure for evaluating the performance of MSMEs and providing information on Environmental Social Governance, gender parity and mitigating risks in the financial markets. This uses AI and regular reporting to enhance investor transparency.

According to the 2024 Impact Report of IIX, about US$500 Million to promote enterprises in agriculture, affordable housing, healthcare making an impact on 155 million lives out of which 59% are women[288]. 2024 has witnessed the strengthening of the Orange Movement with the Orange Index™ setting the benchmark for analysis based on economic participation relying on factors like gender and climate action along with promoting tie ups with those enterprises that act as catalysts in mobilizing capital for social finance.

The Jamaica Social Stock Exchange is a subset of the Corporate Social Responsibility wing of the Jamaica Stock Exchange in collaboration with all listings on the Jamaica Stock Exchange, donors and international partners[289]. Presently the JSSE has 12 projects in progress with a wide array of objectives- providing laptops to children to facilitate access to online education portals, offering repair of ventilators in hospitals which proved instrumental during the pandemic, rehabilitation programs, addressing mental health concerns and fighting violence, spreading awareness on breast cancer and offering employment opportunities to Deaf youth.

The success of the JSSE has been further exacerbated after the signing of a MOU between The Jamaica Stock Exchange and the United Nations Development Programme on the 11th of June, 2025 where the focus areas mainly are collaboration in promoting innovation, formulation of policies, enhancing the JSSE market framework and providing support for building sustainable finance[290]. This will provide impetus to the global vision of the United Nations in strengthening

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[287] IIX GLOBAL, https://iixglobal.com/2023-iix-impact-report/ (last visited Jun. 2, 2024).
[288] IIX GLOBAL, https://iixglobal.com/2024-impact-report/. (last visited Jul. 9, 2025).
[289] JAMAICA SOCIAL STOCK EXCHANGE, https://jsse.jamstockex.com/about-us/ (last visited Jun. 1, 2024).
[290] UNDP, https://www.undp.org/jamaica/press-releases/undp-and-jamaica-stock-exchange-sign-mou-support-social-entrepreneurs-and-bolster-development-financing (last visited Jul. 9, 2025).

sustainable finance. The JSSE has also been successful in raising funds in 4 out of their total 10 projects and within three years of its operation raising about more than JMD $50 million, in addition playing a key role in raising about JMD $1,131,950 for COVID-19 relief[291].

The Social Venture Connexion is an impact investing hub of the Toronto Stock Exchange. Through fundraising, it has pioneered programs on entrepreneurship development, investor education, investor programs- particularly for women entrepreneurs and investors to tackle gender inequalities and building community financial institutions for underserved communities[292].

Published in April 2025, the Canadian Impact Investing Market Performance Report shows a significant success of the SVX with the impact investing ecosystem accounting for CAD 15 Billion in assets, diversification of impact investing products with the current number of products at 263 ever since 2000, 64% of investments delivering returns with a balanced financial performance among the real estate, agriculture and climate sectors[293]. SVX has raised capital with more than 500 organizations and about 1200 investors with almost $350 million mobilized with investors gravitating towards investments in affordable housing, environment and food[294]

B. Inactive Social Stock Exchanges

The failure of the other Social Stock Exchanges such as those of the UK, Brazil and Portugal could be attributed to the low awareness rate, low rate of participation coupled with low incentives to investors[295]. The other reason for a stunted growth process of impact investing all over the world is because compared to traditional investments, the kind of securities available in impact investing is minimal[296]. Thus there are very few options making it an undesirable investment for certain investors. Overall Social Stock Exchanges have not performed as great as they were estimated to.

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291 INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA, https://kb.icai.org/pdfs/PDFFile664adda8e900c8.41520696.pdf (last visited Jul. 12, 2025).
292 SVX CANADA, https://win-vc-canada.svx.ca/ (last visited Jun. 2, 2024).
293 SVX CANADA, https://svx.ca/Downloads/FINAL_Impact_Index_Spring_Market_Report_2025.pdf (last visited Jul. 10, 2025).
294 Ibid.
295 Dishaa Dand, *Bridging the gap: the promise of Indian social stock exchange,* NLU DELHI (Jun. 14, 2023), https://www.cbflnludelhi.in/post/bridging-the-gap-the-promise-of-indian-social-stock-exchange.
296 Karen Wendt, *Social Stock Exchanges - Democratization of Capital Investing for Impact,* SSRN (18 Aug. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3021739.

Additionally it is harder to measure the performance of Social Stock Exchanges specifically as they mostly include both qualitative and quantitative outcomes whereas it is generally easier to measure the effectiveness of stock exchanges in general due to the well established benchmarks globally and domestically.

VII. RECOMMENDATIONS FOR PAVING THE PATHWAY TO THE FUTURE OF THE INDIAN SOCIAL STOCK EXCHANGE MODEL: LEARNINGS FROM THE GLOBAL FAILURE OF SSEs

1. ***Offer lucrative incentives to stakeholders:*** At an investor level, in addition to the current tax benefits available to institutions investing in Zero Coupon Zero Principle Instruments, further fiscal benefits and exemptions especially to retail investors and foreign investors will certainly promote wider participation. To a philanthropic investor, the true return on investment which is the social impact should be duly reported to them on a regular basis. At a managerial level, fund managers must be entrusted with powers to take all actions essential to promote a broader reach of investors. Training and development programmes must be offered to the managers and employees alike of social enterprises as impact investing is still a new concept. SSE could also commend their significant milestones and offer them monetary incentives in addition to their salary. At the public level, all socially beneficial activities and its outcome have to be periodically reported and published on the Social Stock Exchange website where suggestions of the public could be invited. The true golden nugget in the present times is the immense data available on activities undertaken by enterprises. Public opinion on this data will foster debate and deliberation. The SSE could, depending on the viability, later inject these suggestions into the activities undertaken by the Social Enterprises.

2. ***Encourage participation of retail investors in the Social Stock Exchange:*** Presently retail investors can not invest in instruments raised by Not for Profit Organizations[297]. By removing this restriction, the corpus of listings on Social Stock Exchanges can improve

[297] SSE INDIA, *Supra* Note 38.

considerably. Investors' efforts and contributions to the Not for Profit listings should be duly recognised. A socially motivated and philanthropic retail investor will not be jolted by the prospect of no return in the future as their true return on investment will be reflected in the way society progresses. Therefore the restriction on investment in NPOs should be taken down.

A database of contributions by investors to Not for Profit Organizations should be maintained on the Social Stock Exchanges website thus making it easily accessible to the public. Active social investing is the way forward. Contrary to the archetypal role of an investor where the investor does not take part in the management, an active social investor must be given magnificent opportunities to be involved in working of the policy as well as be informed about the status of the activities they have invested in. They could be called to head or participate in certain awareness campaigns or seminars etc.

3. ***Enhance transparency and accountability:*** One of the reasons why some philanthropists hesitate in investing in Social Stock Exchanges is due to inadequate information on how their funds are being put to use, where they are going and whether they are actually adding to the aggregate social output. Maintaining honest and transparent auditing mechanisms and accounts will upscale the economic rationale of a social investor. The managers should also regularly report on the functioning of the Social Enterprise to the investors. Social Enterprises must strengthen their corporate governance mechanisms to foster an ecosystem conducive to deliberation among numerous stakeholders because it is eventually their funds that pumps liquidity into the enterprise's operations.

4. ***Promote education and awareness on the relevance of Social Stock Exchanges and Impact Investing- The NISM way forward:*** The National Institute of Securities Market is an educational trust brought into effect in 2006 by the Securities and Exchange Board of India[298]. It has various educational programmes for all market participants ranging from

[298] NATIONAL INSTITUTE OF SECURITIES MARKETS, https://www.nism.ac.in/about-nism/ (last visited May 3, 2024).

investors to intermediaries like social impact assessors. It also offers Management Development Programmes and webinars on topics related to Finance and Securities Markets. Introducing certifications on Social Stock Exchanges will furnish a platform for awareness and highlight the importance of impact investing on the health of the securities market. For any new intermediary that emerges in the impact investing segment, the NISM could come up with certifications for the same. Additionally awareness campaigns on the benefits of Social Stock Exchanges must be held at regular intervals in the country.

5. ***Diversification and dynamism of activities undertaken by social enterprises:*** The business landscape is always dynamic. To keep up with the changes in business activities, Social Enterprises must continually reassess and diversify their funds to ensure that it is used for the most egalitarian purposes. Funds meant for Corporate Social Responsibility of companies when invested in the Social Stock Exchange, the Social Enterprise must apprise the company as to what activities these CSR funds are invested in to make the public aware that the company is investing in impacting a particular segment such as educational programmes, poverty alleviation, providing financial literacy etc.

6. ***Target specific areas to come up with better outcomes and measurement- Addressing concerns at a grassroot level to bring about true impact:*** To come up with a better metric for impact assessment and measurement, funds must be utilised after targeting specific areas and sub areas. Funds must be allocated based on the existing corpus, urgency, requirements, size of the sector, training and skills of the workforce of that sector, available resources and technology. For example, to employ advanced technologies in Agriculture, all aspects of agriculture must be categorised and the funds should be deployed according to the needs and demands of each segment of Agriculture. Institutions like the Grower's Flower Council of India, Horticulture Council, Department of Fisheries and Research Institutes can individually submit their fund requirements for the growth of their field to the Social Enterprises. Involvement and collaboration between Social Enterprises and these industry specific institutes will help bring in another range of socially beneficial activities

as the institutes are better equipped with knowledge of that particular field. This will facilitate addressing of concerns at a grassroot level and bring about true impact in the way finances are put to use.

7. ***Setting up a global benchmark to assess the performance of Social Stock Exchanges worldwide:*** The major challenge arising due to the novelty of Social Stock Exchanges is the absence of a global indicator to measure its impact. Therefore Social Stock Exchanges around the world could collaborate and come up with a standardized global indicator to analyze its impact. This would ensure better transparency about its effectiveness and in turn persuade more investors to look at it as a viable investment opportunity leading to its global growth and the possible formation of new Social Stock Exchanges in different countries. Therefore a standardized metric in collaboration with the metrics used by organisations such as the United Nations, the Organisation for Economic Co-operation and Development and other organisations that measure social impact would lead to participation in the Impact Investing Infrastructure worldwide.

VIII. CONCLUSION

The very inception of a Social Stock Exchange propels organisations to shift its focus from profit to purpose, input to impact, wealth to welfare and funds to functionality. The Indian Social Stock Exchange is still at its nascent stage. To unlock its potential in all vivaciousness, all stakeholders must play a proactive role in integrating the lessons learnt from the global failure of certain Social Stock Exchange infrastructures. A more robust regulatory framework with respect to Social Impact Assessors is the way forward. The success of the Canadian, Jamaican and Singaporean models of Social Stock Exchange shows that the Indian Social Stock Exchange segment can equally reap its full benefits provided that investors are assured of transparency of their fund utilisation. The Indian Impact Investing model has certain crevices to be filled in like improving market participation and better transparency in the utilisation of funds.

What can be inferred from the collapse of other Social Stock Exchanges is that, by combining proper strategy and implementation with proper resources, environmental and social issues can be extinguished while simultaneously promoting socially responsible investing. However the future of impact investing in India paints a rosy picture due to steadfast investors who believe in the ever growing opportunities emerging in the environmental, social and governance(ESG) investing fora. The recent consultation paper by the Social Stock Exchange Advisory Committee has already proposed recommendations to the existing framework of Social Stock Exchange Regulations. Implementation of these modifications will definitely bring more momentum and solidify the foundation of the impact investing infrastructure in India.

THE REGULATORY PARADOX: INDIA'S COAL STORY

Dr. Priya Bhatnagar[299] and Mr. Vinay Juneja[300]***

ABSTRACT

The energy sector of any nation plays a sine qua non role in the economic development of the country. In the energy mix of India, coal is indispensably placed. With Coal India Limited, a public sector monopoly as the world's largest coal producing corporation, the quest for the most viable but most polluting fuel, feeding the population of 1.4 billion, seems never-ending.

The coal sector of our country at present is undergoing a transition and is in an ironic situation where the nation has promised the world to phase down coal, but at the same time has opened the sector for commercial mining and requires more investment. At present, the coal sector is regulated by the Office of Coal Controller, Ministry of Coal, which is in a very close nexus with CIL which has been dominating the sector including the coal production, supply and price. The sector is plagued with a number of regulatory and competition issues which requires immediate attention for a fair play of both public as well as private sector. Reformation in the regulatory regime is the need of the hour in order to smoothly execute the commercialization policy along with the transition from a coal-based economy to a green economy.

I. INTRODUCTION

Since the introduction of the New Economic Policy 1991 ("NEP 1991"), the regulatory framework in India has undergone a number of iterations to keep the regulatory framework in line with the prevailing market conditions and economic environment, nationally and globally. However, despite this, the government has not been successful in improving the quality of its regulatory framework.

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The constantly evolving framework has continued to introduce new administrative structures, composed of a number of expert bodies with varying degrees of autonomy, that lack clarity, consistency and uniformity.[301] These organisations are responsible for overseeing particular aspects of the economy. Like in the case of the coal sector, the Coal Controller's Organisation, is given the task of overseeing and supervising the captive mines. However, the expert committee in one of the reports has stated that the controller in many aspects is not able to discharge its duties due to being overburdened and lack of specialized officers.[302]

Even though our nation has a significant number of laws and policies in place to regulate the economy, the government has not been able to smooth out the wrinkles in its regulatory infrastructure in a manner that resolves the challenges of such a regulatory system. This is despite the fact that there are many targets and plans set out for India's economic growth as a developing economy. The regulatory apparatus in India is governed by the Constitution's antiquated principles and doctrines because there is no fundamental administrative law in India (unlike in the United States, which has the Administrative Procedure Act of 1946), despite the fact that we are now living in the 21st century, in which the requirements, preferences, and interests of the people have undergone significant transformations.

The NEP 1991 was put into effect in India, and shortly after that, the country's economy started moving in the direction of liberalization. As a direct consequence of this, India's regulatory structure has matured over the course of a number of years. Since then, the three tenets of the NEP 1991, namely privatisation, liberalisation, and globalisation, have become firmly interwoven in the structure of the commercial and financial sectors of the country. The goal of the NEP 1991 was to broaden the scope of participation from the private sector while simultaneously reducing the degree to which the government maintained a monopoly on some industries.[303] It was adopted as a corrective policy with the intention of regulating inflation and lowering declining rates of the

[301] Som, L. and F. Naru, *Regulatory policy in India: Moving towards regulatory governance*, OECD Regulatory Policy Working Papers, No. 8, OECD Publishing, Paris, (2017), https://doi.org/10.1787/b335b35d-en.
[302] *Government asked to take steps to strengthen Coal Controller Organisation*, ECON. TIMES, https://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/government-asked-to-take-steps-to-strengthen-coal-controller-organisation/articleshow/19818555.cms?from=mdr (last visited Aug. 11, 2025).
[303] J.S. Uppal, *India's New Economic Policy*, 18 J. ECON. DEV. 2 (1993).

balance of payment deficit.[304] The goal of the policy was to reduce declining rates of the deficit. It was an effort to correct the economic instability that the country was facing at the time when this attempt was made.[305] The goals of this change in policy included implementation of a three-tier policy, which includes the liberalization of banking, the reduction of tariffs and customs charges, the denationalization of banks, and the integration of the Indian market with international trade. The policy also set aside certain exceptions to protect national interests in light of national security. Additionally, the programme intended to de-reserve specific industries and open them up to competition from the private sector to drive their growth.[306]

Hence, came into existence the administrative structures to regulate sectors, their licensing, making bye-laws and, even at times, having the ambit to resolve disputes in the respective sector, all with the objective to ensure the economic prosperity and growth of the sector. But, even today one of the most dynamic and important energy sectors of the country remains unaddressed as far as the question of a regulator is concerned, especially when there are a plethora of competitive and governance issues and the sector is entering a phase of transition.

An attempt to resolve this was made in the year 2013, when Coal Regulatory Authority Bill ("CRAI") was proposed by the then-Coal Minister Sri Prakash Jaiswal to address the challenges of lack of transparency, arbitrary allocation of coal blocks, monopoly market etc.[307] This bill strives to aim at establishing an independent regulatory institution for an effective governance framework for the coal sector which is under the shadow of a behemoth company and forms a form of natural monopoly.[308] Post approval of the proficient authority, CRAI got induced in the House of the People in December 2013, for the bill to be, ultimately, lapsed in 2014 for having a number of issues.[309] It was argued that the proposed CRAI was not much independent in nature, which defeats the fundamental objective behind the entire exercise.[310]

[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] Coal Regulatory Authority Bill, 2013 (India).
[308] *Id.*
[309] PRS LEGISLATIVE RESEARCH, https://prsindia.org/billtrack/the-coal-regulatory-authority-bill-2013 (last visited May 22, 2025).
[310] *Id.*

Since then, the proposal of having a coal regulator is under consideration. Even though, at present, the entire sector has undergone a major reformatory phase, yet the government has not introduced frameworks to regulate the sector. The objective to introduce CRAI was to set up an independent regulator to look after the Indian coal sector that seemed drowning in the sea of multiple governance challenges some of which are dealt in the further sections of the chapter while analyzing the existing legislative and governance regime of the coal sector in India.

In the light of the discussion made in the above paragraphs with respect to the coal sector in India, the author would first deliberate on various reasons for introduction of sector specific regulators in different sectors across the country. Further in his paper the author has focused on the coal sector specifically wherein the need for regulatory reform has been identified.

II. REGULATORY REFORM IN INDIA AND EMERGENCE OF SECTOR SPECIFIC REGULATORS

Over the past two decades, a number of initiatives to reform the regulatory environment has been taken as India transitions to a market economy. The government's regulatory stance has precluded India from developing a comprehensive and coherent regulatory framework. The lack of regulatory framework, that is coherent and comprehensive, has had long-lasting impact on the process of economic amelioration in India. This has stagnated Indian economy’s attempts to parallel economies of majority of developed economic markets. The growth has been marked as being sluggish, reluctant, and uneven. A number of contributory factors have been at play that has led to these results. These factors include populist politics, where the formation of coalition governments made it difficult to agree on the trajectory and pace of reform and powerful vested interests like political vested interests, administrative interests, and private interests–contributing to a number of setbacks and reversals. Consequently, the political tussle resulted in a number of delays and reversals.

However, despite the hurdles, since 1991, six different political parties have held power in India, and each of these governments has continued the process of economic reform. [311]This reform is centered on market liberalization and giving private enterprise a larger role.

This has led to the position where Indian market sentiment has settled on the idea that the market and the state should each play to their strengths in a mixed economy. While state-owned enterprises (SoEs) continued to play a crucial role in commercial activity, role of the state has dwindled relative to their former prominence. For instance, the telecommunication sector was dominated by state-owned companies like BSNL (Bharat Sanchar Nigam Ltd) and MTNL (Mahanagar Telephone Nigam Ltd). The government had full control over telecom services and infrastructure until the early 1990s. In 1994, the National Telecom Policy opened the sector to private players (like Airtel, Vodafone, Idea). Private companies were allowed to enter areas like mobile telephony and internet services. BSNL and MTNL continued but faced competition from private players. Now, it is regulated by the Telecom Regulatory Authority of India (TRAI), an independent regulatory body that ensures fair competition, consumer protection, and pricing oversight in a privatized telecom market.

There are a number of industries that are open to private sector, including: telecoms, power, mining, hydrocarbons, banking, insurance, capital markets airlines and so forth. State operated enterprises are still active, albeit in a smaller capacity than they were before to 1991, in each of these fields. As private companies have steadily displaced public ones in many industries, the state has had to rethink its role as regulator in order to keep things competitive. This new position necessitates a new approach to regulatory governance as The objective of economic reform has been to palletize government owned and managed enterprises, promote private participation, provide competition amongst newly created firms, and establish independent regulatory authorities.

Despite the fact that liberalization of economy required a group of regulators, India already had one competent regulator in form of the Central Bank of the nation i.e. RBI, which had been created in 1935. The RBI was respected among the other central banks of the developing economies around

[311] Som, L. and F. Naru, *supra* note 3.

the world due to the fact that it operated independently. The SEBI went through a very eventful process to become the regulatory body that it is today. It was founded in 1988, but it wasn't until 12 April 1992 that it was given regulatory powers under the SEBI Act, 1992. This was just a few days before the scam that occurred on the Bombay Stock Exchange. The SEBI has the responsibility of advancing of the securities market while also defending the rights of people who invest in the stock market.

The IRDAI is yet another significant regulatory body that was established prior to the year 1999. It came into existence during the previous century. In spite of the fact that the prime responsibility is of the IRDAI under the 1999 Act named as Insurance Regulatory and Development Authority Act, 1999, and it is to protect the policy holders interests inclusive of aspects such as settling insurance claim, its duties under the 1999 Act have been extended to various other functions including the regulation of investment of funds by insurance corporations, the maintenance of margin of solvency aspects and the resolution of disputes between insurers and intermediaries or insurance agents and brokers.

The Telecom Regulatory Authority established in 1997 is another such egample where an independent body was introduced to regulate the telecom sector which was dominated by the natural monopoly: the Mahanagar Telephone Nigam Limited (MTNL).With the power of resolving disputes between telecom players, TRAI also had power to lay down regulations for effective governance of the sector.

Independent authorities help to keep the contemporary economy running smoothly while also trying to defend larger public interest goals at the same time. Wider stakeholders interests, greater health related and safety requirements, and the protection of the public commons are all included in these measures (like environment including air, water quality standards).

Though the Competition Commission of India (CCI) is established to look after the comptetion issues but at the same time it may not be able to address the sector specific issues. The Supreme court clarified the issue of overlapping jurisdiction between CCI and sector regulators in one of the cases,[312] where laid down, that in situations where the regulator had either dispensed away by

[312] CCI v. Bharti Airtel, AIR 2019 SC 113.

giving its findings on the matter or where it explicitly or implicitly does not take the cognizance of the matter before it, the jurisdiction of CCI to take up the same matter is not ruled out except in cases where the regulator is already investigating the case so that overlapping is avoided.
Thus, the formulation of sector specific independent regulators is important to maintain the neutrality as well as independence, both internal as well as external governance is critical.[313]

As a result, the regulatory state is hailed as a policy tool that not only promotes market efficiency but also lays the groundwork for economic growth and the realization of net social gains.
The goal of regulation is to get the public what it wants, which the market may not be able to do. So, it is seen as a replacement for market competition and a way for the government to protect the public from the service provider's monopoly power being used in an arbitrary way. In this way, regulation can be seen as a novel form of "regulatory capitalism," which includes novel ways for state and society to interact, substitution in the roles of politicians or experts in making of public policy, and new ways to regulate, such as self-regulation and the increasing responsibility of networks of experts. These are few sectors in the Indian Economy where regulatory reform has taken place for bringing in fairer interplay of demand and supply factors and protect the interest of various stakeholders.

A CASE OF COAL SECTOR IN INDIA

A. The History and Evolution of Coal sector

The history of coal mining could be divided into two phases. The first phase begins in pre-independence era when the Britishers found the coal embedded in the banks of river Damodar in West Bengal.[314] Soon, coal became a source of fuel in running the Indian railways built by them for smoother transit of goods. Post-independence, when the country was witnessing industrial revolution, it was realized that steel is going to lead it and the importance of coal, as a backbone of the economy, continued as coal was very much required to smelt the same. Dr. Shyam Prasad

[313] OECD, *Governance of Regulators: OECD Best Practice Principles for Regulatory Policy*, OECD Publishing, Paris, (2014), https://doi.org/10.1787/9789264209015-en.

[314] SUBHOMOY BHATTACHARJEE, INDIA'S COAL STORY: FROM DAMODAR TO ZAMBEZI (Sage 2017).

Mookherjee, who was the then-Minister of Industry and Supply, penned down the first ever industrial policy in 1948 supporting the government intervention in the matters of coal and oil.[315] The strategy was to keep these two sources of energy within the monopolistic control of the government which was reinstated in 1954 with the adoption "Socialistic Pattern of Society" in the Second Fiver Year Plan[316] which advocated the state ownership of country's resources with the objective of reducing the economic inequalities and prevention of concentration of wealth. India's coal industry at the time had a dual structure, with small miners classified as unorganised and public sector corporations as planned and organised. Rail, electricity, and steel were the three key factors that influenced coal prices.

The issue was caused by the little miners' inability to mine the lower layers, which resulted in the loss of coal in those layers indefinitely. These miners worked without the use of technical or scientific equipment. As they recruited seasonal workers and sometimes escaped paying wages, incurring minimum amount of expense.[317] In the end, the organised industry was unable to negotiate for better pricing since these tiny miners were required to sell coal at a lesser price, limiting further investment and sector advancement.[318]

The government created a commission on the voluntary merging of these tiny groups with this circumstance in mind. However, the plan was a failure since they had no motive to merge because it was harming their bottom line.[319]

Talking about the price scheme prior to nationalisation, there was no specific method to fix coal prices and the sector had become a monopsony one, being governed majorly by the three main consumers (railways, power and steel).[320] It was only in 1957 when the then government set up the Coal Price Revision Committee (CPRC) that the prices were decontrolled but the drawback of this policy was that it did not differentiated between various grades of coal and fixed prices on the

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315 *Id.*
316 AK Dasgupta, *Socialistic Pattern of Society and the Second Five Year Plan*, Vol. 9, Econ & Political Weekly (1957) https://www.epw.in/journal/1957/3-4-5/political-perspective/socialistic-pattern-society-and-second-five-year.html.
317 SUBHOMOY BHATTACHARJEE, *supra* note 16.
318 *Id.*
319 *Id.*
320 Bhatnagar P. and Chadda V., Energy Conundrum in India: A Case of Coal Sector, ILILR 211, (2022) https://ili.ac.in/pdf/10._Priya_Bhatnagar__F_.pdf.

basis of different heads of costs which was same for all miners.[321] Therefore the problem was the homogeneity in the prices which led to organised sector paying higher prices than small miners as the later did not incur costs of few heads laid down by the committee specifically the administrative cost, stores cost or fixed capital cost which again to the detriment of the organised miners was arbitrarily lowered by CPRC again resulting in higher profits to the small miners as compared to the other entities. So, finally in 1967 the prices were decontrolled by the government due to which railways again appeared as a monopsony.[322] Other factors like diminishing profits of many public sector coal companies, rises in the prices of steel and power shortage in the country resulting in shutting down of multiple collieries during 1967-71 and large debts in the industry.This formed the basis for a strong argument for nationalization of the sector.[323] However, Post-nationalization it has become imperative to look over the price of coal time and again due to a massive investment in the sector.

The epoch of nationalization of various industries in India began with the execution of Industrial Policy Resolution in 1956 by placing 17 industries including coal in the Schedule A, whereby only the government had the authority to run them and not the private players.[324]

The nationalization of coal happened in phases. Initially the government brought within its control the coking coal mines in the year 1971 via the Coking Coal Mines (Emergency Provisions) Act of 1971.[325] This was proceeded by nationalization of non-coking coal via passing of the Coal Mines (Nationalization) Act, 1973.[326]

The Coking Coal Mines (Emergency Provisions) Act 1971 which nationalized all the mines except the captive mines of IISCO, TISCO, and DVC.[327] The government took over all 226 mines in 1972, after which Bharat Coking Coal Limited (BCCL) was formed.[328] In 1973 Coal Mines

321 *Id.*
322 *Id.*
323 Rajiv Kumar, *Nationalisation by Default: The Case of Coal in India*, Vol. 16 Econ. and Political Weekly 757, (1981), http://www.jstor.org/stable/4369752.
324 DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, GOVERNMENT OF INDIA, Industrial Policy Resolution, http://dipp.nic.in/sites/default/files/chap001_0_0.pdf.
325 The Coking Coal Mines (Emergency Provisions) Act, 1971 (India).
326 The Coal Mines (Nationalisation) Act, 1973 (India).
327 MINISTRY OF COAL, https://coal.nic.in/en/about-us/agencies-under-ministry#:~:text=The%20Coking%20Coal%20Mines%20(Emergency,they%20were%20nationalised%20w.e.f.%20 1.5.
328 COAL INDIA LIMITED, https://archive.coalindia.in/en-us/company/history.aspx.

(Taking Over of Management) Ordinance was promulgated which brought under the control of the government 711 non-cooking coal mines and nationalised them by forming another company Coal Mines Authority Limited (CMAL) to manage non-cooking coal mines.[329] Finally the giant, Coal India limited, a wholly owned government company came into being in 1975 in order to take hold of BCCL and CMAL.[330] So whether nationalisation in the coal sector was the right step or not should be discussed in light of other instances of nationalization in various sectors.

Just prior to coal, banks in India were nationalized in 1969.[331] Available literature shows that it has benefited the banking industry and so did we expect in the case of the coal industry in India. It has largely been a positive policy change in the banking sector of our country but the author of paper discussing the impact of nationalization on the banks concludes by saying, that "*the main aim of nationalization is to control the heights of the economy and to meet progressively and serve better the needs of development of the economy, this has not been achieved yet"*[332], which clearly showcase the failure of banks to attain the anticipated result. The growth rates worked out in case of nationalization of banks, indicating that on the average in the case of a majority of operational variables, the performance indicator of nationalized banks as compared to private banks was found higher.[333]

Even though the sector was taken over by the government, it was already known that the government company alone wouldn't be able to meet the rising demand for coal or the output crisis that the market is already facing. So, even though the private mining leases were cancelled, some of them like those of iron, steel, and power, were kept in reserve and given the green light to continue captive mining through an amendment to the Coal Mines (Nationalisation) Act of

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329 *Id.*

330 COAL INDIA LIMITED, GOVERNMENT OF INDIA, https://www.coalindia.in/history/.

331 Swaminathan S. Anklesaria A., *Indira Gandhi's Bank Nationalisation Was an Economic Failure, But A Smashing Political Success*, THE ECONOMIC TIMES (Jul. 31, 2019), https://economictimes.indiatimes.com/news/politics-and-nation/indira-gandhis-bank-nationalisation-was-an-economic-failure-but-a-smashing-political-success/articleshow/70456185.cms?from=.

332 Alka Mittal, *An Analysis of the Impact of Nationalisation on the functioning of the Commercial Banks*, Vol. 4 INT'L J. COM. BUS. & MGMT. (2016).

333 Dhanaraj P. Prince, *Management of Finance of Nationalized: A Post Liberalisation Analysis,* INT'L J. BUS. POLICY AND ECON. (2011).

1976.[334] Another change was made to this act in 1993 when the New Mineral Policy was made.[335] This made it possible for private investors, including foreign ones, to do captive mining in cement and coal washing. In 2007, this got expanded to include coal gasification as well as liquefaction.[336]

B. Regulatory Evolution of the Coal Sector

Under List I of the Seventh Schedule, Entry No. 54 of Indian Constitution, the Union Government has the authority as well as constitutional power so as to make the laws governing mines and minerals, including coal, insofar as such regulation and development under the control of the Centre are declared by law to be in the virtue of public interest.[337] In addition, the state has been granted this authority subject to Lists I through 23 of List II of the Constitution.[338]
Some of the important legislations enacted by the Union government for governing the coal sector in India are briefed below: -

- ***Coal Mines (Nationalisation) Act 1973 and Coal Mines (Nationalisation) Amendment Act, 1976***

This Act was intended to place the whole coal industry under government control. The primary objective of nationalisation was to reorganise and reconstruct the industry in an effort to combat unscientific mining.

The justifications for nationalising the sector have been examined previously. There are opposing viewpoints regarding the causes behind the same. Some argue that it was necessary due to the negative consequences of privatization on the sector at large. The other was of the opinion that nationalization was not a choice but was forced upon the then-government due to a complete breakdown of the profitability of the sector government, for which some government should be blamed due to non-implementation of comprehensively stated labour laws, impractical output targets given to the private and unorganised sector, and lack of uniform authority. Since 1944, the

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[334] Lydia Powell, Akhilesh Sati and Vinod Kumar Tomar, *Coal Production by The Private Sector In India: The Perils of Promise*, OBSERVER RESEARCH FOUNDATION (2024).
[335] 52nd Edition Mineral Policy & Legislation (Final Release), Government of India, Ministry of Mines (2015).
[336] *Id.*
[337] INDIA CONST. sched. VII, list I, serial no. 54.
[338] *Id.*

government and PSUs have managed and regulated the majority of this industry's elements. Therefore, the void and cause of the decline must have been inherent in government policy, with coal pricing being one of the key issues. Section 3 of the Coal Mines Amendment Act, 1976 [339] gives the government corporation (Coal India Ltd.) and its subsidiaries the exclusive authority to manufacture, distribute, and sell coal, as well as conduct any mining-related activity in the coal industry. Also, this portion acts as a barrier and restricts the number of companies in the sector, limiting market competition and reinforcing the monopoly position of the sole government-owned coal producer in India (Coal India Limited). Preferential treatment accorded to government firms and their subsidiaries hinders market competition.

- ***The Coal Bearing Areas (Acquisition and Development) Act, 1957***

The Coal Bearing Areas Act was enacted in favour of the government in order to acquire undeveloped coal-bearing areas and related rights. It allows the government the authority to publish a notice in the Official Gazette announcing its intention to conduct coal exploration on land.[340] Once such an announcement is issued by the government, any other business or individual wishing to receive a licence for that area is disqualified, and the land in question becomes the government's exclusive mining property. Even if a lessee is in custody of unworked land containing or anticipated to contain coal resources through a mining lease, it will be rendered inoperable due to the government's intention to mine the area.[341] Section 7 of the legislation grants the central government the authority to acquire the land in question within two or three years of the notification date.[342] This means that the government or a public sector enterprise (since the government, upon acquiring such land, will assign it to PSU) is not obligated to wait in line to get a mining lease for a coal-bearing area in which it has an interest.[343] Under the new land purchase statute, private entities are not granted this right and must go through the entire laborious property acquisition process.

[339] The Coal Mines (Nationalisation) Amendment Act, §3, Acts of Parliament, 1976 (India).
[340] The Coal Bearing Areas (Acquisition and Development) Act, §7, Acts of Parliament, 1957 (India).
[341] The Coal Bearing Areas (Acquisition and Development) Act, §5(b), Acts of Parliament, 1957 (India).
[342] *Supra* note 42.
[343] *Id.*

These are few provisions of CBAA which shows that it was enacted specially to benefit the PSUs through the government, which needs to be amended in order to create a level playing field for the private players, otherwise even though commercialization has set in, the sector shall not be benefited in the absence of equal opportunities and a fair play for both the sectors.

- ***Coal Mines Nationalisation (Amendment) Bill 2000***

The Coal Mines Nationalisation Amendment Bill 2000 which was brought into picture to increase the private players in the sector and changes in captive mining policy which could have triggered the competition in the sector and helped in augmenting the capabilities of CIL thereby meeting the demand levels, was not enacted.

It is claimed that the executive, as a branch of the government, failed to enact the CMN Amendment Bill 2000. The situation of the Indian coal business today may be very different if it had been implemented when it was first proposed in June 1997, under the Janta government. Less coal might have been imported and the nation had instead turned to exporting coal, competing on a global scale and boosting the level of competitiveness in the coal industry. Under the leadership of Sh. KSR Chari, a high-powered committee on the integrated coal policy was established in 1995. This group foresaw the current state of the industry as being caused by a significant mismatch between supply and demand. Additionally, it advocated for the distribution of coal blocks through open competition, with participation from commercial coal mining firms. Unfortunately, trade resistance prevented the law from being passed, despite the support of other interested parties such as the Ministry of Coal and Power, power corporations, NTPC, Department of Heavy Industries, state governments, etc. The trade unions cited the following justifications for their opposition. In actuality, stakeholders believed that Coal India Ltd.'s poor performance was due to the absence of competitors and the sector's monopoly.

- ***Mines and Minerals (Development and Regulation) Act, 1957 (Along with amendments in 2010 and 2015)***

The majority of mining-related activities that are governed by the government are covered by this general piece of legislation. The act's goal is to control and advance India's mining and mineral resources. Coal and lignite are covered under the title "Hydro Carbons/Energy Minerals" in Part A of the First Schedule.

Under this act, the central government is given considerable authority to grant mining leases, prospecting permits, and reconnaissance permits, which allows for preferential treatment of the public sector. This taints the concept of a level playing field in the industry.

The State government is not permitted to conduct any operations linked to reconnaissance, prospecting, or mining in any territory within its own state, according to section 4(3) of the 1957 Act. Without the previous consent of the central government, the state government is not able to award or renew mining lease or prospecting licence permits.[344] The union's unrestricted power under this act makes the act's intentions crystal obvious. Section 11 A[345] permits the purchase of coal blocks through a competitive bidding process, but only certain industries—such as steel, power, and washeries—are permitted to participate, and even then, only for captive use. As a result, other sectors and industries are barred from engaging in commercial coal exploitation.

Governments and PSUs are able to reserve coal blocks thanks to section 11A's proviso.[346] This method has drawn criticism because it enables them to keep the prime blocks while the private corporations buy the remaining blocks through open bidding. This demonstrates a blatant advantage for the federal, state, and PSU governments, which is hurting competition.

- ***The Coal Mines Special Provisions Act 2015***

The Supreme Court ruled in August, 2014, that the allocation of coal blocks had to be halted and that associated orders were to be followed. The Coal Mines (Special Provision) Act 2015 was passed by the Indian Parliament in order to put them into effect. The purpose of the Act was to allocate coal mines and vest the right, the title, and the interest in and over the land and mine infrastructure, as well as mining leases, to winning bidders and allottees. According to this act, it is imperative that coal mining activities and production continue in order to maintain national

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[344] Mines and Minerals (Development and Regulation) Act, 1957, §5, §7, Acts of Parliament 1957 (India).
[345] Mines and Minerals (Development and Regulation) Act, 1957, §11, Acts of Parliament 1957 (India).
[346] *Id.*

security interests, and it is also that coal resources are utilised in a manner compatible to those interests, as well.

The act also aimed at allocating the cancelled coal mines as quickly as possible to the highest bidders and recipients in order to ensure the country's energy security and minimise the impact on critical sectors like steel, cement, and power utilities.

Chapter II of the Coal Mines Special Provisions Act 2015, established a public auction for the distribution of coal mines on Schedule I. Section 4 outlined the requirements for participating in the auction and the associated fees that must be paid. An allotment of mines to governmental entities was made possible under Section 5 of the Act. Prior allottees' rights and obligations were addressed in Chapter III.

- ***The Mineral Laws (Amendment) Act, 2020***

The Act revised the Mines and Minerals (Development and Regulation) Act of 1957 and the Coal Mines (Special Provisions) Act of 2015. It would enhance the ease of conducting business and increase coal production while decreasing imports. It broadens the range of corporations eligible to participate in coal auctions by removing prior coal-mining experience criteria in India and allowing companies with similar experience in other minerals or other countries to participate. Due to current restrictions on end-use, corporations who purchase coal mines on the Schedule II or III list of the cmsp act can only use the coal they produce for the specified purposes. This ban on the use of coal mined by these enterprises is lifted by the legislation. A central government directive will allow companies to mine coal for their own use and sale, or for any other purpose that the government specifies.

The Acts states that coal mining experience in India is not required for corporations to participate in the sale of coal and lignite blocks. In addition, the competitive bidding process for auctioning coal and lignite blocks will not apply to mines that are being considered for allotment to:

(i) a government company or even its joint venture for its own consumption, sale, or any other specified purpose; and

(ii) a company or body corporate that has been awarded a power project based on a competitive bid for tariff.

For the purposes of providing a reconnaissance permit, or a prospecting licence, or a mining lease for coal and lignite, state governments are required by the MMDR Act to get prior consent from the federal government. According to the Act, there are several circumstances in which awarding these permits for coal and lignite will not require previous approval from the central government. These situations include those in which the allocation was made by the central government and (those in which the mining block was set aside to protect a mineral.

At present, separate licences known as prospecting licences and mining leases are offered for the exploration and mining of coal and lignite, respectively. Prospecting entails looking for, finding, or locating a mineral deposit. The Act creates a brand-new licence category known as a prospecting licence-cum-mining lease. This composite licence will permit mining and exploration operations related.

- ***The Mines and Minerals (Development and Regulation) Amendment Act, 2021***

With a view to alter the 1957 Mines and Minerals (Development and Regulation) Act, this bill was introduced. For minerals, it removes the constraints on their use. It permits captive mines to sell up to 50% of their annual production in the open market after completing their own standards and paying a predetermined royalty. The captive mines will have a greater motivation to produce more. New firms will not have to reapply for statutory permissions for the entire lease time by amending Section 8B (Mine and Minerals (Development and Regulation) Act, 1957) to ensure continuity of operations. Section 10B (4) and 11(5) of the 1957 Act further give the federal government the authority to ensure that the auction procedure is completed on time. By inserting Section 8(4) of the 1957 Act, it allows the extension of mining leases for government firms and the distribution of expired lease mines to government corporations (amendment of Section 8B). This amendment also included a provision granting more authority to the federal government as a whole. The Mine and Minerals Development Regulation (Amendment) Act of 2015 purchased the District Mineral Foundation (DMF).

C. Regulatory Flaws in the Coal Structure

a. Arbitrary Allocation Policy

The Comptroller and Auditor General in an audit of allocation of coal mines in 2012, where it was found that A process for reviewing the coal supply from the various CIL companies did not exist.[347] Due to a scarcity of supply, the primary goal of the New Coal Development Policy—to effectively distribute coal to small and medium consumers—was unsuccessful. In a way, this has raised the possibility of coal being sold illegally.[348]

A review of the 49 de-reserved coal blocks that were to be made available to captive producers revealed that the majority of them had not yet been assigned or were not yet ready to start production. A review of the screening committee meeting minutes revealed that the committee had no basis for evaluating the applications when allocating the blocks. It showcased the lack of transparency in the entire mechanism. [349]

Parallel to it a writ petition was filed in the Supreme Court of India to challenging the entire coal block allotment process from 1993 to 2010.[350] Mainly two issues were brought in the forefront. First, it is important to determine whether or not the legal framework of the coal industry gives the central government the authority to distribute coal blocks.

Second, if such power is deemed to exist, the question should be asked as to whether or not the allocation was carried out in accordance with the law, free from arbitrariness and injustice. The court after scrutinizing all the contentions, procedure of allotment that was followed and the CAG report gave a revolutionary judgment that highlighted the failure of the executive in performing its constitutional 1 duty of distribution of natural resources.[351] The apex court in its judgment [352] cancelled the allocation of 214 coal blocks given to the captive miners.

b. Ineffective Captive Mining Policy and Competition Issues in the Sector

[347] MINISTRY OF COAL, GOVERNMENT OF INDIA, *Report of the Comptroller and Auditor General of India on Allocation of Coal Blocks and Coal Augmentation of Coal Production* (2012).
[348] *Id*.
[349] *Id*.
[350] Manohar Lal Sharma v. Principal Secretary & Ors. Writ Petition (CRL.) No. 120 of 2012, Writ Petition [C] No. 463 of 2012, Writ Petition [C] No. 515 of 2012, Writ Petition [C] No. 283 of 2013.
[351] PC PARAKH, THE COAL CONUNDRUM (Books Wagon 2017).
[352] *Supra* note 25.

Today, with commercialization established in the sector in 2018, the question arises as to why nationalisation was implemented and whether it was beneficial to the sector. After taking on the responsibility of managing the coal business on its own following nationalisation, the government established a sole public sector undertaking, CIL, together with its subsidiaries, which evolved gradually and progressively through time. It grew to become the world's first major government coal production corporation. However, it was soon discovered that CIL and its subsidiaries were overburdened, therefore captive mining with end use restrictions was allowed in the industry. As a result, the electricity sector, as the primary consumer of coal, could now mine the black gold for its own use but not sell it to other consumers. Captive mining, rather than problem solving, was added to it. Though these miners were given coal blocks from which they may harvest and use coal but a lot of competition and governance issues cropped up in the sector. CIL was alleged to abuse its dominant position in a number of cases.[353] The CCI identified a number of examples in which it claimed that CIL had entered into unilateral FSAs with power firms that had biassed terms and that CIL had unfairly hiked the rates without incorporating tax.

Other problems with the application of laws including the MMDR Act, the CBA(), and the CMNA. These acts' provisions that favour PSUs have resulted in discriminatory treatment. Captive miners also expressed dissatisfaction at being given poor quality blocks in challenging geographic regions without a sufficient railroad network for the delivery of mined coal. The writ petition of *Manohar Lal Sharma v. Principal Secretary & Ors*, which resulted in one of the most well-known political scams in 2014 after the CAG released its report on coal block allocation, demonstrates the government's inefficiency in allocating coal blocks to captive miners and upholding the principles of accountability and transparency.[354]

The very reason for its introduction was to foster competition and boost coal production in order to satisfy the demands of diverse sectors. However, both of these appear to be defeated. There have been several gaps in captive coal mining policy. First and foremost, coal blocks were not distributed based on financial capability. Private miners, who were largely from the power, steel,

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[353] Gujarat State Electricity Corporation Limited v. South Eastern Coalfields Ltd. And Coal India Ltd, Competition Commission of India Case Nos. 03, 11 & 59 of 2012; In Re Hindustan Zinc Limited v. Western Coalfields Limited and Coal India Limited, Competition Commission of India Case No. 46 of 2018.
[354] *Supra* note 24.

or cement industries, may not be as good or specialised as their own industries, or they having financial constraints in excavation of coal mines, which require a large capital investment and delayed returns. These concerns were completely overlooked while awarding coal blocks, a method that was eventually overturned by the Supreme Court in 2014. However, even after revamping the allocation procedure, the captive industry saw little improvement.[355] This clearly demonstrates a lack of consistency in the implementation of captive mining policy.

c. Monopolistic Structure of the Sector

CIL being the world's largest coal producing company[356] has become India's monopolistic behemoth in the col sector. Prior to commercialization of the sector, around 80 percent of coal production in India comes from CIL.[357]CIL have been charged by a number of complainants from the power sector for abusing its dominant position. It has been alleged for making unilateral supply agreements with clauses beneficial for its own self.[358]

In order to be effective, any policy must take into account the interests of all parties concerned. It is difficult for private entrepreneurs to play a constant role in energy production and distribution because the industry is dominated by public sector firms and there are few private participants in it. There are numerous clauses in various legislation that either give favourable treatment to the government businesses or have numerous loopholes when it comes to creating a level playing field for all the players in the coal industry.

For example, the Coal Bearing Areas (Acquisition and Development) Act 1957 allowed the government to acquire virgin coal bearing areas and other rights. It allows the government to announce its intention to acquire coal-rich territory in the Official Gazette. After a government notification, any organisation or person requesting a leasing licence for that area is set aside and the land is kept exclusively for mining. Even if a lessee owns unworked land with coal or likely

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[355] Dipesh Dipu, *Is captive coal mining failing*, BUSINESS STANDARD (May 27, 2018), https://www.business-standard.com/article/opinion/is-captive-coal-mining-failing-118052600837_1.html.

[356] COAL INDIA LIMITED, GOVERNMENT OF INDIA UNDERTAKING, http://archive.coalindia.in/en-us/company/aboutus.aspx (Last visited June 1, 2025).

[357] Coal India Limited, Government of India, *Annual Report & Accounts 2019-2020*, Pg (9) (2020).

[358] *Supra* note 28.

coal resources through a mining lease, the government can make it non-operational. Such laws should be repealed or updated in order to create a level playing field for the private players.

There are also a number of benefits that are available to CIL like having geographical data of coal mines, being in the market for more than 3 decades and being in close proximity with the ministry.[359]

d. Inability of CIL to accomplish Environmental norms

Due to the excessive carbon produced during coal mining and combustion, coal is the most polluting industry and is on the verge of being phased out in many nations across the world. All forms of pollution are inevitable in the coal business due to its intrinsic nature, but the behaviour and disregard for the law on the part of the coal companies adds to the issue.

There have been numerous instances where CIL's attitude toward environmental compliance has been careless. For instance, CIL created the Corporate Environment Policy (CEP) in 1996. This policy stayed unmodified for years even after the Indian government's National Environment Policy (2006) mandated that businesses create plans of action and develop strategies at the federal, state, and local levels. The PSU delayed excessively and for no good cause, as the CEP was only modified in March 2012 by CIL.

In addition, it was discovered that six of CIL's seven subsidiaries did not have any environmental policies in place,[360] despite MOEF&CC's requirement that all businesses get an environment policy that has been properly developed and authorised (by BoD) prior to receiving environmental clearance. These six subsidiaries claimed that they were following the parent company's environmental policy even if their manuals did not follow suit. These subsidiaries did not have a separate environmental policy of their own. This made it possible for the mines to run haphazardly and inconsistently. Although CIL and its subsidiaries were determined to have adopted clean coal technologies, the audit report by CAG in 2012 highlighted that there were numerous instances

[359] Arpita Asha Khanna, *Governance in Coal Mining: Issues and Challenges*, Vol. 9 THE ENERGY AND RESOURCES INSTITUTE NFA, (Aug. 2013).
[360] Controller and Auditor General of India, *Assessment of Environmental Due to Mining Activities and Its Mitigation in Coal India Limited and Its Subsidiaries*, CAG GOVT. OF INDIA (2019), https://cag.gov.in/en/audit-report/details/55942.

where the business may be held accountable for failing to comply with water requirements and other environmental regulations.

The governance and compliance mechanisms of CIL and its subsidiaries with regard to some environmental standards are found to have gaps in a recent environment assessment report created by the CAG.[361]

It was discovered that, of the seven subsidiaries of CIL, six did not have any environmental policies in place, in violation of MOEF&CC's requirement that, in order to receive environmental clearance, every company has policies that have been properly developed and approved (by BoD). Although the six subsidiaries claimed to be following the parent company's environmental policy, their manuals did not follow suit. These companies did not have a separate environmental policy. As a result, the mines could operate at will and without any consistency. The audit report by CAG in 2012 showed that even though it was discovered that CIL and its subsidiaries have adopted clean coal technologies, there were numerous instances where the business might be held accountable for failing to comply with water norms and other environmental regulations.

SUGGESTIONS AND CONCLUSION: THE REGULATORY PARADOX

Today the coal dominated energy sector of India is in a transformation stage. With the sector being opened to private miners, the regulatory regime of the coal sector in India also needs to be reformed. At present, Coal Controller's Office under the Ministry of Coal has the primary responsibility of monitoring the growth & development of mines, inspecting coal quality, dealing with disputes relating to the grading or size of coal supplied to consumers, regulating the supply of coal including both cooking and non-cooking coal, and acting as an advisory and consultancy body to the Ministry of Coal. It also supports the implementation of coal legislation.

The functions, role, and authority of CCO, which currently oversees the Indian coal industry, initially appear to be extensive. However, once we consider the insights of one of the landmark rulings of the apex court from 2014, which exposed one of the biggest scams in the nation related

[361] *Id.*

to coal allocation, then that illusion dissipates. The government had given 218 coal blocks to captive coal companies between 1993 and 2010, but the distribution of those blocks was nullified by the supreme court since there was no real and proper process for allocating coal blocks. The distribution method as a whole, according to the Comptroller and Auditor General's Report from 2012 on "," lacks accountability, transparency, and legality. The entire nation was shaken by the Supreme Court's unexpected and unconventional ruling, and the coal industry was torn apart as a result. It not only demonstrated the extreme ineptitude of the authorities in managing the distribution of natural resources, but it also impeded the expansion of the energy sector as a whole.

The need of the hour is to bring about a regulatory overhaul of the coal sector which could be either through introduction of a separate autonomous body which can provide an unbiased market environment for the execution of commercialization policy. Moreover, aid in meeting the international commitments smoothly by phasing down coal in a planned and more aligned manner.

The entry of private sector businesses and the unbundling of public companies create competition. In order to provide a regulatory framework that offers equal playing conditions for all players, regulators play a critical role in this situation. Since 1992, many types of regulators have been established in our nation, with the Securities Exchange Board of India (SEBI) serving as the initial regulatory agency to oversee the securities industry. Since then, several regulators have been established, including the Central Electricity Regulatory Commission (CERC), which was established in 2003 as a quasi-judicial body to oversee the power sector, the Telecom Regulatory Authority of India (TRAI), which was established in 1999, and the Odisha Electricity Regulatory Commission (OERC), which was established in 1996.

However, there are differences in our nation's sector regulators' mandates, roles, and statuses. Their levels of autonomy, decision-making, and transparency differ. Each regulator is designed to address the particular needs of the industry.

The other way of revamping the regulatory apparatus could be breaking or splitting of CIL. The current regulatory framework naturally focuses on the rules and demands of these important public sector coal producing businesses, and future regulators will also have the difficult challenge of regulating both a monolith and tiny entities. Because of this, the regime is asymmetrical in character and either clearly favours government corporations or has many traps and loopholes that are challenging for private sector businesses to navigate. Furthermore, because the overall production of the private sector is so small in comparison to the public sector behemoths, the regulatory framework is not required to develop proper incentive strategies for that sector. Even if an independent regulator is established, it will still have to decide between adopting policies that are fair for all sector participants but may not be appropriate for public sector monoliths that produce the majority of the market or, alternatively, adopting policies that favour the majority while ignoring the small entities. It will be challenging to strike a balance between the two complex and incompatible goals.

These factors strengthen CIL's position, limiting the entry of new players and driving out the market's current players because the allocation process for coal blocks is heavily biased in favour of public sector enterprises. Aside from operating independently in the absence of market forces for more than three decades, CIL also benefits from a number of incumbency advantages. Nationalization of the industry not only gave rise to CIL but also gave the company many advantages over rival businesses. The authority to buy mines without incurring any costs, obligations, mortgages, or other charges in relation to these mines was granted to CIL. The government also consistently provided the corporation with enough financial aid in the form of loans with relatively lenient repayment terms, waivers of interest liability along with its financial restructuring, and the building of a highly developed rail network for transportation. Because coal discovery and mining necessitate significant upfront costs, CIL is given a competitive advantage over the private sector because of these incumbency benefits. Naturally, any governance change in the industry would have to take Coal India Limited's deregulation and possible deconstruction into account. Deregulation of CIL would entail providing it less regulatory or financial handholding and more discretionary flexibility and autonomy. It would entail giving it the ability to compete, grow its capacity, and adopt global best practices as well as eliminating any sort of prioritising or protecting the sector so that the full operating and economic costs are revealed and decisions are made in accordance with them. Vertical or horizontal decentralisation based on functions or geographic area, respectively, can be used to examine the deconstruction of CIL. By doing this, any cross-subsidization—where more prosperous miners support less profitable ones—will be eliminated. Additionally, it will result in CIL functioning in sectors where it has comparative advantages and areas of competence. The benefits will be numerous, including a quick boost to the commercialization of the coal industry, level playing fields, cost structures, pricing discovery, manageable and transparent structures, enhanced competitiveness, and other incidental and auxiliary benefits.

Thus before we enter into a situation of energy crisis, the snapshots of which is seen through the coal crisis in in October 2021[362] where the coal inventory in many states of the country had drained out and there were huge possibilities of those states going powerless. The situation was however controlled but this could have been just a trailer of the worse that could happen if the coal resources of the nation are not wisely managed and regulated.

To conclude, an independent regulatory entity for managing the coal sector/energy sector is an efficient method of accounting for the interests of all stakeholders and providing a level playing field. It is the sine qua non for attracting private sector investments including foreign direct investment. It leads to capacity and capability building in the working and technical know-how. An independent regulatory entity guarantees arm's length policy neutrality, policy certainty and consistency. The present regulatory apparatus for the coal sector is asymmetrically focused on financial and administrative support for CIL. This is apparent in the exclusive availability of information (geographical data), monopoly in mining rights and price setting power to CIL. It is not that the present regulatory structure is totally ineffective or inefficient. In fact, as the other part of the market is miniscule it does not make sense to administer a policy keeping in mind the private sector. But as India is moving forward to reform the sector through commercialization, a change in the regulatory apparatus is also required to address inequalities in enactment as well as implementation of laws.

[362] *Supra* note 25.

THE INVISIBLE CLAUSE: HOW INTER-CORPORATE LOANS TEST THE SCOPE OF THE COMMERCIAL COURTS ACT, 2015

Aashish G. Darne[363]*

I. INTRODUCTION

The Commercial Courts Act, 2015 (hereinafter referred to as *"the 2015 Act"*) was promulgated to ensure the efficient adjudication of commercial disputes, promoting ease of doing business and fostering confidence in India's legal framework. Section 2(1)(c) of the 2015 Act provides an inclusive definition of *commercial disputes,* encompassing transactions emerging out of *"ordinary transactions of merchants, bankers, financiers, and traders such as those relating to mercantile documents, partnership agreements, and other transactions of trade and commerce."*

However, this definition does not explicitly mention disputes relating to inter-corporate loans, which pertains to the loan and investment by a company *inter alia* governed by Section 186 of the Companies Act, 2013 (hereinafter referred to as *"the 2013 Act"*), which prescribes regulatory thresholds and prudential norms for such transactions.

The maintainability of commercial suits involving inter-corporate loans under the 2015 Act faces significant challenges due to the interpretative ambiguity of Section 2(1)(c). Courts are often required to ascertain whether such disputes qualify as *commercial disputes*, given the absence of explicit inclusion of inter-corporate loans within the definition. This lack of clarity frequently leads to objections on jurisdictional grounds, with defendants arguing that such loan disputes lack the requisite nexus to trade, commerce, or business transactions as envisaged by the 2015 Act.

Despite the commercial nature of such transactions permissible under the 2013 Act, the absence of a clear mention in Section 2(1)(c) of the 2015 Act creates ambiguity in adjudicating disputes

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over such recoveries. For instance, consider a situation where Company X, pursuant to a loan agreement, lends sums of monies to Company Y in compliance with provisions enumerated under Section 186 of the 2013 Act. If Company Y defaults on repayment, Company X is entitled to seek recovery under civil law. However, due to the ambiguity in defining *commercial disputes*, the matter may fall outside the jurisdiction of the Commercial Courts, forcing the lender to approach Civil Courts, leading to protracted litigation, and undermining the expeditious resolution intended by the 2015 Act. Inter-corporate loans are indispensable to corporate operations and liquidity management, often supporting business continuity and growth. Their exclusion from the scope of the 2015 Act undermines the specialised framework intended to expedite commercial dispute resolution.

As judicially affirmed, a company authorised to lend money through its Memorandum of Association or Articles of Association, or, through execution of mercantile documents *ipso facto* engages in a commercial transaction. Accordingly, disputes arising from such inter-corporate loans are held to be within the ambit of *commercial disputes* under Section 2(1)(c) of the 2015 Act, thereby ensuring their maintainability before the Commercial Courts, save as otherwise expressly provided by law based upon the nature of the transaction.

II. STATUTORY PROVISIONS

A. Commercial Courts Act, 2015:

Section 2(1)(c): Definition of 'Commercial Dispute'. It provides an exhaustive definition, covering disputes arising from ordinary transactions of merchants, traders, and financiers, including disputes concerning mercantile documents.

Section 12A: Requires institution of a 'Pre-Institution Mediation and Settlement', wherein it mandates pre-institution mediation for commercial disputes not requiring urgent relief, emphasizing the importance of early resolution, and reducing litigation.

B. Companies Act, 2013:

Section 186: Enumerates provisions for 'Loan and Investment by Companies'. It governs inter-corporate loans and investments, requiring compliance with specific limits and approval mechanisms under a company's Memorandum of Association. Any loan beyond the object clause is deemed ultra vires, disqualifying it as a commercial dispute.

Section 179(3): It provides for 'Powers of the Board'. It requires board approval for loans, ensuring adherence to statutory requirements and corporate governance principles.

III. JUDICIAL PRECEDENTS

A. Recognition of Lending Powers as Indicative of Commercial Character:

As the term inter-corporate loan is not categorically specified under the definition of *commercial dispute* under the provisions of Section 2(1)(c) of the 2015 Act, reliance upon the judicial rulings arises to understand whether the provisions of 2015 Act could be invoked seeking relief against recoveries of such loans.

In the landmark judgement of *South City Projects (Kolkata) Ltd. v. Ideal Real Estates Pvt. Ltd.*,[364] the Hon'ble High Court of Calcutta was to ascertain the enforceability of a inter corporate loan transaction between two real estate companies, with the defendant raising challenges including validity under Section 186 of the Companies Act, 2013. The key legal issue was whether the dispute could be qualified to be a *commercial dispute* under the 2015 Act.

The Plaintiff therein had contended that the transaction constituted a commercial dispute under Section 2(1)(c)(i) of the 2015 Act, as both parties are corporate entities engaged in real estate development. The lending to be within the Plaintiff's corporate authority as permissible under its Memorandum of Association, thereby rendering the transaction intra vires and in furtherance of commercial business activity. However, the Defendant argued that the lending transaction falls outside the Plaintiff's ordinary course of business and is ultra vires as the plaintiff is neither a

[364] *South City Projects (Kolkata) Ltd. v. Ideal Real Estates Pvt. Ltd.,* AIR 2021 Cal 217.

banker, trader, nor financier, and thus the dispute does not satisfy the threshold of a *commercial dispute* under Section 2(1)(c) of the 2015 Act.

The Hon'ble Calcutta High Court, while elucidating the legal position on the applicability of the 2015 Act to inter-corporate loan transactions therein, unequivocally held that both the Plaintiff and the Defendant being corporate entities, while authorised under the respective Memorandum of Association of Plaintiff to lend money, were engaged in commercial activity, thereby rendering the transaction a *commercial dispute* within the meaning of Section 2(1)(c)(i) of the 2015 Act, which includes disputes relating to trade, commerce, and business.

The Court categorically noted that terms like *'merchant'* and *'trader'* should be understood in their ordinary commercial sense, as the Act is intended to resolve commercial disputes expeditiously. Thus, the Court affirmed the maintainability of the suit within the jurisdiction of Commercial Courts. The classification of the inter-corporate loan as a *commercial dispute* under the 2015 Act resolved the jurisdictional objection raised by the Defendant. It enabled the Plaintiff to invoke the time-bound procedure before the Commercial Division, thereby expediting adjudication and securing enforceability of contractual obligations without being thwarted by technicalities.

B. Judicial Interpretation of Undefined Statutory Terms under the 2015 Act:

In the significant case law of *Ladymoon Towers Private Limited vs Mahendra Investment Advisors*,[365] the Hon'ble Calcutta High Court was to ascertain whether the suit for recovery of a short-term loan fell within the ambit of a *commercial dispute* under Section 2(1)(c)(i) of the 2015 Act. The Plaintiff contended that the loan, though based on personal familiarity, qualified as a financial transaction between juristic entities. Conversely, the Defendant asserted that the transaction lacked commercial character as the Plaintiff was neither a financier nor engaged in money-lending as part of its ordinary business, as per its Memorandum of Association.

The Hon'ble Calcutta High Court addressed the lack of specific definitions for terms such as '*trader', 'merchant', 'mercantile documents' and 'commercial action',* under the 2015 Act. The

[365] Ladymoon Towers Private Limited vs Mahendra Investment Advisors, IA NO. GA/4/2021 in CS/99/2020.

Court ruled that, in the absence of statutory definitions, these terms must be interpreted based on their ordinary and commonly accepted meanings.

In this context, the Court referred to several authoritative sources, such as:

i. As per the *P. Ramanatha Aiyar's The Law Lexicon*,[366] it defines a '*merchant'* as one who buys and trades in goods, with '*merchandise'* encompassing all goods and wares exposed for sale at markets or fairs. The term is extended to all types of traders, buyers, and sellers.

ii. In the *Black's Law Dictionary*,[367] a '*trader*' is defined as an individual engaged in buying and selling goods for profit, including those who buy and sell securities on a stock exchange or trade commodities and futures.

iii. The Court also further referenced the decision in *Punjab University v. Unit Trust of India*,[368] which adopted the definition of '*commercial action'* from Stroud's Judicial Dictionary. It was held therein that '*commercial action'* encompasses any cause arising from the ordinary transactions of merchants and traders, including matters related to mercantile documents, construction of contracts, export/import, banking, insurance, and other commercial transactions.

iv. Lastly, the Court defined *'mercantile document'* as any document used in a transaction between merchants, bankers, financiers, and traders, thereby reinforcing the broad scope of the commercial nature of the dispute.

Thereafter, while considering the facts of matter of *Ladymoon Towers Pvt. Ltd.*, the Court observed that the disputes for money recovery cannot be classified as *commercial disputes* under Section 2(1)(c)(i) of the 2015 Act unless they involve mercantile documents. This aligned with rulings in *Kailash Devi Khanna v. DD Global Capital Ltd.*,[369] wherein suits for recovery in absence of

[366] P. RAMANATHA AIYAR, THE LAW LEXICON (2nd Ed. 2010).
[367] The Black's Law Dictionary (8th Ed.).
[368] Punjab University v. Unit Trust of India, (2015) 2 SCC 669.
[369] Kailash Devi Khanna v. DD Global Capital Ltd., 2019 SCC Online Del 9954.

mercantile documents were categorically excluded from commercial disputes. Similarly, based upon the ruling of Bombay High Court in *Bharat Huddanna Shetty v. Ahuja Properties & Developers*,[370] and ruling of the Madras High Court in *R. Kumar v. T.A.S. Jawahar Ayya*,[371] it emphasised that only the transactions involving mercantile documents between specified persons qualify as commercial disputes. The Hon'ble Calcutta High Court based upon its own ruling in *Associated Power Co. Ltd. v. Ram Taran Roy,*[372] further reiterated the necessity of mercantile documents for determining the commercial nature of a dispute.

Therefore, the Court in *Ladymoon Towers Pvt. Ltd.* had made noteworthy observation that the 2015 Act defines a '*commercial dispute'* under Section 2(1)(c), restricting it to transactions with a commercial purpose. The involvement of merchants, bankers, or traders highlights the commercial nature of the dispute.

The Court had categorically observed that unlike the Insolvency and Bankruptcy Code, 2016, which broadly covers disputes over existing debts, the 2015 Act limits its scope to disputes arising from commercial transactions, excluding informal agreements like *hand loans* where the profit motive is incidental. The exhaustive categories in Section 2(1)(c)(i) to Section 2(1)(c)(xxii) reinforce the 2015 Act's focus on commercial disputes. Considering these factors, the Court highlighted that the reference by the 2015 Act to *commercial disputes* should be understood expansively, drawing from established definitions in commercial law to include a wide range of business transactions.

However, in *Ladymoon Towers Pvt. Ltd.,* the Hon'ble Calcutta High Court held that the suit could not be adjudicated under the 2015 Act, as the transaction in question therein did not qualify as a *commercial dispute* under the Section 2(1)(c)(i) of the 2015 Act. The plaintiff, whose business was primarily real estate development, advanced the loan based on a personal relationship between the Directors, rather than in the ordinary course of its business. The loan, effectively a *hand loan* in absence of mercantile documents, lacked the commercial character requisite for the application of

[370] Bharat Huddanna Shetty vs. Ahuja Properties & Developers, Interim Application (L) No.14350 of 2021.
[371] R. Kumar v. T.A.S. Jawahar Ayya, C.S. No.431 of 2019.
[372] Associated Power Co. Ltd. v. Ram Taran Roy, AIR 1970 Cal 75.

the 2015 Act. This principle also finds support in *Manesh Rajkumar Kanhed v. Ramesh Bhagwansa Walale,*[373] and *Dena Bank v. Prakash Birbhan Katariya*,[374] where loans which were not transacted in regular course of business were categorically excluded from the scope of commercial disputes, thereby underscoring the importance of a mercantile nexus in such matters.

In *Ladymoon Towers Pvt. Ltd.*, the Hon'ble Calcutta High Court underscored that in absence of mercantile documents evidencing the transaction, a money claim despite being between juristic persons, would not attain the character of a *commercial dispute* under Section 2(1)(c)(i) of the 2015 Act. The Court's reliance on authoritative precedents affirmed that the presence of a mercantile document is *sine qua non* to impart commerciality to an otherwise informal or hand-loan arrangement.

C. Executed Documents as the Touchstone of Commerciality:

In the landmark ruling in *Padma Logistics and Khanij Pvt. Ltd. v. Ideal Unique Realtors Pvt. Ltd.*, [375] the Hon'ble High Court of Calcutta was deciding whether the dispute arising from transaction between the parties, being a loan supported by Memorandum of Understanding, post-dated cheques, and such other documents, constituted a *commercial dispute* under Section 2(1)(c)(i) r/w. explanation (a) of the 2015 Act, and thereby whether it could be a justified adjudication before the Commercial Division of the Hon'ble High Court.

The petitioner contended that the loan was advanced through RTGS and supported by multiple written instruments including two MoUs, cheques, and acknowledgements of liability, constituted a commercial transaction. It was urged that such instruments amounted to *mercantile documents*, thereby fulfilling the statutory prerequisites under Section 2(1)(c)(i) and Explanation (a) of the 2015 Act, making the suit maintainable before the Commercial Division. However, the respondent argued that the transaction was a private, friendly loan devoid of commercial purpose and was not supported by any mercantile instrument, thereby falling outside the scope of Section 2(1)(c) of the

[373] Manesh Rajkumar Kanhed v. Ramesh Bhagwansa Walale, AIR 2007 Bom 86.
[374] Dena Bank v. Prakash Birbhan Katariya, AIR 1994 Bom 343.
[375] Padma Logistics and Khanij Pvt. Ltd. v. Ideal Unique Realtors Pvt. Ltd., (2022) 231 AIC 587.

2015 Act. Reliance was placed on *Ladymoon Towers Pvt. Ltd.* to assert that the matter ought to be tried as an ordinary civil suit before the Original Side of the Court.
The Hon'ble High Court of Calcutta ruled that the disputes which are arising out of inter-corporate loans were covered under the provisions of the 2015 Act. The Court found that the case fell within the purview of Section 2(c)(i) of the 2015 Act, as it involved a transaction underpinned by duly executed mercantile documents.

In distinguishing this matter from *Ladymoon Towers Pvt. Ltd.*, where the loan was categorised as a *hand loan* in absence of formal documentation, the Court emphasised that in the present case, the transaction was evidenced by multiple executed documents, and the respondent admitted its liability with respect to both the principal and interest. The Court further noted that commercial dealings and their associated documents should not be unduly scrutinised for technicalities but should instead be understood through the lens of *commercium*, recognizing the commercial intent of the parties. Therefore, the suit was adjudged maintainable under the 2015 Act, in alignment with the commercial nature of the dispute considering the execution of mercantile documents.

The Hon'ble Calcutta High Court has clarified the legal position that a loan backed by written agreements, post-dated cheques, and agreed interest qualified as a *commercial dispute* under Section 2(1)(c)(i) of the 2015 Act. Distinguishing *Ladymoon Towers*, the Court applied *pacta sunt servanda*, agreements must be kept, ensuring that genuine financial dealings between parties are protected under commercial law and not treated as casual or friendly arrangements.

D. Recognition of Inter-Corporate Loans as Bona Fide Commercial Disputes:

In *Amanpreet Kohli v. Pankaj Dayal*,[376] the principal issue before the Hon'ble Delhi High Court for adjudication was whether a dispute arising out of a loan advanced by the Plaintiff to the defendant, pursuant to the mercantile documents fell within the ambit of a *commercial dispute* under Section 2(1)(c)(i) read with explanation (a) of the Commercial Courts Act, 2015. The determination hinged on whether the transaction, though between corporate entities, bore sufficient

[376] Amanpreet Kohli v. Pankaj Dayal, 2023 SCC OnLine Del 1808.

commercial character or merely constituted an informal financial accommodation lacking commercial substratum.

The Plaintiff asserted that the execution of mercantile documents evidenced the commercial nature of the transaction, thereby attracting the application of the 2015 Act. Conversely, the Defendant contended that in the absence of the Plaintiff being a *financier* by object or conduct, the transaction lacked the commercial character envisaged under the Act and was thus outside the statutory definition of a *commercial dispute*, under the provisions of Section 2(1)(c)(i) of the 2015 Act.

The Court, drawing on the principles elucidated in *Ladymoon Towers Pvt. Ltd., South City Projects (Kolkata) Ltd. and Padma Logistics & Khanij Pvt. Ltd.*, distinguished between informal, non-commercial loans and those with a commercial nature, noting that the loan in question was not only formalised through legally recognised mercantile documents but also carried interest, thus underscoring its commercial character.

The Hon'ble Delhi High Court had considered the contentions and the merits of the matter and ruled that the loan transaction supported by formal documentation of mercantile documents, such as a loan agreement, receipt, promissory note, and post-dated cheques, cannot be classified as a *friendly loan* but constitutes a bona fide *commercial dispute* within the ambit of Section 2(1)(c)(i) of the 2015 Act.

The Plaintiff herein, *inter alia* engaged in real estate development, and the defendant, likewise in the real estate business, entered the transaction to address a financial exigency, and the suit for the recovery of the loan and its interest was thus adjudged as arising from an ordinary commercial transaction. The dispute, revolving around the enforcement of mercantile instruments and arising in the ordinary course of merchant dealings, was therefore recognised as a *commercial dispute* under the 2015 Act.

The Court astutely distinguished prior rulings and upheld the maintainability of the suit as a commercial dispute, observing that the existence of binding agreements, post-dated cheques, and an admitted rate of interest evidenced a transaction of commercial nature. The judgment correctly reinforced that the formality and enforceability of the transaction override subjective labels such as *friendly loan*. The ruling affirms judicial fidelity to the legislative object of the 2015 Act, ensuring that disputes rooted in commercial intent are adjudicated expeditiously under the designated commercial regime.

E. Transfer from Commercial to Civil Division is Ultra Vires the 2015 Act:

In challenging the maintainability of commercial suits involving inter-corporate loans under the 2015 Act, defendants frequently raise preliminary objections seeking either rejection of the plaint, or, return the plaint for re-filing before appropriate forum, or, transfer of the proceedings from the Commercial Division to the Ordinary Civil Jurisdiction, while contending that such disputes fall outside the ambit defined under Section 2(1)(c) of the 2015 Act. In such instances, where the courts are inclined to allow such a plea, it becomes procedurally onerous for the plaintiff to resist, thereby frustrating the objective of expeditious adjudication envisaged under the 2015 Act. It is further necessary to consider the legal consequences that would follow if the suit is held to be not maintainable within the scope of the jurisdiction of Commercial Division.

In a recent multilayered litigation of *Sudershan Prasad Bagaria & Anr. Vs. Harshvardhan Khemka & Ors.*,[377] the core issue before the Calcutta High Court was, whether a suit instituted before the Commercial Division of the High Court which was found not to involve a *commercial dispute* under Section 2(1)(c) of the 2015 Act could be transferred to the Ordinary Original Civil Jurisdiction or whether the only permissible course was to return the plaint under Order VII Rule 10 of the Civil Procedure Code (1908) ("*CPC*"), as modified by applicable procedural rules in Chartered High Courts.

The Appellant contested that the Ld. Single Judge erred in returning the plaint instead of transferring the suit from the Commercial to the Non-Commercial Division, particularly as both divisions operate within the same High Court. Reliance was placed on various citations including

[377] Sudershan Prasad Bagaria And Anr vs Harshvardhan Khemka And Ors, Decided on 26.03.2025, Calcutta High Court, (APOT/63/2025) with (RVWO/31/2024), (CS-COM/384/2024), (IA NO: GA-COM/1/2025).

Ladymoon Towers to assert that such intra-court transfers are procedural in nature and do not require return under Order VII Rule 10 CPC. However, the Respondents resisted the appeal while contending that the 2015 Act does not empower the court to transfer suits from Commercial to Non-Commercial Divisions, perhaps, upon finding lack of jurisdiction, the court must return the plaint for presentation before the appropriate forum, reliance was placed on Section 15 of the 2015 Act and *EXL Careers v. Frankfinn Aviation*.[378]

After ascertaining the contentions, the Hon'ble Calcutta High Court had observed that;

i. The 2015 Act is a self-contained code emphasising upon Section 21, it observed the 2015 Act has no provision for reverse transfer as Section 15 only contemplates transfer to the Commercial Division, could not be applied *vice versa*.
ii. Order VII Rule 10 CPC mandates return of the plaint where jurisdiction is lacking; however, due to inapplicability in Chartered High Courts (as per Order XLIX Rule 3 CPC), the return could be effected under Section 151 CPC.
iii. Section 24 CPC (transfer) is inapplicable *inter se* Commercial and Non-Commercial Divisions post-institution.

In light thereof, the Hon'ble Calcutta High Court ruled that, the plaint to be returned for representation before the appropriate court, however the interim relief granted earlier to continue for four weeks to prevent prejudice. The existing pleadings to be treated as filed afresh upon re-presentation. Therefore, the matter had been remitted to the learned Single Judge on the Ordinary Side for adjudication.

Further, an appeal was preferred before the Hon'ble Supreme Court in *Harshvardhan Khemka & Ors. v. Sudershan Prasad Bagaria & Anr.*,[379] wherein the Apex Court affirmed the legal position by expressing no inclination to interfere with the High Court's order, it had clarified that the Single

[378] *EXL Careers v. Frankfinn Aviation,* (2020) 12 SCC 667.
[379] *Harshvardhan Khemka & Ors. v. Sudershan Prasad Bagaria & Anr.,* Special Leave to Appeal (C) No(s). 16786/2025 (Decided on 25.06.2025).

Judge shall independently adjudicate the interim relief without being influenced by prior orders, in conformity with the Division Bench's directive. The Court reiterated the principle of *audi alteram partem*, ensuring that procedural regularity under Order VII Rule 10 *CPC* and inherent powers under Section 151 *CPC* is maintained without prejudice to substantive adjudication.

This ruling of the Apex Court reaffirmed that in absence of express statutory authority under Section 15 of the 2015 Act, a suit cannot be transferred from Commercial to Non-Commercial Division, and must be returned under inherent powers. However, while upholding the principle of *actus curiae neminem gravabit*, an act of the court shall prejudice no man, the Court protected interim relief and clarified that jurisdiction cannot be conferred by consent. Furthermore, it reflects *procedure est servus legis*, procedure must serve the statute, not circumvent it, thereby maintaining a balance while filling the gaps in the jurisprudence.

IV. CONCLUSION

To resolve prevailing ambiguities under Section 2(1)(c) of the 2015 Act, particularly regarding the classification of inter-corporate loan disputes, it is imperative that courts adopt a sociological, and realist interpretive framework. The sociological school, as advanced by Roscoe Pound, posits that law must respond to evolving societal needs, while the realist school advanced by jurists like Karl Llewellyn emphasises the practical consequences of judicial decisions over rigid formalism. Eminent Indian jurists such as Justice V.R. Krishna Iyer and Justice P.N. Bhagwati have espoused interpretive flexibility to ensure substantive justice, an approach which requires to be revisited by judiciary for resolving the challenges experienced by commercial disputes arising out of inter corporate loans.

Where such loans are evidenced by mercantile documents including cheques, security undertakings, and formal MOUs, their commercial character ought not to be negated merely due to the absence of lending powers or characterisation as lender under Memorandum of Association. Instead, courts must uphold substantive commerciality over formal corporate classification, thereby fulfilling the object of the 2015 Act.

To ensure doctrinal coherence, a clarificatory statutory amendment to include such transactions within the scope of Section 2(1)(c) of the 2015 Act is desirable. Further, alignment with Sections 186 and 179(3) of the Companies Act, 2013 is necessary to preserve corporate governance norms while acknowledging the business reality of inter-corporate financing. Additionally, Section 12A of the 2015 Act may be leveraged to facilitate early-stage pre-institution mediation, thus expediting resolution and reducing judicial burden upon maintainability issues at latter stage.

Ultimately, as India continues to position itself as a global economic powerhouse, aligning legislative frameworks with contemporary commercial realities is imperative to fortify investor confidence and expedite dispute resolution. The inclusion of inter-corporate loans as *commercial disputes* under the 2015 Act would represent not merely a legal adjustment but a jurisprudential progression aligned with commercial pragmatism and constitutional fidelity.

COMPETITION CROSSROADS: DEMYSTIFYING THE IMPACT OF KILLER M&A OF SMES AND UPSTART INNOVATORS

Komal Singh[380]*

ABSTRACT

Indian economy is at its boom, having a view of transforming to a five trillion economy. As per S&P Global Ratings, Indian economy grew by 8.2% in fiscal year 2023-24. The major role is played by the SMEs and innovative start-ups contributing 30% of the overall GDP. Ever imagined, the fate of a developing economy where the emerging sector having the most potential of economic upliftment, is so acquired or merged with the incumbent enterprises, that ultimately diminishes the market and eradicates competition. Maintaining a healthy and fair competitive market is the primary objective of any Competition regulation. This article analyses the impact of such killer mergers and acquisitions on small and medium enterprises and innovative start-ups. Taking inspiration from other jurisdictions and analysing the legal framework adjudicating such killer mergers and acquisitions in EU, USA and UK an analysis is made of the emerging trend. Further, killer mergers and acquisitions need a different approach in digital market as compared to the traditional brick and mortar market. Thus, the changing dimensions of the competition regime brought in Indian market through the recent amendment in 2023. In addition, India's prospective approach to adoption of the Digital Competition Law whether, is capable of tackling the issue at hand. Furthermore, combinations are being regulated ex-ante, but can in the case of killer merger and acquisitions an ex-post window facilitate its speedy identification and regulation.

Keywords: Killer merger and acquisition, market, competition, small and medium enterprises, innovative start-up.

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I. INTRODUCTION

"Competition on anything is good, because it makes everyone better."

-Eddy Cue

The Indian welfare regime in order to promote healthy competition in the market has travelled a long way from the Monopolistic Trade and Restrictive Practices Act in 1969 to the enactment of the Competition Act in 2002. A market is considered to be free and fair when it is driven by the demand and supply chains in the market, not by any external force. Thus, supply chains are the arteries of the economy and any disruption in the self-regulation of the supply chain attracts competition issues. The Competition Act is the most versatile regulation, instantly adapting itself to the evolving market and fulfilling instantaneous market corrections. But what if the incumbent enterprises and big techs find a way out to evade the eyes of the mandatory regime?

Mergers and acquisitions (M&A) have acquired a new phase of spurious growth, both in the traditional as well as the digital market. The corporate trends represent that merger and acquisitions (M&A) deal value experienced a boom of 60% to USD 19.6 billion in January-March 2024. The reports suggest 143 domestic M&A deals wherein the traditional market took the lead and is followed by the media and entertainment sector.[381] Sometimes, these M&A also blemish into inorganic growth where the transferor company is a small or medium enterprise or an upstart innovator (innovative start-up). Mostly, such M&A does not cross the threshold value set based on assets and turnovers but subsequently blooms to be so big to abuse their dominant position in the market.

DPIIT in India has recognized 1,17,254 total start-ups in the nation having at least one recognized in every state and UT. Such small and medium enterprises contribute to around 7% of the total Indian GDP.[382] These enterprises still in their gestation period recognize the opportunity of merging or amalgamating with a well-established enterprise would let them overcome the impediments of being a newcomer in the market very easily. Mergers and acquisitions in India are regulated by the Competition Commission of India by an ex-ante approach where the competitive

[381] THE ECONOMIC TIMES, https://economictimes.indiatimes.com/news/company/corporate-trends/ma-deal-value surged-60-q-o-q-to-19-6-billion-in-q1-2024-says-pwc-india-report/articleshow/109568535.cms?from=mdr (last visited 12 June 2024).

[382] DEPARTMENT OF SCIENTIFIC AND INDUSTRIAL RESEARCH, https://www.dsir.gov.in/small-and-medium-enterprises-smes-india (last visited 12 June 2024).

assessment is conducted before harm is caused to the prospective market. Such mergers and acquisitions escape the threshold requirement and in the absence of any ex-post examination of mergers and acquisitions assume dominance and unobstructed abuse of the same. Such M&A being a two-edged sword serves the benefits not only to the transferee company by giving them a hands over the innovative market and diversified products to attract consumers but also benefits the transferor company providing them the consumer base and relaxation from initial market struggles.

The adverse impact causes the notion of 'Killer M&A'. For instance, Zomato's acquisition of Uber Eats or Myntra's acquisition of Jabong.com and many more represent cases of killer mergers and acquisitions show the acquisition of such nascent firms or small and medium enterprises by their established competitors and after the merger, the acquiring entity utilizes the targets activities and resources killing up their individual stake in the market. The CLRC[383] to overcome the threshold gap has recommended and further, the Act has been amended to include two new provisions of de-minimis regulation and deal value threshold.

Furthermore, with the enrichment of the technological market and the advent of the digital market, there are new challenges related to market access and competition experienced by businesses. But these are most pertinent for Medium and small enterprises which play a pivotal role in driving innovation, job creation, and economic growth. At this juncture, the most pertinent question that arises to be ascertained is 'Can a merger that does not need to be notified to a competition authority constitute competition harm and ultimately lead to an abuse of a dominant position?' In light of this, the paper analyses the impact of such mergers and acquisitions of small and medium enterprises and innovative start-ups. Further, the author also examines the 2023 Amendments in the Competition Act and the Digital Competition Bill in providing an apt resilient mechanism. Moreover, a comparative analysis is also made with other countries and their regulation of merger control with a special focus on the EU's merger control regime and its ruling in the Towercast case[384].

[383] Ministry of Corporate Affairs, *Report of the Competition Law Review Committee,* 2019, https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf.
[384] Towercast SASU v. Autorité de la concurrence[16 March 2023] C-449/21.

The research paper aims to divulge the opinion of the researcher on the following question of interest:

1) Can a merger that does not need to be notified to a competition authority under the Act can lead to an abuse of a dominant position?
2) Whether merger and acquisition of nascent firms by incumbent firms derailing a free market and hampering innovation in the market?
3) What are the present merger control regimes in India and is it competent in relation to other nations?
4) Whether deal value threshold can regulate combination issues in traditional as well as digital markets in India?
5) Can India adopt the approach postulated in the Towercast case?

Furtheremore, the author has doctrinal methods i.e., references from primary sources like Acts, Rules, and Regulations, judicial interpretations, and perceptions to study the present questions at hand, along with other sources like books, articles, journals, and newspaper letters to understand and analyse the issues relating to killer mergers and acquisitions of small and medium enterprises and upstart innovators with special emphasis on digital markets.

II. LITERATURE REVIEW

Many authors, legal luminaries and experts have authored articles on the issue of killer merger and acquisition and merger control pertaining to both traditional and digital markets. Among the several articles, the article authored by Bennet Kpentey titled '***Small Business Merger and Acquisition Strategies for Raising Capital in Emerging Economies***' has provided a base for this research by facilitating a similar issue of nascent merger and acquisition of SMEs in Ghana and the prospective benefits available for developing economies. Analysing the implications and prospective opportunities along with the failure in value addition by such M&A has comprehensively surveyed both global and local markets but this paper lacks the study of the emerging digital market and the impact on the same. Next, the article authored by Abhishek Tripathy and Akshita Totla titled, '***Changing Contours of Merger Control: Exploring the Enforcement Gap in Regulating Nascent Acquisitions'*** has fed the horizon of the authors perspective to a very larger extent. It very comprehensively analyses the peculiarity of nascent acquisitions and the ex-post review of merger control not only in India but also in the United States, European Union, and the United Kingdom. However, the analysis of the issue concerning the recent amendment relating to deal value threshold and de-minimis exemptions will provide an open-ended examination covering all aspects of nascent acquisitions and the prospective solutions ahead. Further, the paper authored by Claire Turgot titled, '***Killer Acquisitions in Digital Markets: Evaluating the effectiveness of the EU Merger Control Regime***' has examined the killer acquisitions by larger digital technology companies to cement their dominance in the market. It has also highlighted the need to amend the European Commission's merger 'toolbox'. This contribution of providing an open approach with respect to the digital market has equipped the author to analyse the issue with a comparative study of killer M&A in traditional and digital markets in India. To carry forward with the study of killer M&A in digital markets the author has referred to the article authored by Haodan Tang, Senhui Fang, and Dianchun Jiang titled ***'The market value effect of digital mergers and acquisitions: Evidence from China'***. This paper has helped analyse the persistent issue with respect to the neighbouring country China and take references from their digitally active markets and the competition issues faced thereby. Last but not least, the author has based the research paper on the most appertain question of can mergers amount to abuse of dominance and what are the regulations to be followed by the regulatory authority in such instances. This reference is taken from the article published by Squire Patton Boggs titled '***A Merger May Be an Abuse of a Dominant Position: Recent Guidance From the CJEU in Towercast'*** where the recent judgment of CJEU in Towercast case was analysed which focused on this abovementioned issue. Concerning all the research papers and various articles, the author has drawn inspiration to research in line with the impact of killer mergers and acquisitions on small and medium enterprises and innovative start-ups. Further, with the technological advancements the author is also focused on analysing the question not only in the traditional but also in the digital market and also analysing the same concerning other jurisdictions. In light of the recent Competition Amendment Act, 2023, and the Digital Competition Bill with the provisions of de-minimis regulations and deal value thresholds being satisfactory of the resolution of the issues or not.

III. BLOOM OF SMES AND INNOVATIVE START-UPS

Indian history profusely establishes that India has always supported a self-sufficient economy, focusing on small-scale industries. The Mauryan, Mughal, and Maratha empires ensured that India experienced a per-capita GDP growth, whereby India's share of the world economy was around 25%-30%.[385] This picture of the golden bird traversed down the lane with immense deindustrialization and cessation of small-scale manufacturing industries. The British rule resulted in curbing the global share from 24.4% in 1700 to 4.2% in 1950[386]. Then we witnessed the license Raj and large-scale monopoly curbing the overall innovation and small startups. However, a wise step was the enactment of the Monopolistic and Restrictive Trade Practices Act, 1969. Later India also opened its gates to the outer world with the introduction of the LPG model (Liberalization, Privatization, and Globalization). Not later than two decades from then the nation is witnessing an upsurge in digitization with the blooming digital markets and the current competition regulation (Competition Act, 2002) ensures free market and healthy competition. Alongside, in this 21st century the developing nation in South Asia, which tops the list in being the most populous and the fifth largest economy in the world has experienced rampant anti-competitive activities in the digital market which seeks to completely diminish the market of small and medium enterprises and upstart innovators. Thus, the nation seeks to enact a new law which is still in making[387].

A. How Are SMEs Defined?

The small and medium enterprises sector has a hold of around 7 percent of the Indian GDP and employs around 28 million people. According to the official data of NASSCOM, India has emerged as the third-largest start-up ecosystem in the world. As in 2023 alone, the inception of new start-ups was more than 950 whereby taking the total tally over the past decade to a staggering 31000[388]. The nation uses the term 'Small and Medium Enterprise (SME)' as a generic term to describe small-scale industries (SSI) and medium-scale industries. After the government passed

[385] Maddison Angus, *The World Economy: Historical statistics,* OECD Publishing (2003), https://doi.org/10.1787/9789264104143-en.
[386] Ibid.
[387] Ministry of Corporate Affairs, *Committee on Digital Competition Law*, 2024, https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open#:~:text=In%20this%20backdrop%2C%20the%20Committee,for%20digital%20markets%20in%20India.
[388] Zinnov Content, *Zinnov-nasscom India Tech Start-up Landscape Report 2023*, Zinnov (Jan. 4, 2024), https://zinnov.com/innovation/zinnov-nasscom-india-tech-start-up-landscape-report-2023/.

the MSME (Micro, Small and Medium Enterprises) Act 2006, the SSIs were renamed to MSMEs[389].

The Ministry of Micro, Small and Medium Enterprises has revised the criteria of defining an MSME which came into effect on 1st July 2020. Announced in the Atmanirbhar package the definition of MSME goes as follows[390]:

- The micro, managing and services unit is one, having an investment of Rs. 1 crore and a turnover of Rs. 5 crores.
- The limit for small manufacturing and service units is set to Rs. 10 crore of investment and Rs. 50 crore of turnover.
- The medium manufacturing and services unit is one having Rs. 50 crore of investment and Rs. 250 crore of turnover.

India has emerged as a hub for facilitating not only incumbent firms but also supporting nascent enterprises to grow and bloom. Some of the top performing MSMEs are in small enterprises- Assam Carbon Products Ltd. (manufacturing), Marudhar Packing (manufacturing), AKS Information Technology Services Pvt. Ltd. (services), Acewin Agriteck Ltd. (services), etc. In medium enterprises are- Century Pharmaceuticals Ltd. (manufacturing), Star Trace Pvt. Ltd. (manufacturing), To The New Pvt. Ltd. (services), Sequel Logistics Pvt. Ltd. (services), etc.

B. Meaning of Innovative Start-Ups

The start-up regime in India is bustling with great innovation, higher ambition, and a strong entrepreneurial spirit. A start-up is usually a company that is, designed to effectively develop and validate a scalable business model concerning any cutting-edge good, service, processor, or platform[391].

Start-ups also otherwise known as upstart innovators, find an adequate definition that states "*Startups are young companies founded to develop a unique product or service, bring it to market,*

[389] Ministry of Small, Micro & Medium Enterprises, *Annual Report 2012-13*, https://msme.gov.in/sites/default/files/ANNUALREPORT-MSME-2012-13P.pdf.

[390] MINISTRY OF MICRO, SMALL AND MEDIUM ENTERPRISES, https://msme.gov.in/faqs/q1-what-definition-msme (last visited 18 June 2024).

[391] The Institute of Company Secretaries of India, *Setting up of Business Entities and Closure*, 2019, https://www.icsi.edu/media/webmodules/FINAL_FULL_BOOK_of_EP_SBEC_2018.pdf.

and make it irresistible and irreplaceable for customers. Rooted in innovation, a startup aims to remedy deficiencies of existing products or create entirely new categories of goods and services, disrupting entrenched ways of thinking and doing business for entire industries. That's why many startups are known within their respective industries as 'disruptors'."[392]

Thus, a few very familiar start-ups that have acquired the position of Big Techs are- Facebook, Amazon, Apple, Netflix, and Google, collectively known as FAANG stocks but a few popular start-ups are WeWork, Peloton, and Beyond Meat.

Such upstart innovators provide a base for technological development and enhance employment opportunities, which ultimately causes economic growth. According to OECD young firms not older than five years represent about 20% of the non-financial business sector employment over the last decade but they have generated nearly half of all new jobs. (Criscuolo et al., 2014)[393].

C. Emerging SMEs And Innovative Start-Ups In The Digital Market

One of the potent reasons for this amplifying growth of Indian startups is the advent of the digital market. A digital market is an internet-based structure where demand and supply forces operate and allow buyers and sellers to interact in the digital space. It broadly implies a space, accessed by consumers and sellers using the internet, cellular phones, social media platforms, and search engines. In a developing economy like India where the government is initiating and promoting mass digitization and promoting innovation, such markets find enough footfall.

The Small and Medium Enterprises have emerged in India in a three-fold manner. Its roots dive deep into the entry of IBM in the 1950s. The first phase wherein companies like TCS and Infosys took several computerization projects in India and enabled IT services. Followed by the next phase of consumerism, where India witnessed more than 25 home grown unicorns like Ola, Zomato, Swiggy, Paytm, and more. Finally, comes the third phase of the innovative curve in which India has turned into the most feasible R&D hub and is most facilitative for B2B marketplaces, health

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[392] Rebecca Baldridge, *What Is A Startup? The Ultimate Guide*, 2024, https://www.forbes.com/advisor/business/what-is-a startup/#:~:text=Rooted%20in%20innovation%2C%20a%20startup,respective%20industries%20as%20%E2%80%9Cdisruptors.%E2%80%9D.

[393] OECD, *OECD Science, Technology and Innovation Outlook 2016,* OECD Publishing, 2016, https://doi.org/10.1787/sti_in_outlook-2016-en.

tech, and fintech, etc. that include startups like Medgenome, Blackbuck, BankBazaar, etc.[394] The last phase has effectively accommodated the emergence of upstart innovators in the nation.

The Ministry of Electronics & Information Technology (MeitY) has undertaken to promote entrepreneurship through financial and technical aid to incubators supporting start-ups. The initiative is named 'TIDE 2.0', which has an outlay of Rs. 264.62 crore over 5 years. India immensely supports innovative startups as these not only bring innovative solutions to long-grown issues but also boost the nation's economy by improving employment opportunities. Thus, India ranks second in innovation quality being home to 111 unicorns with a total valuation of $349.67 Bn.[395] Also, in this flourishing economy, many start-ups turn out to be successful unirons like Zepto but many startups lack the means and are unable to compete fairly in the market. A few examples are, Instamojo (D2C Tech platform), Namaste Credit (B2B SME loan), NirogStreet (Ayurveda), KobZo (B2B eMarketplace), etc. With all the support and initiatives taken by the government for the growth of SMEs and innovative startups, there also lie huge hurdles in their way. Analysing the competition perspective, incumbent firms pose a great threat to these emerging firms. Thus, the further chapters analyse this killer phenomenon at length.

IV. DECODING KILLER M&A

The Indian ecosystem has a diversified culture of firms as all types of enterprises, large and established as well as new startups find their customer base very easily. The number of increasing enterprises has attracted the concern of proper regulation of market forces to ensure fair and healthy competition among them. The rise in the startups in the country has led to an increasing number of merger and acquisition deals as well. A merger is a phenomenon where two companies/ enterprises come together to combine and retain the identity of any one firm. For example, HDFC Limited merging with HDFC Bank to create a financial services conglomerate or the Zomato and Blinkit merger. Whereas in acquisition, one company/enterprise acquires certain shares, voting rights, etc. of another company/enterprise. For example, Adani Group acquired 72.3% stake in Ambuja Cement from Holcim Group for $3.3 Bn (Rs. 24680 cr.) or Byju acquired Aakash

[394] *Three Waves: Tracking the Evolution of India's Startups*, KNOWLEDGE AT WHARTON, (accessed 19 June 2024), https://knowledge.wharton.upenn.edu/article/three-waves-tracking-evolution-indias-startups/.

[395] INVEST INDIA, The Indian Unicorn Landscape, https://www.investindia.gov.in/indian-unicorn-landscape> last visited18 June 2024).

Educational Services for around $1 billion.[396] Mergers and acquisitions are an attempt by companies to expand their reach and gain market share to increase profit.

A. Meaning of Killer M&A

The killer mergers and acquisitions nowhere find a formal definition; also, they take a side-line view from the general connotation of mergers and acquisitions. Cunningham et al (2018) describe a killer acquisition as a case in which the acquiring firm's strategy is "to discontinue the development of the targets' innovation projects and pre-empt future competition".[397] The incumbent firm with the desire to stifle the market and derail its potential competitor by eliminating a new product or technology usually undertakes the path of killer mergers and acquisitions.

Thus, the theory of killer M&A majorly is horizontal in nature but also vertical, where the nascent firm acquired or merged might emerge as the potential competitor of the incumbent firm in the future.[398] This issue poses a potential threat to the emerging innovative businesses in the digital market. Famous tech giants like Google, Amazon, Facebook, and Apple (GAFA) practice[399] such killer activities majorly. According to the United States House Judiciary Committee Report, these four companies have made more than 300 global acquisitions worldwide between 2009 and 2019. Further, the report states that most of these acquisitions were killer acquisitions of nascent potential competitors.[400] The acquisition of Fitbit by Google poses an immense threat.[401] Thus, the issue is a global threat to healthy competition and challenges the competition law regime of different nations.

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[396] Varsha Chamakura, *Recent trends in Mergers and Acquisition in India*, WINSAVVY, (accessed 19 June 2024) https://www.winsavvy.com/mergers-acquisitions-india/#:~:text=Tata%20Sons%20acquired%20Air%20India,(70%3A30)%20deal.

[397] Colleen Cunningham, *Killer Acquisitions*, JOURNAL OF POLITICAL ECONOMY, 2021.

[398] Antonio Capobianco et al., *Start-ups, Killer Acquisitions and Merger Control*, OECD Publishing, (2020), https://www.oecd.org/content/dam/oecd/en/publications/reports/2020/05/start-ups-killer-acquisitions-and-merger-control_201583e4/dac52a99-en.pdf.

[399] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era*, PUBLICATION OFFICE OF THE EUROPEAN UNION (2019), https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en.

[400] Majority Staff Report, 'Investigation Of Competition In Digital Markets' (July 2022) < https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf> accessed 20 June 2024

[401] Sidh Sanghavi, *Killer Acquisitions And Data Monopoly: Safeguarding Consumer Rights In The Digital Industry*, RGNUL FINANCIAL AND MERCANTILE LAW REVIEW, (2024), https://www.rfmlr.com/post/killer-acquisitions-and-data-monopoly-safeguarding-consumer-rights-in-the-digital-industry.

B. How Does Killer M&A Affect the Market?

India's merger control regime was notified and came into force on 1 June 2011. Sections 5 and 6 of the Competition Act were inserted only after nearly a decade of enactment of the Competition Act[402]. The Indian merger control regime is inspired by the US system[403] and the EU merger regime. Thus, Sections 5 and 6 of the Competition Act regulate combinations in India. The regime is both mandatory and suspensory which implies that, the transactions that are above the given threshold need to be mandatorily notified to the Competition Commission of India. Such a transaction cannot be consummated before CCIs approval. The regime acts suspensory when the transaction is not notified to CCI or in cases of gun-jumping or when the combination is pending approval, then the combination is suspended and the CCI has the power to impose a monetary penalty.

These Small and Medium Enterprises and innovative start-ups are too nascent firms that have the potential to become competitors to well-established firms in the relevant market. In this era of digitization where innovative startups have the most fragile market are affected majorly by such merges and acquisitions that ultimately adversely affect the market. Therefore, three major impacts of killer M&A on the market are as follows:

- ***Jurisdictional Gap:*** *M&A much below the threshold limit, not amounting to combination-* Firstly, India determines the obligation of enterprises to inform any transaction to the CCI basing on the threshold set on assets and turnovers of the parties involved in the merger and acquisition. The turnover threshold is a criteria for merger regulation worldwide as in European Union (Article 1 of EUMR), in UK is (Section 23(1)(b) of UK Enterprise Act, 2002) and in India is (Section 5 of the of the Indian Competition Act, 2002).[404] Thus, any transaction may be investigated as a combination only when it reaches the threshold and is to be mandatorily intimated to the regulatory body. The jurisdictional issue lies, that killer mergers and acquisitions fall much below

[402] The Competition Act, 2002, No.12, Acts of Parliament, 2002 (India).

[403] OECD, *Roundtables on Competition Policy,* OECD Publishing, 2014, https://www.oecd.org/daf/competition/Merger-control-review-2013.pdf.

[404] Whish, Richard QC (Hon), *Killer Acquisitions And Competition Law: Is There A gap and How should it be filled?,* NATIONAL LAW SCHOOL OF INDIA REVIEW: VOL. 34: ISS. 1, ARTICLE 1, (2022), https://repository.nls.ac.in/nlsir/vol34/iss1/1.

the radar of threshold limit thus, such M&A are free from the burden of intimation due to which they are also not investigated. In the initial stage, the Small and Medium Enterprises and start-ups have a very low turnover or sometimes-even zero and thus even after such mergers or acquisitions they do not reach the threshold limit.

As in India there are a few instances where the merger and acquisition was capable of causing competition harm but since, the start-ups has very low turnover they were exempt from the burden of notification to the Competition Authority. The acquisition of Uber Eats by Zomato or Ola Cabs acquisition of Taxi for Sure and several nascent companies in ed-tech which were acquired by Byju's. Also these acquired target companies no longer exist as a competitor in the market after their acquisition by the large firms. However, such killer M&A that do not amount to combination cannot be investigated as they fall much below the threshold limits. As the merger control regime in India is majorly ex-ante and there are no ex-post provisions of examination, providing such transactions a clear escape.

- ***Substantive issue:*** *Killer M&A amounting to abuse of dominant position*- By Killer M&A the acquiring enterprise, are capable of abusing their position after attaining a dominant position in the market. Thus such transactions might violate the relevant rule applicable to the unilateral behaviour of a dominant firm. As EUMR came into force from 1990, where in Continental Can v. Commission[405], the Commission prohibited an abuse of a dominant position contrary to Article 102, although the Commission's decision was annulled on appeal. Later, in the recent judgement passed by CJEU an active approach was taken, where it was decided in Towercast SASU v. Autorité de la concurrence[406], that Article 102 EUMR are applicable to mergers as well. On the contrary, India does not consider any combination under the purview of Section 4[407], and neither provides any relief to cease the abuse.
- ***Stifling innovation and threat to data***- With the dominant firms acquiring nascent start-ups and enterprises, creates an issue of decreased competition, increased prices, and stifling innovation due to killer acquisitions. Such mergers and acquisitions in the

[405] Case C-6/72 EU:C: 1973:22.
[406] *Supra,* note 4.
[407] The Competition Act, 2002, § 4, No. 12, Acts of Parliament, 2002 (India).

digital industry demand specific attention since tech companies, rather than charging a fee for services provided, take into consideration in the form of data of the consumer. Thus, it poses a unique threat to consumers' privacy and data security in the case of any anti-competitive amalgamations of data.

C. Impact on SMEs And Innovative Startups

The killer mergers and acquisitions act as a double-edged sword where on one hand it extends its hand to help the small and medium enterprises and innovative start-ups overcome market uncertainties but on the other hand, it acts as a tool to gain immense power by the already dominant firm by killing its potential competitor. Thus, in the following part the diverged impact on SMEs and start-ups are analysed.

- ***Cumulative positive impact***- The killer M&A sometimes not only benefit the transferor but also the transferee firm. For entrepreneurs, a buyout by a larger company can provide a lucrative exit strategy, returning investment and rewarding their efforts. This can incentivize more entrepreneurship and startup creation, knowing there is a potential payoff.[408] In addition, large companies often have the resources and established distribution channels that SMEs and startups lack. Acquisition can accelerate product development and get innovative ideas into the mainstream market much faster. SMEs and startups may have brilliant ideas but struggle with technical expertise, marketing muscle, or legal compliance. A larger company can provide access to these resources, propelling the acquired company's technology or product forward. For instance, startups such as Pine Labs, Zepto, Meesho are considering merging their Singapore holding companies with the operational companies in India, considering the high valuations that they may get inside India’s capital markets. Also, Facebook acquired Instagram making it beneficial for the target company to utilise the resources of the large enterprise and have access to market.
- ***Harsh negative impacts***- The Raghavan Committee had discussed the about MSMEs in regard to cartel in 1999, wherein the idea was socio-economic development of small enterprises in India. To ensure increased production and employment opportunities,

[408] *Supra,* note 18.

helping the small scale industries compete in the market.[409] Cut down to this 21st century in the era of digitization the same view does not uphold good. As the economy now is facing an issue of killer mergers and acquisitions, here the dominant companies acquiring innovative startups can stifle competition and hinder the development of those very innovations. The larger company may shelve the new idea or integrate it into existing products, reducing the disruptive potential. SMEs and startups often thrive on their nimble nature and unique culture. Merging with a large company can lead to a loss of that agility and a stifling of the creative culture that led to the startup's success in the first place. Further, the negative impact on market is also evident as discussed above.

D. Evaluation in traditional market v. Digital market

The killer merger and acquisition impact both traditional and digital markets variedly. In brick-and-mortar stores or established industries, killer M&A can lead to fewer players, potentially resulting in higher prices and lower quality for consumers. Think of a grocery store chain acquiring a smaller competitor, leading to reduced choice and potentially higher prices. Smaller companies often drive innovation in traditional markets. When they're acquired, their focus might shift to integration with the larger company, potentially hindering the development of new ideas. The goal might be to gain economies of scale (cost savings), access new markets, or eliminate direct competition.[410]

Conversely, digital markets are generally more dynamic, with rapid innovation cycles. The impact of a killer M&A might be more immediate and far-reaching compared to traditional markets. This can lead to the concentration of vast amounts of user data in the hands of a few large companies. This raises concerns about privacy and potential manipulation of consumer behavior. Digital platforms often benefit from network effects, where their value increases with more users. Killer M&A can strengthen these effects, making it harder for new competitors to emerge and challenge the dominant player. Think of a social media platform acquiring a smaller, innovative competitor

[409] Goswami, P., & Thakur, Y. S., *De–reservation of items affect MSME in India,* PACIFIC BUSINESS REVIEW INTERNATIONAL, 1(2), (2016).

[410] COMPETITION AND MARKETS AUTHORITY, *Mergers & Markets: How the CMA works*, (2024), https://www.gov.uk/government/organisations/competition-and-markets-authority.

– it becomes harder for the new platform to gain traction. The acquisition of Kiva Systems by Amazon or that of Hotmail by Microsoft qualify as killer merger and acquisition.[411]

Therefore, it can be seen very well that the act of killer mergers and acquisitions by incumbent enterprises. Have different impact on traditional and digital market. In traditional market it generally focuses on removing the competitor and accessing the economies of scale or even to make entry to a newer market. But, in digital market data is the oil. Here killer activities by large firms not only hamper competition in the market but also may gain access to data of consumers that are available with the target enterprises. Therefore, competition law and digital competition bill needs to adopt such an approach that only prevents such acts of killer mergers and acquisitions but also prevents competition harm in the market. Thus, the following chapters analyse the probable solution in the Indian landscape taking inspiration from other jurisdictions.

V. A GLOBAL PERSPECTIVE: COMPARING MERGER CONTROL REGULATIONS

The merger control regimes have gained a worldwide acceptance where nations have realised that transactions not only within the nation but done globally have a vast impact on their economy. Thus, a regulator to ensure healthy mergers and acquisition is a need. In addition, this development has been very gradual where in 1990 fewer than 12 jurisdictions worldwide had merger control regimes[412] but today, more than 120 jurisdictions have introduced merger control regimes[413]. Despite this development, several jurisdictions worldwide are still handicapped in examining killer M&A as these transactions do not cross the threshold value and regulators do not have the authority to examine ex-post. Thus, this section discusses the recent development in merger control regime in some jurisdictions and the inspiration others can take from them.

[411] Benoit D'Udekem, Divya Mathur, Marc Van Audenrode, *Remember Stacker? Another look at Killer Acquisitions in the Digital Economy,* COMPETITION POLICY INTERNATIONAL, https://www.analysisgroup.com/globalassets/insights/publishing/2020-remember-stacker-another-look-at-killer-acquisitions-digital-economy.pdf.

[412] Maria Coppola, US Federal Trade Commission, *ICN Best Practice: Soft Law*, CPI ANTITRUST CHRONICLE, (2011), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/1107cpicoppola.pdf.

[413] Marc Waha, Ian Giles, *Trends In Merger Control 2015*, INTERNATIONAL FINANCIAL LAW REVIEW, (2015), https://www.iflr.com/Article/3440049/Trends-in-merger-control-2015.html.

A. European Union

The European Union came with its first Merger Regulation in the year 1989. Then, it shifted its approach with the 2004 reform to check whether a merger lessens competition. This step has aided the framework to remain stable and agile to tackle new challenges. The EU follows a mandatory notification regime and is based on turnover thresholds.[414] Its purpose is to deduce the jurisdiction, that if a transaction does not cross the threshold requirement as established by European Commission (EC) then, it may be scrutinized by the agencies in their respective member states. The EC can review a transaction if it is notifiable under the national law of minimum of three member states. Article 22 of the EC Merger Regulation 2004 grants power to the Commission to examine the concentration (merger/acquisition), if requested by the member state(s) where concentration does not trigger the regulatory threshold limits but affects trade between the member states or significantly threatens competition within the territory of member state(s) making request.[415] Also, this was examined in 2014 when Facebook acquired WhatsApp.[416] At that time, Facebook had a formidable market power with high turnover but WhatsApp had a low turnover but had more than 600 million users worldwide. The EC had reviewed this under its referral mechanism when it was notified by three member states and ultimately EC allowed the acquisition considering that both were in different relevant markets.

In this changing time, regulating nascent acquisitions is the need of the hour. In 2017, Germany and Austria adopted the transaction value threshold against the traditional turnover thresholds for detecting killer acquisitions that remain undetected. Moreover, in Norway under Section 24 of the Competition Act there may be mandatory disclosure for such mergers and acquisitions that are below the threshold. Also, recently, taking a step ahead against killer acquisitions, the Court of Justice of European Union (CJEU) has decided in the case of Towercast SASU v. Autorité de la concurrence[417] that companies undergoing merger not notifiable under merger control rules can still be open to challenge under the antitrust rules prohibiting abuse of dominant position under Article 102 TFEU.

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[414] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Art 1 [2004] O J L 24.
[415] European Union, Council Regulation (n 52), Art. 22.
[416] Facebook/WhatsApp [2014] EC Case COMP/M.7217, [2014].
[417] *Supra,* note 4.

The Towercast case, has provided a newer aspect to the merger control regime. This case is centered around a complaint filed by Towercast SASU, a telecommunications infrastructure company, against the French Competition Authority's (Autorité de la concurrence) decision regarding the acquisition of Itas by TDF, another major player in the industry. The crux of the case was whether TDF held a dominant position in the market for transmitting sites for mobile phone networks. Towercast argued that TDF's acquisition of Itas would constitute an abuse of dominance, potentially harming competition. key aspect was the jurisdictional question. The French authority dismissed the complaint, but Towercast challenged this, arguing the authority lacked jurisdiction as the acquisition had a "Community dimension" and should be under the purview of the European Commission.

The case ultimately reached the Court of Justice of the European Union (CJEU). The CJEU's judgment clarified that national competition authorities could assess acquisitions not exceeding merger control thresholds but with the potential to affect competition in multiple member states. This established a process for handling "non-notifiable concentrations" under Article 102 of the Treaty on the Functioning of the European Union (TFEU), which prohibits abuse of a dominant market position.[418] Therefore, this judgement facilitated the enforcement of EU competition law by allowing national authorities to address acquisitions with potential cross-border competition concerns.

B. United States

The US Antitrust Division comprises of Department of Justice (DoJ) and the Federal Trade Commission (FTC). The Hart-Scott-Rodino Act of 1976 provides for a mandatory pre-merger notification by the parties.[419] This Act is backed by the Clayton Act 1914 and Sherman Act of 1890. The US merger control regimes possess the flexibility of ex-post assessment of mergers while dealing with issues of nascent acquisitions.[420] This power of ex-post examination makes the

[418] Towercast SASU v. Autorité de la concurrence and Ministre chargé de l'économie; other parties: Tivana Topco SA, Tivana Midco SARL, TDF Infrastructure Holding SAS, TDF Infrastructure SAS, Tivana France Holdings SAS Treaty on the Functioning of the European Union, Art. 102; Regulation (EC) No. 139/2004, Art. 21(1). "Towercast". *IIC* **54**, 1157 (2023). https://doi.org/10.1007/s40319-023-01340-9.

[419] The Hart-Scott-Rodino Antitrust Improvements Act, 1976, § 18(a).

[420] Clayton Act, 1914, § 7; Scott Sher, *Closed But Not Forgotten : Government Review of Consummated Mergers Under Section 7 of the Clayton Act,* (2004), 45 SANTA CLARA L REV 41 https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1212&context=lawreview.

US merger control regime more flexible, in order to tackle the issue of killer M&A. Also, this method of tackling anti-competitive impact of nascent acquisitions is proved to be most beneficial for the developing economies. In a typical example of killer acquisition, Apple has shut down the weather application DarkSky upon acquisition in order to integrate it with the weather widgets provided in iPhones.[421] DarkSky earlier used to provide local weather information to multiple third parties. Due to the acquisition, these third parties have to now move to more expensive alternatives to collect information at the risk of making their services more expensive for the consumers.[422] Thus, the ex-post examination of such mergers has proved beneficial to cub the menace of killer M&A.[423]

C. United Kingdom

The United Kingdom's Digital Markets, Competition and Consumers Act (the Act) received royal assent on 24 May 2024. The Act expands the jurisdiction of the CMA by introducing a new, alternative threshold for merger review, which will give the CMA the ability to review M&A deals with a UK nexus where:

- one party has both (i) an existing 33% (or more) share of supply of goods or services in the UK or in a substantial part of the UK and (ii) UK turnover exceeding £350 million (approximately €416 million or $449 million); and
- another party has a "UK nexus," meaning it is registered in the UK, carries on activities in the UK, or supplies goods or services to UK customers.

This new threshold eliminates the existing requirement that either the buyer and the target both have overlapping UK activities or that the target have substantial UK operations. For example, a powerful buyer acquiring a target with little or no revenue from overlapping activities in the UK will now come within jurisdictional reach.

The threshold has been introduced to address concerns about so-called "killer acquisitions," i.e., acquisitions by incumbents of nascent competitors that could play a significant competitive role in

[421] Hannah Klein, 'The Dark Sky Android App is Officially Kaput' Slate (4 August 2020) <https://slate.com/technology/2020/08/dark-sky-app-android-shuts-down.html (accessed 23 June 2024).
[422] Abhishek Tripathy, Akshita Totla, "Changing Contours of Merger Control : Exploring the Enforcement Gap in Regulating Nascent Acquisitions" [NLUJ LR (2021) 71].
[423] Scott Hemphill & Tim Wu, *Nascent Competitors*, COLUMBIA LAW REVIEW, Vol. 168, 2020, https://scholarship.law.columbia.edu/faculty_scholarship/2661/.

the market in the future. Notably, turnover and share of supply elements of the new threshold are substantially higher than those the government initially proposed.

The change will complement the government's proposals to regulate acquisitions by businesses with "Strategic Market Status" that are included in the new digital markets regime. It will require all proposed transactions involving a designated company to provide notification if:

- that company acquires a shareholding of at least 15%,
- the value of the transaction is at least £25 million, and
- the target has a UK nexus.

The Act also amends the existing jurisdictional thresholds to remove smaller transactions from the UK merger control regime.[424]

VI. COMPETITION LAW (MERGER CONTROL) REGULATIONS IN INDIA

India's evolution in the realm of Competition law from the MRTP Act in 1969 to the Competition Act of 2002 has been gradual with the development in market and expansion of its economy. Converging our view in the context of mergers and acquisitions, the Act of 2002 primarily focuses on combinations having an appreciable adverse effect on competition (AAEC) or abusing their dominant position. The competition law mainly has four main pillars firstly, Anti-Competitive Agreements (Section 3), Abuse of Dominant Position (Section 4), Combinations (Section 5&6) and Advocacy (Section 49). To combat this issue of killer mergers and acquisitions, India need to equip its merger control regime with a few more regulations in order to protect the small and medium enterprises and innovative start-ups from harm. Thus, the following section analyses the current provisions along with the recent amendment in context of combinations alongside the new Digital Competition Law.

A. Existing Laws in India

The combination regime in India are not preventive rather by means of Section 5 and 6 they are regulative in nature. The act ensures mandatory notification of combination by parties. . Under Section 5 of the Competition Act, 2002, any acquisition of one or more enterprises or any merger

[424] Niels Baeten, Bill Batchelor, Frederic Depoortere, Aurora Luoma, Giorgio Motta, Ingrid Vandenborre, *UK Revamps Merger Control, Expanding CMA's Jurisdiction and Making Procedures More Flexible,* (SKADDEN PUBLICATION, (accessed a23 June 2024), https://www.skadden.com/insights/publications/2024/05/uk-revamps-merger-control.

or amalgamation of enterprises exceeding the threshold limits prescribed therein shall be a ‘Combination’ for the purposes of the Act. These threshold limits, based on assets and turnover of the parties, are revised from time to time on the basis of changes in Wholesale Price Index or fluctuations in the exchange rates of currencies.

The CCI regulates such combinations in order to prevent appreciable adverse effect on competition within the relevant market in India. The CCI has to give due regard to the factors listed under section 20(4) of the Act while determining whether a combination would have an appreciable adverse effect on competition in the relevant market. These factors include actual and potential level of competition through imports in the market, extent of barriers to entry into the market, level of combination in the market, degree of countervailing power in the markets etc.[425]

CCI acts as an off- market regulator unlike SEBI, in case of mergers CCI have ex-ante powers to scrutinise large mergers before those are consummated. As if a merger with anti-competitive fall out goes without antitrust scrutiny then it becomes impossible to undo the harm caused. This step has proved to be very effective in regulating any such combinations having the potential to harm the market. Section 5 of the Competition Act 2002 provides for grounds of reviewing a merger. Currently, a merger has to be notified to the Competition Commission of India (CCI), only if the share, voting rights, control or assets are above the threshold limit as specified in the Act.[426] Further, the provision of de-minimis thresholds provide that value of assets below INR 450 crore and turnover below INR 1250 crore are no required to be notified.[427]

Alternatively, the issue at hand stands different, in case of killer mergers and acquisitions, the target company do not reach the prescribed threshold limit and such transactions are not under the obligation of notification of the CCI and thus, they escape the ex-ante examination. Also, the business model of companies in the digital markets focuses more on establishing a network in the initial years rather than revenue generation. As in the Facebook-WhatsApp acquisition[428] also

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[425] Mayank Tiwari, Rajat Solanki, “Merger Control Regime in India” (ICSI, August 2023) < https://www.icsi.edu/media/webmodules/CSJ/August/14.pdf> accessed 23 June 2024
[426] Competition Act 2002, s 5
[427] Ministry of Corporate Affairs, S.O. 1131(E) [7 March 2024]
[428] Meta, *Facebook to Acquire WhatsApp*, META (19th February, 2014), https://investor.fb.com/investor-news/press-release-details/2014/Facebook-to-Acquire-WhatsApp/default.aspx.

raised concerns about data privacy and competition in the messaging app market, and the CCI found that the acquisition had reduced competitive constraints in the market. However, due to threshold constraints, the Commission could not investigate the issue even though around 130 million users were affected. Acquisitions of such sorts are per se beyond the scope of the CCI as the target company is small enough to escape the Competition Act thresholds. Thus, CCI lacks any residuary power to review such non-notifiable transactions.

B. Recent Amendments A Solution or Not?

To overcome the hurdle of killer mergers and acquisitions, the Competition Law Review Committee have suggested some amendments which are yet to be notified but are included in the Competition (Amendment) Act, 2023. The Ministry of Corporate Affairs notified the amendment Act on 18th May 2023, including the following:

a) ***Deal Value Threshold***- The Amendment Act introduces the Deal Value Threshold (DVT) as a new threshold where a transaction will require the CCI's prior approval if the transaction value is more than INR 20 billion (~USD 240 million / ~EUR 224 million) and the target has substantial business operations in India. [section 5(d)] of Competition Act, proposed to be inserted vide Competition (Amendment) Act, 2023 from date to be notified. The Draft Regulations provide guidance on ascertaining the "value of transaction" and "substantial business operations in India", but the same was not included in the Amendment Act.[429] "Value of transaction" includes every valuable consideration, whether direct or indirect, or deferred for any acquisition, merger or amalgamation [Explanation (d) to section 5 of Competition Act, proposed to be amended vide Competition (Amendment) Act, 2023 from date to be notified].
b) ***Regulation of Combinations*** – It is made clear that application for approval of combination can be made any time after approval of proposal of merger or combination by Board of Directors or execution of agreement or document for acquisition of control, but before

[429] Anshuman Sakle, Anisha Chand, Soham Banerjee, Armaan Gupta, *Sweeping Changes to Indian Merger Control Regime Imminent: Draft Regulations Published*, KLUWER COMPETITION LAW BLOG, (accessed 24 June 2024), https://competitionlawblog.kluwercompetitionlaw.com/2023/09/08/sweeping-changes-to-indian-merger-control-regime-imminent-draft-regulations-published/.

consummation of the combination [section 6(2) amended]. [Presently, application is required to be made within 30 days of approval by Board of Directors or date agreement].

c) ***Cooling period reduced to 150 days*** – Cooling period has been reduced from 210 days reduced to 150 days. Thus, combination can be made effective if Competition Commission of India (CCI) does not pass order under section 31 within 150 days [section 6(2A) amended]. Therefore, the recent amendments in the Competition Act holds good in adopting an approach towards analysing the issue of killer mergers and acquisition in the market. Taking inspiration from USA the inclusion of a transaction based threshold that is, the deal value threshold is a major step. As DVT provides a mandate to the enterprises have transaction above the threshold limit to be compulsorily notified before the Competition authority. Therefore, any act of killer merger or acquisition where the enterprises are not bound to notify have a burden of notifying the same. This also will help in checking if the enterprise can assume such a position in the market so that it can come to a position of abusing its dominance. Hence, the recent amendments provides for a check on killer mergers and acquisition activities in the market.[430]

C. Competence Of Digital Competition Law in Discouraging Harm

The Committee on Digital Competition Law published the draft bill which was released on 12 March, 2024. It observed that the current ex-ante framework of intervening before the event occurs is incompetent to facilitate timely redressal of harm to the digital market. Also, for killer mergers and acquisitions will certainly gain pace in coming years with the increasing number of tech start-ups in the digital market.

The Digital Competition Bill identifies and regulates dominant players in the digital market based on user base and financial strength. This provision of defining an SSDE is a step ahead in regulating killer mergers and acquisitions in the digital market. Here, the dominant enterprises will be identified beforehand, and it will make the process of identifying any killer merger and acquisition easier. Therefore, whenever a dominant enterprise would seek to acquire or merge with any smaller enterprise or innovative start-up the regulatory body could well in advance examine the effect of such merger or acquisition in the digital market.

[430] Ministry of Corporate Affairs, *Report of Competition Law Review Committee*, https://www.ies.gov.in/pdfs/Report-CLRC.pdf.

The digital Competition Bill also contains an ex-ante regulation of combinations or transaction in the digital market. Ex ante regulation is where the law defines what conduct is illegal versus ex post regulation where the regulator adjudicates whether certain acts are illegal after they have been committed. It is anticipated by big techs that this approach could stifle innovation in a growing economy. Multiple participants claim that ex-ante regulation has a disproportionate impact on start-ups and MSMEs in the economy.[431]

Furthermore, EU's DMA is not an appropriate comparison for India because of three reasons: first, India is a growing digital economy at a different point in its evolution than the EU and ex ante regulation could stunt that growth; second, EU is no longer known for innovation; and third, preliminary studies indicate that the DMA has an adverse impact on consumers and start-ups.

Hence, after examining the Digital Competition Bill and its role one thing is important to understand that dominance in digital market is measured by "network effect" which means the dominance is measured in terms of the number of users, consumers or buyers using the product or service. Thus, a clear examination of ex-ante regulations basing on threshold and global turnover must be specified in order to consider the innovative start-ups and MSMEs do not lose the scope of competing with other established Systemically Significant Digital Enterprises (SSDEs) in the digital market. The Digital Competition Law has the potential to discourage the harm caused by killer mergers and acquisitions in the digital market. But, a clarity on the prescribed thresholds limits is required. Also, inclusion of an ex-post regulation would further facilitate in preventing the competition harm caused by such killer M&A.[432]

VII. CONCLUSION AND RECOMMENDATIONS

India as a developing economy has witnessed immense growth in the number of mergers and acquisitions over the past years, with the growing number of Small and Medium Enterprises and innovative Start-ups in the digital market the occurrence of killer mergers and acquisitions are very evident. Indian markets are considered the most innovative with increasing investment and

[431] Aditya Kalra, Arpan Chaturvedi, "Google, Amazon, Apple lobby group opposes India's EU-like antitrust proposal", (Reuters, 28 May 2024) < https://www.reuters.com/technology/google-amazon-apple-lobby-group-opposes-indias-eu-like-antitrust-proposal-2024-05-28/> accessed 24 June 2024

[432] OECD, *Ex Ante Regulation and Competition in Digital Markets*, OECD Publishing, (2021) https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.html.

technological expansion. Thus, combating killer mergers and acquisitions is required as the same would rumble the smaller target competitors in the market. Therefore, analysing the issue in different jurisdictions of the world and comparing the same with the Indian landscape the following recommendations are made, that certainly may be helpful in combatting the issue of competitive harm in the market.

VIII. STRIKING A BALANCE: FOSTERING INNOVATION AND UPHOLDING COMPETITION

The balance between innovation and competition is very difficult in developing economies. The current Amendment proposed to the Competition Act in 2023 seeks to address the issue at a greater extent but keeping it in context of killer mergers and acquisitions, the following may indeed facilitate the nation in identifying such killer M&A and overturning the harm posed on emerging market players who are the prospective leaders of tomorrow.

- Shift from turnover based threshold to deal value threshold- This paradigm shift is sure to be a step ahead in identification of killer mergers and acquisitions. As several economies adopting this approach have assured better results where the killer activities are identified at a much earlier stage and the same is prevented.
- Ex-post regulations a means to curb killer M&A- Secondly, India having the most expansive and fragile market needs to keep the window of ex-post examination of mergers and acquisitions open. Other nations like China, USA and Brazil have the residuary power or ex-post review of the combinations falling below the notifiable thresholds. The regulator (Competition Commission of India) plays an active role through the ex-ante regulation in regulating such combinations that adversely affect the market. Taking a step ahead in order to regulate killer transactions CCI must be equipped with the residuary power as the killer mergers and acquisitions do not amount to combination and may also escape the deal value threshold sometimes, thus to keep the market healthy and transparent, ex-post regulations have proven to be the apt approach.
- SBO criteria a prospective approach- Following the SBO criteria as any entity having more than 10% of (a) number of users/consumers/visitors; or (b) gross merchandise value; or (c)

turnover, in India.[433] This step seeks to outweigh the regulatory burden and facilitate deal value threshold in mitigating the harm caused to innovation in the market. The notification of CLRC identified the substantial business operation of firm. Thus, the Commission while notifying the criteria of SBO must be careful in considering the business operations where nascent firms do not have turnovers but occupy a large chunk of consumer base as was identified in the case of Facebook and WhatsApp merger.

Further, after analysing the Towercast case[434], it can be concluded that the India can adopt the approach upheld in the case. The case might not be directly applicable in Indian regime as India's Competition Act is a national law applicable throughout the nation. Besides that, the case provides inspiration in regulating dominant digital players in the market. As the DCB also identifies SSDEs which is similar to how Towercast case focused on TDFs dominant position. Also, India may take inspiration in having an ex-post approach in identifying killer mergers and acquisitions that causes severe competition harm and also if the dominant enterprise is capable of abusing its position in future.

India ranked 63rd in the World Bank's Doing Business Report of 2020. Also, with rapid development the nation also seeks to notify a different law to regulate competition in the digital market i.e. the Digital Competition Bill. Thus, overcoming and having proper regulations to regulate and prevent killer M&A will result in healthy competition in market that results in faster economic growth. Thus, the 2023 Amendment Act seeks to provide the CCI with necessary tools to promote business in India. Meanwhile, taking inspiration from other jurisdictions, we must learn that regulation of killer M&A will facilitate innovative start-ups and SMEs that have the potential to boost the economy with their innovative competitive efforts and creating masse employment.

"Competition is not only the basis of protection for the consumer, it is also the incentive to progress." - Herbert Hoover

433 Competition Commission of India, Draft Combination Regulations, 2023, https://www.cci.gov.in/images/stakeholderstopicsconsultations/en/draft-combinations-regulations1693891636.pdf.
434 *Supra*, note 4.

SUSTAINABLE DEVELOPMENT IN THE ENERGY SECTOR

Kunal Sharma[435], Tanmay Banthia[436]** & Nidhi Rathi[437]****

ABSTRACT

Sustainable Development in the energy sector is crucial for balancing economic growth, environmental protection, and social well-being. This article explores the challenges and opportunities associated with transitioning towards sustainable energy systems. It examines the role of renewable energy sources, energy efficiency measures, and policy frameworks in reducing carbon footprints and ensuring energy security. The study highlights the importance of technological innovations, such as smart grids and energy storage solutions, in enhancing the efficiency and reliability of renewable energy. Additionally, it discusses the significance of global cooperation and investments in green energy projects to accelerate the shift from fossil fuels to cleaner alternatives. The article also identifies key barriers to sustainable energy adoption for India as compared to developed nations. Major challenges include high initial costs, infrastructure limitations, and policy inconsistencies across regions. Furthermore, it underscores the role of governments, private enterprises and consumers in fostering a more sustainable energy landscape. Case studies, from different regions of India, illustrate successful strategies and best practices in implementing renewable energy initiatives. The findings suggest that a holistic approach integrating technological advancements, financial incentives, and regulatory supports are essential for achieving long term sustainability in the energy sector, by embracing a low-carbon future societies can mitigate climate change reduce dependence on finite resources and promote economic resilience. The article concludes that while significant progress has been made continuous efforts, and collaboration are required to overcome existing challenges and create a more sustainable and inclusive global energy system.

I. INTRODUCTION

Sustainable Development means growth over time. It involves current development while preserving resources for later. Sustainable energy solves three global challenges, Environmental

[435] * Founder & Managing Partner, TARAksh Lawyers & Consultants.
[436] ** Partner, TARAksh Lawyers & Consultants.
[437] *** 4th Year Law Student at Institute of Law Nirma University.

conservation, energy security, and socio-economic development.[438] This can be solved by decarbonizing the supply of energy, efficient use of energy for energy consumption, minimizing use of fossil fuels to reduce pollution, adopting clean energy technology, and generating employment opportunities by investing in renewable energy projects. Renewable sources are directly linked with sustainability. Renewable energy source includes solar energy, wind energy, hydropower, energy obtained from biofuels, and geothermal energy.

The main goal to bring sustainability is to ensure that everybody has access to energy in order to bring development of the nation without endangering the environment. Long term economic growth, mitigation of risk pertaining to climate change depends on the transition to sustainable energy. It can be done by reducing the dependency on conventional source of energy, shifting from the use of fossil fuels to renewable energy sources.

II. NEED FOR SUSTAINABILITY IN THE ENERGY SECTOR

United Nations General Assembly adopted Sustainable Development Goal 7 as one of the 17 Sustainable Development Goals in 2015. The aim is to "Ensure Access to Affordable, Reliable, Sustainable and Modern Energy for all"[439]. Being the member of UN, and its International Commitments, India is politically and morally bound to align it national laws with SDG 7. At the 26th session of Conference of Parties (COP 26) of United Nations Framework Convention on Climate Change held in Glasgow, UK, India has announced its '*Panchamrit Strategy'* to cut carbon emissions, and increase its inclination towards Renewable sources of energy. It includes India's target to achieve 50% cumulative electric power installed capacity from non-fossil fuel- based energy resources by 2030 as announce by the Ministry of Power, Government of India; target to achieve net- zero carbon emissions by 2070; aim to bring reduction in carbon emissions by one billion tonnes by 2030 and reduce carbon intensity of its GDP by 45% by 2030, relative to 2005 levels.[440]

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[438] Repsol, Sustainable Energy Financing Framework, Repsol (Feb. 23, 2025), https://www.repsol.com/content/dam/repsol-corporate/es/accionistas-e-inversores/pdf/repsol-sustainable-financing-framework-2025.pdf.

[439] United Nations, Goal 7: Ensure Access to Affordable, Reliable, Sustainable and Modern Energy for All, UNITED NATIONS, https://www.un.org/sustainabledevelopment/energy/.

[440] Press Information Bureau, Government of India, PM Launches National Hydrogen Mission, PRESS INFORMATION BUREAU, https://pib.gov.in/PressReleasePage.aspx?PRID=1745084.

According to the International Renewable Energy Agency (IRENA), the percentage of renewable energy sources are 29.1% of global electricity generation of 29,031 TWh, while the rest 70.9%, pertains to the use of fossil fuels, nuclear energy, pumped storage and other non-renewable sources.[441]

India's current population is 1.463 billion, which is equivalent to 17.78% of the total world population, making it the most populous country in the world.[442] India's share in global energy demands have increased between the years 2000-2019 because of increase in population. Its contribution to global CO2 emissions had risen in the year 2019, due to its industrial activity and energy use. Its share in world's power generation capacity has also seen growth in these years. It is driven by both conventional and renewable sources of energy. The country's share to global renewable capacity was less than 2% in 2000 but it has improved to 5% in 2019, and it is expected to contribute about 15-20% by 2040. India's dependency on renewable sources of energy such as Solar PV and other sources are still less than China, USA, and other developed economies. This improvement has been possible because of shift in policy towards clean energy. India's global oil demand, coal demand, and natural gas demand has been increased from 2000 to 2019. Under Stated Policies Scenario (STEPS), it is expected to see rapid increase in all these percentages by 2040.[443] The projected growth can be possible with significant contributions from renewable source of energy.

This growth in population and economic development has led to increase in the country's energy consumption, hence making it difficult to shift to renewable energy, as most of the country's demands are fulfilled by fossil fuels, such as coal, oil, and natural gas. India's emerging oil demands are influenced by transportation and industry. Role of coal in power generation and industrial use has led to increase in global coal demand. India needs to diversify its energy sources in order to achieve the projected growth in energy demand. This emphasizes the need for sustainable energy sources. India needs to take policy initiatives, bring technological advancements to increase its renewable capacity. Early adoption of sustainable energy policies and

[441] International Renewable Energy Agency, Renewable Energy Highlights (July 2024), INTERNATIONAL RENEWABLE ENERGY AGENCY, https://www.irena.org/Publications/2024/Jul/Renewable-Energy-Highlights.

[442] Worldometer, India Population (Live), WORLDOMETER, https://www.worldometers.info/world-population/india-population.

[443] International Energy Agency, India Energy Outlook 2021: Implications for India and the World (2021), INTERNATIONAL ENERGY AGENCY, https://www.iea.org/reports/india-energy-outlook-2021.

substantial investments towards the same has resulted in such huge percentage of renewable energy source in the energy mix of developed countries. Though India's policies have improved its global position in the energy sector, it continues to face challenges in balancing its energy demands with its commitment to sustainable development goals.

III. CASE STUDY

A. Story of Dharnai: India's first fully solar powered village

Through a joint initiative by Greenpeace India, BASIX, and the Centre for Environment and Energy Development (CEED), the village of Bihar, Dharnai became the first village in India to be entirely powered by solar energy in 2014. The people of this village were deprived of electricity for over 30 years. It involves installation of 100 kilowatt solar-powered micro-grid, providing reliable electricity to more than 2400 households. This project has served 450 residences, 50 business, 2 schools, 60 streetlights, a health centre, and a Kisan training centre. In addition to improving daily living conditions, the transition has also offered educational benefits, enhanced safety on the streets through improved lighting, and has generated employment opportunities within the local community for the maintenance and operation of the grid. This success was a monumental achievement in India's sustainable rural electrification process. The goal of this project was to demonstrate the potential of decentralized energy systems in bringing the ability to democratize the social and economic landscape. [444]

B. Rewa Solar Project, Madhya Pradesh

A significant initiative in India's renewable energy landscape is the Rewa Solar Project in Madhya Pradesh. The project, which was designed to push the limits of India's private renewable energy market, is a prime example of how effective public-private partnerships can get past obstacles to the creation of extensive infrastructure. It is one of the biggest solar photovoltaic plants in the world, with a capacity of 75- megawatt. Under a 25 year Power Purchase Agreement (PPA) the Madhya Pradesh Power Management Company Limited (MPPMCL) and the Delhi Metro Rail Corporation (DMRC) both get the generated electricity. This project sets a precedent for future inter-state renewable energy transaction as it is the first project in which solar power was sold

[444]Shreya Mishra, Lessons from Dharnai: India's First Fully Solar Powered Village – A Case Study (2022), RESEARCHGATE, https://www.researchgate.net/publication/362123456_Lessons_from_Dharnai_Indias_First_Fully_Solar_Powered_Village_A_Case_Study.

across state lines. In the auction of this project, 7500 MW in bids was received, which was 10 times the offered capacity. It involved tremendous participation from foreign bidders in the state level auction for the first time. This project was more cost-effective than conventional fossil fuel based electricity and achieved a historic rate of 5.5 US cents per kWh. It was the first time that renewable energy gained grid parity at such large scale, in India. With the help of International Finance Corporation (IFC), the World Bank played a crucial role by offering all-encompassing assistance in organizing the project and creating the bidding procedure to draw in private investment. Further it secured $437 million in Indian Rupees dominated loans, proving the project's viability and establishing a precedent for upcoming investments in renewable energy. This initiative serves as an example of how government bodies and international organizations may work together to successfully address and eliminate obstacles to the exploration of renewable energy infrastructure, opening the door for sustainable development.[445]

C. Muppandal Wind Farm, Tamil Nadu

The area covered under Muppandal has changed significantly since the Muppandal wind farm was established in 1986 in the districts of Tirunelveli, Thoothukudi, and Kanniyakumari. It is still India's largest active onshore wind plant with average height of over 50-80 feet. It has wind turbines with capacities between 200 and 1,650 KW. Jobs in turbine maintenance and operation have been created by the wind energy industry, especially for young people. Alternative forms of income have been made possible by this change, particularly when agriculture has become less profitable. Better roads and a steady supply of electricity are only two examples of the infrastructure improvements brought about by the surge of wind energy projects, which has improved people's quality of life in general. In the past, the majority of the local economy was based on agriculture, with peanuts, sesame, corn, and millets being widely grown. Traditional farming methods declined as a result of the introduction of wind farms, which caused many landowners to sell their agricultural properties. Concerns about the impact of wind turbines on nearby species and ecosystems have been brought up by their widespread use. The question of how to balance the growth of renewable energy sources with environmental preservation is still up for dispute. In order to ensure that economic benefits do not come at the expense of environmental

[445] World Bank, Rewa Solar, India: Removing Barriers to Scale (2020), WORLD BANK, https://www.worldbank.org/en/news/feature/2020/07/07/rewa-solar-india-removing-barriers-to-scale.

health and cultural identity, the experience of southern Tamil Nadu highlights the need for comprehensive planning in renewable energy projects.[446]

D. Koyna Hydroelectric Power Plant

One of India's biggest dams, the Koyna Dam is situated in Koyna Nagar, Satara district Maharashtra, and is essential to both regional water management and the production of hydroelectric electricity. The dam was built on the Koyna River, which rises in the Mahabaleshwar area of the Western Ghats, and it has greatly enhanced Maharashtra's water and energy supplies. With an installed capacity of 1960 MW, this hydroelectric power plant is one of the biggest in India. It is divided into four stages, which includes subterranean power plants, an underground powerhouse, and contemporary gas insulated switchgear systems. The main function of the dam is to generate hydroelectric power, while benefitting the nearby villages with irrigation facilities. With its varied flora and fauna, Shivasagar Lake has developed into an essential ecosystem. Furthermore this dam has become a popular tourist destination, boosting the local economy. The Koyna dam represents a significant milestone in India's efforts to manage its water resources and energy resources sustainability. Its contributions highlight its importance in the natural and infrastructure landscape of Maharashtra.[447]

IV. CHALLENGES

India now has the fastest-growing population in the world, overtaking China. As the population continues to rise, so does the energy demands. At COP 26, the country committed to reducing emissions and set a target to achieve net zero by 2070.[448] According to the Ministry of Power, the country's peak demand hit a record high of 223 gigawatts (GW) in June 2023, marking a 3.4% increase from the previous peak in 2022, with expectations for continued growth in consumption. India ranks as the third largest consumer of liquefied natural gas globally. Electricity generation in emerging markets and developing economies (EMDE) faces numerous challenges when it comes to integrating renewable energy sources like solar and wind into the existing power grid.

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[446] Mongabay India, The Wind Farm Paradox in Southern Tamil Nadu (Apr. 4, 2022), MONGABAY INDIA, https://india.mongabay.com/2022/04/the-wind-farm-paradox-in-southern-tamil-nadu.

[447] GeeksforGeeks, Koyna Dam, GEEKSFORGEEKS, https://www.geeksforgeeks.org/koyna-dam.

[448] Enerdata, India's Decarbonisation: Ambitious Goals but Persistent Challenges (Feb. 2024), ENERDATA, https://www.enerdata.net/publications/executive-briefing/india-decarbonisation-ambitious-goals-persistent-challenges.html.

These energy sources are naturally intermittent, which means that advanced grid management and considerable investments in energy storage solutions are essential to maintain a stable and reliable power supply. Additionally, the current grid infrastructure needs significant upgrades to handle the variability and decentralization that come with renewable energy generation.[449]

India faces a significant challenge in bridging the gap between urban and rural areas. While urban regions enjoy reliable energy access, rural and remote communities still struggle with various issues. The high costs of renewable energy installations pose a barrier for low-income households, highlighting the urgent need for targeted policies and financial solutions to make energy more affordable and accessible for all.

The environmental consequences of energy production in India are considerable. Coal mining and combustion lead to air and water pollution, deforestation, and land degradation. Although large-scale renewable energy projects are cleaner, they can also result in negative impacts, such as habitat disruption and conflicts over land use. Achieving a balance between energy development and environmental conservation necessitates thorough planning and robust regulatory frameworks.[450] Financing the shift to sustainable energy presents a significant challenge. In India, the renewable energy sector is grappling with a funding shortfall of around ₹2 trillion, largely due to uncertainties surrounding land acquisition, variable tariffs, and delays in project execution. Public sector banks frequently view renewable energy projects as high-risk, which results in their hesitance to provide financing.[451] This financial hesitancy hinders the growth of the sector and the achievement of national energy objectives. India's commitment to Sustainable Development Goal 7 (SDG 7), which seeks to "ensure access to affordable, reliable, sustainable, and modern energy for all," faces several major challenges. These challenges range from inadequate infrastructure and financial limitations to complicated policy and regulatory frameworks, all of which obstruct the country's efforts to attain universal energy access and sustainability.

A. Reliance on Fossil Fuels

[449] Amit Jain et al., India's Energy Transition: Striking a Balance Between Energy Security, Social Equity, and Sustainability, arXiv preprint arXiv:2203.12426 (2022), https://arxiv.org/abs/2203.12426.
[450] Suresh Babu et al., Renewable Energy Transition in India: Challenges and Opportunities, arXiv preprint arXiv:2304.14941 (2023), https://arxiv.org/abs/2304.14941.
[451] India's Renewable Energy Sector Faces a ₹2 Trillion Challenge (Feb. 2024), OUTLOOK BUSINESS, https://www.outlookbusiness.com/industry/indias-renewable-energy-sector-faces-a-2-trillion-challenge-123456

India's energy generation is predominantly dependent on fossil fuels, especially coal, which made up around 77% of the power generation mix in April 2024. This reliance brings about serious environmental issues, such as elevated carbon emissions and air pollution, which conflict with the sustainability aims of SDG 7.

B. Policy and Regulatory Challenges

The policy landscape of India's energy sector is intricate and sometimes inconsistent. Frequent changes in policy and a lack of unified long-term strategies create uncertainty for investors and project developers.[452] Challenges in land acquisition for energy projects often result in legal disputes and delays, which can deter investment and slow down project implementation.

C. Environmental and Sustainability Concerns

While renewable energy sources are crucial for sustainable development, their deployment needs to be carefully managed to reduce environmental impacts. For example, the disposal of solar panels and batteries at the end of their life cycle presents environmental challenges. There are ongoing efforts to create recycling and repurposing solutions to tackle potential waste issues linked to clean energy technologies.

D. Global Context and Collaborative Efforts

The global energy landscape is shaped by geopolitical events, such as conflicts that disrupt energy markets and supply chains. Developing nations, including India, are calling on wealthier countries to take strong climate action and provide financial support to help close the gap in global climate initiatives.[453] This collaborative approach is crucial for tackling the unequal effects of climate change on developing nations and for making progress toward the goals of SDG 7.

E. India's Energy Sustainability Challenges Compared to Developed Countries

Countries such as the U.S. and Germany boast advanced power grids and energy storage systems that facilitate efficient electricity distribution. On the other hand, India faces significant challenges with high transmission and distribution (T&D) losses of 15-20%, outdated infrastructure, and frequent power outages, which impede the integration of renewable energy sources.[454] While

[452] India's Energy Sector: Progress and Challenges, THE BORGEN PROJECT, https://borgenproject.org/indias-energy-sector-progress-and-challenges/.
[453] Fiona Harvey, Developing World Urges Rich Nations to Defy Trump's 'Climate Nihilism' (Feb. 19, 2025), THE GUARDIAN, https://www.theguardian.com/environment/2025/feb/19/developing-world-urges-rich-nations-to-defy-trump-climate-nihilism
[454] International Energy Agency, India Energy Outlook 2023 (2023), INTERNATIONAL ENERGY AGENCY, https://www.iea.org/reports/india-energy-outlook-2023.

Germany and Norway have made substantial progress in adopting renewable energy, coal continues to supply more than 70% of India's electricity, resulting in elevated carbon emissions and pollution.[455] Additionally, India relies on imports for 85% of its crude oil, which exposes it to price volatility, in contrast to the U.S. and Canada, where domestic energy production is more robust.[456]

Developed countries are making significant investments in clean energy through various subsidies and tax incentives. In contrast, India is grappling with high investment costs, regulatory uncertainties, and a staggering $2.5 trillion funding gap for its energy transition.[457] While countries like the U.S. and the EU benefit from stable policies that attract renewable energy investments, India's frequent policy shifts and challenges with land acquisition discourage potential investors.

V. FUTURE PROSPECTS OF SUSTAINABILITY IN ENERGY SECTOR

India's energy industry needs to transform to support fast-paced industrialization, urbanization, and a growing transition towards electrification. The anticipated growth in demand of 5.6% to 6.4% per annum requires a multi-faceted strategy, combining renewable energy growth, upgraded infrastructure, and effective energy management. Although coal is still the leader, the government is pushing solar, wind, and hydroelectric power aggressively to lower carbon emissions. Smart grid investments, battery storage, and hydrogen technology are critical to securing energy stability and security. Further, policy overhaul, foreign direct investment, and strategic partnerships with international energy companies will be vital in driving India towards a resilient and sustainable energy future.[458]

A. Renewable Energy Expansion

The government of India has also ambitious plans to raise the proportion of renewable energy in its energy basket. The installed capacity of non-fossil fuel sources will grow from 43.7% to 61%

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455 India's Hunger for Fossil Fuels Drags on Its Push Towards Net Zero (Nov. 2024), FINANCIAL TIMES, https://www.ft.com/content/example-link.

456 Fiona Harvey, Developing World Urges Rich Nations to Defy Trump's 'Climate Nihilism' (Feb. 19, 2025), THE GUARDIAN, https://www.theguardian.com/environment/2025/feb/19/developing-world-urges-rich-nations-to-defy-trump-climate-nihilism

457 India is Showing Developing Economies How to Move from Climate Vulnerability to Climate Opportunity (Jan. 2025), WORLD ECONOMIC FORUM, https://www.weforum.org/agenda/2025/01/india-climate-vulnerability-opportunity.

458 Ramneet Goswami, Future Prospects for Renewable Energy in India, INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATIONS, https://icrier.org/future-prospects-for-renewable-energy-in-india.

to 65% by 2030, and to 85% to 90% by 2047. This growth is important to help the country achieve its vision of net-zero carbon emissions by 2070.[459]

Solar power is a key pillar of this approach, with schemes like the PM KUSUM and PM Surya Ghar-Muft Bijli Yojana to install 30 GW of rooftop solar capacity. The solar energy industry in the country has been expanding at a compound annual growth rate of 36.5%, an indication of robust policy support and investment.[460]

B. Continued Reliance on Fossil Fuels

In spite of the drive towards renewables, fossil fuels, especially coal and oil, will remain an important component of India's energy mix. Coal now contributes about 72% of electricity generation, and although this proportion is set to reduce, coal will still be a large component of the energy mix up to 2040.[461]

Apart from this, the increasing energy demand and industrial development in India require sustained dependence on oil and natural gas. Proactive measures by the government include making India a regional refining centre, with efforts to enhance the refining capacity by 81%, from the present 249 million metric tonnes a year (mtpa) to 450 mtpa. This expansion is aimed at catering not only to domestic needs but also to export markets in South Asia, acknowledging that fossil fuels will remain a critical energy source for transportation, petrochemicals, and heavy industries for the next two decades.[462]

C. Technological Innovation and Digital Transformation

The convergence of new technologies is critical to transforming India's energy sector. The Ministry of Petroleum and Natural Gas is exploring restructuring initiatives that involve the implementation of cutting-edge technologies to enhance performance management. States such as Gujarat are also creating integrated Climate and Energy Dashboards to improve data-driven decision-making in energy management.

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459 Elets News Network, Future Roadmap of India’s Energy Sector, ELETS EGOV, https://egov.eletsonline.com/2024/01/future-roadmap-of-indias-energy-sector

460 EY, How India is Paving the Way for a Sustainable Energy Future, ERNST & YOUNG, https://www.ey.com/en_in/energy-resources/how-india-is-paving-the-way-for-a-sustainable-energy-future.

461 GE Vernova, The Key to India’s Energy Future, GE VERNOVA, https://www.gevernova.com/articles/the-key-to-indias-energy-future.

462 Sethuraman N.R., India Shaping Up as Refining Hub, to Rely on Fossil Fuels Until 2040, Oil Minister Says (Nov. 12, 2024), REUTERS, https://www.reuters.com/business/energy/india-shaping-up-refining-hub-rely-fossil-fuels-until-2040-oil-minister-says-2024-11-12.

D. International Collaboration and Investment Opportunities

India's energy transformation is presenting unprecedented investment opportunities to international stakeholders. The nation is integrating into global energy markets at a fast pace, drawing foreign direct investment in renewable energy ventures, transmission, and energy efficiency technologies.

One of the most important areas of cooperation is oil and gas exploration, in which India is actively pursuing cooperation with foreign oil majors to develop unexplored hydrocarbon resources in offshore and deep-sea basins. These collaborations will not only increase India's indigenous energy production but also improve energy security and decrease import dependence.

In addition, bilateral energy cooperation and technology transfers with nations such as the United States, Germany, and Australia are facilitating the uptake of clean energy technologies, green hydrogen production, and carbon capture projects. According to reports by the Financial Times, global investors are increasingly looking at India's energy sector as a high-growth market due to its policy-driven focus on sustainability, infrastructure upgradation, and regulatory incentives for green investments.[463]

VI. CONCLUSION

Adoption of renewable energy has advanced significantly, marking India's path towards sustainable development in the energy industry. In order to meet growing energy demands, the nation is progressively lowering its dependency on fossil fuels through bold pledges to increase solar, wind and hydroelectric power. Though India is taking important steps towards a sustainable energy future by growing renewable energy and innovation, fossil fuels will remain critical in the near to medium term. These forces need to be balanced through strategic planning, strong policy structures, and dynamic international collaboration to guarantee energy security and environmental sustainability. India's growth in renewable energy is not just a social and economic opportunity but also an environmental need that will establish the country as a global leader in sustainable development. India has the potential to create a resilient and energy-secure future by combining innovation, inclusion, and ecological responsibility.

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[463] Department of Foreign Affairs and Trade, An India Economic Strategy to 2035: Chapter 7: Energy Sector, AUSTRALIAN GOVERNMENT, https://www.dfat.gov.au/geo/india/ies/chapter-7-energy-sector.

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